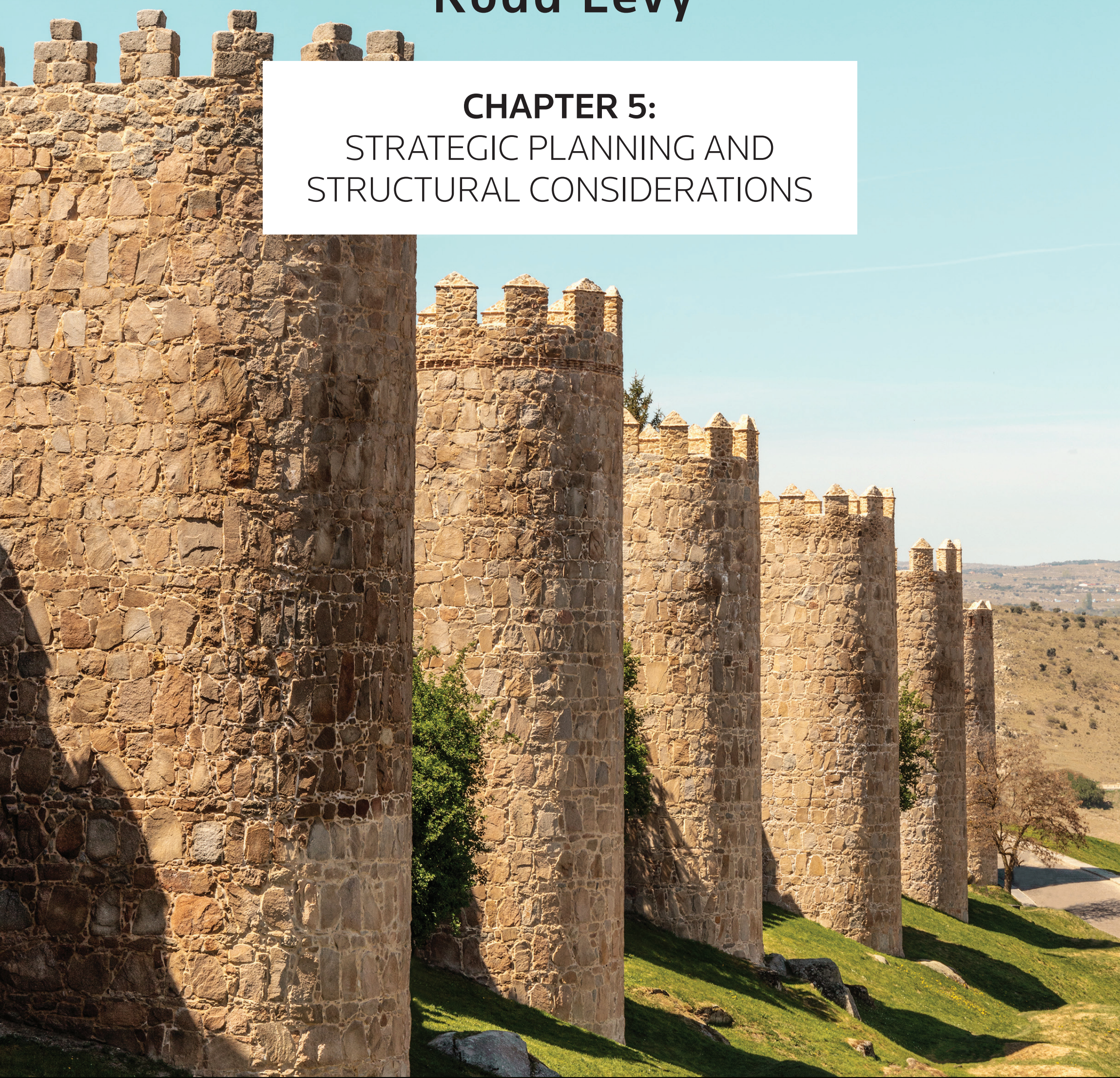
SAMPLE

TAKEOVERS
LAW & STRATEGY

FIFTH EDITION

Rodd Levy



CHAPTER 5:
STRATEGIC PLANNING AND STRUCTURAL CONSIDERATIONS

Lawbook Co.

the answer company™
THOMSON REUTERS®

Chapter 5

Strategic Planning and Structural Considerations

5.1 Introduction

[5.10] Good planning is crucial to the success of every takeover bid, from the point of view of achieving the desired level of acceptances, maximising tactical opportunities and ensuring efficient integration of the target's business once the bid has been completed. This chapter discusses a number of key steps and structural issues that arise before a bid is launched.

5.2 Assemble a team

[5.20] The bidder should assemble a team of experienced people to be involved in the bid. To preserve maximum confidentiality, the team should be as small as possible and only expanded on a need-to-know basis. A code name for the target should be selected and used exclusively.

A typical team would usually include the following:

- **Key executives** — This would generally include the chief executive officer of the bidder, the chief financial officer and the company secretary or general counsel. Often the chairman may take a leading role as well.
- **Investment banker** — The investment banker would usually assist in co-ordinating members of the team and would usually be heavily involved in evaluating the takeover proposal from the bidder's perspective. The investment banker would generally be involved in determining the bid price, advice on takeover strategies and may be

involved in obtaining or providing finance for the bid. Often the investment banker may have identified the takeover opportunity.

- **Lawyer** – The lawyer is responsible for all legal advice, conducting legal due diligence, drafting documents required and advising on the implementation of the bid. The lawyer may often have to play a role in limiting the exuberance of the bidder which could otherwise lead to inadvertent breaches of the law or give rise to unacceptable circumstances.
- **Accountants** – A firm of accountants may become involved to assist the bidder with reviewing the target, financial due diligence, considering the impact of the bid on the bidder and reviewing the reasonableness of any profit forecasts made in the bid documents. If a scrip consideration is offered, the accountants may be responsible for preparing a report or limited audit on the financial information concerning the bidder presented in the takeover documents.
- **Stockbroker** – The stockbroker's role is to assist with any on-market share purchases and to provide information about market reaction to the bid and the availability of shares in the target.
- **Public relations firm** – A public relations firm is often engaged to advise on how best to present the bid to the target shareholders and to ensure that the bid is well received by the financial press and media.

5.3 Due diligence

[5.30] So far as is possible, the bidder should investigate all factors which could affect the value of the target to the bidder or the likelihood of success or the structure of the bid. This would usually involve a detailed examination of all publicly available information and, if the bid is friendly, all information made available by the target itself.

In contrast to private company acquisitions, bidders for public companies do not receive detailed warranties regarding the target company and its business (although see [5.30.60]). In this respect, due diligence prior to making the offer can be critical to ensuring the acquisition is a success for the bidder.

A bidder for a public company usually has very limited scope to force the target to provide non-public information. One way, where the bidder is a shareholder, is to apply to the court under s 247A for an order authorising themselves or any other person on their behalf to inspect the books[1] of the company. The court may grant the order if it is satisfied that the shareholder is seeking inspection in good faith for a proper purpose connected with the exercise of rights attached to their shareholding. Theoretically, this could be used to assist in gathering information in

1 "Books" is defined broadly in s 9 to include a register, any record of information, financial reports or financial records and any document.

determining whether to launch a takeover bid, but the court is likely to refuse the order if the sole motivation is to assist the shareholder in preparing for a bid.[2] A review of the company's books to determine whether to commence litigation against the company may be a proper purpose.[3]

If a bidder cannot gain access to non-public information, there are a few further steps that can be considered.

- First, it may be possible for a bidder to announce that, subject to the outcome of due diligence, it may proceed with a takeover bid. This may put some pressure on the target to allow due diligence access, particularly if the proposed bid price is attractive. However, the bidder must ensure that it does not breach s 631 by publicly proposing a bid without having a sound basis for considering the bid will proceed.[4]
- Secondly, although it is not possible to make a bid subject to a due diligence condition which depends on the bidder being satisfied about certain matters (due to the restriction in s 629), it is possible to make a bid with a due diligence condition which is tested objectively. However, in that case, the terms of the condition should be spelt out in some detail to ensure that the market does not overestimate the likelihood of the bid proceeding.[5] A failure to do so may constitute unacceptable circumstances.[6]
- Thirdly, it may be possible to structure the bid consideration to reflect the financial position or performance of the target at some time after completion of the bid, although this sort of arrangement is more usual in private transactions. In order to comply with the requirement to provide the bid consideration not later than 21 days after the bid closes, the bidder may need to issue a security promptly after the bid closes, which is later redeemed for an amount which varies with the adjustment.

If the target does make available information to a (potential) bidder, it will usually be provided subject to the terms of a confidentiality agreement,

2 The authorities and principles are gathered in *Smartec Capital Pty Ltd v Centro Properties Ltd* [2011] NSWSC 495 and *Mesa Minerals Ltd v Mighty River International Ltd* [2016] FCAFC 16 [22]. Even if it allows inspection of the company's books, the court may limit the use that can be made of information derived from them: *ENT Pty Ltd v Sunraysia Television Ltd* [2007] NSWSC 270 [77]–[82].

3 *Unity APA Ltd v Humes Ltd (No 2)* (1987) 5 ACLC 64; *ENT Pty Ltd v Sunraysia Television Ltd* [2007] NSWSC 270.

4 See further 7.6.

5 Similarly, there is no prohibition on announcing that a person is contemplating making a bid, if due diligence is satisfactory: but any such announcement should make it clear that the bid may not be made, and it is preferable not to announce a possible bid until the bidder's intention is definite.

6 *Realestate.com.au Ltd* [2001] ATP 1.

requiring the bidder to keep the information and the discussions between the parties confidential. A key point for negotiation in a confidentiality agreement will be the standstill provision. In general terms such a provision prevents the bidder or its related parties from buying shares in the target or even making a takeover offer for the target (other than an offer recommended by the target directors) for a specified period. The periods may vary but three, six or 12 months are not uncommon. The terms of standstills often provide that the restriction is released, in whole or in part, if a third party makes a bid for the target.

A standstill provision which applied for 12 months after the bidder withdrew from a sale process was considered in *International All Sports Ltd 01* [2009] ATP 4 and *International All Sports Ltd 01R* [2009] ATP 5. The Panel decided that the standstill was not unacceptable and the 12-month term was justifiable on the facts, having regard to market practice, the nature of the information provided (including forecasts extending beyond the term of the standstill), the nature of the business providing the information and the nature of the recipient (a competitor in the same industry). The Panel considered that it was necessary to ascertain whether the bidder was provided with commercially sensitive information regardless of whether that information was price sensitive or required disclosure in takeover documents.

