Australia

Takeover Guide

Contacts

Nicola Charlston

King & Wood Mallesons, Melbourne

nicola.charlston@au.kwm.com

Richard Hanson

King & Wood Mallesons, Melbourne

richard.hanson@au.kwm.com

Contents

	Page
OVERVIEW OF WHAT THIS GUIDE COVERS	3
CONTROL TRANSACTIONS AT A GLANCE	3
REGULATORY FRAMEWORK AND THE GENERAL PROHIBITION	4
METHODS FOR ACQUIRING CONTROL	8
SCHEMES OF ARRANGEMENT	14
COMPARISON OF TAKEOVER BIDS AND SCHEMES	16
PLANNING AND PREPARING AN ACQUISITION	17
DOING AND DOCUMENTING THE DEAL	24
RESPONDING TO A CONTROL TRANSACTION APPROACH	27
MINORITY SHAREHOLDERS	29
KEY REGULATORY BODIES	30
FURTHER INFORMATION	31

OVERVIEW OF WHAT THIS GUIDE COVERS

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

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

CONTROL TRANSACTIONS AT A GLANCE

Introduction
Acquisitions of publicly listed Australian companies are regulated by a combination of legislation (chapter 6 of the Corporations Act 2001 (Cth) (the Corporations Act)) and regulation. These rules also apply to acquisitions of publicly listed Australian managed investment schemes and unlisted Australian companies with more than 50 shareholders.

The 20 per cent rule
Chapter 6 of the Corporations Act broadly prohibits a person from acquiring securities in a company that is subject to the takeover rules when the number of securities controlled by that person and their associates would exceed 20 per cent (or increase from a starting point that is above 20 per cent and below 90 per cent).

Exceptions to the 20 per cent rule
The most common ways of acquiring an interest in more than 20 per cent of the securities in an entity that is subject to the takeover rules is by way of a takeover bid (off-market or on-market) or a scheme of arrangement. Other methods include (among others) acquisitions made with shareholder approval, creeping acquisitions (three per cent increase in any six-month period), acquisitions made pursuant to a pro rata rights issue and acquisitions by an underwriter or sub-underwriter that result from an issue of securities under a regulated disclosure document. These are considered in more detail in the section titled *Other frequently used gateways through the 20% prohibition*.

Off-market takeovers
Under an off-market bid, a bidder makes separate but identical offers to all holders of securities in a target to acquire their securities. The acceptance of the offer by a holder results in an agreement for the acquisition of their securities. Off-market takeover bids are usually made conditional upon the satisfaction or waiver of a number of conditions, such as that the bidder reaches a minimum level of acceptances (usually 50 per cent or 90 per cent) or obtains specified regulatory approvals (eg, foreign investment or Australian competition approvals). Off-market takeover bids may be friendly (ie, made with the recommendation of the target board) or hostile.

Schemes of arrangement
Under a scheme of arrangement, a target company seeks court and shareholder approval for the transfer of target shares to the bidder. To be successful, a scheme needs the approval of 75 per cent by value and 50 per cent by number of each class of securityholders present and voting at a scheme meeting (excluding any votes cast by the bidder or any of its associates).

In addition, the court must exercise its general discretion to approve the scheme. As a scheme requires the cooperation of the target company, it is only used for an agreed acquisition. The binary (all or nothing) outcome means schemes are frequently used to effect 100 per cent acquisitions.

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

- timing requirements;
- target register analysis (eg, supportive, dissenting or apathetic shareholders);
- whether a strategic stake will be acquired before a bid is launched (noting that an interest of 5 per cent or more will need to be disclosed to the market);
- whether the bidder wishes to acquire 100 per cent control; and
- the amount of due diligence required and whether a friendly deal with the target board's support is necessary.

Bidders must also be conscious of the insider trading laws in Australia and the fact that they may be unable to acquire or agree to acquire any shares in the target while they are in receipt of non-public price-sensitive information.

Considerations for a target
The aim of any control transaction response should not simply be to deter potential bidders but rather to ensure that, if control is to pass, the transfer occurs on favourable terms and at a price that reflects the true underlying value of the company. Target directors must act in the best interests of the company and for a proper purpose in considering any control proposal, and should not seek to frustrate a bid once it has been made (with the decision regarding whether control should be passed to be left to shareholders at that point). Target directors can prepare for a possible approach by preparing a takeover response manual and undertaking other pre-approach tasks, such as monitoring the share register, maintaining a current valuation and preparing for the grant of due diligence.

The key immediate decision for target directors upon receipt of a confidential takeover approach is whether to announce the approach to the Australian Securities Exchange (ASX) and whether to engage with the bidder. If the target grants due diligence access it will usually only do so where a friendly acquisition is possible and where a confidentiality agreement has been entered into with the bidder. This may contain a standstill provision under which the bidder undertakes not to acquire securities in the target for a specified period other than pursuant to an agreed offer.

REGULATORY FRAMEWORK AND THE GENERAL PROHIBITION

Acquisitions of entities listed on the ASX are regulated under chapter 6 of the Corporations Act and, to a lesser extent, the rules and regulations of the ASX.

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

This guide is principally concerned with the most common form of control transaction: 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.

Corporations Act
The regulation of control transactions of public companies in Australia is underpinned by a set of principles that aim to protect securityholders by providing that the transition of control in a public company should occur in a manner that 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 (and those that control the bidder) who proposes to acquire a substantial interest in the target;
  - have a reasonable time to consider a proposal; and
  - be given enough information to assess its merits; and
- target securityholders should have a reasonable and equal opportunity to participate in any benefits flowing from a proposal.

These principles underpin the provisions of chapter 6 that regulate in detail the various aspects of control transactions in Australia. They also form the basis of applications to, and decisions made by, the Takeovers Panel in relation to control transactions (see the section titled *The Takeovers Panel*).

General prohibition
The fundamental feature of chapter 6 is a general prohibition, contained in section 606 of the Corporations Act, which prohibits a person from acquiring (whether by way of a purchase of existing securities or an issue of new securities) a 'relevant interest' in securities in an Australian company if, because of the acquisition, any person's 'voting power' in the company would increase from 20 per cent or less to more than 20 per cent; or a starting point that is above 20 per cent and below 90 per cent, unless the acquisition is expressly permitted by one of the 'gateways' set out in section 611 of the Corporations Act (which includes acquisitions by way of takeover bid or scheme of arrangement).

