

# A GUIDE TO TAKEOVERS IN AUSTRALIA

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KING & WOOD MALLESONS

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## FOREWORD

This guide provides an overview of the legal issues and practical processes involved in making or responding to a public takeover in Australia. It is an introduction to the complex issues involved in Australian takeovers.

King & Wood Mallesons is recognised as one of the leaders in the field of mergers and acquisitions, having advised on some of Australia's most significant and innovative transactions. Details of a selection of recent major transactions on which we have acted are set out at page 36 of this guide.

We would be pleased to assist and provide further information on any of the topics in this guide.

If you have any questions or require further information, please do not hesitate to contact any of the partners listed on page 37 of this guide.

## OUR EXPERTISE

Leading corporations come to King & Wood Mallesons for assistance with their most important and challenging transactions and issues. Our clients rely on our technical expertise, sector insights and commitment to working together to deliver on their strategic objectives.

King & Wood Mallesons is a new regional legal powerhouse. On 1 March 2012, China's leading law firm King & Wood and Australia's market leader Mallesons Stephen Jaques combined to become the largest legal brand in the Asia Pacific region. Our alliance combining an Australian firm and a Chinese firm is unique in the global legal market. The combined firm has over 380 partners and 1800 lawyers with 21 offices in key business markets around the globe including London, New York and Tokyo. It takes advantage of Asia as the new driver of global economic growth. Further, it provides our clients with access to local law experts, relationships and connections, and seamless service across borders. In all, a "one-stop" for PRC, Hong Kong, English and Australian law.

Our Australian offices are in the major transaction centres of Sydney and Melbourne, supported by our government practice in Canberra and resources and energy driven practices in Brisbane and Perth. Our lawyers have been involved in some of Asia Pacific's largest and most complex M&A transactions. Operating across a range of industries and sectors, our team specialise in all aspects of public company takeovers, both friendly and hostile.

We provide strategic advice to directors, prepare takeover documentation and advise on all legal issues associated with takeovers and other control transactions. Our close relationships with leading investment banks and regulators including the Australian Securities and Investment Commission, Australian Stock Exchange, Australian Competition and Consumer Commission, the Takeovers Panel and the Foreign Investment Review Board ensure we are able to effectively handle the myriad of regulatory, competition, foreign investment and securities issues associated with such transactions.

# OUR REPUTATION

## KING & WOOD MALLESONS

**International Law Firm of the Year** Legal Business Awards 2012

**Best Large Law Firm** BRW Client Choice Awards 2010, 2009

**Regional Law Firm of the Year** IFLR Asia Awards 2010, 2009, 2007, 2006, 2005, 2004

**National Law Firm of the Year (Australia)** IFLR Asia Awards 2011, 2009, 2008, 2007, 2006, 2005, 2004, 2003

**Best Large Professional Services Firm** BRW Client Choice Awards 2009

**M&A Deal of the Year** ALB Australasian Law Awards 2010, China Law & Practice Awards 2009, IFLR Asia Awards 2009

**Regional Law Firm of the Year** IFLR Asian Awards 2010, 2009, 2007, 2006, 2005, 2004

**Australian Deal Team of the Year - M&A** ALB Australasian Law Awards 2011, 2009, 2008

**Law Firm of the Year (Australia)** PLC Which lawyer? Global Awards 2010, 2009

**Corporate Legal Services Firm of the Year** CFO Awards 2011, 2010, 2009, 2008, 2007

### Corporate/M&A first-tier rankings

- Chambers Global Guide 2012
- IFLR 1000 2012
- Asia Pacific Legal 500 2012
- PLC Which lawyer? 2012

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## THE KING & WOOD MALLESONS DIFFERENCE

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| "They are long established and their big advantages are their bench strength and good people at all levels."<br>Chambers Global Guide, 2012   | 6 Responding to a takeover approach       | 30 |
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# 1. INTRODUCTION

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## OVERVIEW OF WHAT THIS GUIDE PROVIDES

This guide provides a general introduction to key legal issues and considerations involved in making, or responding to, a bid to acquire control of a publicly-listed entity in Australia.

The guide covers the:

- general laws and regulatory bodies governing acquisitions of interests in public companies;
- most common methods of acquiring control:
  - off-market takeover bids,
  - on-market takeover bids; and
  - schemes of arrangement;and their relative merits;
- key factors and strategic considerations relevant to planning an acquisition;
- steps, documentation and timing involved in implementing an off-market bid; and
- key issues for companies anticipating (or responding to) a takeover.



## WHO THIS GUIDE WILL ASSIST

The guide should be of general assistance to:

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

## FURTHER ASSISTANCE

The guide provides general commentary on the legal and practical issues involved in conducting a takeover in Australia as at June 2011.

Public takeovers in Australia are complex and highly regulated. This guide does not provide an exhaustive analysis of the issues involved. Anyone involved in any takeover activity should obtain detailed professional advice before taking action and should not rely on this guide in substitution for that advice.

If you require specific advice in the context of a transaction, or a possible or proposed transaction, please contact any of the King & Wood Mallesons partners listed on page 37 of this guide.

# 2. REGULATORY BACKGROUND

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## LEGISLATIVE FRAMEWORK

Takeovers of entities listed on the Australian Stock Exchange (“ASX”) are regulated under Chapter 6 of the Corporations Act 2001 (Cwlth) (“Corporations Act”) and, to a lesser extent, the rules and regulations of ASX.

The regime under the Corporations Act relates not only to takeover bids for voting shares in publicly listed entities, but also for non-voting shares and other securities, such as convertible debt securities and options over issued or unissued securities or other securities. It also regulates the shares and securities in Australian incorporated companies which are not publicly listed but which have more than 50 holders.

This guide is principally concerned with the most common form of takeover, the acquisition of voting securities in ASX-listed entities. References are commonly made to “securities” and “securityholders” of a company in relation to “shares”, and “shareholders”, but those concepts can generally be adapted to relate to listed trusts and their “units” and “unitholders” as appropriate.

## AIMS OF TAKEOVERS LEGISLATION

The regulation of takeovers is underpinned by a set of principles which aim to protect securityholders and ensure that the transition of control in a public company occurs in a manner which is transparent, fair and treats all securityholders equally. The principles are enshrined in section 602 of Chapter 6 of the Corporations Act and provide that:

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

These principles form the basis for the fundamental takeovers prohibition (discussed below) and underpin the further provisions of Chapter 6 which regulate in detail the various aspects of takeovers in Australia. They also form the basis of challenges to, and decisions made by, the Takeovers Panel in relation to takeovers (see page 8).

## BASIC TAKEOVER PROHIBITION

The fundamental feature of Chapter 6 is a general takeovers prohibition, contained in section 606 of the Corporations Act, which prohibits a person from acquiring (whether by way of a purchase of existing securities or an issue of new securities) a ‘relevant interest’ in securities in an Australian company if because of the acquisition:

- any person’s voting power in the company would increase from below 20% to more than 20%; or
- any person’s voting power in the company that is above 20% and below 90% would increase,

unless the acquisition is expressly permitted by one of the ‘gateways’ set out at section 611 of the Corporations Act.

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

The most significant acquisition gateways are described in more detail later in this guide, but a summary of the types of acquisitions commonly permitted by section 611 is set out on the following page.

## Permitted gateways through the '20%' prohibition

|                         |   |
|-------------------------|---|
| Off-market takeover bid | Acquisitions under a takeover offer made to all target securityholders where securityholders sell securities to a bidder by way of off-market acceptances   |
| On-market takeover bid  | Acquisitions under a takeover offer made to all target securityholders where securityholders sell securities to a bidder through the ASX  |
| Scheme of arrangement   | Acquisitions under a scheme of arrangement approved by the target securityholders and the Court   |
| Securityholder approval | Acquisitions made with the approval of independent target securityholders not affiliated with the acquisition   |
| Creeping acquisition    | Acquisitions of not more than 3% of the voting power in a company in a 6 month period by a securityholder already holding at least 19%  |
| Rights issue            | Acquisitions resulting from pro-rata rights issues offered equally to all securityholders   |
| Underwriting            | Acquisitions by an underwriter of an issue of securities made pursuant to a prospectus or other disclosure document   |
| Downstream              | Indirect acquisitions resulting from an acquisition of securities in an 'upstream' company listed on the ASX (or other approved foreign market) which itself has a relevant interest in a 'downstream' ASX listed company |

## KEY CONCEPTS RELATING TO THE TAKEOVERS PROHIBITION

The concepts of 'relevant interest' and 'voting power' are critical to an understanding of the takeovers provisions. A person (including an entity) has a relevant interest in a security if the person:

- is the holder of the security;
- has power to exercise or control the exercise of the voting power attached to the security; or
- has power to dispose of or control the disposal of the security.

A person's voting power in a company is the proportion of the votes attaching to all voting securities in which a person and their associates have a relevant interest in relation to the total number of votes attached to all voting securities in the company. An associate of a person is defined in very broad and detailed terms, but in summary two persons will be associated if:

- one controls the other or they are under the common control of another person;
- there is an agreement, understanding or arrangement (whether legally enforceable or not) between them for the purpose of controlling or influencing the relevant company's board or affairs; or
- they are acting or proposing to act in concert in relation to the relevant company's affairs.

As a result of these broad concepts, the regulatory ambit of the takeovers prohibition casts a wide net.