From the bidder's perspective, apart from standstills, care should be taken in negotiating the permitted use of confidential information in a confidentiality agreement. If the permitted use is tied to assessing information for the purposes of making a friendly or recommended takeover offer, the target may attempt to restrain the bidder from making a hostile takeover bid.[7]

If information is received from the target, the bidder must be careful in ensuring full disclosure is made in the takeover documentation so as to comply with the statutory disclosure requirements and to avoid allegations that the bidder has inside information. Furthermore, in extreme cases, an information advantage (such as having confidential information about the target or information about a possible takeover bid) may give rise to unacceptable circumstances if a person uses that information to acquire shares in the target from persons unaware of that information.[8] Unlike the position in the UK, there is no rule in Australia that a target must give competing bidders equal access to due diligence information: see [14.50.60].

Investigations will differ between target companies, but key items of information which would usually be investigated include the following.

7 See *Certicom Corp v Research In Motion Ltd* (2009) CanLII 1651 (Ontario Sup Ct); *Martin Marietta Materials Inc v Vulcan Materials Company* 2012 WL 2783101 (Del. July 12, 2012).

8 *Skywest Limited 03* [2004] ATP 17; *Advance Property Fund* [2000] ATP 7.

Financial aspects

[5.30.10] Recent annual reports and accounts, interim financial statements and other releases to the stock exchange should be examined to understand the financial position of the target. Particular attention should be paid to the accounting policies in determining profits and losses, any contingent liabilities in the financial statements, the valuations of significant assets and the cash flow and profit generated by different businesses carried on by the company. If appropriate, the bidder may seek its own valuations of significant assets of the target. The bidder should determine whether the takeover will involve the acquisition of goodwill and what effect the post-acquisition amortisation of that goodwill will have on the bidder's earnings.

Generally, information concerning financial aspects of the bidder can be obtained from a search of the records maintained by the stock exchange if the target company is listed. If the target company is not listed, similar information can be obtained from ASIC's records. Often information in annual or half-yearly reports will be out of date. Frequently, more current information, especially forecast information, is published in stockbrokers' research reports. These are often produced by analysts after lengthy discussions with company executives and tours of the company's operations and, accordingly, may be fairly accurate. However, it would be unwise to place too much reliance on these reports unless the information has been verified by the company.

Capital structure

[5.30.20] The bidder should determine the classes of securities on issue in the target. Particular attention should be paid to any arrangements which could lead to the issue of new shares (such as pursuant to options or pursuant to employee share and option plans). The rights of each class of security should be checked to see that they will not vary in the event of a takeover bid so as to disadvantage a bidder. An early decision should be made as to which classes of securities will be the subject of the bid. Information concerning securities can be obtained from the stock exchange and from an examination of the constitution of the target. This would also indicate the scope the target has to issue shares without breaching ASX Listing Rule 7.1 which provides that, subject to certain exceptions in ASX Listing Rule 7.2, a listed entity cannot issue, or agree to issue, equity securities equivalent to more than 15% of its issued capital in a 12-month period, without obtaining the approval of security holders.[9]

9 An entity outside the ASX300 may be able to issue an additional 10% if it has obtained prior approval under ASX Listing Rule 7.1A. The ability of a target to issue new securities is also limited once a bid is announced by ASX Listing Rule 7.9 and by the rule against frustrating actions: see 7.6.

Restrictions in constitution

[5.30.30] Although generally prohibited in listed companies, constitutions of unlisted companies frequently contain shareholding limits (such as a prohibition against holding more than 5% of issued shares) and/or pre-emption rights requiring a shareholder to offer their shares for sale first to other shareholders before they can be sold to a third party. It is therefore critical that a bid for such a company is framed so as to comply with the restriction.

For example, a bid for a company which has a shareholding limit in its constitution will need to be conditional on a special resolution in general meeting to remove the restriction (and also confer on the bidder the right to vote shares accepted at the meeting). Unless the target is recommending the bid, the bidder may also need to be able to requisition a meeting under s 249D or convene a meeting itself under s 249F.

Where shares in the target are subject to pre-emptive rights, it may be necessary for the bid to remain open for long enough to allow shareholders who wish to accept the bid to go through the pre-emptive rights process (which usually requires written notice to other shareholders and a specified time to elapse).

In *Tower Software Engineering Pty Ltd 01* [2006] ATP 20, the target's constitution conferred pre-emptive rights under which a selling shareholder had to offer their shares to other shareholders for one month before they could sell to a third party within three months. The target directors consented to early dispatch of the bidder's statement to shareholders purportedly on the basis of ensuring shareholders and employees were "as fully informed as practicable". However, this had the effect of ensuring that a 14% shareholder who had already given notice under the pre-emptive rights procedure would receive the bidder's statement and could accept the offer before its three-month selling period expired. The Takeovers Panel considered that the consent to early dispatch, without having undertaken a review of the bidder's statement or obtaining any legal or financial advice in relation to it, would have justified a declaration of unacceptable circumstances having regard to the facts of the matter and the effect the decision had on the control of the target.[10]

In *Coopers Brewery Ltd 01* [2005] ATP 18, a bid was made for a target whose constitution contained a pre-emptive rights regime that applied when a shareholder wanted to transfer his or her shares to a person other than a relative. Under the constitution, the company was appointed as the transferor's agent to sell the shares and, in effect, allowed the company's auditors to determine the (fair value) price at which the transfers would

10 See also court proceedings relating to the registration of transfers of shares pursuant to an acceptance of the takeover bid (VID 496 of 2006) and in relation to the enforcement of undertakings given to the Panel: *McCann v Pendant Software Pty Ltd* (2006) 235 ALR 566.

occur under the regime. This price could have been lower than the offer price under the takeover offer, which would have frustrated the bid.[11]

Special legislation

[5.30.40] If the target company carries on a particular type of business, it may be necessary to obtain government approval under a specific statute before acquiring shares beyond a certain limit (see Ch 4). If the target has overseas operations, there may be foreign statutes which impact on a takeover.

Change-of-control clauses

[5.30.50] If a significant part of the target's business or funding depends on arrangements under a key contract or other arrangements, it will be critical to review the terms of that contract or arrangement to determine whether it can be adversely affected by a successful takeover bid. It is common for joint venture agreements to enable one party to terminate the joint venture or to buy out the interest of the other venturer if the other venturer is the subject of a change of control.[12] Similarly, industrial property licences and funding arrangements may be liable to be terminated on a change of control.[13] If the bidder cannot get access to these documents, the bid can be made conditional on there being no adverse effect under the key contract or perhaps making the bid conditional on disclosure of key parts of it. This should elicit a response from the target company directors in their target's statement commenting on whether the contract or arrangement contains such a provision and any material information that is relevant to the bid.

---

11 The takeover offer led to a number of Takeovers Panel applications and court cases regarding various issues, such as misleading statements in relation to the operation of the pre-emptive right regime, a submission that the Panel make orders effectively modifying the operation of the pre-emptive right process (which was declined), misleading target's statements and an amendment to the constitution removing the ability of Lion Nathan to be registered as a shareholder. Ultimately, the bid was stopped by the target in general meeting amending its constitution to introduce strict shareholding restrictions against the bidder acquiring shares: see *Coopers Brewery Ltd 01* [2005] ATP 18; *Coopers Brewery Ltd 02* [2005] ATP 19; *Coopers Brewery Ltd 03* [2005] ATP 22; *Coopers Brewery Ltd 04* [2005] ATP 21; *Coopers Brewery Ltd 03R* [2005] ATP 23; *Coopers Brewery Ltd 04R* [2005] ATP 24; and *Lion Nathan Australia Pty Ltd v Coopers Brewery Ltd* (2005) 55 ASCR 583; *Lion Nathan Australia Pty Ltd v Coopers Brewery Ltd* (2005) 56 ACSR 263; and *Lion Nathan Australia Pty Ltd v Coopers Brewery Ltd* (2005) 59 ACSR 444.

12 Compare *AMP Shopping Centre Trust 01* [2003] ATP 21; and *AMP Shopping Centre Trust 02* [2003] ATP 24.

13 *National Foods Limited 01* [2005] ATP 8; *Novus Petroleum Limited 01* [2004] ATP 2. In *Australian Leisure and Hospitality Group Limited 02* [2004] ATP 21 the Panel required a target to disclose which material contracts were subject to change-of-control clauses, in order to allow target shareholders to assess the prospects of the bid. In *Billabong International Ltd* [2013] ATP 9 and in *Moreton Resources Ltd* [2013] ATP 14, the Panel considered that particular change of control clauses in funding agreements were unacceptable lock-ups, but in *RCL Group Ltd* [2012] ATP 2 a change of control clause was thought inoffensive.

Existing shareholdings

[5.30.60] The register of shareholders should be reviewed to identify significant shareholdings, especially those likely to be available for sale, such as shares held by a person under financial pressure, and those which may be sympathetic to the incumbent directors, such as the directors' personal and family holdings, the target company's superannuation fund and employee shareholdings. Attention should be paid to significant shareholders who are also trustees. An offer at a fair price will put a trustee under some pressure to accept as a refusal may lead to allegations of breach of fiduciary duties, especially if the share price declines after the bid closes. A review of the register may also identify shareholders who themselves may become rival bidders.

To obtain information about the register of shareholders before a bid is launched, any person can inspect the register of shareholders—which must be open for inspection (s 173(1))—and make copies or extracts from it: s 173(3). If a person pays a fee no greater than a prescribed amount[14] and makes an application which discloses their name and address and the purpose for which they require the copy,[15] the company is obliged to send a copy of the register or part of the register within seven days after payment is received or such longer period as ASIC allows: s 173(3) and (3A).[16] If the register is kept on a computer, the target must provide electronic data if it is requested in this form: s 173(3).[17] The data must be readable, though need not be formatted for the receiver's operating system. The right to seek a copy of "part of the register" enables a person to request only selected information, such as a list of holders of shares of a particular class or those becoming members after a certain date, provided the criterion for identifying the holders is apparent from the register itself.[18]

---

14 A member of the company or scheme may inspect the register without charge. Otherwise, the maximum fee for inspection is $5.00 per inspection if the register is not kept on a computer, or a reasonable amount not exceeding the marginal cost of providing the inspection, if the register is kept on a computer. The maximum fee for the supply of a copy is $250, plus 5 cents per member in excess of 5,000 and up to 19,999 members, plus 1 cent per member at 20,000 or more members: *Corporations Regulations*, reg 1.1.01, Sch 4, items 1 and 1AA. In *Direct Share Purchasing Corporation Pty Ltd v AXA Asia Pacific Holdings Ltd* [2008] FCA 935, Finkelstein J held that the marginal and reasonable cost of provision of a CD-ROM containing the register was $250.

