

ASIC'S TAKE ON PUBLIC M&A IN THE SECOND HALF OF 2017

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Legal Briefings - By **Paul Branston and James Sippe**

We look at the public M&A data released by ASIC for the second half of 2017 and the areas that were a focus for ASIC's regulatory activities during that period.

IN BRIEF

- ASIC has published observations on public M&A activity for the second half of 2017, including that cash continues to be the favoured consideration offered by bidders and that bidders were predominantly Australian-based.
- ASIC noted increasing concerns on its part about scheme timetables where the transaction is subject to conditions and there is 'significant uncertainty' regarding the timing of satisfaction of those conditions. It also repeated its concerns about attorney appointment clauses in takeover bid offer terms that operate before the bid is unconditional, and reported on its ongoing independent expert surveillance activities.

OVERVIEW

In its half-yearly Corporate Finance Report released last month, ASIC reported 31 control transactions for the last 6 months of 2017 (**2H17**).¹ This was the same number as in the previous 6 months, but down on the 41 transactions in the corresponding 6-month period last year.

Some of the noteworthy observations from ASIC on the transactions were that:

- **Cash continues to be favoured** – 62.1% of bids and schemes (by number) offered cash only consideration. By target value, this was only 21.2% – but this statistic was impacted by the large Tatts/Tabcorp scheme transaction that involved cash and scrip. 8 out of the top 10 deals by target value offered cash or a cash alternative.
- **Bidders were predominantly Australian-based** – 77.6% of bids and schemes (by target value) were from Australian-based bidders. This was markedly different from the previous 6 months, where 80% of bids and schemes by value were from foreign bidders (although the sizeable DUET/Cheung Kong scheme had a major impact on the statistics for the previous 6 months).
- **A continued flurry of smaller deals** – The bulk of deals were at the smaller end of the market, with 58.6% of deals for targets (by number) valued at under \$50 million.
- **Shareholder-approved transactions continue to be popular** – Transactions approved by shareholders under section 611 item 7 of the Corporations Act (another way to effect control transactions) remained the most common type of control transaction notified to ASIC. However, the actual number of documents provided for ASIC review in connection with this type of transaction was down on the previous 6 months: 29 in the second half of 2017 compared to 48 in the first half of 2017.

WHAT WAS IN ASIC'S SIGHTS IN 2H17?

ASIC had three main areas of focus in the second half of 2017:

1. Uncertainty in timetables for scheme transactions

ASIC reported that it raised concerns about uncertainty in the timetables for scheme transactions that are subject to conditions when there is 'significant uncertainty' regarding the likely timing of those conditions being satisfied.

ASIC's view is that the scheme meeting – at which target shareholders consider whether to approve the scheme transaction – should be held shortly before the second court hearing at which the court is asked to approve the scheme in order to ensure currency of the shareholder vote at the second court hearing. Typically, by the time of the second court hearing, most if not all of the conditions to the scheme (other than court approval) have been satisfied or waived.

ASIC's view is also that scheme proponents should take into account the desirability of avoiding the need for supplementary disclosure to shareholders or the postponement of the scheme meeting when scheduling the first court hearing – the hearing at which the court grants orders convening the scheme meeting. ASIC indicated that it may query scheme proponents on the timetable and any uncertainty regarding the conditions to the scheme ahead of a first court hearing.

2. Appointment of bidder as attorney before bid unconditional

ASIC has previously expressed concerns about takeover bid offer terms under which an accepting target shareholder appoints the bidder as their attorney in respect of the relevant target shares *prior to the offer becoming unconditional*. ASIC considers that appointment terms that operate while there is still uncertainty about whether the bid will become unconditional may be contrary to the principles of the takeover rules in Chapter 6 of the Corporations Act.

ASIC noted that some recent control transactions had included this form of attorney appointment right, and indicated that it reminded the parties involved of its views. The Takeovers Panel has previously indicated that this form of attorney appointment may not be unacceptable provided that it is prominently disclosed to target shareholders.²

3. Continued surveillance of independent expert's reports

ASIC reported that it conducted four surveillances of providers of independent expert's reports. It said it identified 'significant concerns' regarding the firms. In one instance, following ASIC's investigation, the firm involved voluntarily applied to vary the terms of its AFS licence to remove its authorisation to provide independent expert advice.

Companies involved in M&A transactions involving an independent expert should continue to approach the appointment and briefing of the expert carefully to ensure the expert's independence is not tainted and the expert is provided with up-to-date and correct information.

ASIC also noted that it had concerns regarding the disclosure of assumptions in reports prepared by specialists (e.g. geology and mining reports) that are used in connection with independent expert's reports. ASIC expects experts to critically assess the reports prepared by specialists, including the reasonableness of the specialist's assumptions, in particular where there is limited empirical analysis or information to support the specialist's conclusions.

ENDNOTES

1. ASIC's data is based on disclosure documents lodged or publicly released during the relevant period: see page 22 of REPORT 567: ASIC regulation of corporate finance: July to December 2017 (February 2018).
2. See *Sydney Gas Limited 01* [2006] ATP 9 at [85].

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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