Although the prohibition is directed against the acquisition of voting securities, it has the corresponding effect of limiting the alternatives available to a securityholder wanting to sell a large holding, particularly one of more than 20 per cent, 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 in the section titled *Methods for acquiring control*.

Key concepts relating to the general prohibition
The concepts of 'relevant interest' and 'voting power' are critical to understanding the takeovers provisions. A person has a 'relevant interest' in a security if the person:

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

For example, an option to acquire an issued security or a conditional agreement to do so generally creates a relevant interest in a security.

A person's 'voting power' in a company is the proportion of votes attached to all voting securities in which a person and their associates[1] have a relevant interest as a percentage of the total number of votes attached to all voting securities in the company.

Extraterritorial operation
Australian takeover law purports to have extraterritorial 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 (eg, if an acquirer assumes control of a non-Australian company that itself holds more than 20 per cent of the voting power in an ASX-listed company).

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

Key regulators
The key takeovers regulators are the Australian Securities and Investments Commission (ASIC) and the Australian Takeovers Panel. ASIC is Australia's corporate, markets and financial services

[1] 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.

regulator, and supervises compliance with the Corporations Act. The Takeovers Panel is a non-judicial body that is the primary forum for resolving corporate control transaction disputes in Australia.

Further information on ASIC and the Takeovers Panel is set out in the section titled *Key regulatory bodies.*

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

Control transactions involving foreign investors

Australia has a foreign investment regime that regulates the acquisition by 'foreign persons' of certain interests in Australian businesses (including the acquisition of shares in Australian companies). The Foreign Acquisitions and Takeovers Act 1975 (Cth) (FATA), together with the Foreign Acquisitions and Takeovers Regulation 2015 (the Regulations) and Australia's Foreign Investment Policy, regulate foreign investment in Australia, and set out the requirements for notifying the Australian Federal Treasurer (the Treasurer) (through FIRB) of a proposed investment when certain thresholds and criteria are satisfied. The Treasurer has the power to block a proposed acquisition or (if the acquisition has already been completed in breach of FATA) to order that an acquisition be reversed. On 1 January 2021, the Australian Government finalised and released the below updated legislation to make further changes to FATA and the Regulations:

- Foreign Investment Reform (Protecting Australia's National Security) Act 2020 (Cth) to amend FATA; and
- Foreign Investment Reform (Protecting Australia's National Security) Regulations 2020 (Cth) to amend the Regulations.

These legislative changes included reinstating the monetary thresholds under the FIRB regime, new FIRB approval triggers and changes regarding foreign government investors. Since 1 January 2021, the monetary thresholds imposed by FIRB have been reinstated and the temporary $0 monetary threshold that was introduced during the Covid-19 outbreak has been removed. More information on the monetary thresholds imposed on land investments or non-land investments can be found at https://firb.gov.au/general-guidance/monetary-thresholds.

It is important to carefully consider whether FIRB approval is required for a transaction. If a proposed acquisition requires FIRB approval, the foreign person must:

- obtain FIRB approval before entering into any agreement for the proposed acquisition; or
- have FIRB approval as a condition precedent if any agreement is executed before FIRB approval is obtained.

Under FATA, notification is required for certain proposed investments by foreign persons (including any corporation, business or trust in which there is a substantial foreign interest) and 'no objections notification' obtained. These include:

1. acquisitions of 20 per cent or more in an Australian entity (with gross assets of AU$289m or more (indexed annually)): the 20 per cent may be of actual shares, units, voting power, potential voting power or rights to shares or units;
2. acquisitions of interests in Australian land (an interest in land, which may be legal or equitable, may arise by purchasing the land, under a lease or licence, financing and profit-sharing arrangements, or an interest in a land corporation or trust). Some exemptions apply under FATA and the Regulations;
3. acquisitions of 10 per cent or more in an agribusiness, where the consideration for the interest is AU$63m or more (indexed annually); agricultural land is defined under section 4 of FATA as land in Australia that is used, or that could reasonably be used, for a primary production business (within the meaning of subsection 995-1 of the Income Tax Assessment Act 1997 (Cth); and

4. all foreign government investors must obtain approval before acquiring a direct interest in an Australian business, starting a new business or acquiring an interest in Australian land, regardless of the value of the investment.

Under FATA, certain proposed investments by foreign persons are ‘significant actions’ that may activate the Treasurer’s powers and it is recommended that a ‘no objections notification’ be obtained for:

5. acquisitions of 20 per cent or more in an existing Australian business (where the gross assets of the business are valued at AU$289m or more (indexed annually)); and
6. takeovers of offshore companies with Australian assets where the gross Australian assets of the company are valued at AU$289m or more (indexed annually).

In respect of 1, 5 and 6 above, a higher monetary threshold of AU$1,250m (indexed annually) applies to investing entities that are from nations prescribed under the Regulations (currently, the United States, New Zealand, South Korea, Chile, Japan and China), provided there is no government ownership in the investor and the investment is not in a prescribed sensitive sector. The higher threshold of AU$1,094m applies to agribusiness investments, but only for investing entities from the US, New Zealand and Chile.

The prescribed sensitive sectors for business acquisitions are:

- media;
- telecoms;
- transport;
- military and defence-related activities;
- encryption and security technologies; and
- the extraction of uranium or plutonium or the operation of nuclear facilities.

Where the investment is in a prescribed sensitive sector or by an entity controlled by a government of a prescribed country, a monetary threshold of AU$281m (indexed annually) applies.

Recent changes to the FIRB regime provide that, where an investment involves national security concerns, it will be assessed under a standalone ‘national security test’. FIRB has published Guidance Note 8, which outlines what constitutes a ‘national security business’, ‘carrying on a national security business’, ‘starting a national security business’ and ‘national security land’. Guidance Note 8 also includes sector-by-sector guidance on certain sectors, such as higher education, commercial real estate, transport, and waste and sewerage.

The purpose of the FIRB regime is to empower the Treasurer to make adverse orders (including prohibition or disposal orders) in respect of proposals that are considered by the Treasurer to be ‘contrary to the national interest’. In addition, certain transactions are compulsorily notifiable, and criminal sanctions may apply where a prior no objections notification is not obtained.

Additional criteria are applicable with respect to foreign government investors and prescribed investors, and with respect to investments involving the following sectors: banking; telecoms; airports and airlines; shipping; media; and resource sectors.

We recommend seeking FIRB advice before entering into any formal documentation to avoid any penalties arising.