15 The company need not supply the copy if the purpose disclosed is one listed in *Corporations Regulations*, Reg 2C.1.03: briefly, they are soliciting donations from holders and researching their wealth, approaches by stockbrokers or for purposes covered by s 1019D(1) (the "David Tweed provisions"). It is an offence to provide false or misleading information in the application. Although s 173(3A)(c) requires the application to be made in the prescribed form, no form seems to have been prescribed or approved: Reg 2C.1.04 merely requires the applicant to disclose their name and address.

16 Similar information may be sought about the register of option-holders: s 170 and 173.

17 Reversing the previous position: *APA Oceanic Funds Management Ltd v Smith (No 1)* (1987) 9 NSWLR 569. Compare s 641.

18 *Re Performing Right Society Ltd* [1978] 1 WLR 1197.

Generally, before a bid is announced, a person considering making a bid would not make a formal request to receive a copy of the register as to do so would alert the target that a bid may be imminent. There is, however, a regular practice of stockbrokers seeking lists of the top 20 or 40 shareholders and such a request can usually be made without raising suspicion.

Often major shareholdings will be in the names of nominee companies and the ultimate controllers may be difficult to identify from a review of the register. If a target is unlisted, those shares that are not held beneficially should be identified on the register (s 169(5A)), but the identity of the beneficial owner need not be disclosed. If the target is listed, the identity of a controller may be identified in a substantial holding notice under s 671B or in response to a notice given under s 672A requesting disclosure of all persons with relevant interests in certain shares. Copies of substantial holding notices must be given to the ASX by the substantial holder. It is also possible for a shareholder to request that ASIC require that a disclosure notice under s 672B be given to the registered shareholder: see s 672A(2). Information received by the company in response to a notice given under s 672A or received by the company from ASIC in response to a notice under s 672B must be kept in a register which is open for inspection: s 672DA. This is discussed in greater detail in 16.4. Requests for ASIC to issue a disclosure notice and inspections of the s 672DA register may alert the target company to a possible predator and, therefore, would generally only be pursued after the bid is announced.

Once a bidder's statement is served, the bidder can request details as to the holders of shares, options and convertible notes: s 641. See further discussion at 10.1.

Downstream interests

[5.30.70] The bidder should also seek to establish whether the proposed target has relevant interests in other companies, indirect acquisition of which may be subject to Ch 6. There will usually be evidence of any such holdings in the target's financial statements. If the target is listed, the downstream acquisition will be exempt from s 606, by virtue of s 611, item 14. If the target is not listed, the better view is that the downstream acquisition is nonetheless exempt if the bidder acquires over 20% of the upstream company by takeover bid or scheme of arrangement, but ASIC may not share this view. Even if the downstream acquisition is covered by s 611, there is some risk that ASIC will refer the acquisition to the Panel as an artifice to acquire over 20% of the downstream company without making a bid: see 19.11 and ASIC Regulatory Guide 71: *Downstream acquisitions*.

5.4 Takeover bid or scheme of arrangement?

[5.40] Instead of making a formal takeover bid, it is possible for a bidder to achieve control of a target company by effecting a scheme of arrangement under s 411.[19] A scheme of arrangement is, in its most basic form, essentially an arrangement between the company and its shareholders which becomes binding once the statutory tests are met. Accordingly, it can be used to compel all shareholders to transfer their shares to a bidder in exchange for cash or other consideration.

Key steps in a scheme

[5.40.10] The key steps in undertaking a takeover by way of a scheme are generally as follows:

- the target and bidder agree to implement the scheme under a binding contract usually called a merger or scheme implementation agreement;
- a booklet satisfying the disclosure requirements in s 412 and under ASIC policy is prepared and settled with ASIC;
- an application is made to court for a shareholders' meeting to be convened, usually on 28 days' notice;
- at the meeting, the scheme is considered by the shareholders and must be approved by a majority in number of shareholders[20] at a general meeting who represent 75% in value of the shares voted at the meeting;
- the matter returns to court for final approval; and
- finally, the scheme is implemented, usually by all shares in the target not held by the bidder being transferred to the bidder in exchange for payment of the consideration under the scheme.

If the target has other securities on issue, these are usually dealt with under a contemporaneous and inter-conditional scheme or by private agreement.

Avoidance of Ch 6

[5.40.20] There is an important restriction on using a scheme of arrangement. Section 411(17) provides that a court must not approve a scheme of arrangement unless:

- it is satisfied the scheme has not been proposed for the purpose of avoiding the takeovers provisions in Ch 6 of the *Corporations Act*; or

---

19 For a detailed discussion of schemes of arrangement, see Damian and Rich, *Schemes, Takeovers and Himalayan Peaks* (3rd ed, University of Sydney, 2013). Also see Corporations and Markets Advisory Committee, *Members' Schemes of Arrangement* (Australian Government, 2009) for a discussion of schemes and possible reforms of the relevant provisions.

20 Section 411(4)(a)(ii)(B) gives the court discretion to approve a scheme even where the vote is not passed by a majority of members present. This is intended to operate where the outcome has been influenced by activities, such as share splitting, or otherwise to allow for unforeseen extraordinary circumstances.

- ASIC produces a statement to the court that it has no objection to the scheme.[21]

In practice, this restriction is invariably dealt with by obtaining a statement from ASIC that it does not object to the scheme. ASIC's policy is that it, and the law, does not prefer one acquisition structure over the other.[22] However, ASIC will only produce a no objection statement to the court if it is satisfied that all material information relating to the scheme of arrangement has been disclosed and the standard of disclosure in the explanatory memorandum is commensurate with that required under the takeover provisions.[23] ASIC will also take an interest in actions or features of the scheme that would be prohibited in a takeover and may refuse to produce the necessary statement for that reason (see discussion on *Re Ranger Minerals Ltd* (2002) 42 ACSR 582 below).

The courts have held in a number of decisions[24] that, if ASIC produces a no objection statement, it is not open to the court to reject the scheme on the basis of takeover avoidance. However, the court may still consider any avoidance of Ch 6 as part of assessing whether the scheme is fair as part of its general discretion[25] to approve the scheme under s 411(4)(b).

The predecessor of s 411(17) was concerned primarily with attempts to circumvent the higher 90% threshold for compulsory acquisition under the takeover provisions. However, in 1999, the compulsory acquisition provisions were moved to Ch 6A. Therefore, it is arguable that the use of a scheme of arrangement to take advantage of the lower 75% vote approval threshold cannot be a ground for applying s 411(17).[26]

In rare situations where it has been necessary for courts to consider whether the scheme has been proposed for the purpose of avoiding the takeover provisions in Ch 6 of the *Corporations Act*, the courts have generally focused on how the bidder and the target came to decide to

---

21 See ASIC Regulatory Guide 60: *Schemes of arrangement*, RG 60.104 for the circumstances in which ASIC will be prepared to produce a statement to the court.

22 ASIC Regulatory Guide 60: *Schemes of arrangement*, RG 60.17–60.19.

23 ASIC Regulatory Guide 60: *Schemes of arrangement*, RG 60.26 and 60.104(c).

24 *Re Advance Bank Australia Ltd* (1997) 136 FLR 281; *Re MIM Holdings Ltd* (2003) 45 ACSR 554; *Re News Corporation Ltd* (2004) 51 ACSR 394; *Re Mincom Ltd [No 3]* (2007) 64 ACSR 387; *Re Coles Group Ltd* (2007) 65 ACSR 494.

25 In relation to the court's general discretion to approve a scheme see *Re NRMA Ltd* (2000) 156 FLR 412 [21]–[24]. In determining whether or not to exercise its general discretion the court needs to be satisfied that there has been no oppression and that the scheme is one capable of being approved by shareholders, voting honestly: also see *Re Hudson Conway Ltd* (2000) 22 ACSR 657.

26 This point was noted in the course of a careful review of the origin and operation of the provision in *Macquarie Private Capital A Ltd* [2008] NSWSC 323 [32], per Barrett J. In *Re Hellenic & General Trust Ltd* [1976] 1 WLR 123, where no provision comparable to s 411(17) applied, the court withheld approval of a scheme of arrangement, in part because one reason for propounding it was to outflank a 13% parcel, which could have prevented compulsory acquisition after a takeover bid.

proceed by way of scheme and on basic features of the proposal. Schemes have readily been approved where an aspect of the transaction could not have been achieved in a takeover bid, such as where the scheme involves a cash payment to target shareholders as a result of a reduction of capital,[27] a cancellation of options in the target,[28] a share buy-back to return excess funds and dividend franking credits to shareholders or where the target is giving financial assistance to the acquisition and the scheme will satisfy the requirements of s 260A of the Act.

However, there remain a handful of cases where issues have been raised about whether the scheme was proposed to avoid Ch 6.

In *Re David Mitchell Ltd*,[29] a case concerning an unlisted company with 59 shareholders, Finkelstein J gave notice to the company at the court hearing to convene the shareholders meeting that, if a significant number of shareholders voted against the scheme, his Honour would require the "Ch 6 avoidance" point argued at the court hearing to approve the scheme. As it happened, the scheme obtained 99.8% approval with only one small shareholder voting against the scheme.

The issue arose also in *Re MIM Holdings Ltd* (2003) 45 ACSR 554, where a shareholder holding approximately 2.5% of the target opposed the convening of the scheme meeting, arguing that the acquisition should proceed by a takeover under Ch 6. White J did not consider that the shareholder had made a sufficient case on the Ch 6 avoidance point to cause the court to stop the scheme "in its tracks". The court referred to evidence that the scheme was proposed because it was the only way in which the acquirer could fund the $4.9 billion necessary to complete the transaction — the lenders to the acquirer requiring a high degree of certainty as to the outcome and as to timing. In convening the scheme meetings, White J commented that the initial court hearing did not usually require an in-depth analysis of whether the scheme warrants approval by the court. Her Honour also noted that, if ASIC produced a no objection statement at the court hearing to approve the scheme, it would not be open to the court to reject the scheme on this point.

