DOING BUSINESS IN AUSTRALIA

ACQUISITIONS AND DISPOSALS OF BUSINESS

Chapter 5

Acquisitions and Disposals of Business

There are a number of ways in which a foreign investor can seek to acquire an Australian business with the best approach turning on a number of factors including:

- whether the foreign investor wishes to acquire just the business assets of the company or the company itself;
- the type of company that is being acquired—that is, whether it is a public or a private company;
- the regulatory approvals that may be required; and
- the tax and accounting treatment of the acquisition (see Chapter 11 of this publication, 'Taxation, stamp duty and customs duty').

Share acquisitions

Private treaty

For Australian companies with less than 50 shareholders, it is possible to effect an acquisition by way of private agreement or treaty between the selling shareholders and the purchaser. This is usually in a share sale agreement which records the shares in the target being sold, the price to be paid and the conditions of sale. The document will also typically describe the basis of setting the purchase price, warranties and indemnities in favour of the purchaser, pre-completion conditions and restrictive covenants.

Takeovers

In general terms, a takeover involves the acquisition by one company, the bidder, of a sufficient number of shares in another company, the target, for the bidder to obtain control of the operations, assets and finances of the target.

The rules relating to takeovers in the *Corporations Act 2001* (Cth) (**Corporations Act**) apply to acquisitions of Australian incorporated companies which are listed on the Australian Securities Exchange (**ASX**) or have more than 50 shareholders.

The general rule is that a person must not acquire a relevant interest in issued voting shares in a company (by being the holder of such shares or having the power to control the voting or disposal of such shares) if that acquisition results in any person's voting power in that company increasing:

- from 20% or below to more than 20%; or
- from a starting point that is above 20% and below 90%,

unless the acquisition occurs in certain specified circumstances (including where a takeover bid is made).

Takeover bids can be either off-market or on-market, although off-market bids are by far the most common form. An off-market bid takes the form of an offer contained in a bidder's statement sent to shareholders. On-market bids are effected by a broker through the ASX.

The Corporations Act imposes strict timing and procedural requirements for takeover bids and there are restrictions on dealing in the target's shares during the bid period (for example, the bidder must not dispose of securities). The restrictions also apply to transactions before a bid is announced (for example, the consideration offered under a takeover must equal or exceed the maximum consideration that the bidder or its associate agreed to pay for target shares during the four months prior to the bid).

To undertake a takeover bid, the bidder must prepare a disclosure statement called a 'bidder's statement', which informs the target's directors and shareholders of the terms of the bid and relevant background information. Ideally, a bidder should be prepared to lodge the bidder's statement very shortly after the bid is announced.

The target must formally respond to a takeover bid by preparing a 'target's statement', which includes the recommendation of the target's directors and other information relevant to whether shareholders should accept the bid.

External factors, such as share movements on the stock exchange during the bid process and public perceptions as to the advantages and disadvantages of the bid, may affect the outcome of the bid.

The Corporations Act contains procedures to allow a bidder to compulsorily acquire the remaining securities during or at the end of the offer period provided that certain thresholds (generally 90%) have been met.

The timetable for a takeover will be driven by various factors, including the respective strategies of the target and bidder and whether any regulatory approvals are required (e.g. the Foreign Investment Review Board or the Australian Competition and Consumer Commission). In FY2018, the median timeline for a takeover from announcement to compulsory acquisition date was 105 days.

Disputes relating to takeover bids that occur during the bid period are handled by the Takeovers Panel. For more details about the Takeovers Panel, see Chapter 2 of this publication, 'Corporate regulators'.

Further information on takeovers can be found in *The Herbert Smith Freehills Guide to Takeovers in Australia*.

Schemes of arrangement

A scheme of arrangement is a statutory contract between the target company and its shareholders (and in some cases, option holders and creditors) to reconstruct the company's share capital, assets or liabilities.

A scheme can be used to acquire a target company either by transferring all shares in the target to the bidder or cancelling all shares in the target except those held by the bidder.

Once the scheme is approved by the target's shareholders in a general meeting and approved by the court, it is binding on all target shareholders. Schemes are highly regulated by the Corporations Act. To undertake a scheme, the target must prepare and send to its shareholders a 'scheme booklet', containing all information material to the shareholders' decision whether or not to approve the scheme. The level of disclosure is broadly equivalent to disclosures made in a bidder's and a target's statement for a takeover bid.

In addition to strategy and necessary regulatory approvals, the scheme timetable may be impacted by the availability of court hearing dates. In FY2018, the median timeline for a scheme from announcement to implementation date was 116 days.

A scheme cannot be effected without the target's cooperation. The target is required to produce the scheme booklet and convene the necessary meetings. For this reason, schemes are only used for friendly transactions.

Schemes have been used with increasing frequency in recent years. Reasons for this include:

- the two approval thresholds for a scheme—a majority of shareholders holding at least 75% of the votes voting in favour at a shareholders meeting—often mean it is easier to acquire 100% of a company under a scheme than under the 90% compulsory acquisition threshold applying to takeovers;
- there is greater certainty in the outcome of a scheme of arrangement given that the offer is either accepted or rejected in its entirety and the timetable is generally more certain; and
- there may be greater flexibility in a scheme of arrangement, such that different forms of consideration and treatment of shareholders are permitted.

Further information on schemes of arrangement can be found in *The Herbert Smith Freehills Guide to Schemes of Arrangement in Australia*.

Business asset acquisitions

As an alternative to buying the shares in a company, a foreign investor may acquire only the business assets of a company. Such an acquisition will usually be documented in a business sale agreement which will record what assets are being sold, the price to be paid and the conditions of sale. Similar to a share sale agreement, the business sale agreement will also typically describe the basis of setting the purchase price, warranties and indemnities in favour of the purchaser, pre-completion conditions and restrictive covenants.

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