Australian competition regulation
Section 50 of the Competition and Consumer Act 2010 (Cth) (CCA) (formerly the Trade Practices Act 1974 (Cth)) prohibits mergers or acquisitions that would have the effect, or be likely to have the effect, of substantially lessening competition in a market. If a transaction is between two competitors in the same market, the buyer and seller may consider including approval from the ACCC (which enforces CCA) as a condition to completion. There is no requirement to notify the ACCC of a proposed merger under CCA. However, the ACCC can apply for an injunction to prevent a merger (and seek divestiture and penalties) if it believes the merger is likely to substantially lessen competition in a market. Generally, the ACCC will closely investigate a merger if the merged entity will have a market share of

20 per cent of more following the transaction. However, in some circumstances, the ACCC also investigates mergers where the merged entity will have a market share of less than 20 per cent, or where the acquisition involves a minority stake.

Approval from the ACCC can be obtained through two methods: informal clearance and formal clearance. Informal clearance involves approaching the ACCC (which initially can be done on a confidential basis) and seeking a comfort letter stating that the ACCC does not intend to oppose the merger. Formal clearance involves following the procedures set out in CCA and, if obtained, will provide formal immunity from proceedings under section 50 of CCA. Due to its flexibility, informal clearance is the most popular method of approval in Australia. To date, the formal clearance procedures have not been used.

Currently, merger parties also have the option of applying for statutory authorisation for a transaction from the Australian Competition Tribunal (the Tribunal) as an alternative to seeking clearance from the ACCC.

Moreover, in 2021, the ACCC proposed a major overhaul of Australia's existing merger regime. The proposals were instigated by the ACCC's concerns in relation to the current merger rules' fitness for purpose, challenges faced by the ACCC in opposing transactions, and the consequences for consumers of increased concentration and market power (particularly in relation to digital platforms) in the Australian economy. The ACCC's proposals include a new single formal clearance regime, a change to the legal test and merger factors and a specific and a separate legal test for acquisitions by large digital platforms. The proposed reforms have been merely framed as the 'start of debate' and there is no current intention to put these proposals to the government until after the next federal election in 2022. Accordingly, in Australia, while there remain no formal merger notification requirements under CCA, if the buyer and the seller are comfortable that their transaction will not substantially lessen competition, it is still common to provide a courtesy notification to the ACCC of the proposed transaction.

Other regulatory approvals
We also note that other regulatory approvals may be required if the transaction involves a company or business in an Australian regulated industry. Transactions in the following industries could include the following regulatory approvals as conditions to completion:

- Banking: approval under the Financial Sector (Shareholdings) Act 1998 (Cth), which applies if a stake of 15 per cent or more is acquired in a financial sector company and approval from the Australian Prudential Regulation Authority.
- Media: approval from the Australian Communications and Media Authority under the Broadcasting Services Act 1992 (Cth), which regulates media ownership including unacceptable media diversity situations.
- Airports: the Airports Act 1996 (Cth) restricts foreign ownership of airports to 49 per cent, ownership of certain pairs of airports to 15 per cent in a paired airport and airline ownership of airports to five per cent (per airline).
- Aged care: the Aged Care Quality and Safety Commission Act 2018 (Cth) and Aged Care Act 1997 (Cth) requires that any applicants who wish to provide home care, residential aged care or flexible care are required to be approved as Approved Providers.

METHODS FOR ACQUIRING CONTROL

Permitted acquisitions under the Corporations Act
The most common ways of acquiring an interest in more than 20 per cent of the voting securities in a listed entity are:

- a takeover bid, either off-market or on-market (described in detail in the section titled *Takeover bids*); and
- a court approved scheme of arrangement (described in detail in the section titled *Schemes of arrangement*).

Other frequently used gateways through the 20 per cent prohibition

Securityholder approval
In this case, acquisitions 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 also usually requires an independent expert's report to be provided to securityholders. In the absence of minority securityholders participating in a control premium, securityholders typically expect the new investors to bring additional benefits to the target, such as access to capital, technology or management.

Creeping acquisitions
These are acquisitions by a person who has continuously throughout the preceding six months held voting power of at least 19 per cent in a company provided that, as a result of the acquisition, they would not increase their stake to more than 3 per cent 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 readjustments.

'Downstream' acquisitions
Acquisitions that, as a result of the '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 per cent 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 Takeovers Panel may nevertheless 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 that 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 per cent 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.

The ASX recently introduced a requirement for bidders to seek shareholder approval where the issue of new securities by a bidder in a takeover bid or scheme of arrangement would equal or exceed 100 per cent of the bidder's share capital.

In light of the inherent conflict with the fundamental principles of chapter 6, ASIC and the Takeovers Panel also carefully consider any reverse takeovers that 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.

Rights issues
This relates to acquisitions that 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 Takeovers Panel carefully review rights issues that affect control and may consider acquisitions unacceptable where the structure, pricing or underwriting arrangements have control effects that are disproportionate to the fundraising purposes of the rights issue. In such circumstances, the Takeovers Panel may make orders to prevent or amend a rights issue or require the approval of target securityholders.

Underwriting
Acquisitions by an underwriter or sub-underwriter that result from the issue of securities under a regulated disclosure document (eg, 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 (ie, the effect of them acquiring the maximum number of securities permitted under the arrangements). ASIC and the Takeovers Panel's concerns regarding the use of contrived underwriting agreements to circumvent the takeovers prohibition apply equally to this exemption.

Takeover bids
There are two forms of takeover bids in Australia:

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

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

Off-market takeover bids
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 holders accept 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 per cent or 90 per cent) or obtains specified regulatory approvals, such as from FIRB or the ACCC.

On-market takeover bids
By contrast, under an on-market bid, quoted securities are acquired through the ASX rather than through off-market acceptances.

A bidder, through a broker, stands in the market during the bid period and offers to acquire all of the target's securities at the specified offer price. The bidder has priority over other trades on the market at that price.

On-market bids are rare in Australia, largely due to the requirement that they be cash only and unconditional, and therefore risk a bidder being left without control. However, the speed with which an on-market bid can be implemented (with a bidder acquiring securities on-market within hours of announcing the bid and sellers able to receive consideration within days of accepting an offer) can make an on-market bid a highly effective takeover tool when used in the right transaction.