---

27 *Re ACM Gold Ltd; Re Mount Leyshon Gold Mines Ltd* (1992) 7 ACSR 231; *Re Stockbridge* (1993) 9 ACSR 637.

28 Since Ch 6 now provides for a formal takeover bid to be made for options and other securities, the need to deal with options, by itself, may not be sufficient reason to use a scheme of arrangement. Option-holders have long been treated by the courts as able to be dealt with under a creditors' scheme of arrangement, as contingent creditors, on the theory that if the holder exercised the option and the company failed to issue the share, the holder would have a claim against the company: in *Westgold Resources Ltd* [2012] WASC 301 [16], Hall J set out the history of this approach and mentioned the doubts that judges have entertained about it, but concluded that it is now established. See also Damian and Rich, *Schemes, Takeovers and Himalayan Peaks* (3rd ed, University of Sydney, 2013), [3.4.1] and Corporations and Securities Advisory Committee *Members' Schemes of Arrangement—Report* Sydney, 2009 at 7.1 and 7.6.1.

29 *Re David Mitchell Ltd* (unreported, Fed Ct Aust, Finkelstein J, Nos 3173, 3174 and 3175 of 2002, 19 November 2002).

The takeover avoidance point was also raised in *Re Mincom Ltd [No 3]* (2007) 64 ACSR 387, where Fryberg J considered that a substantial purpose of using a scheme rather than a takeover was to provide greater certainty of timing. In his Honour's view, this amounted to avoidance of Ch 6 and, specifically, avoidance of the ability under s 650C to extend the offer period up to 12 months. While ASIC provided its no objection statement under s 411(17)(b), the avoidance point was still a factor to take into account in the court's exercise of its general discretion to approve a scheme. However, in the circumstances of the case, the avoidance of Ch 6 did not alter the exercise of the court's discretion to approve the scheme.

For many years, ASIC has not raised the general issue that a Ch 6 bid could have been used to achieve much the same outcome as a given scheme of arrangement.[30] ASIC raised a specific Ch 6 avoidance point, however, at the court hearing to convene the shareholder meetings in *Re Ranger Minerals Ltd* (2002) 42 ACSR 582. ASIC was concerned that the acquiring company had purchased 19.28% of the issued capital of the target at a price above the price payable under the scheme of arrangement. ASIC considered that the scheme allowed the acquirer to circumvent the minimum bid price rule in s 621(3)[31] as well as the prohibition on collateral benefits in s 623, one or other of which would have applied, had the takeover been by Ch 6 bid. In response, the acquirer and the target argued that the scheme had not been proposed for that purpose: it had in fact been proposed before the share purchase had taken place or indeed been contemplated. The scheme had been proposed because the acquirer needed certainty that it would acquire 100% of the target and have access to the target's cash holdings by a specified date in order to meet other commitments. Parker J found that there was no reason to find that the scheme had been proposed for the purpose of avoiding Ch 6 and convened the shareholder meetings in relation to the scheme. However, Parker J left the door open for the application of Ch 6 principles to a scheme of arrangement in an appropriate case to ensure equality and prevent unfairness.[32]

These cases and the apparent willingness of ASIC to object in an appropriate case, suggest that bidders who wish to proceed by scheme of arrangement, rather than a takeover bid, should have clear and valid reasons for doing so and should be prepared to justify these in court.[33]

30 A fact noted in *Re Archaean Gold* (1997) 23 ACSR 143, in a way which suggests that Santow J may have shared some of Finkelstein J's reservations.

31 Section 621(3) provides that the consideration offered under a takeover bid must equal or exceed the maximum consideration paid, or agreed to be paid, for a security in the bid class in the four months before the date of the bid.

32 *Re Ranger Minerals Ltd* (2002) 42 ACSR 582, 591, followed, without comparable attention to the scheme company's purposes, in *Re Goodman Fielder Ltd* [2014] FCA 1449 [15]–[20], per Yates J.

33 See also ASIC Regulatory Guide 60: *Schemes of arrangement*, RG 60.70(b).

Deciding between a scheme and a takeover bid

[5.40.30] In making a decision whether to proceed by scheme of arrangement or by takeover bid, a bidder will need to have regard to the issues below.

Control of the transaction

[5.40.30A] The court may not have jurisdiction to sanction the scheme unless the scheme has been proposed with the support of the board of the scheme company.[34]

Accordingly, a scheme may only be appropriate in a recommended takeover, management buy-out or a friendly merger of two companies beneath a new holding company.

This also means that the process for a scheme of arrangement is driven by the target company. It is the target company who applies to the court and it is the target company who has primary responsibility for preparing the explanatory memorandum to be sent to scheme shareholders. To the contrary, a takeover bid process and timetable is driven by the bidder.

In a scheme, the bidder may gain some control over the process via an implementation agreement between the bidder and the target which sets out the obligations of a target company and a bidder in relation to the scheme process. However, ultimately, the target controls the process.

Certainty

[5.40.30B] A scheme provides greater certainty. It is an "all-or-nothing" proposition. Either shareholders approve the scheme by the requisite majorities and the court approves the scheme, in which case, the bidder will obtain 100% of the company or the shareholders (or the court) do not approve the scheme and the bidder gets nothing. This means that a bidder will know by a certain date whether or not the acquisition is successful. This may be attractive if the bidder wishes to know whether or not it can pursue other alternative investment opportunities or, as in the case of the bidder in *Re Ranger Minerals Ltd* (2002) 42 ACSR 582, whether it needs to arrange alternative means of accessing cash to meet its other commitments.

A takeover bid can also be all or nothing in that a takeover bid may be conditional on obtaining sufficient acceptances to proceed to compulsory acquisition and 100% ownership. Similarly, a bidder may close the bid after a month if it has not been successful by that time. Nevertheless, it is not uncommon for bids to be extended, or to close, without 100% being obtained and as such the timing is less certain.

---

34 *Re Savoy Hotel Ltd* [1981] 3 All ER 646; *Re Centro Properties Limited* [2011] NSWSC 1465 [30], *Citect Corporation Ltd* (2006) 56 ACSR 663; [2006] NSWSC 143 [16], and compare *Molopo Energy Ltd* [2014] NSWSC 1864, concerning a proposed reduction of capital.

A scheme places much greater pressure on shareholders to make a decision at the scheme meeting on the proposal on the table. In a takeover bid, the pressure is on the bidder (particularly in a conditional bid) to modify the bid, such as by declaring it unconditional, increasing the price, extending the closing date or by publicly declaring the offer price "final" or ruling out further extensions to the closing date: see 11.7.

Time to implement

[5.40.30C] From the time a scheme is announced, it can take 10–14 weeks (and sometimes longer) for it to be completed. The timetable and steps are somewhat certain. However, as the process involves various steps required by law, there is little that can be done to shorten the timetable if the need arises (for example, a rival bid emerges).

In contrast, it can often take less time for a bidder to reach a controlling position under a takeover bid. This may particularly be the case if there are large shareholders willing to commit to the bid. However, the timetable for a takeover is ultimately uncertain, as it depends on the speed and timing of acceptances. This is compounded by the additional time that may be required to reach the compulsory acquisition threshold under a bid and to implement the compulsory acquisition procedure. This may mean that the overall timetable to reach 100% ownership may be roughly the same under a bid as under a scheme.

Procedurally rigid

[5.40.30D] A takeover bid will give a bidder far more procedural flexibility to change the terms of the offer mid-way through the process if, for example, a rival bid emerges or if it becomes necessary to increase the consideration to ensure a sufficient number of shareholders accept the bid.

By contrast, a scheme of arrangement involves a more rigid process. To improve the terms of the offer mid-way through the process generally requires the parties to go back to court and this would usually require fresh proxies to be sought for the meeting.[35]

---

35 See *Re Citect Corporation Ltd* (2006) 56 ACSR 663; [2006] NSWSC 143 and *Re Excel Coal Ltd (No 3)* (2006) 60 ACSR 184 where the courts approved the dispatch of supplementary explanatory materials and allowed a further resolution to be proposed at the scheme meeting to amend the resolution to approve the scheme. Once the first resolution amending the scheme is passed, the amended scheme can then be put to shareholders.

It may be possible to change the terms of the proposal without court approval if the scheme involves a cash-only consideration and the only change is to increase the amount of cash payable. This could be achieved by the acquirer executing a deed poll (which would be outside strict terms of the scheme) to the effect that, if shareholders approve the scheme, the acquirer will pay an additional amount or the target would pay an additional dividend. As this is not disadvantageous to shareholders, the court should be able to approve the scheme even where the additional payment is announced just before the scheme meeting: see *Re McConnell Dowell Corporation Ltd* (unreported, Fed Ct Aust, Giles J, 1 August 2003).

This lack of flexibility may have severe consequences for a bidder if an alternative bid offering a higher price emerges.

Lower thresholds to reach 100%

[5.40.30E] Under a scheme, in order to obtain 100% ownership, a bidder needs only have a majority of shareholders by number present and voting at each scheme meeting who represent 75% by value present and voting to approve the scheme. Given that not all shareholders may vote, this may mean a positive response from the holders of only 50–60% of shares (or, in some cases, an even lower percentage) may be enough to achieve the necessary approval.[36] By contrast, under a takeover bid, the holders of at least 90% of shares must take positive action to accept the bid before the outstanding minority holdings can be compulsorily acquired.

Similarly, it may be harder under a scheme for any one shareholder to prevent a bidder from being successful. In a bid, a holder of 10% can, by itself, prevent a bidder from getting to compulsory acquisition. In a scheme, depending on how many shareholders vote, a 10% holding may not be enough to vote down a scheme.

Expert's report

[5.40.30F] To meet ASIC policy, schemes of arrangement generally require an independent expert's report opining whether the scheme is in the best interests of shareholders. By contrast, a takeover bid only requires an independent expert's report if the bidder and target have a director in common or the bidder has voting power of 30% or more when it makes the takeover offer: s 640.[37]

Structural flexibility

[5.40.30G] A scheme of arrangement is a flexible tool and a bidder and a target company can achieve a number of different ends in the one transaction. For example:

- part of a company could be demerged to existing shareholders while the other part is transferred to an acquirer. This may be particularly attractive for a bidder who is interested only in certain assets of the company; or
- part of the scheme may involve a buy-back and a return of franking credits.

---

36 These are not percentages of the entire shareholder body, however. Each meeting is of a class of members, identified as being similarly affected by the scheme, so that the proposed acquirer and its allies cannot vote together with members who are deciding whether to sell under the scheme.

