

ASIC REPORTS ON ITS REGULATORY ACTIVITIES IN THE PUBLIC M&A SPACE

24 March 2016 | Australia, Brisbane, Melbourne, Perth, Sydney

Legal Briefings - By **Rebecca Maslen Stannage, Courtney Dixon, Calvin Shaw**

ASIC has released its report on its recent regulatory activities, concerns and developments in relation to corporate transactions.

Based on key indicators that ASIC identified, there is an increase in Australian public [M&A](#) activity for the 6-month period ended 31 December 2015 (compared to the prior period). Interestingly, item 7 shareholder-approved deals were the most common form of change of control transactions.

SUMMARY

- ASIC has released its report on its recent regulatory activities, concerns and developments in relation to corporate transactions.
- Based on key indicators that ASIC identified, there is an increase in Australian public M&A activity for the 6-month period ended 31 December 2015 (compared to the prior period). Interestingly, item 7 shareholder-approved deals were the most common form of change of control transactions.
- Independent expert reports remain on ASIC's radar. A live concern of ASIC is the appointment of the same independent expert by an acquirer and a target in friendly deals.
- The use of scale-backs in schemes of arrangement is still attracting ASIC's attention - ASIC's expectation is that shareholders should be provided with sufficient certainty to be able to confidently vote on the transaction before them.

- ASIC has reminded market participants that target shareholder intention statements are subject to its 'truth in takeovers' policy and that the effect of these statements should be properly acknowledged in any announcements by bidders and targets.
- ASIC's compulsory information-gathering powers may, depending on the circumstances, mean that information (which the Takeovers Panel may not otherwise obtain) ends up before the Panel.
- ASIC continues to focus on identifying takeovers matters (as well as the conduct of market participants generally) that may warrant referral to its enforcement teams for further action.

OVERVIEW

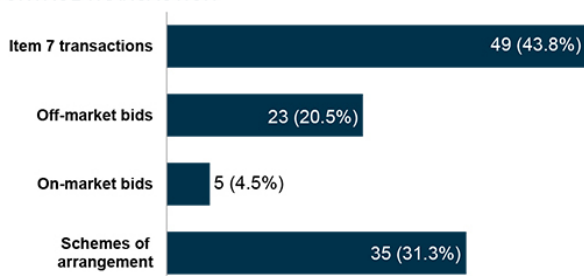
ASIC has issued its report¹ on recent regulatory activities, concerns and developments, in relation to takeover bids, schemes of arrangements and shareholder-approved transactions under item 7 of section 611 of the *Corporations Act 2001* (Cth). We outline here some of the interesting developments and timely reminders, from an M&A perspective, which are discussed in the report.

ASIC'S STATISTICS SHOW INCREASED ACTIVITY IN AUSTRALIAN PUBLIC M&A

Consistent with recent M&A league tables,² based on key indicators that ASIC identified, there was an increase in public M&A activity for the 6 months ended 31 December 2015 when compared to the prior 6 months. ASIC observed an increase in the number of bidder's statements lodged, a significant increase in the number of scheme booklets provided to it, an increase in M&A-related applications and also transaction size.

Interestingly, ASIC's statistics reveal that item 7 transactions (where target shareholders approve increases in voting power above the 20% threshold) were the most popular form of effecting a change of control transaction. ASIC reported a 40% increase over the prior period in these types of deals provided to ASIC for review.³ ASIC's statistics also show that there were five on-market bids, up from three in the prior period. This increase is consistent with the trend we identified last year.⁴

CONTROL TRANSACTION



Source: ASIC Report 469: ASIC regulation of corporate finance: July to December 2015, p18.

INDEPENDENT EXPERT REPORTS ARE STILL ON ASIC'S RADAR

ASIC has again raised concerns with the quality of independent expert reports.

ASIC's current focus is on the practice in friendly deals of the bidder and target appointing the same expert. Although the facts would be quite rare, ASIC's concern is that a conflict of interest may arise where the target's appointed independent expert, who is also the acquirer's appointed independent expert, is required to evaluate a rival transaction. ASIC has recommended that acquirers and targets should carefully consider whether the costs involved in appointing separate experts are outweighed by the need for an independent board's recommendation to be based on clearly independent analysis.

SUFFICIENT CERTAINTY IN SCALE-BACKS IN SCHEMES OF ARRANGEMENT

ASIC has previously raised concerns in relation to schemes of arrangement which feature scale-back mechanisms where alternative forms of consideration are offered.⁵ ASIC has reiterated its concern that there is potential for scale-backs to introduce uncertainty for target company shareholders on the basis that those shareholders may receive different consideration (in nature and scale) from that which they elected to receive.