Key features of an off-market takeover bid

Securities	The offer must relate to all of the securities in the target company of the relevant class or a specified proportion of each holder's securities. An offer cannot be made on a 'first come, first served' basis.
Consideration	Consideration may be cash, securities or a combination of both. The consideration must be equal to, or more than, the amount or value of the highest consideration for the securities that 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. If the consideration is increased during the offer, the increased consideration is payable to any securityholder who had already accepted the offer prior to the increase. Consideration must be paid within one month of the later of an acceptance and the offer becoming unconditional and, in any event, not later than 21 days after the offer closes. The 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).
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, or there are regulatory approvals, the duration of the bid may be significantly longer. Formal offers to securityholders under an off-market takeover bid must be made within two months of the 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.

	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. Certain conditions are prohibited (eg, conditions specifying a maximum acceptance level or that give the bidder a subjective discretion as to whether the condition is satisfied).
Documents	Bidders are required to prepare a bidder's statement containing prescribed information about the bidder and the terms of the bid (and that 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 for target shareholders to complete and return. A target is similarly required to lodge and dispatch a target's statement 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 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 per cent or more of the target or has directors on the target board, and are usually 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 per cent threshold when the offer is unconditional and the bidder's statement has been given to the target. If the bidder purchases securities above the prevailing offer price, the offer price is automatically increased to match the higher price.
Variations	A bidder may vary its offer under an off-market bid by increasing the amount of consideration, adding a new type of consideration (eg, adding an all-cash alternative to a bid offering securities as consideration) or by extending the offer period. If the consideration is increased or a new type of consideration is added, every person whose securities were acquired before the variation is entitled to receive the increased (or new) consideration. So, if cash is added as an alternative to securities, each person who has accepted an offer may elect cash in lieu of the other consideration. The bidder cannot withdraw an offer once it has been accepted. Unaccepted offers can only be withdrawn with ASIC's consent. The target's securityholders generally cannot withdraw their acceptance of the offer except in limited circumstances. For example, they may withdraw their acceptance if the offer is subject to a defeating condition and the offer period is extended so that payment is postponed for more than one month.

Key considerations

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

1. Examples of common takeover conditions:
   (i) a condition that the bidder receives acceptances in respect of a specified minimum percentage of voting securities, usually 50.1 per cent (which normally gives the bidder control of the target) or 90 per cent (which normally allows compulsory acquisition to proceed);
   (ii) 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 (eg, certain transactions that affect a target's share capital, result in an agreement to issue securities or involve the sale of a substantial part of the target's business);
   (iii) a condition that regulatory approvals are received (eg, FIRB or ACCC approval);
   (iv) a condition that there are no material adverse changes in the financial position of the target; and

(v) conditions in relation to the business such as the target not amending or entering into a material contract, not purchasing or selling a material asset or business of changing the employment terms of senior executives.

2. Examples of prohibited takeover conditions:
   (i) the offer may be withdrawn if the number of acceptances exceeds a specified number;
   (ii) the bidder may acquire securities from some, but not all, persons accepting offers under the bid;
   (iii) 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; and
   (iv) 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 that require positive action by a bidder to make and progress applications to regulators are considered acceptable).

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

What is a 'reasonable basis' depends on the circumstances of each case. Where new external financing is being relied upon, the bidder may have reasonable grounds at the time of announcing its bid or lodging its bidder's statement, even if the relevant arrangements have not been formally documented, or they remain subject to conditions precedent to drawdown, provided that there is a sufficiently detailed binding commitment in place (eg, a signed term sheet or commitment letter). Where pre-existing facilities will be drawn down, the bidder should ensure that the funds are available and not required for other group operations. Where internal cash reserves are to be used, they should be free from security interests, rights of set off or other arrangements (eg, being required for other group operations) that would materially affect the bidder's ability to use them. Any funding to be provided indirectly through the bidder's corporate group should be subject to binding documentation that ensures that the bidder entity has access to the required funds, and the parent of the group should agree to procure compliance by relevant group members with the arrangements.

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

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. Regulatory delays are another reason for a takeover bid being longer than three months.

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 seven 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 per cent, 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) and each subsequent time that the offer is extended.

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 bid include:

Acceptance facilities	Because the opportunities to withdraw an acceptance are limited, securityholders and institutional securityholders can be reluctant to accept a conditional offer. To help overcome this reluctance, a bidder may establish an acceptance facility. Under an acceptance facility, an agent holds acceptance instructions on behalf of a securityholder, which can withdraw its instructions at any time before a defined trigger event (eg, 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 that can no longer be withdrawn. The use of acceptance facilities is particularly effective in the case of institutional securityholders who are reluctant to restrict their ability to trade in their securities or whose investment mandates often prevent them from accepting an offer until it is unconditional. By using an acceptance facility, such holders are able to provisionally 'accept' into the facility while the bid is still conditional, for example, while it is still subject to a 50 per cent minimum acceptance condition. A strong flow of 'acceptances' into an acceptance facility can then give a bidder momentum in building acceptances and if acceptances in the facility, plus actual acceptances, exceed the level of a minimum acceptance condition a bidder will be able to waive that condition, knowing that the facility will close upon the waiver and lock in all acceptances in the facility at that time.
Last and final statements	These statements, under which a bidder announces that an offer is final or will not be extended, can be used to force the hand of securityholders waiting for a potential higher offer. Special care must be taken before such statements are made given the approach taken by ASIC and the Takeovers Panel to hold bidders to these statements (eg, the 'offer price will not be increased').
Virtual variations	By promising to remove outstanding offer conditions or improve the offer price should the bid achieve a specified level of acceptances, bidders are often able to elicit further acceptances without having to actually vary an offer until the relevant target is reached.
Accelerated payment	By reducing the time period in which acceptances are paid out under the offer terms (eg, to make payment equivalent to the on-market terms of 'T+2' (the day of trade plus two trading days)), a bidder can make an offer more attractive to securityholders, in particular, relative to the alternative of selling on-market.
Removing conditions	A decision to remove outstanding conditions before the last week of the offer period will often encourage securityholders to accept the unconditional offer and can be used in conjunction with voluntary or automatic extensions available in the last week of a bid period. Bidders are not entitled to waive conditions (other than those relating to standard prescribed occurrences) in the last week of an offer period. If the offer is still conditional it cannot be extended during the last week of the offer period, unless a competing bid is made or improved.
Last-week variations	A strategy of delaying the announcement of a decision over whether to extend the offer period (if the offer is unconditional) or increase the offer price in the last week of an offer can often place securityholders under pressure to consider accepting a bid. However, care must be taken to ensure compliance with the provisions of chapter 6. A bidder cannot generally elect to extend a conditional bid in the last week of an offer, but a bid will be automatically extended for 14 days if in the last seven days of the offer period the bidder increases the offer price or reaches voting power of 50 per cent in the target. In *Qantas Airways Limited 02* [2007] ATP 6 and *Qantas Airways Limited 02R* [2007] ATP 7, the Takeovers Panel refused to extend the deadline for a takeover offer following receipt of an acceptance just after the deadline for the close of the bid, which would otherwise have pushed acceptances to over 50 per cent and automatically extended the offer period.