37 Reg 5.1.01 and cll 8303 and 8306 of Sch 8 to the *Corporations Regulations* only require such a report if the other party to the reconstruction or amalgamation has a director in common with the scheme company, or an entitlement to 30% of the shares in the scheme company. "Entitlement" was the term corresponding to "voting power" before March 2000. See also ASIC Regulatory Guide 60: *Schemes of arrangement*, RG 60.74–RG 60.78.

Further, if the bid has highly leveraged financing, it may also be necessary to seek target shareholder approval under s 260B for the provision of financial assistance for the acquisition of target shares. It will be practical to obtain that approval at the same time as approval is obtained for the scheme. In the case of a takeover bid with the same financing structure, a need arises for a shareholders meeting where one may not otherwise be required.

Chapter 6 provisions do not apply

[5.40.30H] Many of the Ch 6 constraints and restrictions do not apply to schemes of arrangements, for example: the rule in s 631 requiring a person to dispatch offers within two months of announcing a bid; the minimum bid price rule in s 621(3);[38] the restrictions on certain types of conditions in s 629; and the rule against collateral benefits in s 623. This may be a significant advantage in the context of, for example, management buy-outs or public-to-private takeover bids.

However, as discussed above at [5.40.20], ASIC and the courts may, in some cases, seek to apply Ch 6 principles to various aspects of schemes of arrangements. While there does not seem to be any basis in the black letter of the legislation for the application of Ch 6 principles to a scheme of arrangement, courts may seek to exercise their supervisory jurisdiction to adopt Ch 6 principles in relation to schemes.[39]

Trust schemes

[5.40.40] The scheme of arrangement provisions in Pt 5.1 do not apply to the reconstruction of a managed investment scheme. As an alternative to making a takeover offer under Ch 6, however, all the units in a managed investment scheme may be acquired under a "trust scheme".[40] This is a transaction modelled on a scheme of arrangement under Pt 5.1 but involving the amendment of the scheme's constitution to introduce provisions to effect a compulsory acquisition of units on issue.[41] Except that s 411(17) does not apply to a trust scheme, it has much the same advantages and disadvantages as a scheme of arrangement under Pt 5.1, as discussed at [5.40.30].

A trust scheme generally requires two unit-holder resolutions.

38 Note the discussion of *Re Ranger Minerals* (2002) 42 ACSR 582 in [5.40.20].

39 *Re Archaean Gold* (1997) 23 ACSR 143, 147.

40 See *Colonial First State Property Trust Group 01* [2002] ATP 15; Takeovers Panel Guidance Note 15: *Trust Scheme Mergers*; *Re Macquarie Capital Alliance Ltd* (2008) 67 ACSR 484; Damian and Rich, *Schemes, Takeovers and Himalayan Peaks* (3rd ed, University of Sydney, 2013), [9.10]; and section D of ASIC Regulatory Guide 74: *Acquisitions approved by members*.

41 In stapled security matters, this technique has been used in tandem with a true scheme of arrangement since *Re Mirvac Ltd* [1999] NSWSC 457.

First, an ordinary resolution under s 611, item 7[42] to approve the acquisition beyond 20% by the acquirer. The resolution must be passed by independent unit-holders. No votes may be cast in favour of the resolution by the person proposing to acquire the units and their associates or by any person from whom the acquisition is to be made and their associates. This can present a problem where every unit-holder will have their units acquired under the proposal. In that case, an ASIC modification of s 611, item 7 can be obtained so that only a unit-holder who has an interest in the acquisition other than as a member cannot vote in favour.[43]

Secondly, a special resolution under s 601GC to amend the constitution of the managed investment scheme to effect the actual acquisition and transfer of the units.[44]

A trust scheme may also be effected via a redemption of the units (other than those held by the acquirer). In this case, as there is no acquisition, it may be possible to avoid the need for a resolution under s 611, item 7 or an ASIC modification.[45] Only a special resolution to amend the constitution to compel the redemption would be required.

Although a trust scheme does not require court approval, it is normal to seek approval in the form of judicial advice that the responsible entity of the scheme would be justified in submitting resolutions to approve the trust scheme to a meeting, and again that it would be justified in amending the constitution of the scheme, after those resolutions have been passed.[46]

Care needs to be taken in preparing the explanatory statement for unit-holders in relation to a trust scheme. In the absence of mandatory supervision by a court, the Takeovers Panel recommends procedures and disclosures equivalent to a scheme of arrangement be adopted to ensure that any acquisition by a trust scheme is not considered to be unacceptable.[47] In this respect, unit-holders must be provided with all material information in relation to the proposal, as well as disclosure equivalent to that required for a scheme of arrangement or takeover under Ch 6.[48]

---

42 See detailed discussion at 19.6.

43 ASIC Regulatory Guide 74: *Acquisitions approved by members*, RG 74.62–RG 74.65.

44 *Colonial First State Property Trust Group 01* [2002] ATP 15; Takeovers Panel Guidance Note 15: *Trust Scheme Mergers*.

45 Takeovers Panel Guidance Note 15: *Trust Scheme Mergers*, [15.23].

46 Under s 63 of the *Trustee Act 1925* (NSW) or r 54.02 of the *Supreme Court (General Civil Procedure) Rules 2005* (Vic) or Reg 54.3 of the *Uniform Civil Procedure Rules 2005*: the provisions are compared in *Macedonian Orthodox Community Church St Petka Inc v His Eminence Petar The Diocesan Bishop of The Macedonian Orthodox Diocese of Australia and New Zealand* [2008] HCA 42 [41]–[49]. The second application should not be made until after the meeting: *Re Mirvac Ltd* [1999] NSWSC 457 [48].

47 Takeovers Panel Guidance Note 15: *Trust Scheme Mergers*.

48 Takeovers Panel Guidance Note 15: *Trust Scheme Mergers*, [15.21]–[15.25].

5.5 Joint bids

[5.50] A joint takeover bid may be an appropriate way to proceed with an acquisition if a single bidder lacks the resources to mount a bid by itself, where an existing shareholder wants to retain or increase their interest in the target company or where different persons have interests in different assets of the target company.[49] A joint bid may be made in one of several forms:

- two or more persons may make the bid in their names jointly or using an agent or nominee: see the definition of "bidder" in s 9; or
- the joint bidders may form a joint venture bid vehicle to make the bid.[50]

More often than not, a joint venture vehicle form is used as it will generally provide more flexibility during the conduct of the bid and after the bid has closed.

Before a joint bid is made, there would generally be a bidding agreement between the parties. This would deal with various aspects relating to the conduct of the bid and potentially cover how the parties will deal with the assets of the target company after the bid has been completed.

As a tactical matter, joint bidders are usually reluctant for the bidding agreement to go into great detail as to how the assets of the target company would be distributed between them if the bid is successful. This is because, if that detail is agreed, it must be disclosed in the bidder's statement (as being central to the parties' intentions). Any valuation the bidders put on the target's assets may give the directors of the target company scope to criticise the bid as undervaluing the target's assets or may encourage other potential bidders or encourage shareholders not to accept.

The legal implications of a joint bid depend primarily on the aggregate percentage of voting shares that the joint bidders control when they decide to proceed. This is because by entering the bidding arrangement they will generally become associates and acquire relevant interests in each other's shares. In *Edensor Nominees Pty Ltd v ASIC* (2002) 41 ACSR 325, a 12% shareholder and a 28% shareholder executed a bidding agreement which provided for them to form a joint venture company to make a takeover bid. Amongst other things, the agreement stated that each remained free to dispose of their existing shares in the target company. Despite that provision, the court decided that the parties had an overriding understanding between them that neither would accept the bid and would

49 The definition of "bidder" in s 9 expressly contemplates more than one bidder, overruling *Blue Metal Industries Ltd v Dilley* [1969] UKPCHCA 2: see Company Law Advisory Committee, *Second Interim Report to the Standing Committee of Attorneys-General on Disclosure of Substantial Shareholdings and Takeovers* [29].

50 Though not strictly a "joint bid", a similar economic outcome can be achieved if the bidder agrees with a third party before launching the bid to sell certain assets of the target if the bid is successful: see discussion at 5.6.

retain their shares so that they would assist the bidding vehicle to reach the compulsory acquisition thresholds. This constituted a relevant interest (and, as a result, a breach of the 20% rule).

If the aggregate number of shares that are held is less than 20%, formation of the joint bidding arrangement will not necessarily have any implications, other than a need to file a substantial shareholding notice if the aggregate shares exceed more than 5% of voting shares in the target (or would result in a 1% change to an existing notice).[51] The notice would need to be accompanied by a copy of the joint bidding agreement.

If the aggregate shares represent more than 20% of the total voting shares, there is a significant risk of a breach of s 606. In those circumstances, ASIC will generally grant modifications to facilitate a joint bid if the bid complies with the following major conditions:[52]

(1) The bid must contain a non-waivable minimum acceptance condition of 50.1% of shares held by target shareholders who are not associated with the joint bidders.[53] This is designed to ensure the bid proceeds only at a price that target shareholders who are not associated with the joint bidders and who hold a majority of all shares held by non-associated shareholders consider acceptable and will stop the joint bidders being able to use a joint bid to take control at a lower than fair price.[54]

(2) If a higher rival bid is made, the bidders must agree to accept it, unless they match the price. This condition is designed to ensure the joint bidders do not necessarily deter a potential rival bid and any ensuing auction for the target company. ASIC has said that it may not impose this condition if one of the joint bidders has a relevant interest in over 50% of the target's voting shares, or has less than 3% voting power in the target.[55]

(3) The bidders must use their best endeavours to have the target engage an independent expert to prepare a report on the bid.[56]

51 See Pathak, "'Public to Private' Takeover Bids" (2003) 21 C&SLJ 295, 312.

52 ASIC Regulatory Guide 9: *Takeover bids*, RG 9.626–RG 9.644.

53 ASIC Regulatory Guide 9: *Takeover bids*, RG 9.632. For issues with a former acceptance condition see *Prudential Investment Company of Australia Ltd* [2003] ATP 36.

54 ASIC's refusal to relax this requirement was upheld by the Panel in *Lion-Asia Resources Pte Ltd* [2009] ATP 25.

55 ASIC Regulatory Guide 9: *Takeover bids*, RG 9.640–RG 9.642. The reasoning is that a 50% block is a complete deterrent on its own, and item 9 in s 611 allows an acquisition of 3%. The condition may be imposed if ASIC finds that the joint bidders have contrived shareholdings to bring them within one of these exceptions.

