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Takeover guide for Australian companies listed on the ASX

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The Australian legislative environment

The Corporations Act is the primary regulation for takeovers of companies listed on the Australian Securities Exchange (ASX), publically listed managed investment schemes and unlisted companies with more than 50 members.

The Corporations Act attempts to strike a balance between shareholder protection and encouraging change of control transactions which can lead to an efficient use of scarce resources.

In addition to the Corporations Act, certain takeovers are required to comply with other pieces of legislation. For example:

- the Foreign Acquisition and Takeovers Act, where the bidder is a foreign entity;
- the Competition and Consumer Act, where the target company operates in certain prescribed sectors such as media, insurance or banking; or
- where there may be a substantial lessening of competition.

Core principles of Australian takeovers law

Acquisition of control of shares or interests is to take place in an efficient, informed competitive market where:

- holders of the interests know the identity of the person attempting to obtain control;
- holders have a reasonable time to consider the proposal and are given enough information to consider the proposal;
- as far as practicable the holders have a reasonable and equal opportunity to participate in any benefits through the proposal; and
- an appropriate procedure is followed as a preliminary to compulsory acquisition of interests.

What government approvals are required for foreign investors?

Foreign investment in Australia is regulated by the Foreign Acquisitions and Takeovers Act (FATA) 1975 (Cth), its related regulations, and Australia's Foreign Investment Policy (FIRB Policy).

The Australian Federal Treasurer administers FATA and FIRB Policy, assisted by the Foreign Investment Review Board (FIRB). The Treasurer has the authority to refuse proposals for certain foreign investments in Australia, impose conditions on those proposals and make a range of other orders (including divestment orders), if the Treasurer considers the proposal to be contrary to the national interest.

Certain foreign investment proposals require notification to the FIRB and the Treasurer's approval before being implemented. In practice, most applications do not raise national interest concerns and generally receive approval.

Applications for FIRB approval are confidential, however it should be noted that the FIRB will consult with other governmental bodies including the Critical Infrastructure Centre, the Australian Taxation Office and the Australian Competition and Consumer Commission. These are discussed further on page 18.

Where FIRB approval is required, engagement with the FIRB prior to application to discuss the potential application is to be encouraged.

In 2016–17, the FIRB approved $168 billion of foreign investment. China ($38.9 billion) and the United States ($26.5billion) continued to be the top two sources of approved investment while Canada continues to grow as a key source of investment into Australia with $23.2 billion worth of approvals during the same period, an increase of $7.5 billion from 2015–16.

Transactions are required to be notified to the FIRB including where:

- A foreign government or their agencies are investing directly.
- The investing entity is considered to be a foreign government entity. This occurs when a foreign government has a substantial interest (greater than 20% interest where from one country or greater than 40% interest in aggregate from foreign government investors from more than one country) and can include sovereign wealth funds and state pension plans investing through private equity vehicles.
- Investors from countries that Australia has free trade agreements with - Chile, China, Japan, South Korea, Singapore, USA, New Zealand – where they intend to acquire 20% or more of the securities of an Australian company that operates in a non-sensitive business and is not a land or agriculture related and has assets or securities of A$1,134 million.
- For investors from all other countries, notification is required at a lower threshold of $A261million in respect of non-sensitive business that are not land or agribusinesses.
- Investments in the media sector, in agribusiness, mining and production tenements and land proposals have lower thresholds.
- Investments in sensitive businesses. Sensitive businesses include media, telecommunications, transport, defence and military related industries and activities, encryption and securities technologies, and communications systems, the extraction of uranium or plutonium, or the operation of nuclear facilities.

20% Rule – key prohibition for acquiring interest in Australian public companies

The key prohibition in the Corporations Act for acquiring interests in Australian public companies is that a person must not acquire a 'relevant interest' in issued voting shares in a company if the transaction will result, subject to certain exceptions, in that person's relevant interest in the voting power in the company either:

- increasing from below 20% to above 20%; or
- where their voting power is above 20% and less than 90% increasing.

The prohibition applies whether or not the acquirer intends to make a takeover bid.

But there are certain exceptions to the 20% prohibition rule that apply where the person acquires voting power by way of:

- making a takeover bid;
- members scheme of arrangement;
- the target's security holders approving the acquisition by a resolution passed at a general meeting;
- creeping acquisitions of 3% every six months from a starting position above 19.9%;
- pro rata rights issues or in certain underwriting scenarios; or
- certain exempted downstream acquisitions.