Compulsory acquisition after a bid

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

- relevant interests in 90 per cent by number of the securities in the bid class;
- acquired at least 75 per cent by number of the securities that the bidder offered to acquire under the bid (whether the acquisitions occurred under the bid or otherwise); and
- 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.

SCHEMES OF ARRANGEMENT

Key features of a scheme of arrangement
A scheme of arrangement is a court approved procedure under part 5.1 of the Corporations Act that may be used to effect a wide range of corporate restructures, including transfers of all or a specified proportion of each shareholder's securities to a bidder. As such, it can be used as an alternative to a takeover bid to effect a change of control or merger of companies. Indeed, in past years, schemes have become more common than 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 per cent of the securities to which the scheme relates or nothing if it is not successful.

A successful scheme needs the approval of 75 per cent by value and 50 per cent 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. However, it is rare for the court not to approve a normal scheme.

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 (eg, having a maximum cash pool available) but also enables an acquisition simultaneously to incorporate additional complexities, such as the transfer or demerger of specified assets or liabilities or the reduction of a target's capital.

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

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

However, it is common for bidders to attempt to drag initially reluctant targets to the negotiating table through the use of 'bear hug' announcements that 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
The rules in part 5.1 of the Corporations Act governing schemes of arrangement are not as prescriptive as those contained in chapter 6 for a takeover bid. Schemes are therefore generally

subject to fewer specific rules and can allow for more flexible structures than takeovers. The general steps in the scheme process are as follows:

Scheme Implementation Agreement (SIA) signed	The first step is the execution of an SIA (also sometimes called a merger implementation agreement) between a bidder and the target company setting out each party's rights and obligations in proposing and implementing a recommended scheme. The SIA covers the key terms and conditions of the scheme including: • the obligations on the target board to pursue and recommend the scheme; • the consideration to be paid by the bidder; • obligations on the bidder and the target to provide material information to target shareholders; • the target's obligations to apply to the court for an order convening a shareholders' meeting to vote on the scheme; • break fee arrangements; and • other deal protection provisions. The terms of a typical SIA are similar to the typical terms in a bid implementation agreement for a friendly takeover (see the section titled 'Doing and documenting the deal').
Scheme announced	The execution of the SIA triggers an obligation on an ASX-listed target to make a public announcement regarding the key terms of the scheme, including the consideration to be paid by the bidder and the key features of the SIA. While the initial announcement would customarily follow agreement of an SIA, for tactical reasons individual parties may seek to announce a potential deal earlier: in the case of a bidder, to put pressure on a target board to put a proposal to securityholders and, in the case of a target, to flush out any potential counter-offers and initiate an auction.
Scheme booklet	Once the SIA is executed and the scheme is announced, the target (with input from the bidder) will begin preparing the scheme documents (including an explanatory statement or scheme booklet and a notice of meeting) to be sent to each securityholder. It has also become common practice (and generally expected by ASIC and the court) to include in the scheme booklet an independent expert's report stating whether the scheme is in the best 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 that is then produced at the first court hearing to demonstrate that ASIC has had an opportunity to review, and is satisfied with, the disclosure in the scheme booklet.
First court hearing	Following ASIC's review of the scheme booklet, the target will apply to the court for orders approving the dispatch of the scheme booklet (containing the notice of scheme meeting) and the convening of a meeting of securityholders (or meetings of separate classes of securityholders) to consider and vote on the scheme.
Dispatch of scheme booklet	After the court has approved the convening of the scheme meeting the target will register the scheme booklet with ASIC and arrange for it to be dispatched to target securityholders. Securityholders must be given at least 28 days' notice of the scheme meeting for listed entities (21 days for non-listed targets).
Scheme meeting	For a scheme to be successfully approved, it must be approved by each relevant class of securityholders by: • the majority in number of those securityholders present and voting in that class (in person or by proxy); and • securityholders representing 75 per cent of the votes cast on the resolution in that class, • but excluding any votes of any securityholders who are associates of the bidder. One of the more challenging issues that can arise in a scheme is whether securityholders with the right to vote on a scheme should do so at the same or separate class meetings. This is because the scheme must be approved by the requisite majorities in each class. The creation of separate classes can be problematic because it gives each class of securityholders an effective

	veto right over the scheme. Class issues may arise, for instance, where particular securityholders receive a collateral benefit that is not available to all securityholders.
Second court hearing	If the scheme is approved by target securityholders by the requisite majorities and all conditions to the scheme have been satisfied or waived, the target must return to court for an order approving the scheme. The court has discretion regarding whether 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 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); and a statement in writing by ASIC stating that it has no objection to the scheme is produced to the court. It is rare for the court not to approve a scheme.
Scheme effective	A 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 booklet will contain a subsequent implementation date at which time any security acquisition or reorganisation will occur and consideration will be paid to target securityholders.

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

COMPARISON OF TAKEOVER BIDS AND SCHEMES

The table below outlines the differences between a takeover bid and a scheme of arrangement.