56 ASIC Regulatory Guide 9: *Takeover bids*, RG 9.643.

(4) The joint bidders must terminate any relevant agreements or arrangements relating to the joint bid if the bid does not proceed or fails because a defeating condition is not satisfied or waived.[57]

The second condition is the most controversial. ASIC's intention is that this would require the joint bidders to sell not only shares acquired under the joint bid, but also their existing shares to the rival bidder. Therefore, by deciding to launch a bid, the joint bidders may, in fact, be forced to sell their shares. Difficulties may also arise in comparing cash bids with scrip bids and determining which is the higher bid. Joint bidders will be reluctant to receive rival bidder's scrip.

This aspect of the policy requires revision as, rather than promoting or facilitating joint bids, this feature has the opposite effect. ASIC should be willing to depart from this rule where the shareholders have been long-term holders and are willing to dispose of any shares acquired under the bid.

Any joint bidders who require ASIC relief should ensure that any joint bidding agreement or other agreement entered into prior to ASIC relief being obtained is expressed as being subject to such relief being obtained to take advantage of s 609(7).

As an alternative to seeking relief from ASIC, joint bidders with an aggregate voting power over 20% may also proceed without breaching s 606 if the bidding agreement is conditional on the matters in s 609(7), that is, conditional on a resolution under s 611, item 7 and does not confer control over voting nor restrict disposals for more than three months.[58] That course will avoid the risk that ASIC imposes the requirement to sell into a higher bid, though it will require a general meeting of the target (something that will be more convenient if proceeding via scheme of arrangement).

If one of the joint bidders is a shareholder in the target company, an agreement to make a joint bid will confer benefits on the shareholder which are not available to other shareholders. This will be the case where the joint bidders agree to divide the target's assets between them after the bid and, even if that is not the case, it is arguable that benefits may be conferred by the arrangements under which the shareholder becomes a joint bidder, that is, a benefit may be represented by the mere opportunity to invest in the joint bidding vehicle.[59]

57 ASIC Regulatory Guide 9: *Takeover bids*, RG 9.644.

58 ASIC Regulatory Guide 9: *Takeover bids*, RG 9.645–RG 9.652 on when this technique is acceptable (the bidders must really intend to hold the meeting to approve the acquisition), and when ASIC will give relief to extend the three-month period. See also [3.60.70] for discussion of s 607(7), including the need for use of s 609(7) to be *bona fide* to ensure that the use of the exception will not be unacceptable.

59 The mere opportunity to acquire an asset may be a benefit: *Aberfoyle Ltd v Western Metals Ltd* (1998) 28 ACSR 187, 223 per Finkelstein J.

From a strict legal point of view, provided the joint bidding agreement is reached before the offer period commences and is not settled until after it closes, there should be no breach of the rule against collateral benefits in s 623 (discussed at 11.4).

An uncertainty remains, however, whether the Takeovers Panel may nevertheless declare the arrangements unacceptable, particularly as its Guidance Note 21: *Collateral Benefits* contemplates pre-bid benefits as potentially breaching the equality principle in s 602. There is a strong indication in *GasNet Australia Ltd* [2006] ATP 22 that the Panel will regard arrangements between bona fide joint bidders as outside the collateral benefits rule (and the minimum bid price rule), because the benefits are received in the capacity of joint bidder, not that of potential offeree, although the matter was concluded before being fully argued.

The London Takeover Panel takes the view that benefits received by a shareholder in the capacity of a genuine joint bidder do not attract the equivalent London rule. For this purpose, the London Panel asks whether the shareholder can properly be considered to be a genuine offeror, rather than simply acting in concert with the bidder. The test it uses is as follows:

> A genuine offeror is a person who, alone or with others, seeks to obtain control of an offeree company, and who, following the acquisition of control, can expect to exert a significant influence over the offeree company, to participate in distributions of profits and surplus capital and to benefit from any increase in the value of the offeree company, while at the same time bearing the risk of a fall in its value resulting from a poor performance of the company's business or adverse market condition.[60]

The London Panel assesses this by reference to the facts of the particular case, but looks to the following criteria:

- What proportion of the equity share capital of the bid vehicle will the person own after completion of the acquisition?
- Will the person be able to exert a significant influence over the future management and direction of the bid vehicle?
- What contribution is the person making to the consortium?
- Will the person be able to influence significantly the conduct of the bid?
- Are there arrangements in place to enable the person to exit from his or her investment in the bid vehicle within a short time or at a time when other equity investors cannot?

These factors are outlined in the London Panel decision in *Canary Wharf Group Plc* (London Takeover Panel 2003/25). In that case, a continuing 15% shareholder was considered to be a genuine joint bidder and, therefore, benefits received in that capacity were permissible.[61]

60 *Canary Wharf Group Plc* [London Panel 2003/25] [14].

61 Although the Panel did not cite *Canary Wharf* in its *GasNet* reasons, or the *Canary Wharf* indicia of a *bona fide* joint bid, it does seem to have had that decision in mind: it also

5.6 Pre-bid asset sale agreements

[5.60] A bidder may wish to launch a bid only if it has certainty about the eventual disposal of a particular asset or business of the target. This may be because the bidder is not comfortable owning that particular type of business or because it gives rise to concerns under competition laws. Alternatively, the bidder may be relying on the eventual sale to assist financing the bid.[62] In such cases, the bidder will wish to enter a pre-bid asset sale agreement with a third party. These arrangements raise difficult issues, in particular if the purchaser is an existing shareholder in the target, or if less than 100% of the target is acquired under the bid.

Transaction steps

[5.60.10] The steps involved in the transaction would be as follows:

- the bidder and the third party would enter into an agreement under which the third party would agree to acquire the relevant asset from the target if the bid is successful;
- the agreement would specify the terms (including price or price formula) on which the third party would purchase the asset;
- details of the agreement would be disclosed in the bidder's statement; and
- once the takeover had been successfully concluded, the third party would purchase the asset on the agreed terms.

An alternative structure is for a bid to be made which is conditional on the target disposing of (or entering into an agreement to dispose of) the particular asset during the offer period, on specified terms and conditions. This avoids some of the legal complications described below, but gives the bidder no certainty that the sale will occur.[63]

Shareholder as purchaser

[5.60.20] If the purchaser is a shareholder in the target, a threshold issue arises about whether the transaction gives rise to unequal benefits to target shareholders contrary to the equality principle under s 602(c).

There is an argument that the mere opportunity to acquire the asset which is not otherwise generally available, even on arm's length terms, will

looked to the "capacity" (see [11.40.30]) in which a joint bidder received benefits, and pointed out that there were no indications that the *GasNet* bid was other than a *bona fide* joint bid.

62 A variation is where the offer is structured so that the consideration under the bid includes shares in a company which owns the unwanted assets: see the examples discussed in *Email Ltd 03* [2000] ATP 5; and *Brickworks Ltd 01* [2000] ATP 6. The bid is therefore effectively spinning-off the unwanted asset back to its existing owners.

63 For an example of a bid conditional on the sale of an asset, see *Becker Group Ltd 01* [2001] ATP 13; and *Becker Group Ltd 02* [2007] ATP 15. In that case, the sale of an asset to a major shareholder gave rise to concerns under s 623.

constitute a benefit within the meaning of the legislation. Support for this view comes from cases dealing with the collateral benefits prohibition (discussed at 11.4). For example, in *Aberfoyle Ltd v Western Metals Ltd* (1998) 28 ACSR 187 at 223, Finkelstein J said that the mere opportunity to acquire a significant number of shares at one time was a benefit.[64]

Under the CLERP amendments in March 2000, the law was amended to facilitate takeover bids and avoid problems that were perceived to arise from the operation of the former collateral benefits rule prior to the making of formal offers. As a consequence, it now seems that a transaction with a shareholder is possible, provided that the transaction is on arm's length terms. This is supported by the Takeovers Panel's decisions in *Alpha Healthcare Ltd* [2001] ATP 13; *PowerTel Limited 03* [2003] ATP 28; and *Normandy Mining Ltd 06* [2001] ATP 32. In those cases, the Panel said that, provided there was evidence indicating the transaction did not give an additional benefit to the shareholder, the transaction would be acceptable.[65] On the other hand, if the terms are shown to be favourable to the shareholder, the value of the benefit may need to be reflected in the price paid to that shareholder under the bid[66] or, if the transaction was entered into during the offer period, the transaction may breach s 623.

The process undertaken in relation to the sale of an asset to a shareholder may be important in evidencing whether or not a sale is an arm's length transaction. In *Becker Group Ltd 01* [2007] ATP 13, the Panel found unacceptable circumstances to exist in relation to a proposal to sell the film business, which was a substantial asset of the target, to a company associated with the major shareholder in connection with a takeover offer for the company which was conditional on the sale being completed. In that case there was no independent market testing of the fair value of the film business, the sale price was approximately half of the book value of the target and the bidder and its associates' shareholding meant that shareholder approval of the sale of the film business under ASX Listing Rule 10.1 was virtually assured.

Risk of not achieving 100%

[5.60.30] If the bidder achieves 100% shareholding in the target, the transaction can be completed without any further shareholder approval or complications.

64 Further support comes from *Thiess Holdings Ltd v CSR Limited* (unreported, Sup Ct Qld, No 3189 of 1979), a case decided under the AASE listing requirements. In that case, a shareholder agreed to sell its shares and, if the offer was successful, to purchase coal mining interests from the bidder. Connolly J held that it was reasonably arguable that this arrangement conferred a special benefit on the shareholder, even if on arm's length terms.

65 See also Takeovers Panel Guidance Note 21: *Collateral Benefits*; and *Becker Group Ltd 01* [2007] ATP 13 [59].

66 An adjustment of the minimum bid price under s 621(3) does not resolve the problem, as it will benefit the shareholder who engages in the collateral transaction, as well as other shareholders.

However, even if the takeover offers are made with a 90% minimum acceptance condition (so as to enable compulsory acquisition), usually a bidder has to consider freeing the offers from that condition to encourage acceptances. This creates a risk that the bidder may end up with less than 100% as it would not be able to reach the compulsory acquisition thresholds. In that event, there is a danger that the transaction could not be completed without a shareholder vote.

There are several relevant restrictions.