Contravention of the 20% rule may be a criminal offence. Consequences can include forced divestment of securities in addition to other monetary penalties.

Bid strategy

When a decision is made to pursue an acquisition, the acquiring company will need to consider its bid strategy.

When formulating a bid strategy, bidders should consider whether they will proceed by takeover bid or scheme of arrangement, prior to acquiring a pre-bid stake. This is because a pre-bid stake in a scheme, where there are turnout thresholds, may make it harder to reach the shareholder approval threshold due to the shallower pool of eligible votes.

Key questions that the bidder should ask when formulating a bid strategy:

- Does the bidder require 100% of the target or just control?
- Does the bidder require certainty of outcome?
- Are any regulatory approvals required (such as FIRB and ACCC) and if so when should they be approached?
- Should the bidder acquire a pre-bid stake in the target (noting that this will be perceived as a hostile action by the target's board and will require disclosure where the interest acquired is greater than 5%)?
- Is it possible for the bidder to obtain pre-bid commitments from major shareholders?
- What level of due diligence is required? Is the bidder prepared to rely on public information or does it require confirmation of specific items which will require a level of support from the target's board?
- Is the bidder prepared to enter into a 'standstill agreement' in exchange for due diligence?
- What type of consideration should the bidder offer?
- Is the bidder prepared to go hostile?
- What does the target's security register look like?
- Does the bidder require control of the transaction process? Takeovers are driven by the bidder whereas schemes are in the control of the target.
- At what point in the process does the bidder want its approach disclosed?
- Does the bidder require flexibility to change the offer partway through the process?
- What is the level of interloper risk?

Methods of acquiring control

The most common method of obtaining control in an Australian publicly listed company is by way of a takeover bid.

Where transaction values are greater than $1billion, a member's scheme of arrangement involving the transfer of shares to the acquirer becomes a more common method. This is likely due to the certainty of outcome (all or nothing) provided by the structure. Schemes of arrangement are also useful where the bidder requires the certainty of an 'all or nothing' outcome.

Hostile transactions have, to date, been relatively uncommon in Australia and the majority of successful transactions obtain support in the form of a recommendation from the target company's board of directors (at some point in the transaction process).

Disclosure by a target

Maintaining secrecy during the acquisition of a publically listed company is paramount. Target companies generally do not have an obligation to disclose confidential, non-binding, indicative or incomplete proposals to the ASX but may strategically choose to do so.

Timetables

Indicative timetable for a scheme of arrangement

Day 0	Scheme implementation agreement signed and announced.
Day 40	Draft scheme booklet and independent experts report lodged with ASIC for review.
At least 14 days	
Day 56	**First court hearing.** Application to court to convene shareholder meeting.
Day 58	Scheme booklet registered with ASIC, published on ASX and sent to target shareholders.
At least 28 days	
Day 90	Shareholder meeting to consider and approve held scheme.
Day 92	**Second court hearing.** Court approval sought. Court orders approving scheme made. ASX announcement by target.
Day 94	**Effective date.** Court orders approving scheme lodged with ASIC
Day 100	Record date.
Day 107	**Implementation date.** Payment of scheme consideration and transfer / cancellation of Scheme shares

Indicative timetable for a basic off-market takeover bid

Begin preparation

Public announcement of takeover Bidder's statement lodged with ASIC.

On same day or within 21 days

Day 1 – Bidder's statement served on target and lodged with ASIC

Day 15 – Earliest date for dispatch of bidder's statement and offers to target security holders and offer opening (unless early dispatch consented to by target) to be completed in two days

Day 32 – Last date for dispatch of target's statement (within 15 days of despatch of Bidders statement), serve on the bidder and lodge with ASIC and the ASX.

Day 38 – Final date for declaring a conditional bid unconditional or extending a conditional bid.

Day 46 – Earliest date for offer to close (must be one month after offer opens and no longer than 12 months).

Day 47 – Earliest that compulsory acquisition notices can be sent (assuming 90% threshold reached).

Day 79 – Earliest date for compulsory acquisition to take effect.

Types of takeover bids

A takeover bid in Australia may be an off-market bid or an on-market bid.