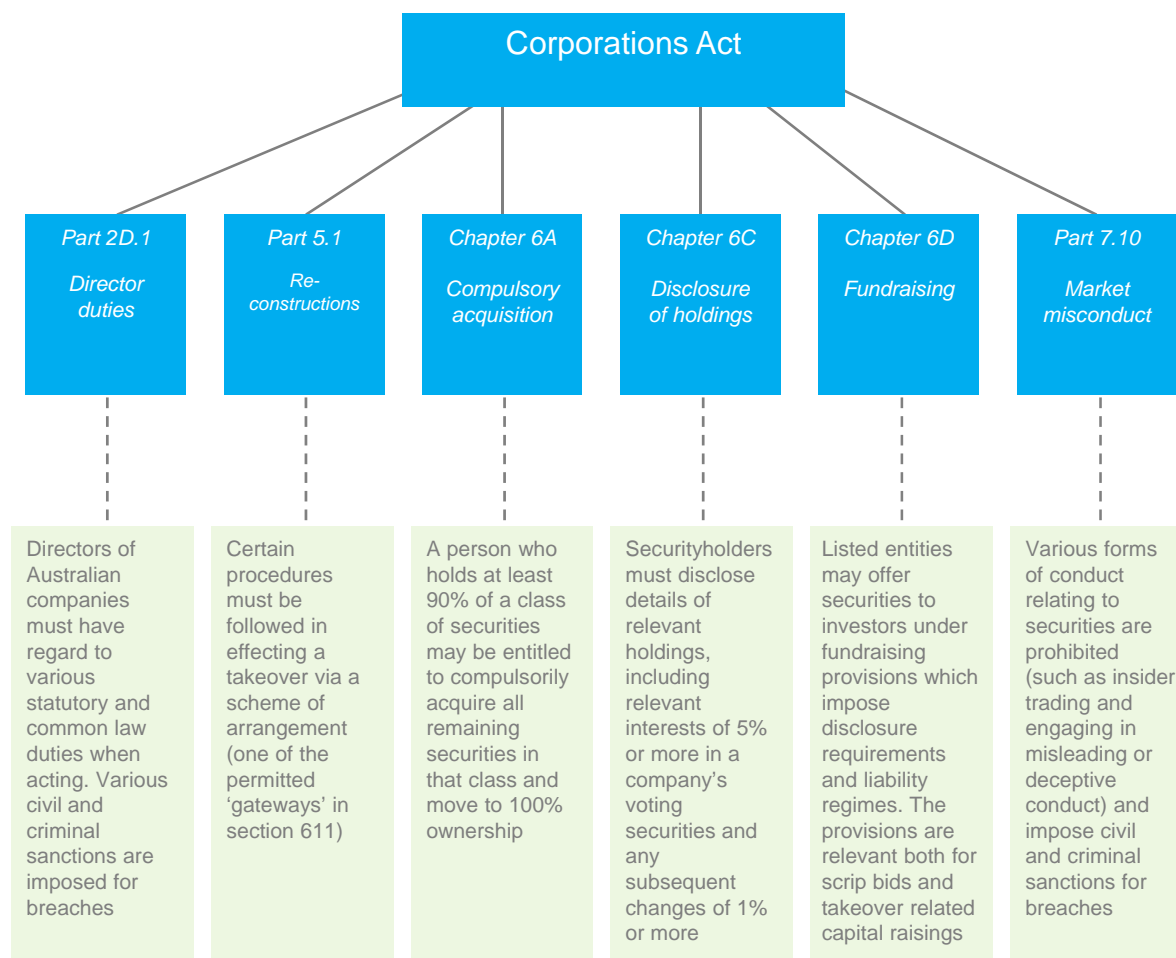
## EXTRA-TERRITORIAL OPERATION

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

As noted in the table opposite, these indirect 'downstream' acquisitions which result from an acquisition of securities in a non-Australian 'upstream' company will fall within a permitted gateway to the 20% prohibition where the upstream company is listed on an approved foreign market (which includes, amongst others, the London Stock Exchange, New York Stock Exchange, NASDAQ, Toronto Stock Exchange, Deutsche Borse, Paris Bourse, Tokyo Stock Exchange and Hong Kong Stock Exchange).

## OTHER RELEVANT CORPORATIONS ACT PROVISIONS

In addition to Chapter 6, the following parts of the Corporations Act often have relevance in connection with a takeover:



## KEY REGULATORY BODIES

### ASIC

The Australian Securities & Investments Commission ("ASIC") supervises the operation of companies and securities laws including takeovers law.

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

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

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

### The Takeovers Panel (the "Panel")

The Panel is a non-judicial body comprised of a small full-time executive and a part-time panel of representatives from industry and the legal, finance and accounting professions.

The Panel is the principal forum for resolving disputes relating to a takeover during a takeover bid.

The Panel has broad statutory powers to:

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

During a takeover bid, the Panel displaces the Courts as the primary forum for resolving disputes in relation to the bid. Each of the bidder, the target, ASIC and any other person whose interests are affected by a takeover bid may apply to the Panel for a declaration or appropriate orders. Court proceedings during a bid in relation to a takeover may only be commenced by ASIC or a public authority of the Commonwealth or a State.

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

- having regard to the effects the circumstances have had (or are having, will have or are likely to have) on the control or potential control of a company or the acquisition or proposed acquisition of a substantial interest in a company;

- having regard to the principles (see page 6) enshrined in section 602 of the Corporations Act; or
- because they have constituted or given rise to (or currently, will or are likely to constitute or give rise to) a contravention of a specified Chapter of the Corporations Act,

*and* the Panel considers that action is not against the public interest taking into account relevant policy considerations.

Decisions of the Panel are subject to merits review by a separately convened review Panel and can be subject to judicial review by the Courts where a Panel has acted in breach of administrative law processes or principles.

In addition to its dispute resolution powers, the Panel also has authority to make rules governing takeover bids provided that they are not inconsistent with the provisions of Chapter 6. While the Panel has not made substantive rules, it has published guidance notes on a variety of topics.

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

#### **Other important regulators**

Other bodies may also become involved in certain circumstances, such as when a takeover involves a foreign acquirer or raises anti-competitive issues.

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

If an acquirer is foreign for the purposes of the Foreign Acquisitions and Takeovers Act, in many circumstances the acquisition must also be approved by the Treasurer of Australia acting on the advice of the Foreign Investment Review Board (“FIRB”).

The Australian Competition and Consumer Commission (“ACCC”) administers the Competition and Consumer Act (formerly the Trade Practices Act) and may also become involved in a takeover if the acquisition would have the effect, or be likely to have the effect, of substantially lessening competition in a substantial market in Australia.

Other regulators and specific industry bodies such as the Australian Broadcasting Authority and the Australian Prudential Regulatory Authority may also become involved in takeovers involving participants in particular sectors such as media, banking and insurance.

Further details of Australian foreign investment, competition and other regulatory regimes can be found in our publication “A Guide to doing business in Australia” which is available on request or via [www.kwm.com](http://www.kwm.com)

# 3. METHODS OF ACQUIRING CONTROL

## PERMITTED ACQUISITIONS UNDER THE CORPORATIONS ACT

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

- a takeover bid, either off-market or on-market (described in detail on pages 11 and 12 respectively); and
- a court approved scheme of arrangement (described in detail on page 13).

Other frequently used gateways through the 20% prohibition are:

**Securityholder approval** - Acquisitions which have the approval of an ordinary resolution of the target company (excluding any votes by any of the parties to the acquisition or their associates). Target securityholders must be provided with all information known to the target and the acquirer that is material to the decision on how to vote. ASIC will also usually require an independent expert's report to be provided to securityholders. For issues or sales of securities at below market value, securityholders will typically require the new investors to bring additional benefits to the target such as access to capital, technology or management.

**Creeping acquisition** - Acquisitions by a person who has continuously throughout the preceding six months held voting power of at least 19% in a company provided that, as a result of the acquisition, they would not increase their stake to more than 3% higher than they had six months before the acquisition. This method is usually only used where the acquirer is prepared to build a strategic stake in the target over a period of years or for small re-adjustments.

**Downstream' acquisitions** – Acquisitions which, as a result of an 'upstream' acquisition of an interest in a listed entity that itself holds securities in the downstream company, increase an acquirer's indirect voting power in a listed entity beyond the 20% threshold are exempt if the securities in the upstream company are listed on the ASX or a foreign financial market approved by ASIC. ASIC and the Panel may consider such acquisitions unacceptable where it appears that the exemption is being used for the purpose of acquiring control of or a substantial interest in the downstream company.

**Acceptances of scrip bids** - Acquisitions which result from the acceptance of an offer under a takeover bid in which the securities form part of the consideration offered are also exempt from the 20% prohibition. This exemption allows so-called 'reverse takeovers' in which a bidder offers so many of its own securities as consideration for securities in a target that the target's securityholders end up acquiring control of the bidder itself. In light of the inherent conflict with the fundamental principles of Chapter 6, ASIC and the Panel will carefully consider any reverse takeovers which threaten control of the bidder passing without its securityholders having the opportunity to participate in any decision, and orders may be made for such bids to require approval of the bidder's securityholders.

In addition, it is possible for parties to increase their holdings in excess of the 20% prohibition in connection with issues of securities as follows:

**Rights issues** - Acquisitions which arise through participation in rights issues of securities offered on an equal pro-rata basis to all existing securityholders (including acquisitions by underwriters and sub-underwriters of rights issues). However, ASIC and the Panel will carefully review rights issues which affect control, and may consider acquisitions unacceptable where the structure, pricing or underwriting arrangements have control effects which are disproportionate to the fundraising purposes of a rights issue. In such circumstances, the Panel may make orders to prevent or amend a rights issue or require the approval of target securityholders.

**Underwriting** - Acquisitions by an underwriter or sub-underwriter which result from an issue of securities under a regulated disclosure document (e.g. a prospectus) where that document disclosed the effect that the acquisition would have on the underwriter or sub-underwriter's voting power in the company, (i.e. the effect of them acquiring the maximum number of securities permitted under the arrangements). ASIC and the Panel's concerns regarding the use of contrived underwriting agreements to circumvent the takeovers prohibition apply equally to this exemption.

## TAKEOVER BIDS

Takeover bids in Australia can be either off-market bids (the most common form of takeover) for quoted or unquoted securities or on-market bids, which are only available for quoted securities and are relatively rare. Takeover bids are often classed as friendly or hostile depending upon whether the bidder has secured the support of the target's board in supporting and recommending acceptance of the bid.