ASX Listing Rule 10.1

[5.60.30A] A listed company cannot dispose of an asset with a value of more than 5% of shareholders' funds to a substantial (greater than 10%) shareholder or an "associate" of a substantial shareholder, unless independent shareholder approval is obtained: ASX Listing Rule 10.1.

If the purchaser is a substantial shareholder in its own right, this rule may be attracted.

If the purchaser is not a substantial shareholder in its own right, there is a question whether it would be regarded as an associate of the bidder (who would be a substantial shareholder if the bid was successful) for the purposes of this rule. It is arguable that, provided the purchaser has no involvement in the conduct or the financing of the takeover bid, the bidder and the purchaser are not associates as they are dealing at arm's length in relation to a one-off transaction. Nevertheless, there is a risk that they could be regarded by the ASX as associates for the purposes of ASX Listing Rule 10.1. This seems to follow as the purchaser's obligation to buy the asset is owed to the bidder (since there is no contract between the target and the purchaser) and this implies that the purchaser and the bidder are associated in relation to the sale of the assets.

If the rule applies, the sale of the assets would need to be approved by the target shareholders. The parties to the transaction and their associates could not vote on the resolution: ASX Listing Rules 14.11 and 14.11.1. Therefore, the bidder, as an associate of the purchaser (a party to the transaction), could not vote on the resolution, leaving only remaining shareholders eligible to vote.[67]

To overcome this difficulty it may be possible to seek a waiver of ASX Listing Rule 10.1 to allow the sale of assets to the purchaser to proceed without shareholder approval. This could arguably be justified on the basis that the rule is only intended to apply to transactions with persons in a position of influence (which would not apply to the bidder or the purchaser at the time of their agreement) and on the basis that, if the

67 In *Becker Group Ltd 01* [2007] ATP 13, the sale was structured as an agreement between the target company and a company associated with its major shareholders. The Panel determined that, given the interconnected nature of the sale of the asset and a concurrent takeover offer which was conditional on the sale being completed, the bidder could not vote its shares on the shareholders resolution to approve the sale.

bidder's statement makes it clear that the bidder intends to procure the disposal of the assets after the bid, the target shareholders can take this into account in deciding whether to accept the bid. However, there are no clear precedents supporting the grant of a waiver.

If a waiver cannot be obtained, another course may be to make the bid conditional on a shareholder approval during the offer period. In that case, it is likely that target shareholders could vote in favour of the transaction (or appoint the bidder to do so on their behalf), even if they intended to or had accepted the bid.

ASX Listing Rule 11.2

[5.60.30B] A listed company must get the approval of shareholders before it may dispose of its "main undertaking". This expression does not have a technical meaning and an assessment must be made of the importance of the assets to the target having regard to such things as relativities of assets used in the business, revenues and profits generated.

If the relevant assets comprise the main undertaking, ASX Listing Rule 11.2 requires a resolution to be passed by the holders of at least 50% of ordinary shares. On this resolution, no regard is had to votes cast by "any person who might obtain a benefit, except a benefit solely in the capacity of a security holder, if the resolution is passed": see ASX Listing Rule 14.11.1. The bidder may derive a benefit from the distribution of the proceeds of the sale, whether through a dividend or a return of capital, and this could be used to repay debt. However, the dividend or return of capital would be received by the bidder in its capacity as a shareholder, and would be the same as the benefit received by all other remaining target shareholders. Therefore, the bidder is arguably not precluded by this rule from voting its shares in the target in this situation.

Company constitutions commonly provide provisions in similar terms to ASX Listing Rule 11.2. The constitution of the target should be reviewed to see if it has a broader operation.

The disclosure required in a notice of meeting to consider such a resolution was discussed by Austin J in *ENT Pty Ltd v Sunraysia Television Ltd* [2007] NSWSC 270.

Related party transactions

[5.60.30C] Pt 2E of the *Corporations Act* prohibits a public company giving a financial benefit to a related party unless one of the statutory exceptions apply. This can create a further difficulty as it is arguable that the purchaser would be a related party itself on the basis of acting in concert with a controller of the public company (that is, the bidder): s 228(7). In that case, the transaction may require approval of independent shareholders.

There is an exception for arm's length transactions, but a pre-bid transaction may not be on arm's length terms as far as the target is concerned. Due to confidentiality limitations, the transaction is unlikely to have been fully tested by the market and it is possible a better price could have been obtained from elsewhere, particularly if due diligence was allowed or standard warranties given. Therefore, a shareholder vote may be required. If the bidder is an associate of the purchaser, it may be precluded from voting: s 224.

Directors' duties

[5.60.30D] Although it is likely that, after the takeover is concluded, the bidder nominees would comprise a majority on the target's board, those directors cannot advance the bidder's interests at the expense of the target's interests. Those interests could require a sale of the assets on different terms from the pre-bid transaction or to a different purchaser.

If the directors are concerned about whether their actions are in the interests of all shareholders, the only safe way to proceed would be with the approval of shareholders. However, there would be no common law rule which would prevent the bidder from voting on such a resolution.

Association and substantial holding notice

[5.60.30E] An agreement between a bidder (which had over 5% acceptances) and a third party (which was not a shareholder in the target) to operate part of the target's business as a joint venture after the bid may have had the effect of making the third party an associate of the bidder. On that view, the third party is obliged to lodge a substantial holding notice reflecting its voting power over the acceptances held by the bidder, and to attach a copy of the joint venture agreement, even if it contains sensitive commercial arrangements.[68]

Method of distributing sale proceeds

[5.60.40] Assuming the sale goes ahead, the proceeds from the sale of the assets could be distributed by the target to its shareholders (including the bidder) either by way of dividend or return of capital.

Payment of a dividend would be a matter for the target's directors, subject to s 254T, which requires that:

- the company's assets exceed its liabilities immediately before the dividend is declared, by enough to cover the dividend;
- the payment of the dividend is fair and reasonable to the company's shareholders as a whole; and
- the payment of the dividend does not materially prejudice the company's ability to pay its creditors.[69]

68 *National Foods Limited 01* [2005] ATP 8.

69 The section was repealed and replaced in 2010, with a view to removing the former requirement that dividends be paid only out of profits. Whether the new section had that

An alternative is to return capital to shareholders via a reduction of capital. This does not require court approval, but does require shareholder approval: s 256C. Assuming the capital reduction is an "equal reduction" (that is, all the target shareholders are treated the same), the bidder could vote on this resolution and only a 50% vote is required. The directors of the target would also need to form the view that the capital reduction:

- was fair and reasonable to the company's shareholders as a whole; and
- did not materially prejudice the company's ability to pay its creditors: s 256B.

Although these matters would need to be assessed at the relevant time, these requirements should not pose any major problems, especially if the target is not highly geared or part of the proceeds are used to repay the target's debt.

There is an additional risk that all or part of the dividend or capital return could be taxed as an unfranked dividend in the hands of the shareholders. This depends, in part, on whether the dividend or capital return is attributable to the profits of the target, having particular regard to any profit derived on sale of the assets.

Financial assistance

[5.60.50] It is arguable that the distribution of the proceeds of the sale of the assets in the target (by dividend or capital return) to the bidder may assist the bidder in acquiring the target's shares. Section 260A provides that a company may financially assist a person to acquire shares in it only if:

- giving the assistance does not materially prejudice the interests of the company or its shareholders or its ability to pay creditors;
- the assistance is approved by a special resolution of shareholders (and shareholders in any parent company which is listed); or
- the assistance is exempt.

It has been suggested (without being decided) that, where the financial assistance occurs after the acquisition, s 260A can apply even if, at the time of the acquisition, there is no contract or arrangement to deliver the financial assistance.[70] Precisely what link is required between the acquisition and the assistance for the section to apply has not been decided. However, it is arguably sufficient if, at the time of the acquisition of the shares, there is a "legitimate expectation" by the purchaser that the later financial assistance will be provided by the target.[71] On that view,

effect was considered in *Re Centro Properties Limited* [2011] NSWSC 1171 and in *Wambo Coal Pty Ltd v Sumiseki Materials Co Ltd* [2014] NSWCA 326 [57].

70 *Law Society of New South Wales v Milios* (1999) 33 ACSR 396. See further discussion in 22.6.

71 *Tallglen Pty Ltd v Optus Communications Pty Ltd* (1998) 28 ASCR 610.

there may be a sufficient connection between the acquisition of shares in the target and a later dividend or capital return by the target since, at the time of the bid, the bidder expects that the assets will be sold and the proceeds distributed.

Despite those views, the rule will not apply if the asset sale proceeds are returned to the bidder (and other the target shareholders) through a capital reduction or share buy-back: s 260C(5).

If the funds are returned through payment of a dividend, the rule can apply: s 260A(2)(b). However, it is unlikely that payment of a dividend could result in material prejudice to the company, its shareholders or its ability to pay creditors, given that the dividend could only be paid in accordance with s 254T.

Therefore, although this will need to be assessed at the time, it is unlikely that s 260A will apply to the sale of the assets and the distribution of the proceeds. If the rule did apply, the financial assistance could be provided if approved by a special resolution passed by the target's shareholders and, assuming the bidder holds more than 50% of the target, a special resolution of the bidder's shareholders: s 260B. However, the bidder and its associates cannot vote their shares in respect of the target resolution: s 260B(1).

5.7 Reverse takeovers

[5.70] A reverse takeover is one where the bidder makes an offer to acquire shares in a larger company for a share consideration which will result in the shareholders in the larger company becoming the majority holders in the bidder. It may result in a target shareholder acquiring voting power of 20% or more in the bidder, or even control of the bidder.[72]

A reverse takeover will have the same economic result as if the larger company had acquired the smaller company. It may be a suitable method of proceeding for various reasons.

- The small company may have an active growth-orientated management which may be supported by the shareholders in the larger company, particularly if the larger company is seen as less active or with less attractive prospects.
- The larger company may be unlisted. A share swap offer by a listed company would therefore enable the smaller company to maintain its listing (though usually the ASX will require the smaller listed company to hold a general meeting to approve the offer and to effectively reapply for listing).[73]

72 Factual issues as to whether reverse takeovers in this sense had led to changes in control had to be resolved in *Perpetual Custodians Ltd v IOOF Investment Management Ltd* [2012] NSWSC 1318 and in *Gloucester Coal 01R* [2009] ATP 9.