An off-market bid is the more commonly used form of takeover bid. Essentially, an off-market bid involves the issue of a takeover offer (in the form of a bidder's statement) to each of the shareholders or unitholders of the target company which is a separate but identical offer. To accept the takeover offer, the target shareholder or unitholder will send their acceptance directly to the bidder.

On-market takeover

An on-market bid is made through the ASX and, consequently, is only applicable to the securities of a listed company. An announcement of the takeover offer is made through a broker to the ASX, followed by a bidder's statement being issued to target shareholders.

While there are a number of differences between an on-market bid and an off-market bid, one of the most important differences is that the consideration for an on-market bid must be cash only (whereas for an off-market bid the consideration may include other shares) and the bid must be unconditional.

Target shareholders accept the takeover offer by selling their securities on-market. For both an off-market and an on market takeover, the target company prepares a target's statement for its shareholders containing details of the takeover offer and other essential information.

Off-market takeover

An off-market takeover bid involves a bidder making an identical written offer to all security holders of the target company or trust. Takeover bids must stay open for a minimum of one month and a maximum of 12 months. Formal offers must be made within two months of the announcement of a bid.

Offers are made through the bidder issuing a bidder's statement which must be responded to by the target issuing a target's statement. Both these documents are released to ASX (where the target is listed) and despatched to all Target security holders.

Offers are typically open for the minimum period and extended by the bidder. If within the last seven days of the offer period the consideration is improved or the bidder's voting power increases to more than 50% the offer will automatically be extended by 14 days from the relevant event.

Off-market takeover bids are by far the most common form of takeover bid in Australia and can be either friendly or hostile.

Under an off-market bid, the bidder has flexibility as to what it offers as consideration. Consideration can include alternatives, provided that all security holders are treated equally by being offered the same alternatives (subject to limited exceptions). The consideration offered under an off-market bid may be a cash sum, securities including shares, interests in a managed investment scheme or options or a combination of a cash sum and securities. Off-market bids may also be subject to conditions.

During an off-market bid, once an offer is declared unconditional and the bidder's statement has been despatched, the bidder may acquire securities on-market above the 20% threshold. Bidders should be aware that if the price paid for securities on-market is greater than the offer price, the offer price will be automatically increased.

Whilst not common, bidders can also make a takeover bid for less than 100% of the target.

Compulsory acquisition

Under a takeover bid, a bidder may proceed to compulsorily acquire any hold out shareholders at the bid price once it has obtained a relevant interest in 90% of the target securities. This is provided that the bidder has acquired at least 75% of the securities it offered to acquire under the bid. This typically takes one to two months to complete if the procedure is not challenged.

Hold out shareholders who do not agree with their securities being compulsorily acquired have the right to challenge a compulsory acquisition notice but bear the onus of proof to show that the consideration being offered is not 'fair value'.

If the bidder does not reach 90% under the bid, there are a number of alternative methods that may be available to the bidder to acquire the remainder of the shares. However it should be noted that these methods will be more time consuming, costly and more likely to be subject to challenge by dissenting shareholders.

Consideration, funding and minimum bid price rule

Under a takeover bid, bidders may not offer consideration which is less than that paid, or agreed to be paid, for target securities in the four months prior to the date of the bid. Consideration must be paid within one month of the offer becoming unconditional or acceptance by a target security holder, whatever is later, provided that payment is made no later than 21 days after the offer has closed. In order to make the offer more attractive, if a bid is unconditional or no longer subject to conditions, bidders will often accelerate the date of payment.

When making a takeover bid, bidders must have adequate funding arrangements in place or have reasonable grounds to expect that when offers become unconditional, it will have unconditional funding.

During the offer period, bidders may increase the consideration being offered but not reduce the consideration. Any target security holders who accepted an off-market bid during the offer period, prior to any increase, will be entitled to receive the higher consideration for their securities.

Certain variations to the consideration offered such as the changing the ratio of shares and cash offered will require ASIC consent.

Conditions

The key advantage of an off-market takeover bid is that the offer may be subject to conditions.

However conditions cannot be within the bidder's control, dependent on the bidder's option or a direct result of the bidder's action.

Common conditions include:

- Obtaining regulatory approvals - such as foreign investment or competition approvals
- Obtaining a minimum percentage of acceptances through the bid (i.e 50.1%, 90%)
- No material adverse change occurring in respect of the target
- No breach of the implementation agreement where there is an agreed transaction
- The target not being subject to certain prescribed actions which may impact its value, such as selling the main asset or undertaking or raising new capital, or paying dividends

During the course of the bid, bidders may elect to free the takeover bid from conditions.