### Features of an off-market takeover bid

Under an off-market bid, a bidder makes separate but identical offers to all holders of securities in a target company to acquire their securities. When a holder accepts the offer, an agreement for the acquisition of their securities results. Off-market takeover bids are often made conditional upon the satisfaction or waiver of a number of conditions, such as that the bidder reaches a minimum level of acceptances (usually 50% or 90%) or obtains specified regulatory approvals such as FIRB or ACCC.

The common features of an off-market takeover bid are:

#### Mallesons deal: hostile bid for Symbion Health

A Mallesons team led by David Friedlander and Jason Watts acted for Primary Healthcare on its successful \$A3.5bn off-market takeover of healthcare operator Symbion Health. The transaction was proposed as a rival counter-bid to a scheme of arrangement proposed between Symbion and Healthscope. The deal involved Court action and applications to the Takeovers Panel in relation to Symbion's affairs, and was accompanied by a simultaneous capital raising by Primary to fund the acquisition.

|                     |  |
|---------------------|--|
| Securities          | The offer must relate to all of the securities or other securities in the target company of the relevant class, or a specified proportion of each holder's securities.   |
| Consideration       | Consideration may be cash, securities or a combination of both. If the consideration is increased during the offer, the increased consideration is payable retrospectively to any securityholders who have already accepted. Consideration must be paid within one month of the later of an acceptance and the offer becoming unconditional.   |
| Timing              | An uncontested off-market bid usually takes a minimum of three months from announcement to completion. If a bid is contested by the target or a rival bidder, the duration of the bid may be significantly longer. Formal offers to securityholders under an off-market takeover bid must be made within two months of announcement of a bid and must stay open for a minimum of one month and a maximum of 12 months.   |
| Conditions          | The offer may include conditions or be unconditional, although certain conditions are prohibited (e.g. conditions specifying a maximum acceptance level or which give the bidder a subjective discretion as to whether or not a bid succeeds).   |
| Documents           | Bidders are required to prepare bidder's statements containing prescribed information about the bidder and the terms of the bid (and which normally contain the formal 'offer' to securityholders). Bidder's statements are lodged with ASIC, ASX and the target and then sent to target securityholders with acceptance forms to complete and return.<br><br>A target is similarly required to lodge and despatch target's statements in response. Target's statements are required to set out prescribed information to assist securityholders in considering their response to a takeover bid, including the recommendations of the target's directors as to whether or not to accept the bid. Independent expert's reports as to whether an offer is fair and reasonable must be included where a bidder has 30% or more of the target or has directors on the target board, and are often voluntarily provided in other instances to give support to the recommendation of the directors. |
| On-market purchases | A bidder can only purchase securities on-market in excess of the 20% threshold when the offer is unconditional and the bidder's statement has been given to the target. If the bidder purchases such securities above the prevailing offer price, the offer price is automatically increased to match the higher price.  |

## Features of an on-market takeover bid

Under an on-market bid, quoted securities are acquired through the ASX rather than through off-market acceptances.

A bidder will stand in the market during the bid period and offer to acquire all of the target's securities at the specified offer price through an appointed broker, and will have priority over other trades on the market at that price.

On-market bids are rare in Australia, largely due to the requirement that they be cash-only and unconditional and the consequent perception that they are less flexible and higher-risk than off-market bids. However, the speed with which an on-market bid can be implemented (with a bidder acquiring securities on-market within hours of announcing the bid and sellers able to receive consideration within days of accepting an offer) can make an on-market bid a highly effective takeover tool when used in the right market environment.

The common features of an on-market takeover bid are:

### Mallesons deal: on-market takeover of QGC

A Mallesons team led by Tim Bednall and Lee Horan advised international gas major BG Group on its successful A\$5.6 billion on-market takeover bid for Queensland Gas Company (QGC), a major coal seam gas producer. The innovative bid was the first significant takeover in Australia to use an on-market structure and enabled BG Group to secure control of QGC within a week and reach the 90% compulsory acquisition threshold in just 3 weeks, highlighting the strategic merits of an on-market takeover when used in the right context.

|                     |   |
|---------------------|---|
| Securities          | The offer must relate to all securities in the target company (of the relevant class) and not just a specified proportion of each holder's securities.  |
| Consideration       | Consideration for the securities must be cash. The bidder can increase its bid price without having to pay more for securities already acquired on-market. Consideration is paid on a normal T+3 basis, i.e. on the third trading day after the date of the transaction.  |
| Timing              | The duration of the bid will likely depend upon whether or not a bid is contested by the target or a rival bidder. Offers to securityholders under an on-market takeover bid must be made within 15 days of announcement and must also stay open for a minimum of one month and a maximum period of 12 months. Given the shorter time periods for lodgement and despatch of the bidder's statement and opening of the formal offer period, and the fact that the bid must be unconditional, on-market bids would usually be expected to have a shorter duration than an off-market bid.   |
| Conditions          | As the offer must be unconditional, all regulatory approvals must be obtained prior to announcement. As a consequence, the bidder is less protected than under an off-market bid where minimum acceptance or material adverse change conditions are typically used.   |
| Documents           | <p>Despite the formal offers being made to securityholders on-market (through the appointed broker), bidders are required to prepare bidder's statements setting out the same prescribed information about the bidder and the terms of the bid. In on-market bids, bidders are required to lodge their bidder's statements with ASIC, ASX and the target on the day of announcing the bid and have a further 14 days to despatch them to target securityholders.</p> <p>Targets must respond with a target's statement containing the prescribed information to assist securityholders, but must have the document lodged with ASIC, ASX and the target and despatched to securityholders within 14 days of the bid's announcement.</p> |
| On-market purchases | A bidder may purchase securities on-market in excess of the 20% threshold as soon as the bid is announced and before an 'offer' formally opens (i.e. upon the despatch of bidder statements to securityholders).  |

## SCHEME OF ARRANGEMENT

### Features of a scheme of arrangement

Under a scheme of arrangement, a company, with the approval of its creditors or securityholders, can effect a reconstruction of its capital, assets or liabilities through a court approved procedure under Part 5.1 of the Corporations Act.

Schemes may be used to effect a wide range of corporate restructures, including transfers of all or a specified proportion of each shareholder's securities to a bidder, cancellations of existing securities or issues of new securities to a bidder, and as such can be used as an alternative to a takeover bid to effect a change of control or merger of companies. Indeed, in past years schemes have become as common as takeovers as a means of effecting friendly acquisitions in Australia.

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

A successful scheme needs the approval of 75% by value and 50% by number of each class of securityholders present and voting at a scheme meeting (excluding any votes cast by the bidder or any of its associates) plus the Court to exercise its general discretion to approve the scheme. There is therefore a key risk in a scheme that a court may refuse to sanction a scheme of arrangement (or convene the appropriate scheme meeting) if it considers it appropriate to do so in the context of

the scheme as a whole and any potential prejudice to securityholders, creditors or other parties, even if the requisite levels of securityholder approval have been obtained at the scheme meeting.

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

As with off-market bids, schemes of arrangement can be made conditional upon the occurrence or non-occurrence of specified events or actions, and it is common for schemes to be proposed subject to the receipt of necessary regulatory approvals or there being no material adverse change in the financial position of the target.

#### Mallesons deal: acquisition of AXA Asia Pacific

A Mallesons team led by Stephen Minns, Alison Lansley and Joseph Muraca advised financial services group AXA Asia Pacific on a series of takeover approaches from AMP and National Australia Bank. These culminated in a transaction with AMP which valued AXA Asia Pacific at over A\$14bn. The transaction was implemented via a scheme of arrangement and sale of AXA Asia Pacific's Australian business to AMP and the sale of its Asian businesses to its French parent, AXA SA.

### Target support

Whilst it is theoretically possible for a potential bidder with a minority securityholding (or the support of some securityholders) to propose a scheme of arrangement to effect an acquisition without the support of the target company, it is generally considered essential for a scheme to be proposed and supported by the target company, because of the positive obligations on the target to, amongst other things, issue the scheme documentation to target securityholders.

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

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

## Structure of a scheme

A scheme of arrangement generally involves the steps set out below:

|                      |   |
|----------------------|---|
| MIA signed           | The execution of an MIA between a bidder and the target company setting out each party's rights and obligations in proposing and implementing a recommended scheme.   |
| Scheme announced     | The public announcement of the key terms of the scheme, including the consideration to be paid by the bidder and the key features of the MIA. Customarily the initial announcement would follow agreement of an MIA, although for tactical reasons individual parties may seek to announce a potential deal earlier, in the case of a bidder to put pressure on a target board to put a proposal to securityholders and in the case of a target to flush out any potential counter-offers and initiate an auction.  |
| Scheme documents     | The preparation of scheme documents (including an explanatory statement or scheme booklet and a notice of meeting to each securityholder). It has become common practice to include an independent expert's report stating whether the scheme is in the best interest of the securityholders. ASIC must be given a reasonable opportunity (generally at least 14 days) to review the scheme documents to enable it to raise any concerns with the target company before the First Court hearing. If ASIC is satisfied with the documents it will provide confirmation to the target which is then produced to the First Court hearing to demonstrate that ASIC has had an opportunity to review, and is satisfied with, the disclosure in the scheme documents. |
| First Court hearing  | An application to the court to convene a meeting of securityholders (or meetings of separate classes of securityholders) to consider and vote on the scheme.  |
| Scheme meeting       | A resolution of each relevant class of securityholders to approve the scheme, which must be passed by: <ul style="list-style-type: none"> <li>• a majority in number of those securityholders present and voting (in person or by proxy); and</li> <li>• securityholders representing 75% of the votes cast on the resolution,</li> </ul> but excluding any votes of any securityholders who are "associates" of the bidder.  |
| Second court hearing | An application to the court for approval of the scheme. The court has a discretion whether or not to approve a scheme, and in exercising that discretion will generally consider whether, in general, the scheme is fair and reasonable. A court may not approve a scheme of arrangement unless: <ul style="list-style-type: none"> <li>• it is satisfied that the scheme has not been proposed for the purpose of avoiding the takeover provisions of the Corporations Act (generally not a difficult hurdle to overcome in practice); or</li> <li>• a statement in writing by ASIC stating that it has no objection to the scheme is produced to the court.</li> </ul>  |
| Scheme effective     | The scheme of arrangement is binding on all members (including any dissenters) of the target company once it has the approval of the requisite securityholders and a court order is lodged approving the scheme. The scheme documentation will usually contain a subsequent implementation date at which time any security acquisition or reorganisation will occur and consideration will be paid to target securityholders.   |

