

ASIC REPORTS REGARDING THE PUBLIC M&A SPACE FOR THE FIRST HALF OF 2016

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

ASIC's figures for control transactions show that, while the number of takeover bids in the first half of calendar 2016 was the same as schemes of arrangement, value was heavily weighted to schemes.

SUMMARY

- Item 7 shareholder-approved deals were the most common form of control transaction (as they were in the preceding six months).
- Most deals were domestic but the largest three, and the bulk of the value, involved foreign offerors.
- ASIC's focus remains on inappropriate disclosure (ASIC had concerns in more than half the deals launched), structural concerns, independent expert reports, shareholder intention statements and association concerns.

OVERVIEW

ASIC has issued its report on its activity in relation to takeover bids, schemes of arrangements and other control transactions for the first six months of calendar 2016.

TRENDS IN PUBLIC M&A

ASIC observed a decrease in the number of takeover bids and schemes of arrangement compared to the previous 6 month period. ASIC reported that the split between schemes of arrangements and takeover bids (based on documents lodged or registered with ASIC) was 50/50. However, when measured by value, schemes represented a significant 93% compared with takeover bids at 7%. This figure was skewed by the high-value acquisition of Asciano Limited. If Asciano was excluded, schemes represented 67% by value.



Source: ASIC Report 489: ASIC regulation of corporate finance: January to June 2016, p28.

Interestingly, ASIC observed that 77% of schemes and bids lodged or registered in the first half of 2016 were for cash consideration. When weighted by target value, cash consideration represented an overwhelming 97% of schemes and bids during that period.



Source: ASIC Report 489: ASIC regulation of corporate finance: January to June 2016, p28.

Likewise, although most offerors during the first half of 2016 were domestic, when weighted by target value, foreign offerors represented 93% of targets.



Source: ASIC Report 489: ASIC regulation of corporate finance: January to June 2016, p29.

ASIC CONCERNS REGARDING DISCLOSURE, STRUCTURAL CONCERNS AND INDEPENDENT EXPERT REPORTS

In ASIC's view, in over 55% of bids and schemes lodged in the first half of 2016, there was inappropriate disclosure. ASIC gave the example of directors' interests not appropriately disclosed or inaccurate disclosure of trading price date or implied transaction values.

ASIC also found structural concerns in almost 25% of bids and schemes lodged in the review period. Examples of these concerns related to the minimum bid-price rule, or where the offer terms were not the same for all target shareholders.

As in its previous two corporate finance reports, ASIC raised concerns about independent expert reports. In the past 6 months, ASIC found issues with independent expert reports in over 20% of bids and schemes, in particular, on the basis of inadequate disclosure of the expert's underlying assumptions and whether the expert had reasonable grounds.

SCHEME DISCLOSURE OUTSIDE REGULATED DOCUMENTS

ASIC observed an example of a target company director sending supplementary material to target shareholders after the scheme booklet had been approved by the court and despatched. Contrary to the approach in ASIC's stated policy,¹ the supplementary material was not reviewed by ASIC nor approved by the court. ASIC declined to provide its usual 'no objection' letter for this scheme and appeared at court to ensure the matter was brought to the court's attention.

'FIRSTS' IN SCHEMES OF ARRANGEMENT - JOINT BIDS AND FOREIGN COMPANY

For the first time ASIC granted relief to facilitate a joint scheme of arrangement subject to the joint scheme conditions (including the 'match or accept' condition and the voting restrictions) contained in Regulatory Guide 9² (in relation to the Asciano acquisition).

As previously reported in our legal briefings,³ ASIC also saw for the first time, a scheme of arrangement of a foreign (Papua New Guinea) company was implemented under the Australian Corporations Act. Relevantly, the target had been listed on ASX for 20 years and approximately 96% of its shareholders had registered addresses in Australia.

SOLICITING SHAREHOLDER INTENTION STATEMENTS - COULD THEY GIVE RISE TO RELEVANT INTERESTS?

As previously reported in our legal briefings,⁴ ASIC reminded shareholders that they may be held to statements they make about accepting a takeover bid in accordance with ASIC's 'truth in takeovers' policy.

This time ASIC was focussed on the solicitation of these statements by targets and the potential for a relevant interest to arise, potentially in breach of the takeovers laws.

ASIC's example involved a target company which had released an announcement indicating that a substantial holder, who had earlier indicated its intention to vote against the scheme, had advised the target that if the acquirer increased the scheme consideration to a certain price then it would vote in favour of the scheme (in the absence of a superior proposal) and allow publication of its stated intention. The same announcement also indicated that the acquirer had given an acknowledgement to the target that it agreed to increase the scheme consideration in reliance on the substantial holder's public statement.

In this example, ASIC was concerned that the circumstances outlined in the announcement showed an overall agreement, arrangement or understanding between the acquirer and substantial shareholder that was sufficient for the acquirer to have obtained a relevant interest in the substantial holder's shares.

ASIC required the target to disclose ASIC's concerns in a supplementary explanatory memorandum and tag the votes of the substantial holder. Since the scheme was passed by a sufficient majority, ASIC ultimately did not object to the scheme (although it appeared at court to assist the court to understand ASIC's concerns).

PUBLIC PROPOSALS EXPRESSED TO BE NOT A PROPOSAL FOR THE PURPOSES OF SECTION 631

ASIC is concerned that certain proposals to make a takeover bid are expressed as not being a proposal 'for the purpose of section 631 of the Corporations Act'. ASIC referred to a recent deal where a proposer suggested the reason for that was because the proposal was dependent on certain conditions being met. Section 631 contains a prohibition on a person publicly proposing to make a takeover bid if they do not make the offer under a takeover bid within 2 months after the proposal.

Consistent with its stated guidance, ASIC views the conditionality of a proposal as being relevant to whether the proposer has a defence to section 631 (under section 670F) and not whether section 631 is triggered in the first place. ASIC suggested that for a person to say that section 631 does not apply to their proposal may in fact be misleading and deceptive. ASIC reminded bidders about the importance of clearly and comprehensively setting out the conditions so that the market can assess the likelihood that a bid will proceed.

RESTRICTIONS ON PARTICIPATING IN AN OFFER SHORTFALL MAY LEAD TO UNACCEPTABLE CIRCUMSTANCES

ASIC raised concerns about a proposed rights issue which was to be underwritten by the company's major shareholders. When ASIC expressed its concern that no shortfall facility was being offered, the issuer proposed a 'top up' facility that would allow shareholders to participate in the shortfall by taking up a maximum additional number of shares equivalent to their existing holding.

ASIC considered that because of the restrictions on the ability of shareholders to participate in the offer shortfall, the offeror had not undertaken all reasonable steps to mitigate the potential control effect of the underwriting by the major shareholders. The issuer ultimately decided to seek item 7 approval for the underwriting arrangements.

ENFORCEMENT ACTION CONTINUES TO BE FOCUSED ON ASSOCIATION CONCERNS

In the review period, ASIC made two applications to the Takeovers Panel – both involved association concerns. ASIC also made submissions in seven unrelated applications made by third parties.

ENDNOTES

1. Regulatory Guide 60, Schemes of Arrangement.
2. Regulatory Guide 9, Takeover bids. The conditions are designed to address unique concerns that arise when a joint bid or scheme is proposed.
3. Using Australian schemes of arrangement to acquire foreign companies.
4. ASIC reports on its regulatory activities in the public M&A space.

KEY CONTACTS

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



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