If a condition is triggered, a bidder can allow its bid to lapse and any acceptances prior to that date will not complete.

Conditions are not able to be waived within the last seven days of the offer period.

Withdrawal rights

Once accepted, a bidder is not permitted to withdraw an offer (assuming the offer is unconditional). Unaccepted offers can only be withdrawn with ASIC's consent.

Once accepted, the target's security holders generally cannot withdraw their acceptance of the offer except in limited circumstances.

Often, in order to generate momentum, bidders will establish an institutional acceptance facility so that security holders can show support for the bid whilst retaining a right to withdraw. The terms of the institutional acceptance facility can include that once the bid has passed a certain minimum acceptance threshold (say 50%) or becomes unconditional, all acceptances in the facility will be accepted into the takeover bid.

Variations to the bid

During the offer period, a bidder is able to vary its offer by increasing the amount of consideration, adding a new form of consideration or by extending the offer period. If a bidder increases the consideration offered or adds a new form of consideration, each person whose securities were acquired before the variation is entitled to receive the increased or new consideration.

Other key considerations

Due Diligence

There is a reasonable amount of publically available information available on listed Australian companies. This is because of continuous disclosure obligations which require listed companies to disclose price sensitive information to the market subject to limited exceptions. This reporting includes the filing of annual reports and half yearly financial results.

If the bidder plans to request due diligence access to the target, this should be considered carefully and as part of its broader acquisition strategy. For example, a takeover bid is not permitted to include a due diligence condition. Bidders should also be prepared for the target's board to attempt to keep due diligence requests to matters of a confirmatory nature only.

Any inside information gained through due diligence may also impact on the bidder's ability to acquire a pre-bid stake or enter into agreements with shareholders due to insider trading laws.

Ultimately, if a target decides to grant due diligence, bidders should expect to sign up to non-disclosure agreements which may contain standstill arrangements restricting the bidder's ability to acquire further securities in the target without the target's consent.

Pre-bid acquisitions

Bidders may consider acquiring a stake prior to launching a bid. This can be achieved in a number of ways including through directly acquiring securities, entering into pre-acceptance arrangements or using cash settled equity swaps. Each of these options has pros and cons and may force disclosure.

Pre-acceptance arrangements

Bidders may obtain an undertaking from security holders who have a relevant interest in up to 20% of the target's securities (subject to any FIRB approvals required) to accept the takeover bid provided that it is announced within a certain time period. Often these types of arrangements will allow the security holder to obtain any increase in the takeover offer by selling into the bid.

1. **Cash settled equity swaps**

   The bidder may acquire an economic exposure through cash settled equity swaps. When a control transaction is on foot, disclosure will be required where the position is greater than 5% of the target's securities.

2. **Rules against collateral benefits**

   In a takeover bid, a bidder may not offer or agree to provide a special benefit to a person or class of people which is likely to induce acceptance of the takeover bid or dispose of securities, unless that benefit is offered to all security holders in the bid class under the bid.

3. **Minimum bid price rule**

   A floor price for any offer is set in the four months prior to making a takeover bid when securities in the bid class are either purchased or agreed to be purchased. Where the prior consideration was not provided in cash or in listed securities, an independent valuation report must be included with the bidder's statement.

4. **Rules against escalators**

   Bidders are not permitted to reach an agreement to increase the purchase price if it subsequently makes a bid at a higher price.

5. **Truth in takeovers**

   ASIC's 'truth in takeovers' policy, holds both bidders and targets at their word when making public statements during an offer period and prevents them from acting in a manner contrary to the public statement at a later date. Statements made during the offer period cannot be misleading or deceptive.

This often creates a tension as bidders try to generate momentum for a bid by making public statements that are meant to drive acceptances. Common situations include where a bidder has publically stated that the bid is final or that they will not increase the price.

All statements made during the offer period should have caveats to ensure the bidder has flexibility to increase its price or extend the offer period at a later date.

Schemes of arrangements

Schemes of arrangement are an alternative to a takeover bid in Australia and can also be used for corporate reconstructions, including demergers. In friendly deals they are more commonly used than takeover bids.