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

## COMPARISON OF BIDS AND SCHEMES

|                                 | Off-market takeover  | On-market takeover   | Scheme of arrangement   |
|---------------------------------|--|--|---|
| Control                         | Bidder controls the process at all stages  |  | Target controls process subject to terms of an agreed MIA   |
| Target support                  | Not essential but a 'friendly' bid which enjoys the support of the target is preferable  |  | Generally considered essential  |
| Court approval                  | No formal court or regulatory assent required. Takeovers Panel has oversight role  |  | Court approval needed to order scheme meeting and approve scheme. ASIC has formal review role and Panel may become involved in an oversight role                    |
| Conditions                      | May be conditional   | Must be unconditional  | May be conditional  |
| Consideration                   | May be cash and/or securities  | Must be cash   | May be cash and/or securities   |
| Announcement                    | Can announce bid subject to conditions and approvals   | All regulatory approvals required before announcement  | Subject to agreement with target  |
| Time to end date                | Uncertain - likely to be at least 3 months but no fixed date, bid may be extended for up to a year   | Uncertain - likely to be at least 2 months but no fixed date, bid may be extended for up to a year | Certain - likely to be about 4 months   |
| Threshold to reach 100%         | 90% threshold to trigger right to compulsory acquisition of securities in the bid class  |  | For each class of securityholders, 50% of those present and voting and 75% by value of securities   |
| Differentiation between holders | All securityholders must be treated equally - collateral benefits likely to induce acceptance not allowed  |  | Acceptable if disclosed, although may create separate securityholder classes requiring separate votes   |
| Flexibility of structure        | Initial flexibility constrained by Corporations Act requirements but relatively straightforward to increase offer price and modify offer terms during bid period |  | Initial structural flexibility (e.g. to incorporate related transactions) but subsequent amendments generally require court sanction and detailed notice to members |
| Interloper vulnerability        | Flexibility for the bidder to vary offer terms in response to interloper   |  | Less flexibility for the bidder to vary offer terms in response to interloper   |
| Disclosure requirements         | Similar. Target commonly commissions a 'fair and reasonable' report by an independent expert, although technically not required.                                 | Similar. Independent expert report unlikely given timing   | Similar. Scheme booklet commonly includes a 'best interest' report by independent expert, although not technically required   |
| Other deal risks                | Minimum acceptance conditions may be imposed to mitigate risks of failing to acquire control   | As bid is unconditional, risk of ending below 50% or marooned between 50% and 90%                  | "All or nothing" outcome  |

# 4. PLANNING AN ACQUISITION

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## KEY ROLES AND ADVISERS

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

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

**Legal adviser** – responsibilities include:

- assisting with bid structuring and strategy
- conducting legal due diligence on the target
- advising on legal compliance
- liaising with regulators (e.g. ASIC, ASX, Panel, ACCC and FIRB)
- preparing transaction documentation
- negotiations with the target and other parties
- general transaction management

**Financial adviser** – responsibilities include:

- assisting with bid structuring and strategy
- general transaction management
- assisting with valuations of the target
- assisting with raising finance for the bidder
- providing brokerage and market services
- managing communications with the target, investors, analysts and other market participants
- soliciting offer support and acceptances

**Accounting adviser** – responsibilities include:

- conducting financial due diligence on the target
- preparing any specialist transaction reports required
- assisting with valuations of the target

**Tax adviser** – responsibilities include:

- advising on tax efficient transaction structuring and financing
- conducting tax due diligence on the target

**Security registry** – responsibilities include:

- general administration of a takeover:
- processing and reporting acceptances
- securityholder mailings
- other logistics
- registry analysis

**Public relations** – advisers may be appointed in relation to the following areas:

- **Corporate / media** – responsibilities include managing corporate communications strategy and liaising with the media
- **Retail** – responsibilities include managing communications with a broad public securityholder base (e.g. phone help-lines and proxy solicitation services)
- **Government / regulatory** – responsibilities include managing communications with other key stakeholders, such as governmental and regulatory bodies

## DUE DILIGENCE

It is common that a bidder will want to perform some due diligence on a target prior to launching a takeover. However, it is rare for the level of due diligence enquiries undertaken on an acquisition of securities in an ASX-listed company to be as extensive as the enquiries undertaken for an acquisition of assets or securities in a private company. The extent of the enquiries which can be made in a public takeover will largely depend upon whether a bid is friendly or hostile.

### **Level of due diligence – friendly acquisition**

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

Although significant information will be made publicly available pursuant to periodic and continuous disclosure obligations, bidders will be keen to obtain comfort about other information which may not have been publicly disclosed because it falls below the threshold of being material to a normal investor or comes within one of the permitted exceptions to the continuous disclosure rules. If non-public price sensitive information is obtained by the bidder, it will need to be disclosed to the market before the bidder acquires or agrees to acquire securities in the target.

The level of access which a target may grant will often depend upon the relative bargaining strengths of the parties and the target's willingness to enter into an agreed transaction at the bidder's indicative price. There is no formal requirement in Australia for a target to provide equal information to all potential bidders, but a failure to treat all bidders equally may result in the Panel finding unacceptable circumstances in the absence of the specific compelling reasons for unequal treatment.

### **Level of due diligence – hostile acquisition**

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

- periodic reports such as annual reports and accounts;
- disclosure documents relating to previous security offerings or takeovers in which the target has been involved;
- details of the target's security capital and major securityholders;

- details of the target's directors and senior management (including certain details of remuneration and security holdings);
- a copy of the target's constitution; and
- ASX announcements of all materially price sensitive information relating to the target (except information permitted to be withheld under the continuous disclosure rules, such as confidential information relating to incomplete proposals or negotiations).

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

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

### Standstill agreements

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

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

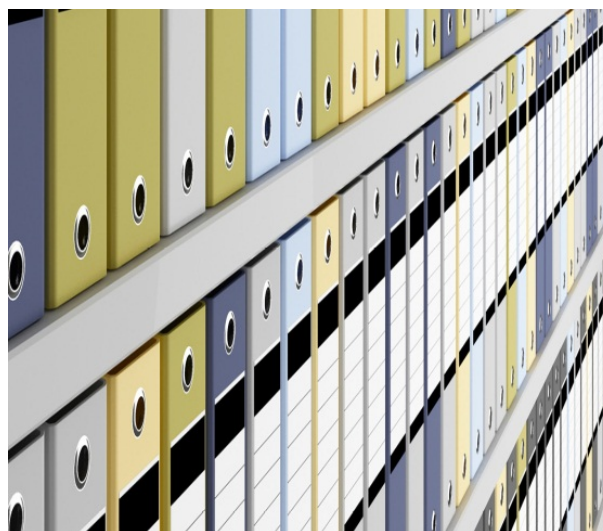
Standstill provisions serve a dual purpose for a target. They achieve a strategic goal for a target by restricting a bidder from acquiring or increasing a strategic stake prior to making a bid (which could otherwise reduce the likelihood of counter-bidders emerging), and also limit the risks of the target and its officers committing a 'tipping' insider trading offence by disclosing non-public price-sensitive information to persons who they believe may acquire securities in the target.

In relation to insider trading concerns, even in the absence of any specific contractual standstill provisions, a bidder needs to refrain from acquiring or agreeing to acquire any securities in the target while in receipt of non-public price-sensitive information to avoid committing an insider trading offence.

### Cleansing statements

If a takeover or other acquisition is to proceed and the bidder is in possession of non-public price-sensitive information, the information needs to be 'cleansed' via disclosure to the market in order for the bidder to acquire securities in the target legally.

A bidder's ability to disclose such information will depend upon the precise terms of the confidentiality obligations owed to the target, and a bidder therefore needs to consider the drafting of those obligations carefully in order to preserve its flexibility to disclose relevant confidential information to the market.



## STRUCTURING CONSIDERATIONS

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

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

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



## PRE-ANNOUNCEMENT STRATEGY

### Discussions with the target

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

The ASX Listing Rules require a target to immediately notify the ASX (and the wider market) of any information concerning it that a reasonable person would expect to have a material effect on the price or value of the target's securities.

Proposed takeover activity is always likely to fall within the category of disclosable price sensitive information, unless the approach and associated discussions with a target fall within a permitted exception to the general disclosure obligation.

Generally speaking the details of a takeover proposal will not strictly require disclosure if:

- a reasonable person would not expect the information to be disclosed;
- the information is confidential; and
- the information concerns an incomplete proposal or negotiation.

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

### Leaks

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

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

### Last and final statements

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

### Deal protection mechanisms

If a target is willing to recommend a bid or scheme, the bidder and the target will likely negotiate an agreement detailing the terms of the proposal and the parties' obligations to each other in implementing the transaction. In addition to the main terms of the proposal (e.g. offer price, details of the target's recommendation, and any offer conditions) an agreement will often contain a variety of deal protection mechanisms for the benefit of the bidder and/or the target.