	Takeover bid	**Scheme of arrangement**
Control of implementation	Bidder controls the process at all stages	Target controls the process subject to the terms of an implementation agreement with the bidder
Target support	Not essential, but a ‘friendly’ bid that enjoys target support is preferable	Essential in practice
Court approval	No formal court or regulatory assent required Takeovers Panel has an oversight role	Court approval needed to order a scheme meeting and approve the scheme ASIC has a formal review role and the Takeovers Panel may become involved in an oversight role
Conditions	Off-market bid may be conditional On-market bid must be unconditional All regulatory approvals must be obtained prior to announcement	May be conditional
Consideration	Off-market bid may be cash and/or securities On-market bid consideration must be cash	May be cash and/or securities Easier to offer consideration, such as ‘mix and match’, where there is a specific pool of cash or securities available as consideration
Announcement	Can announce the bid without target support	Subject to agreement with the target

	Takeover bid	Scheme of arrangement
Time to end date	Uncertain: likely to be at least three months but no fixed date; bid may be extended for up to a year	More certain: likely to be about four months
Threshold to reach 100 per cent	90 per cent threshold to trigger the right to the compulsory acquisition of securities in the bid class	For each class of securityholders, 50 per cent by the number of holders present and voting and 75 per cent of votes cast
Differentiation between holders	All securityholders must be treated equally Collateral benefits likely to induce acceptance not allowed	Acceptable if disclosed, although may create separate securityholder classes requiring separate votes
Flexibility of structure	Initial flexibility constrained by Corporations Act requirements, but relatively straightforward to increase the offer price and modify the offer terms during the bid period	Initial structural flexibility (eg, to incorporate related transactions), but subsequent amendments generally require a court sanction and further notice to securityholders
Interloper vulnerability	Flexibility for the bidder to vary the offer terms in response to an interloper	Less flexibility for the bidder to vary the offer terms in response to an interloper
Disclosure requirements	Similar: target commonly commissions a 'fair and reasonable' report by an independent expert, although not always required	Similar: scheme booklet almost always includes a 'best interest' report by an independent expert, although technically not required
Other deal risks	Risk of not acquiring control Minimum acceptance conditions may be imposed to mitigate this risk	'All or nothing' outcome

PLANNING AND PREPARING AN ACQUISITION

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. The bidder will also often need to assemble a team of advisers to assist with the takeover process.

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

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

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

Due diligence

It is common that a bidder will want to perform some due diligence on a target prior to launching a control transaction. The extent of the enquiries that can be made in a public context largely depend on 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 discussions with a view to recommending a bid or scheme to its securityholders, it is likely that a potential bidder will seek access to detailed confidential information regarding the target prior to finalising the terms of an offer and announcement of the transaction.

Although significant information will be made publicly available pursuant to periodic and continuous disclosure obligations, bidders will be keen to obtain comfort about other information that 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. While the level of due diligence enquiries undertaken on an acquisition of securities in an ASX-listed company is normally less extensive than the enquiries undertaken for an acquisition of assets or securities in a private company, the level of due diligence has increased in recent years. In particular, it can be very detailed where the bidder is a private equity firm, there is more than one party in a consortium bid and there is a plan to separate the assets, or the acquisition is in the financial services or infrastructure sectors.

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

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

Level of due diligence: hostile acquisition
If a target is not willing to enter 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 on 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 obtain the following from desktop searches:

- periodic reports, such as annual reports and accounts;
- disclosure documents relating to previous security offerings or takeovers in which the target has been involved;
- details of the target's security capital and major securityholders;
- details of the target's directors and senior management (including certain details of remuneration and security holdings);
- a copy of the target's constitution;
- details of any material litigation or Takeovers Panel proceedings involving the target; and
- ASX announcements of all materially price-sensitive information relating to the target (except information permitted to be withheld under the continuous disclosure rules, eg, 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 that a target has made into the beneficial ownership of its securities. However, in making direct detailed enquiries of a target such as this, a bidder runs the risk of alerting the target to the possibility of a bid.

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

Confidentiality and standstill agreements
In receiving non-public due diligence information from a target, a bidder will usually be required to enter into some form of confidentiality/non-disclosure agreement restricting its usage and disclosure of the information that 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 (that could otherwise reduce the likelihood of counter-bidders emerging). They 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 must 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.

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 for the bidder to acquire securities in the target legally.

A bidder's ability to disclose such information depends on the precise terms of the confidentiality obligations owed to the target. A bidder should consider the drafting of those obligations carefully to seek to preserve its flexibility to disclose relevant confidential information to the market. However, a target is unlikely to allow such a provision in a confidentiality agreement.

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

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

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

Timing
While the potentially shorter timeframes of on and off-market bids may appeal to some, other bidders may find the potentially more certain timeframe of a scheme more attractive. In practice, any difference in timing between a takeover and a scheme is unlikely to be material given all the other factors that can affect the timetable for a takeover or scheme.

Register
An analysis of the target's register for supportive/dissenting/apathetic securityholders will inform the likelihood of reaching the required thresholds under a scheme and bid.

Strategic stake
A bidder may have more flexibility in structuring acquisitions of strategic stakes under a scheme, but such stakes can increase the relative voting power of scheme dissenters.

Outcome
Whether a bidder needs 100 per cent control or is happy to settle for 50 to 90 per cent (or even below 50 per cent) will inform the choice between a scheme or a bid and the conditions required.

Financing and consideration
A bidder needs to consider whether it can offer scrip or has available committed financing to offer cash, and the relative merits of each for the bidder and target securityholders.

Flexibility
The initial flexible structure of a scheme needs to be balanced against the greater ongoing flexibility under a bid to vary an offer in response to delays, opposition and interloper activity.

Tax
A takeover should be structured in a way which optimises tax efficiency both for the bidder and the target and its securityholders.

The sale or purchase of a business will give rise to various tax issues that need to be considered carefully. The specific circumstances of a buyer or seller will be critical in determining the associated costs, incidence of taxes and availability of any relief. Early consideration of tax consequences is important when structuring a transaction and drafting the transaction documents.

If the buyer (or seller) is a foreign entity or the business in question is conducted (in whole or in part) outside Australia, then foreign tax issues may also be relevant. Additionally, an amount on account of foreign resident capital gains withholding tax (up to 12.5 per cent for contracts entered into after 1 July 2017) may need to be withheld from the purchase price by the buyer unless certain criteria are met. This may be the case even where both parties are Australian residents.

Pre-announcement strategy
Any approach to a target seeking a prior recommendation for a proposal (rather than simply announcing the proposed offer outright without forewarning) carries with it the risk that the target announces the existence of the approach to the market, in an effort to increase the target's security price. Such an announcement by the target has the potential to limit the first-mover advantage of the bidder 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. However, a confidential indicative proposal for a takeover or a scheme is likely to fall within the exceptions that permit non-disclosure of information, as long as there are no leaks.

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

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 a leak will trigger a disclosure obligation will depend on 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 known) 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.

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

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

Some common deal protection mechanisms are set out below.