Schemes of arrangement are a statutory procedure conducted under the supervision of the court and as they are proposed by the target company to its members, a recommendation from the majority of the target's board is required.

A scheme requires:

- The target company to apply to the court to convene a meeting of shareholders
- An explanatory memorandum being sent to shareholders
- The meeting to be held
- The approval of 75% of shareholders by value in each class, present and voting
- A majority (50%) by number of shareholders in each class, present and voting
- Court approval

Any securities held by the bidder and its associates will not count towards meeting the relevant approval thresholds set out above.

Unlike takeover bids, schemes of arrangement result in certainty for the bidder due to the 'all or nothing' outcome. If approved by the requisite number of shareholders and the court, the bidder will acquire 100% of the securities in the target (including those who did not vote in favour of the scheme). However, if the scheme is unsuccessful, the bidder will not acquire any interest in the target.

Schemes of arrangement can generally be completed in three to four months, assuming there are no rival bidders and no regulatory approvals are required.

Under a scheme, a bidder can offer cash, securities or a combination of both to target shareholders. In contrast to takeover bids, schemes can contain conditions that are within the bidder's control (such as a due diligence condition).

Bidders and the target will agree an implementation agreement which sets out the process for implementing the scheme, any conditions, deal protection measures and any restrictions on the conduct of the target's business prior to the scheme becoming effective.

The implementation agreement also contains the scheme itself and a deed poll from the bidder undertaking to perform its obligations under the scheme.

The target is required to prepare and send an explanatory memorandum and notice of meeting to its security holders containing all information relating to the scheme that is material to a security holder's voting decision.

It is the target's responsibility to group its shareholders into classes prior to voting. A class of shareholders is limited to those whose rights and entitlements are not so dissimilar as to make it impossible for them to consult together with a view to their common interest.

Market practice in Australia is that ASIC expects to see a report from an independent expert on whether the scheme is fair and reasonable, and in the best interests of shareholders. An independent expert's report is legally required in a scheme if the bidder holds 30% or greater interest of shares in the target or if there is one or more common director on the board of the bidder and the target company.

ASIC has a statutory review period of 14 days prior to dispatch of the explanatory memorandum and will produce a 'no objection' statement to the court if it is satisfied that all material information relating to the scheme has been disclosed. As part of this disclosure, ASIC requires that the same type and standard of information that would have been in a bidder's statement for a takeover bid has also been provided to those holding target securities.

The court must also be satisfied that the scheme is not being proposed to avoid the takeover provisions of the Corporations Act.

Schemes of arrangement have greater flexibility to include conditions, however the court will require any conditions to be satisfied or waived prior to giving its approval to a scheme.

Deal protection measures / lock up devices

The Takeovers Panel can find certain deal protection measures to constitute 'unacceptable circumstances' where they have the effect of preventing competition involving current or potential bidders, or where they have the effect of substantially coercing shareholders into accepting the bid.

The Panel will look to the substance over the form of the lock up device.

Lock up devices in Australia are subject to 'fiduciary outs' such that the board of the bidder is not restrained from complying with their fiduciary duties to all shareholders.

No shop and no talk arrangements

No shop arrangements prevent the target's board from soliciting or initiating discussions or a proposal from a potential competing bidder. No talk arrangements prevent the target's board from participating in any discussions with potential competing bidders, including in circumstances where the competing bid was not solicited or initiated by the target. No talk arrangements are subject to fiduciary carve outs to permit directors to act in the best interests of target shareholders and consider any better proposal.

'Go shop' arrangements where the board is entitled to seek out alternative bids for a period of time are rarely part of the landscape in Australia.

Notification rights and matching rights

Notification rights require the target to notify the bidder when it has received a competing proposal that is unsolicited. Matching rights permit the bidder to match any competing proposal, within an agreed period of time, before the the target's directors are able to recommended the competing proposal.

Break fees

The payment of a break fee in certain specified circumstances to compensate for sunken expenses where the transaction has been recommended by the target but does not proceed is common in Australia.

The Takeovers Panel has issued guidance on the subject and market practice is that a break fee not exceeding 1% of the value of the target (as ascribed by the bid) is acceptable and not a disincentive to a rival bid emerging where there are reasonable triggers for the payment.

These triggers may include:

- a change of directors' recommendation (other than in certain circumstances);
- a competing transaction that successfully completes;
- a material condition precedent within the target's control not being satisfied; or
- a material breach within the target's control.