Although ASIC will approach each transaction on a case-by-case basis, it reiterated its policy-based expectation that target shareholders should be provided with sufficient certainty where alternative consideration is offered, so that shareholders can confidently vote on the scheme fully informed of the effect of any potential scale-back.

ASIC ISSUES A REMINDER ABOUT 'TRUTH IN TAKEOVERS' IN THE CONTEXT OF STATEMENTS MADE BY TARGET SHAREHOLDERS

ASIC has reminded shareholders that they may be held to the statements they make about accepting or not accepting a takeover bid in accordance with ASIC's 'truth in takeovers'⁶ policy.

Statements made in the press by a substantial shareholder, in the context of a takeover bid, recently caught ASIC's eye.

Specifically, a shareholder holding more than 10% of the target's shares publicly commented that it would not accept the offer or sell its shares for less than a certain price which was above the offer price. The bidder subsequently announced that it would increase the consideration payable under the bid if it acquired at least 90% of the target's shares. ASIC's concern arose because the increased consideration could only be paid if the substantial shareholder (who could determine whether the bidder obtain at least 90%) departed from its prior statements – contrary to ASIC's 'truth in takeovers' policy.

After ASIC took up the issue with the bidder and target, clarifying disclosures were released by them to make it clear that the increased consideration was actually not available, because the substantial shareholder was unable to accept by virtue of its prior public statements (which the substantial shareholder confirmed to ASIC).

ASIC has also reminded bidders and targets that they should ensure that their announcements (in a bid context) properly acknowledge the existence and effect of any relevant statements (presumably by shareholders or other market participants) to ensure they are not misleading.

INFORMATION GATHERED BY ASIC UNDER ITS COMPULSORY INFORMATION-GATHERING POWERS CAN END UP BEFORE THE TAKEOVERS PANEL

As a result of association-related concerns it had about two shareholders who accepted the bid by G8 Education Limited for Affinity Education Group Limited, ASIC used its compulsory information-gathering powers⁷ to obtain information from various parties.

Ultimately, the matter was taken to the Takeovers Panel, and ASIC's submissions were informed by the information which it had gathered. In ASIC's view, it was unlikely that this information would have otherwise been provided to the Panel.⁸

CONTINUOUS DISCLOSURE OBLIGATIONS WHEN IN POSSESSION OF A MATERIALLY PRICE- OR VALUE-SENSITIVE VALUATION REPORT

One of the enforcement actions highlighted in the report arose in the context of a related party transaction. It is a salient reminder for companies possessing an expert or specialist report which contains potentially price- or value-sensitive information.

In mid-August 2014, a party lodged a notice of meeting with ASIC which contained a valuation report prepared by an independent geological firm. The report valued one of the company's projects at US\$300,000 – a steep discount to the figure of approximately A\$1.9 million which was recorded in the company's financial report for the half-year to 31 December 2013.

ASIC alleged that the company was aware of the valuation report and the decreased project valuation approximately one month *prior* to the notice being released, and therefore should have announced this information on or around the earlier date to comply with its continuous disclosure obligations (rather than waiting until it dispatched its notice of meeting).

The company received an infringement notice for failure to comply with its continuous disclosure obligations (which contained a \$33,000 penalty).

ENDNOTES

1. Report 469: ASIC regulation of corporate finance: July to December 2015.
2. Thomson Reuters, Australia M&A H2 2015 compared with H1 2015 by number of announced deals.
3. There is no formal requirement to provide a draft copy of the relevant explanatory memorandum to ASIC for its review before its despatch to shareholders for an item 7 of section 611 transaction, so the actual number of item 7 transactions may in fact be higher.
4. See article '[Resurgence in on-market takeover bids](#)'.
5. Report 446: ASIC regulation of corporate finance January to June 2015.
6. ASIC Regulatory Guide 25 Takeovers: False and misleading statements.
7. See division 3 of part 3 of *Australian Securities And Investments Commission Act 2001* (Cth).
8. At paragraph 90 of Report 469, ASIC suggest the reason for the information otherwise being unlikely to come before the Panel is because a number of parties from whom ASIC sought information were not directly involved in the proceedings or had not adequately responded to the Panel's inquiries.

KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.



REBECCA MASLEN-STANNAGE
PARTNER, SYDNEY

+61 2 9225 5500
Rebecca.Maslen-
Stannage@hsf.com

LEGAL NOTICE

The contents of this publication, current at the date of publication set out above, are for reference purposes only. They do not constitute legal advice and should not be relied upon as such. Specific legal advice about your specific circumstances should always be sought separately before taking any action based on this publication.

© Herbert Smith Freehills 2020

SUBSCRIBE TO STAY UP-TO-DATE WITH LATEST THINKING, BLOGS, EVENTS, AND MORE

Close

© HERBERT SMITH FREEHILLS LLP 2020