

DENTONS

Mergers and acquisitions

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1. Regulations

- The Corporations Act
- The Foreign Acquisitions and Takeovers Act
- The Competition and Consumer Act
- The ASX Listing Rules (provided either the purchaser, seller or target is listed on the ASX)
- Legislation specific to the industry in which the purchaser, seller or target operates

2. Takeovers and schemes of arrangement

Control of a public company in Australia may be acquired by way of a takeover or a scheme of arrangement.

Takeover bids

The acquisition of interests in listed companies, listed management investment schemes, and unlisted companies with greater than 50 shareholders are subject to the takeovers provisions set out in the Corporations Act.

Under the Corporations Act, a person must not acquire a 'relevant interest' in issued voting shares in a company if, because of the transaction, that person's voting power in the company increases above 20 per cent. This prohibition applies whether or not the acquirer intends to make a takeover bid and is subject to certain exceptions (such as the target's shareholders approving the acquisition by a resolution passed at a general meeting).

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 of the target company. To accept the takeover offer, the target shareholder will send their acceptance directly to the bidder.

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 securities exchange (followed by a bidder's statement being issued to target shareholders). 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. The target's statement must be sent to all 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). Further important distinctions are that unlike for an on-market bid, an off-market bid may be a partial bid and may be subject to conditions.

Schemes of arrangement

Schemes of arrangement are also used for corporate reconstructions, including mergers, and are an alternative to a takeover bid in Australia. A scheme of arrangement is a shareholder and court-approved and ASIC reviewed statutory process whereby a target company proposes a scheme to its shareholders. It involves the bidder and the target company entering into a formal 'scheme of implementation agreement' which sets out the terms of the schemes and commits parties to the transaction. The scheme implementation agreement typically obliges the target company to ensure that its directors recommend to its shareholders to vote in favour of the scheme unless the target company receives a superior proposal. Generally, the scheme is first publicly announced when the scheme implementation agreement is executed.

The process is therefore more generally target driven (as to being bidder driven in a takeover) and includes preparing a disclosure document known as a 'scheme booklet' to the target company's shareholders. The scheme booklet generally contains all the information available to the target company and the bidder and also contains a report from an independent expert as to the value of the target company's shares and the expert's opinion as to whether the scheme is in the 'best interest' of the shareholders.

A shareholder resolution must be passed at a meeting by at least 75 per cent of the votes cast on the resolution (by value) and more than 50 per cent of each class of the target's shareholders present and voting (by headcount).

Whilst the overall timeline to complete a scheme of arrangement is not prescribed by law, there are several time-related legal requirements and the process from the bidder approaching the target through to implementation may take up to or greater than four months (subject to the extent of due diligence on the target company).

Certain takeovers and schemes of arrangement will require approval under the Foreign Acquisitions and Takeovers Act. Please refer to section 2 for further information.

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