## SOME COMMON DEAL PROTECTION MECHANISMS TO BE NEGOTIATED ARE:

|           |  |
|-----------|--|
| Break fee | It has become common in agreed bids and schemes for a target to agree to pay a break fee to a bidder if certain specified events occur which cause the transaction to fail (such as the target board withdrawing its recommendation of a proposal). Whilst break fees are not objectionable per se, the Panel may consider them unacceptable if they have an anti-competitive effect. For instance, the Panel will generally declare unacceptable circumstances exist if the size or structure of the break fee is such that they may pose a material disincentive to the emergence of rival bids or have coercive effects on target securityholders. As a general rule of thumb, fees not exceeding more than 1% of the equity value of a target will generally not be considered unacceptable, although that view may be changed if payment is subject to unduly excessive or sensitive triggers. Although less common, targets may also request a 'reverse break fee' to compensate them if the proposal does not go ahead for some reason affecting the bidder, such as the bidder breaching the MIA or failing to obtain regulatory approvals.  |
| No-shop   | No-shop exclusivity provisions are commonly agreed to prevent a target from 'shopping' itself to other rival bidders for a specified period, to allow the bidder a period of time in which to consummate its transaction. A no-shop operates by preventing the target from soliciting, encouraging or initiating negotiations with another person with a view to obtaining a rival proposal to acquire the target or its assets. Target directors need to carefully consider the implications of entering into such exclusivity arrangements, particularly in regard to the fiduciary duties which they owe to the target and its securityholders. Whilst no-shop exclusivity arrangements are not objectionable per se and are fairly standard in the market, the Panel may consider them unacceptable if they are excessively restrictive and therefore unreasonably anti-competitive or coercive, in which case the Panel may render offending provisions unenforceable.  |
| No-talk   | No-talk exclusivity provisions go further than no-shop provisions, and seek to prevent a target from entering into any negotiations with potential rival bidders, even where an approach is unsolicited. Because they are by nature much more restrictive than no-shop provisions, directors must take great care in agreeing to them as they can be inconsistent with their fiduciary duties to maximise the value for securityholders in a sale of the company. For that reason, it is common that a target board will not agree to a no-talk restriction without a 'fiduciary carve-out' which enables them to respond to unsolicited offers which are reasonably expected to lead to a superior proposal and which, if ignored, would likely constitute a breach of their fiduciary duties.  |
| Go-shop   | As an alternative to a no-shop restriction, a target may request a go-shop provision under which it is entitled to shop the company to solicit other potential bidders for a limited period of time, after which, if it has failed to solicit a superior proposal, it will submit to no-shop and no-talk restrictions.   |
| Other     | In conjunction with the exclusivity arrangements, a bidder may also seek to obtain additional rights, such as a notification right to be informed of the details of any competing proposal received by a target, or a matching right entitling the bidder to match any superior proposals received before the target is permitted to announce a competing transaction. The Panel can find such provisions unacceptable if they have adverse anti-competitive effects by discouraging other potential bidders from entering negotiations and minimising any offer price increases which an original bidder may have to make to stay in a bidding war for the target. However, notification and matching-right bidder protection provisions are becoming increasingly common and are generally considered acceptable provided their scope is appropriately restricted, e.g. by ensuring that a notification right only entitles a bidder to be informed of the existence of a proposal rather than receive its full details, or by providing that a matching right is limited in duration and gives a competing bidder an opportunity to respond to any increased offer from an original bidder. |

## “AIR HUGS”

In recent times, some acquirers have elected to pursue a strategy of an “air hug”, where they publicly announce that they have approached a target with a view to initiating discussions to potentially lead to an agreed offer or merger by scheme, but stop short of formally announcing an offer or an intention to launch one. The strategy is intended to raise support among a target’s securityholders for a potential transaction, in a bid to force the target’s board to the negotiating table. However, the Panel has recently made clear that, as “air hug” proposals do not constitute formal takeover proposals which are capable of being put directly to target securityholders, they do not benefit from the same protections as formal takeover proposals and, in particular, do not enliven the “frustrating actions” policy which serves to restrict a target’s flexibility to undertake defensive actions upon receipt of a takeover approach.

## Discussions with target securityholders and stakebuilding

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

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

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

### Confidentiality

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

### Insider trading

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

Whilst bidders have the benefit of the ‘own intentions’ exception to any “dealing” offence (in relation to the price sensitive information that they themselves intend to launch a bid), to avoid a ‘tipping’ offence they must ensure that any securityholders who enter into pre-bid discussions are prohibited from dealing in securities of the target with third parties whilst in receipt of inside information about a future bid.

### Association

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

### Collateral benefits

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

## Pricing issues

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

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

## Pre-bid agreements and acceptance intentions

As noted above, bidders can enter into a variety of different types of pre-bid arrangements with shareholders to acquire securities up to the 20% threshold. Arrangements can range from simple outright acquisitions giving a bidder an initial stake at the outset, to more complex arrangements involving acceptance agreements, deferred purchase and settlement agreements and put and call

option arrangements. These types of arrangement can enable a bidder to acquire shares in certain circumstances whilst also offering some flexibility for vendors to benefit from potential increases in a bidder's offer price or superior competing offers.

As an alternative (or potentially in addition) to entering into pre-bid agreements with target securityholders, a bidder may seek to elicit a target securityholder to publicly announce that they intend to accept an offer for their securities, rather than enter into an actual arrangement to sell their securities to the bidder. A bidder may then rely upon the "truth in takeovers" provisions to effectively bind the shareholder into acting consistently with their statement.

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

## Disclosure of securityholdings

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

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

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

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

Interests in purely 'economic' derivative instruments (such as cash settled equity swaps) which do not provide for physical settlement of securities or grant voting rights to an acquirer do not give rise to 'relevant interests' and therefore do not require disclosure under these provisions. However, the Panel considers that non-disclosure of such positions can give rise to unacceptable circumstances in the context of control transactions, and therefore expect holders any such positions which exceed 5% to disclose them where a control transaction or acquisition of a substantial interest occurs or is proposed.

# 5. IMPLEMENTING AN OFF-MARKET TAKEOVER BID

## KEY FEATURES OF AN OFF-MARKET TAKEOVER BID

An off-market bid is the most common form of takeover in Australia.

### Applicable securities

The offer must relate to all of the securities in the target company of the relevant class, or a specified proportion of the securities in the bid class held by each target securityholder. An offer cannot be made on a “first in first served” basis.

### Consideration

The consideration must be equal to, or more than, the amount or value of the highest consideration for the securities which the bidder or its associates have provided in the four months before the date of the bid. Except in very limited circumstances, all target securityholders must be offered the same consideration per security.

A bidder must pay for securities no later than one month after the offer is accepted or becomes unconditional, whichever is the later and, in any event, not later than 21 days after the offer closes.

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

### Conditions

An offer under an off-market bid may be conditional. A bidder may subsequently declare the offer to be free from a condition by giving notice to the target and ASX (or ASIC if the target securities are not listed), in most cases not less than seven days before the end of the offer period. If at the end of the offer period the remaining conditions are not satisfied, all acceptances under the offer are void and no securities are acquired.

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

| Examples of common takeover conditions   | Examples of prohibited takeover conditions   |
|--|--|
| <ul style="list-style-type: none"><li>• a condition that the bidder receives acceptances in respect of a specified minimum percentage of voting securities, usually 50.1% (which normally gives the bidder control of the target) or 90% (which normally allows compulsory acquisition to proceed)</li><li>• a condition that none of the events or circumstances referred to in sections 652C(1) or (2) of the Corporations Act (“prescribed occurrences”) occurs in relation to the target or its subsidiaries (e.g. certain transactions which affect a target’s share capital or involve the sale of a substantial part of its business)</li><li>• a condition that regulatory approvals are received (for example, FIRB or ACCC approval)</li><li>• a condition that there are no material adverse changes in the financial position of the target company</li><li>• a condition that there is no issue of securities by the target or its subsidiaries and no sale of the main undertaking of the target</li></ul> | <ul style="list-style-type: none"><li>• the offer may be withdrawn if the number of acceptances exceeds a specified number</li><li>• the bidder may acquire securities from some, but not all, persons accepting offers under the bid</li><li>• offerees must approve payment of compensation for loss of office to a director, secretary or executive officer of the target company or a related body corporate</li><li>• a condition, the fulfilment of which depends upon an opinion, belief or other state of mind of the bidder or an associate, or the occurrence of some event within the sole control of the bidder or associate (although as a matter of practice, regulatory approval conditions which require positive action by a bidder to make and progress applications to regulators are considered acceptable).</li></ul> |

## On-market purchases

A bidder may only purchase securities on-market in excess of the 20% threshold when the offer is unconditional or is only subject to a “prescribed occurrences” condition and the bidder’s statement has been given to the target. If the bidder purchases such securities above the prevailing offer price, the offer price must be automatically increased to match the higher price.

## Variations

A bidder may vary its offer under an off-market bid by increasing the amount or consideration, changing the type of consideration, or by extending the offer period. If the consideration is increased, every person whose securities were acquired before the variation is entitled to receive the increased consideration. If cash is offered as an alternative to securities, each person who has accepted an offer may elect cash in lieu of the other consideration.

## Withdrawal

The bidder cannot withdraw an offer once it has been accepted. Unaccepted offers can only be withdrawn with ASIC’s consent. The target’s securityholders generally cannot withdraw their acceptance of the offer. However, they may withdraw their acceptance if the offer is subject to a defeating condition and the offer period is extended so that payment is postponed for more than one month.

## BID DOCUMENTATION

### Offer and bidder’s statements

The bidder is required to prepare a bidder’s statement containing prescribed information about the bidder and the terms of the bid. The bidder’s statement usually includes the offer document, which specifies the formal terms of the offer, such as the consideration, the length of the offer period, and the conditions, if any, to which the offer is subject.