Break fee	It has become common in agreed bids and schemes for a target to agree to pay a break fee to a bidder if certain specified events occur that cause the transaction to fail (eg, the target board withdrawing its recommendation of a proposal). While break fees are not objectionable as such, the Takeovers Panel may consider them unacceptable if they have an anti-competitive effect. For instance, the Takeovers Panel will generally declare unacceptable circumstances exist if the size or structure of the break fee is such that the break fee may pose a material disincentive to the emergence of rival bids or have coercive effects on target securityholders. As a general rule of thumb, fees not exceeding 1 per cent of the equity value of a target will generally not be considered unacceptable, although that view may change if payment is subject to unduly excessive or sensitive triggers. Where there is a break fee, it is usually agreed that payment of a break fee will be the sole remedy for breach of the agreement. 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 SIA or failing to obtain regulatory approvals. There is no regulatory cap on a reverse break fee and these fees can be more than one per cent.
No-shop	A no-shop operates by preventing the target from soliciting, encouraging or initiating negotiations with another person with a view to obtaining a rival proposal to acquire the target or its assets. Target directors need to carefully consider the implications of entering into such exclusivity arrangements, particularly in regard to the fiduciary duties that they owe to the target and its securityholders.
No-talk	No-talk exclusivity provisions go further than no-shop provisions and seek to prevent a target from entering into any negotiations with potential rival bidders, even where an approach is unsolicited. Because they are by nature much more restrictive than no-shop provisions, directors must take great care in agreeing to them as they can be inconsistent with their fiduciary duties to maximise the value for securityholders in a sale of the company. For that reason, and because of guidance from the Takeovers Panel, all no-talk provisions have a 'fiduciary carve-out', which enables a target board to respond to unsolicited offers that would likely constitute a breach of its fiduciary duties, which may include where the unsolicited offer is reasonably expected to lead to a superior proposal. For this reason, a no-talk provision is unlikely to prevent a target negotiating with a genuine alternative bidder.
Go-shop	A target may request a go-shop provision under which it is entitled to solicit other potential bidders for a limited period of time, after which, if it has failed to solicit a superior proposal, it will submit to no-shop and no-talk restrictions. Go-shops have been relatively uncommon in the Australian market.
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 Takeovers 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 that the original bidder may have to make to stay in a bidding war for the target. However, notification and matching-right bidder protection provisions have become fairly common and are generally considered acceptable, provided their scope is appropriately restricted, for example, by providing that a matching right is limited in duration and gives a competing bidder an opportunity to respond to any increased offer from the original bidder.

Discussions with target securityholders and stake-building

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

Confidentiality

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

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

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

Association

It is important to ensure during pre-bid discussions that no 'agreement, arrangement or understanding' (written or otherwise) arises between a bidder and any securityholder for the purposes of controlling or influencing a target's board or affairs or in relation to target securities. There is a risk that such arrangements may create an association between the parties, requiring aggregation of the parties' relevant interests and potentially resulting in premature disclosure obligations or a breach of the 20 per cent 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. While there are prohibitions against bidders entering into an 'escalator agreement', under which a pre-bid stake is acquired on terms that 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, process agreements and intention statements
As noted above, bidders can enter into a variety of types of pre-bid arrangements with shareholders to acquire securities up to the 20 per cent threshold. Arrangements can range from simple outright acquisitions giving a bidder an initial stake at the outset to more complex arrangements involving acceptance agreements, deferred purchase and settlement agreements, put and call option arrangements and process agreements (which may contain key agreed deal terms, due diligence and exclusivity arrangements). These types of arrangement can enable a bidder to acquire shares in certain circumstances, while also offering some flexibility for vendors to benefit from potential increases in a bidder's offer price or superior competing offers. However, as a general rule, the speed with which pre-bid agreements need to be negotiated means that complex pre-bid agreements are relatively rare.

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

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

Pre-bid stakes and agreements in connection with a scheme
A bidder proposing a scheme may acquire a pre-bid stake to limit the chances of a competing bidder obtaining a stake that may block a proposed scheme.

However, a pre-bid agreement where the purchase is conditional prior to a scheme is more complicated than prior to a takeover, as it is difficult to make a payment in consideration of a favourable vote without creating a separate class of shareholder. For that reason, the more common approach is to settle for a statement of support subject to there being no higher proposal.

Disclosure of security holdings
An acquirer must give notice to a target and the ASX if they, either alone or together with associates, acquire an interest in 5 per cent 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 one per cent or more in the voting securities held, and give notice on ceasing to be a substantial holder. During the period of a takeover bid, changes in a bidder's interest in the target need to be notified by 0930 on the next trading day.

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

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

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

DOING AND DOCUMENTING THE DEAL

Documentation
The documentation required varies depending on whether the transaction proceeds by way of a takeover bid or scheme of arrangement.

Takeover bid

Bid implementation agreement
If the bid is friendly, the parties may enter into a bid implementation agreement that sets out the terms on which the bid will be proposed. Typically, a bid implementation agreement would contain similar terms to a SIA. It would cover the key terms of the proposed bid including:

- the consideration to be offered;
- obligations on the target board to recommend the bid;
- any conditions of the bid;
- break fee arrangements; and
- other deal protection mechanisms.

Offer and bidder's statement
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 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 can be sent to shareholders earlier than 14 days after service with the consent of the target.

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 the 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 that 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 have voting power in the target of over 30 per cent 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.

A 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).

Scheme

Scheme implementation agreement
A SIA sets out the agreed terms and steps pursuant to which the bidder will acquire the shares in the target pursuant to a scheme of arrangement under part 5.1 of the Corporations Act. As with a bid implementation agreement, the SIA will include the key terms of the proposed scheme including:

- the consideration to be offered by the bidder;
- obligations on the target board to recommend the bid;
- any conditions of the scheme;
- any break fee arrangements; and
- other deal protection mechanisms.

The SIA will also annex:

- a scheme of arrangement which sets out the process by which the shares in the target are to be transferred to the bidder if the scheme is approved; and
- a 'deed poll', which contains an undertaking by the bidder in favour of all of the target shareholders to perform its obligations under the scheme, including the payment of the scheme consideration, if the scheme becomes effective.

Scheme booklet
Following execution of the SIA, the target will be required to prepare a 'scheme booklet', which explains the manner in which the scheme will be considered and implemented (if approved) and to provide such information as is prescribed or otherwise material to the decision of securityholders whether to approve the scheme. The scheme booklet includes the explanatory statement required to be sent to securityholders under part 5.1 of the Corporations Act in relation to the scheme, as well as the notice of meeting convening the scheme meeting itself.