73 See ASX Listing Rule 11.1 and ASX Listing Rules Guidance Note 12: *Significant Changes to Activities*.

- There may be tax advantages if capital gains tax rollover relief is not available and the shareholders in the larger company would incur a smaller liability than would the shareholders in the smaller company if it was taken over. This may be the case, for instance, if their shares had a high cost base or were pre-capital gains tax shares.
- The smaller company may have a minority shareholder above the 10% level which could block compulsory acquisition if the larger company was to bid for the smaller company. In that event, assuming there are no such potential dissidents in the larger company, a reverse takeover bid may more easily achieve the desired result of merging the two companies.

However, care must be taken to ensure the directors of the smaller company are discharging their fiduciary duties properly.[74]

The issue of shares under a reverse takeover is exempt from the general prohibition under ASX Listing Rule 7.1 against a listed company issuing more than 15% of its capital in a 12-month period.[75] Furthermore, the acquisition of shares by the accepting shareholders is exempt from s 606: s 611, item 4.[76]

Even if a reverse takeover leads to a change of control of the bidder, shareholders in the bidder will not receive a takeover bid. If they do not have an opportunity to vote on the transaction,[77] the Panel may find that the bid leads to unacceptable circumstances, particularly if the reverse takeover locks up control of the bidder and frustrates another possible control transaction.[78] The Panel suggests that a defeating condition in the bid that no superior proposal is made for control of the bidder may deal with the latter issue, but it may not be straightforward to determine which proposal is superior.

74 See *Residues Treatment & Trading Co Ltd v Southern Resources Ltd* (1989) 15 ACLR 770, where a reverse takeover was successfully challenged by a minority on the grounds that it was designed for the impermissible purpose of maintaining control by the directors and their associates.

75 ASX Listing Rule 7.2, exceptions 5 and 6. On 12 April 2017, ASX released draft amendments to Listing Rule 7.2 which would limit to 100% the number of shares a listed company may issue for the purposes of a takeover without obtaining shareholder approval. As ASX notes, this limit is concerned only with dilution of existing equity, not with effects on control.

76 See discussion at 19.4. Examples of reverse takeovers are found in *Television New England Ltd v Northern Rivers Television Ltd* (1971) CLC 27, 128; *Re Australian Development Ltd* (1973) 6 SASR 197; *Rossfield Group Operations Pty Ltd v Austral Group Ltd* [1981] Qd R 279.

77 As in *AuIron Energy Limited* [2003] ATP 31.

78 Takeovers Panel Guidance Note 1: *Unacceptable Circumstances*, [32(b)]; *Titan Hills Australia Ltd* [1991] ATP; *Gloucester Coal 01* [2009] ATP 6; *Gloucester Coal 01R* [2009] ATP 9; see also 19.4.

5.8 Sale of main undertaking

[5.80] Sometimes a majority of shareholders may be in favour of a sale of the entire company, whether by way of takeover or scheme of arrangement. However, the existence of a significant minority shareholder opposed to a sale may make a takeover bid by a bidder requiring 100% ownership or control of the main assets of the company futile. One possibility to structure around the influence of the significant minority shareholder is for the company to sell its main business, assets or undertaking to a third party and then return the proceeds of the sale to its shareholders via a buy-back, reduction of capital or a winding up of the company. This may require a resolution under ASX Listing Rule 11.2: see [5.60.30B].

5.9 Dual-listed company mergers

[5.90] Another method for effecting a merger, which has only been used for a few mergers, albeit high profile ones,[79] is a dual-listed company or DLC merger. A DLC merger involves the combination of two companies through contractual arrangements rather than the acquisition by one of an interest in the other. The arrangement creates a synthetic merger where the two companies operate as if they were a single entity (with identical boards and senior management) and the economic and voting interests of the two sets of shareholders are the same.

The main features of a DLC structure are as follows.

- The two companies retain separate corporate identities and separate stock exchange listings, though commonly the companies will adopt matching corporate names and identities.
- Shareholders in each company continue to hold their existing shares and, accordingly, continue to receive dividends from the company in which they originally invested. The shareholders will, however, effectively have an economic and voting interest in the merged group as a result of a contractual requirement that the distributions received by each group of shareholders (both regarding income and capital) must effectively be equalised on a per share basis and as a result of a joint electorate when voting on matters of mutual interest. In order to equalise these interests, the two companies will agree in the merger agreement on an equalisation ratio. Bonus shares are issued by one of the companies (or, alternatively, shares are consolidated) so that the value of shares in each company is equivalent. If there is a subsequent action by one of the companies that would result in a change to the equalisation ratio, the companies would be obliged to take some action to restore the equilibrium. There would be further arrangements concerning the payment of dividends so that if one company proposes to pay a dividend, the other must match it. If the other

79 For example, the coming together in 1995 of CRA Limited and RTZ plc to form Rio Tinto and the coming together in 1998 of BHP Limited and Billiton plc to form BHP-Billiton.

company cannot match that dividend, the companies will, as far as practical, enter into a balancing transaction as may be necessary to enable both companies to pay the appropriate amount of dividends.

- As the two companies remain separate corporate entities, they each continue to have a separate board of directors, but the board will comprise the same people. The constitution of the companies would normally be amended so that, in addition to the normal fiduciary duties to the relevant entity, the board is entitled to have regard to the interests of shareholders in the other entity in the management of the merged group.
- Both sets of shareholders would vote on matters concerning the merged group. To ensure the appropriate voting outcome is achieved, a special voting share would typically be issued and held by an independent trustee who would vote the share in accordance with the votes cast on the matching resolution of the other company.
- To further equalise the economic position of each company, the two companies may enter into cross-guarantees so that creditors will, to the extent possible, be placed in the same position as if the debts were owed by each company in the merged group.
- In order to deal with the possibility of a takeover offer, the constitution of each company would contain a provision to ensure that a person cannot gain control of the merged group without having made an offer to both sets of shareholders on equivalent terms in accordance with the equalisation ratio. This would normally require extensive modifications to the *Corporations Act* so far as these rules are intended to apply to an Australian incorporated entity.[80]

In order to implement a DLC merger, each company would hold a shareholders' meeting to pass resolutions, to approve the arrangement and to amend their constitutions to authorise the new arrangements concerning the unified board, voting procedures, takeovers and other matters. For an Australian company, therefore, this will require a special resolution passed by the holders of 75% of shares represented at the meeting.

The principal advantages of proceeding with DLC mergers relate to tax. This is relevant as far as the shareholders are concerned, as both sets of shareholders will retain their current investments without triggering a capital gains tax upon a disposal of shares. Furthermore, by retaining shares in the original company, the shareholders will be able to retain the

80 A bid would also typically need to comply with rules in different jurisdictions, which may well be inconsistent, requiring specific regulatory relief. For these reasons, a hostile takeover bid for a dual-listed company is difficult. The preferred manner of acquisition being inter-connected schemes of arrangements.

benefit of the particular tax treatment of dividends paid on their shares.[81] (For example, a non-Australian company cannot pay franked dividends to Australian residents.) Secondly, a DLC merger will enable each entity to retain its own assets and avoid triggering change-of-control provisions in contracts and avoid a disposal (or notional disposal) of assets which may give rise to other taxes and costs.

5.10 Tender offers

[5.100] A tender offer is an offer made to shareholders in the target to purchase a limited amount of shares in a way which does not require a formal takeover offer to be made. This may be a suitable way to proceed if the purchaser wishes to acquire less than 20% of the target.

Tender offers rarely give rise to a significant level of acceptances. Shareholders tend to view them as a prelude to a full takeover bid, which may offer more favourable terms. A bid within the next four months must be at least at the same price due to the minimum bid price rule in s 621. This encourages shareholders to wait. The tender offer may also begin rumours of a bid which forces up the market price, making the tender procedure less attractive.

There are also legal difficulties due to the prohibition in s 606(4) against a person making an offer to acquire, or issuing an invitation in relation to, shares if the person would be prohibited by s 606(1) or (2) from acquiring those shares. This effectively prevents an invitation being sent to shareholders enabling them to tender their shares at a price specified by the shareholder on the basis the purchaser would buy the shares tendered at the lowest price, and would not purchase shares which would increase its entitlement beyond 20% of voting shares in the target. This follows because such an invitation would be "in respect of" more than 20%.[82]

Accordingly, a tender offer must be drafted carefully to take one of the following forms.

- It may be an offer to purchase a proportion of every shareholder's holding, say 19.9%.
- It may be a series of offers to selected shareholders to purchase a fixed number of shares (ensuring that the aggregate number of shares subject to offers at any one time does not exceed 20% of the target's voting shares).
- It may be a first-come-first-served offer under which the purchaser agreed to purchase the first 19.9% of shares tendered and, at that moment, all other offers automatically lapse.[83] Any ability of the

81 See also ASIC Regulatory Guide 29: *Financial reporting by Australian entities in dual-listed company arrangements*, which sets out ASIC's views on some financial reporting matters relating to DLCs.

82 *Albert v Votraint No 320 Pty Ltd* (1987) 13 ACLR 336.

83 Similar to the arrangement considered in *CAC v Industrial Equity Ltd* [1972] 2 NSWLR 120.

purchaser to increase the percentage will lead to a breach of s 606(4).[84] The offer should state that the offeror will hold any acceptance form it receives in respect of an offer which has lapsed as a bare trustee for the shareholder so that, relying on s 609(2), any control arising from holding the form would be disregarded in determining whether a relevant interest had been acquired.

It may be an offer or invitation conditional on prior approval of ASIC: see s 609(7).[85]

The NCSC stated that it was prepared to grant relief to ensure that tender offers did not infringe the predecessor to s 606(4). The conditions of the relief require the tenders to close on a fixed date, to specify the maximum number of shares sought, to invite shareholders to specify their price, to accept the lowest priced tenders and to return offer documents and any share certificates within five days of rejecting the shares tendered for whatever reason.[86] ASIC seems not to have continued this specific policy, though it has granted modifications to clarify that acceptances under a tender offer may not confer a relevant interest until finalised.

A tender under which shares or other securities are offered as consideration must comply with the prospectus provisions of the *Corporations Act*.[87]

84 *United Dairies Ltd v Ord Minnett Ltd* (1987) 12 ACLR 198.

85 See also *Precision Data Holdings Ltd v Titan Hills Australia Ltd* (1990) 2 ACSR 707, 727 per Tadgell J.

86 See NCSC Policy Statement 154.

87 *The Broken Hill Proprietary Company Ltd v Bell Resources Ltd* (1984) 8 ACLR 609.