A copy of the bidder’s statement (including the offer document) must be lodged with ASIC and with ASX, as well as served on the target company. The bidder’s statement (including the offer document) must also be sent to target securityholders between 14 and 28 days after it has been served on the target company and in any event no later than two months after the bidder has announced its intention to make an offer.

The bidder’s statement must comply with the requirements specified in the Corporations Act. Matters required to be disclosed in a bidder’s statement include:

- the identity of the bidder;
- the date of the statement;
- the bidder’s intentions regarding the business of the target and the future employment of its employees;

- if the consideration offered under the bid is cash, details of the funding arrangements;
- if the consideration offered under the bid is or includes securities or managed investment products, all material that would be required by Corporations Act to be included in a prospectus or product disclosure statement in relation to the securities or managed investment products;
- details of the consideration provided by the bidder or an associate for target securities in the bid class during the four months before the date of the bid;
- details of any benefit given by the bidder or an associate over those four months which was likely to induce the recipient to accept an offer under the bid;
- whether the bid is to extend to securities that come to be in the bid class during the period as the result of the conversion of other securities;
- the number of securities in any class in the target in which the bidder has a relevant interest; and
- the bidder’s voting power in the target.

In addition to those specific requirements, the bidder’s statement must include any other information that is known to the bidder and is material to the making of a decision by target securityholders as to whether to accept an offer under the bid.

### Target's statement

The target company is required to respond to the bidder's statement by issuing a target's statement. The target's statement must be sent by the target company to the bidder and the target's securityholders, and must also be lodged with ASIC and ASX.

A target's statement must include all information that target securityholders and their professional advisers would reasonably require to make an informed assessment whether to accept the offer under the bid. A target's statement must also contain a statement by each director of the target:

- recommending that offers under the bid be accepted or not accepted, and giving reasons for the recommendation; or
- giving reasons why a recommendation is not made.

The target's statement must also be accompanied by an independent expert's report where the bidder and its associates has a voting power in the target of over 30%, or where both companies share a common director.

However, an independent expert's report is commonly produced even when it is not strictly required by law, as a target board will often seek to rely on the backing of an independent expert's report to justify their valuation of and response to a bid.

### Supplementary statements

The bidder and the target must prepare supplementary statements in relation to the following, where such matters would be material from a target securityholder's point of view:

- where the bidder or the target becomes aware of a misleading or deceptive statement in, or of an omission of required information from, its original documents; or
- where the bidder or target becomes aware of a new circumstance, arising after the original documents were lodged, that would have been included if it had arisen before the documents were lodged.

The supplementary statement must be sent to the bidder or target (as applicable) as soon as practicable, and given to ASIC and ASX (or to the securityholders who have not accepted an offer under the bid, if the target is not listed).

### LIABILITY REGIME

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

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

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

The range of persons who may be liable for misleading or deceptive statements, omissions or include the directors of the offeror company and target company and experts who consent to their reports being included in any takeover documentation. In some instances the advisers of the offeror and target company may, depending on the extent of their involvement in the preparation of takeover documentation, also be liable for any damage or loss resulting from a misleading or deceptive statement or material omission.

It is important to note that liability for misleading or deceptive statements extends beyond the contents of the bidder's (or target's) statement, to cover other documents and public statements made in relation to a takeover and a target's securities. While there are some statutory 'due diligence-type' defences for misstatements and omissions in the bidder's statement, there are no such formal defences available for misleading and deceptive statements made outside of the bidder's statement.

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

## ENFORCEMENT AND DISPUTES

As noted earlier, ASIC supervises the operation of Chapter 6 and has wide powers to exempt persons from or to modify or vary the operation of any of provisions of Chapter 6.

The Panel is the primary forum for resolving disputes under Chapter 6. Indeed, only ASIC or another public authority is permitted to commence court proceedings in relation to a takeover bid, or a proposed takeover bid, until the bid period has ended.

The members of the Panel are selected according to their knowledge of, or experience in, business, the administration of companies, the financial markets, law, economics or accounting. The objectives of making the Panel the primary forum were to provide a speedy, informal process for resolving takeover disputes and to reduce, if not eliminate, recourse to litigation as a tactical manoeuvre in takeover defence.

The Panel is given the broad power to declare circumstances in relation to the affairs of an Australian company to be unacceptable circumstances, having regard to their effect on the control of the company or the acquisition of a substantial interest in it. The Panel may make such a declaration even if the relevant circumstances do not involve a contravention of Chapter 6. Conversely, the Panel may, but need not, make such a declaration in circumstances that involve such a contravention.

If the Panel makes a declaration of unacceptable circumstances, it may make any order that it thinks appropriate, among other things, to protect the rights or interests of any person affected by the circumstances. It may also make interim orders pending the outcome of its decision-making process,

It is an offence to contravene a Panel order, and they are enforceable through the Courts.

### Takeovers Panel activity

Since being constituted in 2000, the Panel has dealt with over 340 applications. While applications span a wide variety of issues, some common grounds for applications are:

- misleading or inadequate disclosure to securityholders (around half of the Panel's applications have been grounded on failures to provide sufficient information to securityholders);
- alleged associations between participants in a takeover and related breaches of Chapter 6;
- exclusivity and lock-up arrangements inhibiting the operation of an efficient and competitive market;
- adverse control effects arising from rights issues and underwriting arrangements; and
- arrangements which result in unequal treatment of securityholders (such as collateral benefits).

## TIMETABLE

An uncontested off-market bid will usually take a minimum period of three months from announcement to completion. If the bid is contested by the target company or another bidder, or if another bidder has announced a competing bid, the period for the takeover bid may be substantially longer while the bidder attempts to secure control or reach the compulsory acquisition threshold.

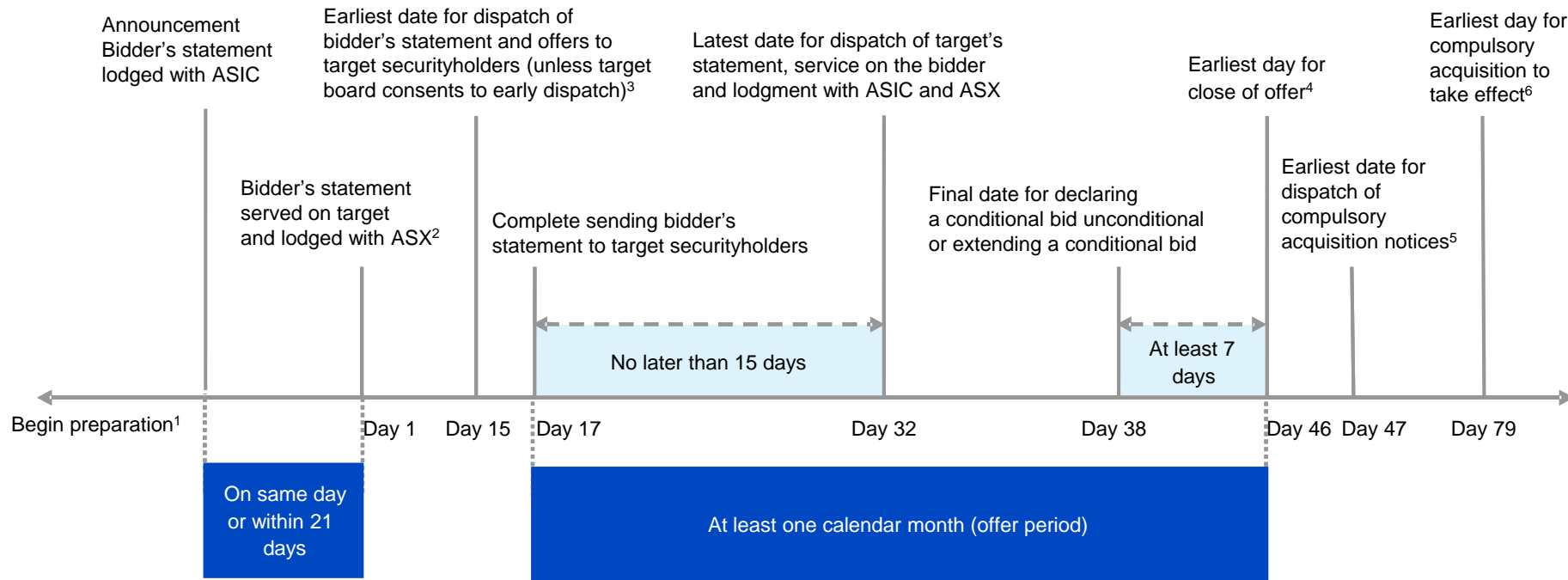
Offers under a takeover bid must be open for a minimum of one month and a maximum of 12 months.

A bidder is generally free to extend its offer at any time up to the end of the bid if it is unconditional. If a bid is still subject to conditions, it cannot be voluntarily extended by the bidder after the bidder gives notice of the status of the conditions (which must occur on a specified date between 7 and 14 days before the close of the offer) unless a rival takeover bid is announced or improved. However, if in the last seven days of the offer period the bidder improves the consideration offered, or the bidder's voting power in the target increases to more than 50%, the offer period is automatically extended for 14 days after the event.

Withdrawal rights are afforded to holders who have accepted a conditional bid if the bid is extended by more than a month (in total).

The following page sets out an indicative timetable for a standard off-market takeover.