Although the target is mainly responsible for preparing the scheme booklet, the bidder will also be required to provide information for inclusion in the scheme booklet, including information regarding its intentions if the scheme is implemented and funding arrangements for the scheme consideration. Further disclosure may be required if the consideration offered under the scheme by the bidder consists of scrip rather than cash.

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 or omissions 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. In addition, there are no formal due diligence style defences available for misleading statements or omissions in a scheme booklet.

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

RESPONDING TO A CONTROL TRANSACTION APPROACH

Formulating a response strategy
The overriding principle of a response strategy should not simply be to deter potential bidders but rather to ensure that, if control is going to pass, the transfer occurs on favourable terms and at a price that reflects the true underlying value of the 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 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, if an offer appears likely to succeed, maximise the consideration for securityholders.

Planning for and being vigilant against an unsolicited takeover bid will ensure that the 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 are outlined below.

Planning and vigilance measures

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

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

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

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

Communicate the company’s value to the market
The best response strategy is to ensure a company is fully valued by the market. Communications with analysts are an effective way to do this.

Develop relationships with equity desks
They can play an important role in communicating the company’s messages and reporting back market sentiment.

Preparation of a takeover response manual
A response manual is a document that 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 coordinated 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.

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

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

However, some examples of strategies that have been regarded as defensive in the context of anticipated 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, for example, a pro rata issue of securities increasing the number of shares for a bidder to acquire or an issue of convertible securities with special terms and conditions that apply in the event of a takeover.
'Poison pills'	For example, changes in 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 Takeovers Panel may declare poison pills to be unacceptable if they have not been disclosed to, or approved by, securityholders. Poison pills are extremely rare in Australia.
'Shark repellents'	Amending the provisions in company's constitutions to cause the company to be a less attractive or attainable target, such as a percentage restriction on acquiring securities, or restrictions on securityholders rights to convene general meetings (to the extent permitted by law). Such provisions are very rare in Australia and their use can be restricted by ASX rules.

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

If the bidder's approach is made publicly, a 'holding statement' should be sent to the 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 proposed offer prior to a public announcement, it should consider whether trading in the company's securities should be halted until the bid is announced.

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

Key roles and advisers
It is common practice for large Australian companies to establish a takeover response team (which would typically include key executives, 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 response team (eg, legal advisers, financial advisers and public relations consultants).

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

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

Directors' duties
Australian law (and the ASX Listing Rules and Takeovers 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 Takeovers Panel has consistently expressed the view that transactions that have an effect on the control of a company should be left to securityholders, not the board of the company. Any attempt by a target board to interfere in the right of securityholders as a group to approve transactions is likely to 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 includes 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 Takeovers Panel. Action by the target's directors to frustrate a bid or a potential bid (in particular, any action taken by the target that could trigger a condition to the bidder's offer or may otherwise lead to that offer being withdrawn or not proceeding) may constitute unacceptable circumstances because it deprives securityholders of the opportunity to consider the bid. This could include a transaction, such as the sale or purchase of a business, that had been planned for some time, but the agreements had not been signed prior to the approach by a bidder in connection with a takeover. The directors may remedy frustrating action that 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 Takeovers Panel.

MINORITY SHAREHOLDERS

A controlling company does not have duties or liability to the minority shareholders of a company it controls. However, minority shareholders do have the ability to apply to the court for relief in cases where the minority shareholders are being oppressed or subjected to unfair prejudice by the controlling company or the directors of the company. The court has a broad discretion as to the remedies it can grant in favour of oppressed minority shareholders.

KEY REGULATORY BODIES

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

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

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

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

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

- make declarations of 'unacceptable circumstances' regarding the affairs of 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 that relate to modifying the operation of or granting exemptions from the provisions of chapter 6 relating to takeovers.

During a takeover bid, the Takeovers Panel displaces the courts as the primary forum for resolving disputes in relation to the bid. Each of the bidder, the target, ASIC and any other person whose interests are affected by a takeover bid may apply to the Takeovers 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 Takeovers Panel also plays a role in disputes in relation to schemes of arrangement, although the Panel will be reluctant to intervene once a scheme has been considered by the court (ie, after the first court hearing).

The Takeovers Panel may only make a declaration of unacceptable circumstances and consequential orders if it considers that action is not against the public interest taking into account relevant policy considerations, and 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 the section titled 'Corporations Act') 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.

Decisions of the Takeovers 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 Takeovers Panel also has authority to make rules governing takeover bids provided that they are not inconsistent with the provisions of chapter 6. While the Takeovers Panel has not made substantive rules, it has published guidance notes on a variety of topics.

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

Since being constituted in 2000, the Takeovers Panel has dealt with over 400 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 Takeovers 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 that result in unequal treatment of securityholders (eg, collateral benefits).

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 Takeovers Panel, the 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 the ASX is to ensure there is an informed market in securities of the target company (and the acquirer, if listed).

As noted in the section titled *Control transactions involving foreign investors*, 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 FIRB.

Also, as noted in the section titled *Australian competition regulation*, the ACCC administers the CCA 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 Communications and Media 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 INFORMATION

The following links can provide useful background and information when considering participating in the sale or acquisition of an Australian business.

Company information
Information about Australian Companies is available from ASIC at www.asic.gov.au. ASIC provides free online searches of its national names database, which contains basic information about registered and deregistered companies, business/trading names and documents lodged by Australian companies. Detailed current and historical extracts of companies and company officers are available for a fee. It is a very useful resource as it also lists recent documentation lodged by companies.

Listed companies
Listed company information can also be searched at and obtained from the ASX. All company announcements made to the ASX, as well as details of trading history (share volume and price) are available from the ASX and can be found at www.asx.com.au.

Australian taxation
Information about Australian's taxation regime is available on the Australian Taxation Office's website, www.ato.gov.au.

FIRB regime
Information on the recent changes to the FIRB regime from 1 January 2021 can be found at www.kwm.com/en/au/knowledge/insights/unpacking-what-financial-sponsors-need-to-know-about-the-major-reforms-20201214.

ACCC merger reforms
Information on the recent ACCC reform proposals can be found at www.kwm.com/en/au/knowledge/insights/accc-merger-reform-proposals-20210827.

Further assistance
This guide provides general commentary on the legal and practical issues involved in control transactions in Australia as at 15 March 2022.

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