Reverse break fees where the target is compensated for the transaction not proceeding due to a circumstance that is within the bidder's control, such as the bidder failing to obtain a regulatory approval (such as from the FIRB or ACCC) or breaching the implementation agreement, are also becoming increasingly common.

Whilst the Panel has not issued guidance on the size of reverse break fees as they do not pose a disincentive to rival bidders, it is rare for the size of a reverse break fee to exceed 1% of the transaction value.

Key Regulators

Australian Securities and Investments Commission (ASIC)

ASIC's role is to supervise compliance with the Corporations Act and it has broad powers, including to modify and grant relief from the takeover provisions, investigate suspected breaches of the law, make submissions and apply for orders or declarations from the Takeovers Panel or the courts.

For schemes of arrangement, ASIC has a 14 day statutory period to review scheme documents which can be extended. ASIC may also appear at the court hearings and make submissions to the court.

Courts

The court's role in control transactions differs depending on the acquisition structure used. In schemes of arrangement, the court plays a pivotal role with the acquisition process being convened and approved by the Court.

In a takeover bid structure, the court's role is more limited and the Takeovers Panel is the forum for resolving disputes.

Only ASIC or another government authority can apply to the court to stop or affect a takeover bid.

Takeovers Panel

The Takeovers Panel is the primary forum in Australia for resolving disputes when a takeover bid is on foot. The Takeovers Panel has jurisdiction where there is a potential acquisition of control or a substantial interest in a company.

The Takeovers Panel is comprised of market participants drawn from commercial participants including, investment banking, legal, academic and commercial fields, and is a non-judicial body with very broad powers.

The Takeovers Panel has broad powers to make a wide range of orders either on an interim or final basis and to declare 'unacceptable circumstances' in relation to a company even where there has not been a breach of the Corporations Act.

The Takeovers Panel will have regard to the policy principles which form the basis of the relevant legislation which are set out in section 1.

The Panel cannot act without an application from either ASIC, the bidder, the target or any person whose interests are affected by the relevant circumstances.

Panel proceedings are conducted in private by submission, but the Panel will release to the public a media release on its website once it has reached a decision on the merits of the application.

Where the proposed transaction is proceeding by way of a scheme of arrangement, the Takeovers Panel is unlikely to become involved in a dispute once the court has commenced its process.

Australian Securities Exchange (ASX)

The ASX looks to ensure that those trading the target's securities are doing so in an informed market and that the Listing Rules are complied with.

The ASX Listing Rules restrict securities being issued by a target once a takeover bid has been announced.

Foreign Investment Review Board (FIRB)

Foreign investment in Australia is regulated by the Foreign Acquisitions and Takeovers Act (FATA) 1975 (Cth), its related regulations, and Australia's Foreign Investment Policy (FIRB Policy).

The Australian Federal Treasurer administers FATA and FIRB Policy, assisted by the Foreign Investment Review

Board (FIRB). The Treasurer has the authority to refuse proposals for certain foreign investments in Australia, impose conditions on those proposals and make a range of other orders, if the Treasurer considers the proposal to be contrary to the national interest.

Certain foreign investment proposals require notification to the FIRB and the Treasurer's approval before being implemented. In practice, most applications do not raise national interest concerns and generally receive approval.

Applications for FIRB approval are confidential.

Australian Competition and Consumer Commission (ACCC)

The ACCC is the statutory body responsible for administering the Competition and Consumer Act 2010 (Cth) (CCA) and a range of additional legislation which governs competition and fair trading in Australia.

The CCA prohibits the acquisition of shares or assets if the acquisition would have the effect, or be likely to have the effect, of substantially lessening competition in any market in Australia.

Whilst there is no requirement for parties to notify the ACCC of a proposed merger, careful analysis should be undertaken and the ACCC encourages parties to approach the ACCC, as soon as there is a real likelihood that a proposed merger will proceed, to discuss possible competition issues.

If FIRB approval is required, the FIRB will also consult with the ACCC.

Australian Taxation Office (ATO)

If FIRB approval is required, the FIRB will also consult with the ATO. It is not uncommon for FIRB approval to be given conditional upon the bidder undertaking to comply with Australian taxation law and to providing certain information to the ATO on a continuing basis.

Critical Infrastructure Centre (CIC)

If a target operates in the sectors of telecommunications, electricity, gas, water or ports. The CIC will be notified and will conduct a risk assessment as part of the FIRB approval process.