## INDICATIVE TIMETABLE FOR AN OFF-MARKET BID



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

## THE ENDGAME – CLOSING A BID

Some strategies that can be employed by bidders to increase the prospects of success in the final stages of a takeover include:

|                           |  |
|---------------------------|--|
| Acceptance facilities     | Under an acceptance facility, an agent holds acceptance instructions on behalf of a securityholder, which can withdraw its instructions at any time before a defined trigger event (such as the satisfaction of all conditions) occurs. Upon the trigger, the facility immediately 'locks' in all acceptances in the facility at that time, and the bidder gets the benefit of those acceptances which can no longer be withdrawn. The use of acceptance facilities is particularly effective in the case of institutional securityholders, whose investment mandates often prevent them from accepting an offer until it is unconditional. By using an acceptance facility, such holders are able to provisionally 'accept' into the facility while the bid is still conditional, e.g. while it is still subject to a 50% minimum acceptance condition. A strong flow of 'acceptances' into an acceptance facility can then give a bidder momentum in building acceptances and, if acceptances in the facility plus actual acceptances exceed the level of a minimum acceptance condition, a bidder will be able to waive that condition knowing that the facility will close upon the waiver and lock in all acceptances in the facility at that time. |
| Last and final statements | These statements, under which a bidder announces that an offer is final or will not be extended, can be used to force the hand of securityholders waiting for a potential higher offer.  |
| Virtual variations        | By promising to remove outstanding offer conditions or improve the offer price should the bid achieve a specified level of acceptances, bidders are often able to elicit further acceptances without having to actually vary an offer until the relevant target is reached.  |
| Accelerated payment       | By reducing the time period in which acceptances are paid out under the offer terms (e.g. to make payment equivalent to the on-market terms of "T+3" (being the day of trade plus three trading days), a bidder can make an offer more attractive to securityholders, in particular relative to the alternative of selling on-market.  |
| Removing conditions       | A decision to remove outstanding conditions before the last week of the offer period will often encourage securityholders to accept the unconditional offer, and can be used in conjunction with voluntary or automatic extensions available in the last week of a bid period. Bidder are not entitled to waive conditions (other than those relating to standard prescribed occurrences) in the last week of an offer period. If the offer is still conditional it cannot be extended during the last week of the offer period, unless a competing bid is made or improved.   |
| Last-week variations      | Strategies of delaying decisions over whether to extend the offer period (if the offer is unconditional) or increase the offer price in the last week of an offer can often place securityholders under pressure to consider accepting a bid. However, care must be taken to ensure compliance with the provisions of Chapter 6. As noted at page 25 above, a bidder cannot generally elect to extend a conditional bid in the last week of an offer, but a bid will be automatically extended for 14 days if in the last seven days of the offer period the bidder increases the offer price or reaches voting power of 50% in the target.  |

## COMPULSORY ACQUISITION AFTER A BID

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

- relevant interests in 90% by number of securities in the bid class; and
- if a bidder begins with an interest in more than 60% of the target, also acquired at least 75% by number of the securities that the bidder offered to acquire under the bid (whether or not the acquisitions occurred under the bid or otherwise).

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

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

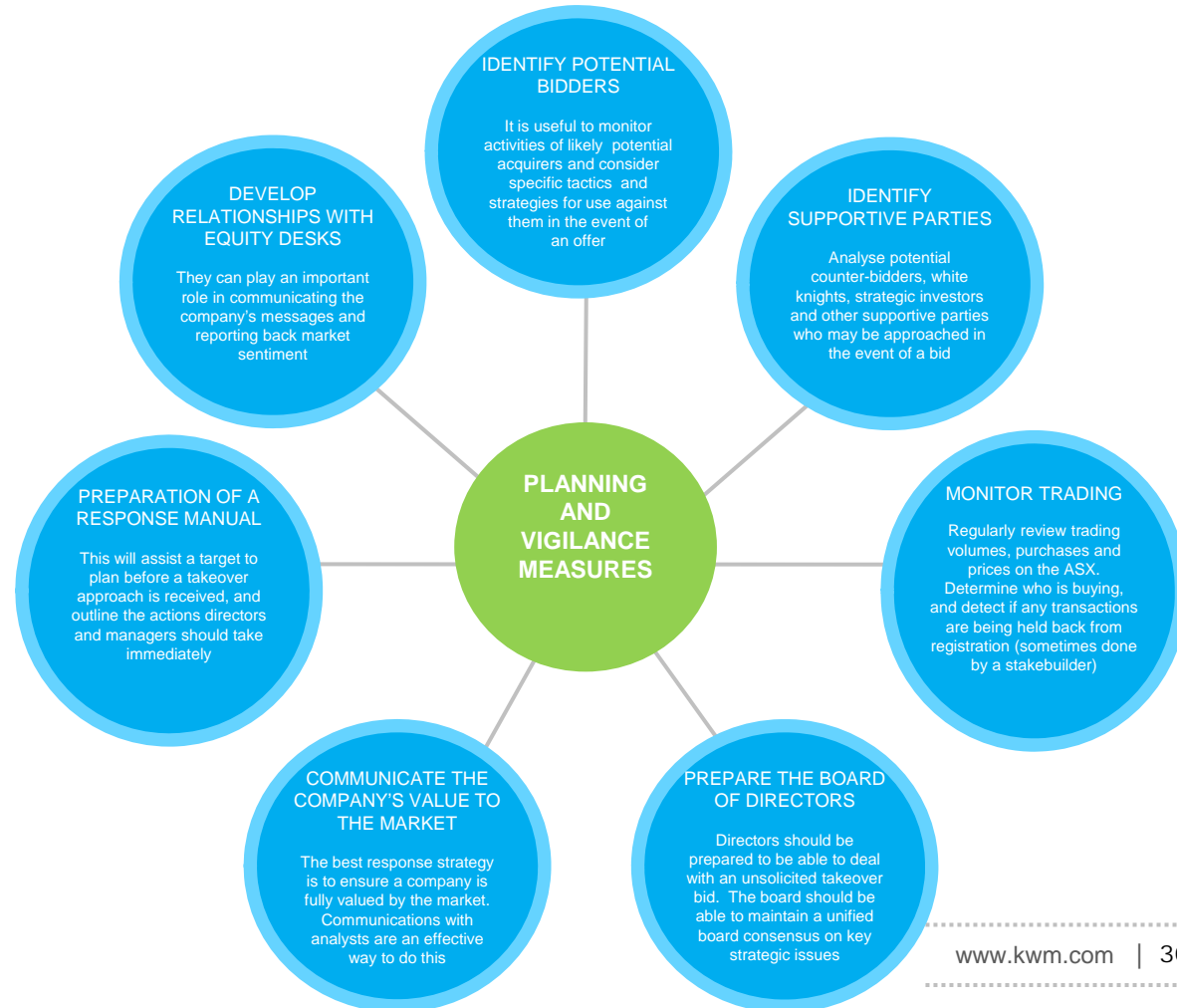
# 6. RESPONDING TO A TAKEOVER APPROACH

## FORMULATING A RESPONSE STRATEGY

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

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

Planning for and being vigilant against an unsolicited takeover bid will ensure that the company is in a position to make an effective response to an unsolicited takeover offer or approach. Some important planning measures to ensure a company is prepared for an unsolicited takeover bid include:



## Preparation of a takeover response manual

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

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

King & Wood Mallesons can assist in the preparation of a defence manual. For further information, please contact one of the partners listed at the end of this publication.

## PRE-EMPTIVE PREVENTATIVE STRATEGIES

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

However, there are a number of other measures which may decrease the chance of an unsolicited takeover or approach. These strategies should only be implemented if the directors genuinely believe that they are in the best interests of securityholders and the transactions are being implemented in good faith and for proper purposes. Further, as many measures which have the effect of prohibiting or discouraging unsolicited takeover bids are highly regulated in Australia by the ASX Listing Rules, the Corporations Act and the Panel, legal advice should be sought prior to implementing any of these strategies. Given the impact of these regulations, the likelihood of such strategies being effective in thwarting potential takeover activity may be low. However, some examples of strategies that have been regarded as defensive in the context of anticipated or subsequent takeover bids include:

|                                 |   |
|---------------------------------|---|
| Expansion by way of acquisition | This is particularly effective if funded by an issue of securities. However, this may also force the hand of a potential bidder and could potentially result in an unsolicited offer.   |
| Amendment of capital structure  | The alteration of a company's capital structure may act as a defensive strategy if it makes a potential bidder's task more difficult, e.g. a pro-rata issue of securities increasing the number of shares for a bidder to acquire or an issue of convertible securities with special terms and conditions that apply in the event of a takeover.                          |
| "Poison Pills"                  | For example, changes in the company's capital structure or pre-emptive rights or change of control provisions in material contracts may result in adverse consequences in the event of a takeover, which may deter potential acquirers. However, the Panel may declare poison pills to be unacceptable if they have not been disclosed to or approved by securityholders. |
| "Golden Parachutes"             | A review of employment contracts to include large payments for a change in control is often known as "Golden Parachutes". (However, note that Golden Parachutes are restricted by the ASX Listing Rules, the Corporations Act and Directors' duties).   |
| "Shark Repellents"              | Amending the provisions in company's constitution to cause the company to be a less attractive or attainable target, such as a percentage restriction on acquiring securities, or restrictions on securityholders rights to convene general meetings.   |

## RESPONDING TO AN APPROACH

### Immediate response

As soon as a takeover offer is received, the target board should be notified immediately and should convene a meeting as soon as possible. Senior management should also be notified and a takeover defence team (see below) assembled. If the bidder's approach is made publicly, a 'holding statement' should be sent to ASX, urging securityholders to take no action in relation to the offer until given further direction by the board after more detailed consideration. If the target company is informed of the takeover bid prior to a public announcement, it should consider whether trading in the company's securities should be halted until the bid is announced.

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

### Key roles and advisers

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

The general roles of the takeover response team, and the external advisers, are outlined below:

**The board** – Comprised of full board. Roles include:

- authorising overall strategic response to unsolicited offer
- full and final approval for major decisions, including whether to recommend or reject the bid, whether to seek a counter bidder, and authorising the signing and despatch of the key response documents (e.g. the target's statement)
- key directors and chairman may have roles in negotiating with the target and communicating to shareholders and the media

**Board response committee** – Comprised of Chair and CEO (and potentially other directors). Roles include:

- co-ordinating and managing the implementation of strategic responses
- approving communications releases
- sign-off of the target's statement and other response documents
- making recommendations to the full board
- instructing financial and legal advisers

**Takeover strategy group** – Comprised of CEO, CFO, other senior management and key advisers. Roles include:

- developing initial response strategy for the board's approval
- management of the takeover response
- recommending appropriate courses of action to the board and board sub-committee
- overseeing communications and response documents

**Takeover response team** – Comprised of wider group of senior management (including legal, HR, investor relations, finance) and advisers. Roles include:

- overseeing implementation of tasks and strategies set by the takeover strategy group
- preparing drafts of key documents and communications
- monitoring takeover and market developments and reporting on material issues
- conducting detailed analysis of the offer and analysing the bidder's tactics and strategy
- liaising with other advisers

**Legal advisor** – Roles include:

- providing strategic, legal and tactical advice
- participation in takeover strategy group and takeover response team
- working closely with the target and the financial advisers to formulate and structure defence strategies
- assisting with planning and conducting target's statement due diligence
- drafting the target's statement
- reviewing the bidder's statement to identify any legal issues and hurdles
- managing regulatory requirements, involving communicating with regulators such as ASIC and the Panel
- undertaking Panel or Court procedures, if any
- ensuring that the brief to any independent experts meets legal requirements

**Financial advisor** – Usually an investment bank or independent advisory house). Roles include:

- overall responsibility for strategic, financial and tactical advice
- participation in takeover strategy group and takeover response team
- securityholder/broker analysis
- analysing the bidder, the price it can afford to pay, and its likely tactics

- analysing (and potentially approaching) potential counter-bidders and friendly parties
- preparing analyst/investor presentations
- developing alternative approaches for maximising securityholder value

**Public relations consultants** – Roles include:

- responsible for the development of the overall communications strategy for major and retail securityholders, relevant analysts and the media
- ensuring effective and efficient communication with all stakeholders

**Other** – It may be necessary through the course of a bid to involve other parties, such as independent experts to prepare reports to accompany the target's statement, proxy solicitation services to make and field calls from securityholders and printers to print and distribute the target's statement and other communications.



**Defensive tactics**

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

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

Outlined over the page are some of the defensive strategies that may potentially be adopted following an approach:

## COMMON DEFENCE STRATEGIES

|  |  |
|--|--|
| Branding the bid as inadequate or opportunistic                        | <p>Criticism of the commercial desirability of an offer is usually dealt with in the target statement. This can be done by highlighting the inadequacy of the bid in terms of:</p> <ul style="list-style-type: none"> <li>• the premium/discount to market (before and after the offer is announced);</li> <li>• a multiple of historic and future earnings or a comparison of the offer to trading and transaction multiples of comparable companies;</li> <li>• the fundamental value estimated by an expert, if engaged, or the strategic importance and value of the company, including any 'hidden' value not fully appreciated by the market; and</li> <li>• any conditionality (and associated risk) attached to the bidder's offer.</li> </ul> |
| Commission of an independent expert report                             | <p>Legally, an independent expert's report is only required when the bidder holds more than 30% of the company, or has common directors. However, an independent expert's report is voluntarily included in many target statements to justify a board's response to an offer.</p>  |
| Criticising the bidder   | <p>To the extent that the offer consideration is scrip, it may be helpful to undermine the value of the bidder's scrip. A target may also seek to attack the credibility of the bidder's business or management or to highlight a bidder's ability to pay more in light of anticipated synergies and other perceived deal benefits.</p>  |
| Releasing favourable information                                       | <p>The company should ensure that, wherever possible, favourable information is released to the market and those who can influence shareholder opinions (such as the media and analysts) to ensure that the company is fully valued by the market.</p>   |
| Announcing higher dividends, capital return or a bonus issue           | <p>Depending on the company's balance sheet position, a cash return to securityholders may be appropriate. The feasibility of this strategy will be dependent on the structure and the gearing of the company at the time of the offer. In particular, if a company has been advised of a proposed takeover, the ASX Listing Rules will prevent the company from issuing new securities for the next three months unless securityholder approval is obtained.</p>  |
| Facilitating another bid or alternative transaction                    | <p>If directors approach an alternative interested person to see if a higher bid might be made, the directors' actions must be even-handed between competing bidders and must be designed to facilitate an auction or some other method to assist securityholders in receiving a fair market price for their securities.</p>   |
| Encourage friendly buying or placement to white knight                 | <p>The directors of the target may be able to encourage a third party to buy securities in the company to in turn encourage the bidder to increase the offer price. Care should be taken that the third party purchaser of the securities is not an "associate" of the target, especially when the target has an interest in its own securities.</p>   |
| Appeal to the loyalty of securityholders                               | <p>Some securityholders may be influenced by an appeal not to let control of the company pass to a particular bidder. This may be a useful strategy where the bidder is a foreign corporation, or where the bidder is likely to break up the target upon a successful bid. Communications should seek to enhance understanding by securityholders of the future direction of the company. Letters from the chairman to securityholders can be an important tool in keeping small securityholders informed and onside.</p>  |
| Appeal to courts, the Panel, or other regulators                       | <p>It is common practice in a hostile takeover for the target and its advisers to conduct a detailed review of the bidder's statement and other announcements looking for anything that could be the basis for an application to the Panel or complaint to ASIC or any other regulatory non-compliance. A target may also seek to lobby specific regulators which have the ability to directly or indirectly influence the outcome of a bid.</p>   |
| Making a counterbid for the bidder's securities (the 'Pacman' defence) | <p>A "Pacman defence" is a term used to describe a target's bid for the bidder. If the Pacman defence is used, directors should be aware that the defensive bid is likely to trigger a defeating condition of the initial bid, and may constitute "frustrating action". Such a defence may also be viewed as an act by the directors of the target to protect their own interests, which would be a breach of their director duties.</p>   |

## DIRECTORS DUTIES

Australian law (and the ASX Listing Rules and Panel policy in particular) prohibit a company from adopting strategies designed to prevent a bid being made or to frustrate a bid once it has been made, unless securityholder approval has been obtained.

Directors should proceed with caution when considering whether an act has the potential to frustrate a bona fide offer. The Panel has consistently expressed the view that transactions which have an effect on the control of a company should be left to securityholders, not the board of the company, to decide - any attempt by a target board to interfere in the right of securityholders as a group to approve transactions will likely be unacceptable. The fundamental obligation of directors is to act bona fide in the interests of the company and for a proper purpose, irrespective of whether a takeover bid has been made.

Directors are under a duty to assess the reasonableness of any takeover bid. This will include obtaining appropriate information in order to assess the company's value. Where necessary, directors need to obtain professional advice, such as engaging an independent expert. Ultimately, directors are responsible for ensuring that securityholders are provided with sufficient information to make an informed assessment as to whether to accept the offer under the bid.

Directors must also take care that any of their actions, including defensive actions, must not give rise to a declaration of unacceptable circumstances by the Panel. Action by the target's directors to frustrate a bid or a potential bid (in particular, any action taken by the target which could trigger a condition to the bidder's offer or may otherwise lead to that offer being withdrawn or not proceeding) may constitute unacceptable circumstances because it deprives securityholders of the opportunity to consider the bid. The directors may remedy frustrating action which would otherwise amount to unacceptable circumstances by obtaining securityholder approval for the action.

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

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

| Glossary         |   |
|------------------|---|
| ACCC             | The Australian Competition and Consumer Commission, responsible amongst other things for ensuring that takeovers will not substantially lessen competition in a market  |
| ASIC             | The Australian Securities & Investments Commission, the regulatory body which administers and ensures compliance with the Corporations Act  |
| ASX              | The Australian Securities Exchange, the primary securities exchange in Australia which operates pursuant to the ASX Listing Rules for listed entities   |
| Corporations Act | The Corporations Act 2001 (Cwth), which regulates corporate activities and the securities market in Australia   |
| FIRB             | The Foreign Investment Review Board, a governmental body which assists the Treasurer in ensuring acquisitions are consistent with the Foreign Acquisitions and Takeovers Act 1975 (Cth) and Australia's foreign investment policy |
| MIA              | A merger implementation agreement (sometimes referred to as a scheme or bid implementation agreement), which governs the relationship between a bidder and target in an agreed takeover   |
| Panel            | The Takeovers Panel, a body of professionals empowered under the Corporations Act to adjudicate on disputes arising in relation to takeovers  |

# OUR EXPERIENCE

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## DONE DEALS

King & Wood Mallesons has a strong track record of acting on some of the Asia Pacific region's most complex and innovative public M&A transactions.

### INTOLL

on its A\$3.4bn acquisition by the Canada Pension Plan Investment Board by way of a scheme of arrangement

### CHINALCO

on the acquisition of its A\$20bn stake in Rio Tinto and subsequent proposal to invest a further A\$20 billion through an acquisition of an additional stake and interests in Rio Tinto's underlying assets

### AXA ASIA PACIFIC

on bids by AMP and National Australia Bank and its eventual A\$14.6bn scheme of arrangement to sell its Australian and New Zealand businesses to AMP and its Asian businesses to AXA SA

### XSTRATA

on numerous public M&A transactions in Australia worth in excess of A\$10bn, including successful takeover bids for Resource Pacific, Jubilee Mines and Sphere Minerals

### LION NATHAN

on its A\$6bn scheme of arrangement for the privatisation by Kirin Holdings and on takeover bids for Coca-Cola Amatil and Coopers Brewery Limited

### BG GROUP

on its successful A\$5.6bn on-market takeover of Queensland Gas Company and attempted A\$13.8bn scheme of arrangement and off-market takeover bid for Origin Energy

### BROOKFIELD INFRASTRUCTURE PARTNERS

on its initial 40% investment in Prime Infrastructure Group and subsequent scheme of arrangement and combined takeover bid for the remaining 60% of Prime

### PRIMARY HEALTHCARE

on its successful A\$3.5bn contested acquisition of healthcare operator Symbion Health by way of an off-market takeover with an associated capital raising

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