Considerations for a target

Directors of ASX listed Australian companies are subject to directors duties. Directors have duties to act bona fide in the best interests of the company, for a proper purpose and in good faith.

In order to fulfil this obligation, directors will consider the reasonableness of a proposed takeover bid, decide whether or not to engage with the bidder and whether or not to respond publicly.

Where a takeover bid is made, the target company's directors must issue a target statement that must include each director's recommendation as to whether security holders should accept the takeover bid. It needs to include reasons for the recommendation and all information that target shareholders and their professional advisers would reasonably require to make an informed assessment of whether or not to accept the takeover bid.

Certain actions which would cause the defeat of a takeover bid in the absence of security holder approval are prohibited by the Frustrating Actions policy of the Takeovers Panel and the ASX Listing Rules, and may result in a declaration of unacceptable circumstances.

Common defence tactics include:

- Attempting to delay dispatch of the target's statement through commencing legal action for inadequate or misleading disclosures in the bidder's statement. This can have the effect of buying time for the target to seek a rival offer
- Criticising the consideration being offered and the identity of the bidder
- Seeking a rival bidder

High level comparison of Takeovers and Schemes

	Takeover bid	Scheme of arrangement
All or nothing	Can be subject to minimum acceptance condition and used to acquire less than 100% of shares.	Binary outcome. Will either acquire 100% or 0%.
Approval threshold to acquire 100%	90% relevant interest in target securities is required to proceed to compulsory acquisition.	• 75% by value; and • a majority by number; of all security holders present and voting
Approvals required	Target security holder approval required. No court approval required.	Court approval required to convene scheme meeting and approve scheme in addition to target security holders' approval of transaction.
Control of process	Driven by bidder.	Driven by target subject to implementation agreement. Target directors support required to drive process.
Target recommendation	Not required but preferable.	Essential.
Consideration	Cash, securities or a combination may be offered in off-market bids. Cash only in on-market bid	Cash, securities or a combination may be offered.
Timetable	Statutory timetable. Can be less than three months and may be extended for up to a year.	Typically four months in the absence of a competing bid and regulatory approvals.
Pre-bid stake	Counts towards minimum acceptance conditions.	Does not count towards the approval thresholds.

	Takeover bid	Scheme of arrangement
Flexibility of structure	Takeover bids may be subject to conditions that are not within the control of the bidder or which depend on the bidder's opinion (unless an on market bid). Offer may be varied by increasing price or extending offer period. Bidder can be hostile.	More flexible initially, however once documents convening shareholder meetings have been sent, further variations require court approval and notice to shareholders. Friendly transactions only.
Documentation	Bidders statement prepared by bidder and target statement prepared by target.	Subject to ASIC and court review. Target is responsible for preparation.
Rival bidders	Bidder may amend bid if a rival bid emerges.	More involved process to amend bid.
Independent experts report	Required where common interests between bidder and target.	Commonly included.
Treatment of security holders	Must be treated equally. Rule against collateral benefits.	Flexibility permitted, however will require disclosure and may create a separate class for approval purposes.
Withdrawal rights	Not permitted without ASIC consent.	Permitted up until point the court has approved the scheme.
Court approval	No – but ASIC will monitor and Takeovers Panel is the forum for disputes.	Required.

High level thresholds in acquisitions of Australian public companies

Level at which companies and ASIC can trace beneficial ownership in shares.	Below 5%
Level of disclosure of substantial shareholding publicly disclosed.	5% within two business days or by 9:30 a.m. on the next trading day if a takeover bid is on foot.
Subsequent changes of shareholdings.	+1%
Prohibition on acquisitions triggered unless via permitted gateway.	20%
Ability to appoint directors, pass ordinary resolutions.	50%
Ability to pass special resolutions.	75%
Scheme/plan of arrangement approval threshold for target shareholders.	75% by value + 50% by number for each class present and voting.
Ability to delist from ASX / relevant stock exchange.	75% subject to certain conditions including the offer remained open for at least two weeks after the bidder reached 75% and the application for removal is made within one month of the date of the takeover bid.
Accepting shareholders obtain tax rollover relief for a scrip bid.	80%
Compulsory acquisition of minorities permitted.	90% (provided 75% of the shares that the bidder offered to acquire).

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Notes

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