

M&A TRENDS AND HOT BUTTON ISSUES FROM ASIC'S HY18 CORPORATE FINANCE REPORT

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Legal Briefings - By **Malika Chandrasegaran**

We delve into the corporate finance report recently released by ASIC summarising key statistics on takeovers and schemes and issues ASIC has focused on in public M&A over the first half of 2018.

IN BRIEF

- ASIC observed 29 control transactions over the first half of 2018 with a collective implied value of AU\$27.5 billion, with slightly more takeovers than schemes in the period - offshore acquirers drove the majority of those transactions.
- ASIC focus over the first half of the year in the M&A space has been on truth in takeovers, top-up clauses in pre-bid agreements, bid conditions, last minutes changes to scheme terms and disclosure relating to substantial holdings.

ASIC'S CORPORATE FINANCE REPORT

ASIC has released its bi-annual report¹ summarising its corporate regulatory activity over the first half of 2018. The report includes key statistics and observations from its oversight of transactions over the period.

We provide some of the M&A highlights below.

PUBLIC M&A ACTIVITY

Some interesting observations made by ASIC on public M&A activity over the first half of 2018 are:

- **High deal activity:** ASIC observed 29 control transactions where the disclosure document was lodged or registered in the first half of 2018. This is fairly similar to the number of control transactions observed in each of the previous two 6-month periods (i.e. 31 control transactions in each of those periods). However, the total value of control transactions was significantly higher in the first half of 2018 – AU\$27.5 billion² compared to AU\$4.5 billion in the second half of 2017 and AU\$12.4 billion in the first half of 2017.
- **Schemes vs bids:** There were a few more control transactions undertaken by way of takeover bid than scheme of arrangement, with 16 transactions undertaken by bid (including multiple competing bids counted separately) and 13 by scheme. However, many of the largest transactions undertaken over the period were undertaken by way of scheme while most of the transactions under AU\$50 million in value were undertaken by way of takeover bid.
- **Strong offshore interest in Australia:** Offshore acquirers were behind 94% by value and 59% by number of control transactions in the period. Even disregarding the Westfield scheme, offshore acquirers still accounted for 78% by value of control transactions.
- **Cash remains king on big transactions:** eight of the top 10 control transactions by value offered all-cash consideration, with the other two (including the Westfield transaction) offering part scrip and part cash consideration.
- **Smaller deals continue to be popular:** Consistent with the prior six months, the majority of deals were at the smaller end of the market, with the target in 55.1% of control transactions valued at under AU\$50 million. That said, notably, 41.3% of control transactions were in respect of targets valued between AU\$200 million to AU\$1 billion.

ASIC HOT BUTTON ISSUES

Key areas of ASIC focus over the first half of the year were:

Truth in takeovers

ASIC has confirmed its focus on truth in takeovers and noted that over the first half of the year it intervened on numerous 'last and final' or 'truth in takeovers' statements by market participants.

ASIC has also flagged that it will be reviewing *RG25: Takeovers: False and misleading statements*.

See further [our separate article](#) on this topic.

Top-up clauses in pre-bid agreements

ASIC noted that it is observing an emerging practice for pre-bid acceptance agreements to contain 'top-up clauses' i.e. clauses to compensate pre-bid holders if the bidder ends up selling shares into a competing higher bid.

ASIC's view is that clauses of this nature could mean that a different offer is made to the pre-bid shareholder from that made to other holders, contrary to the equality principle underlying the takeovers regime in Chapter 6 of the *Corporations Act*.

ASIC cited two instances where pre-bid agreements contained clauses of this nature. In one instance, ASIC advised the bidder and the pre-bid holder that if the top-up was triggered, ASIC may apply to the Takeovers Panel. In another instance, ASIC sought a truth in takeovers public commitment from the bidder that it would not take any steps to trigger the top-up clause.

Bid conditions

ASIC has flagged that will pay close attention to bid conditions, particularly where a condition appears to be within the control of the bidder or where it is unclear whether the condition has been triggered or not.

In particular, ASIC has noted that, prior to dispatching offers, bidders should consider whether any conditions have been triggered and either (1) carve it out from the condition, or (2) elect not to proceed with the bid to the extent permitted under the *Corporations Act*.

Last minute price increase under a scheme

In the recent *Billabong* scheme,³ on the morning of the scheme meeting, Boardriders, Inc. (the bidder) agreed to a price increase. The price increase was explained by the Chairman at the scheme meeting, which then proceeded. The Court then approved the scheme with the amended price at the second Court hearing.

ASIC has flagged that it did not object to the last minute change in that scheme due to evidence based on proxies lodged that the resolution would have been approved even without the change. However, ASIC has noted that it considers that last minute changes to scheme terms can be coercive and create significant risks, even for an increase to a cash offer, and particularly if there is an active or likely auction for control underway.

ASIC encourages parties considering scheme amendments to approach ASIC first.

Ensuring adequate disclosure in substantial holding notices

ASIC has re-iterated the requirement that, when making substantial holding disclosures in connection with a transaction, shareholders should provide full copies of all contemporaneous agreements relating to the substantive transaction (rather than just a preliminary agreement, even if that technically first gave rise to the person's change in voting power).

ASIC indicated that it will most likely take action where the timing and sequencing of entering into final documentation appears to suggest avoidance.

ASIC also noted that they consider it inappropriate to redact documents attached to substantial holding notices.

ENDNOTES

1. ASIC Report 589: ASIC regulation of corporate finance: January to June 2018.
2. The large deal value was in part due to Unibail-Rodamco SE's AU\$18.7 billion acquisition of Westfield Corporation by way of scheme of arrangement.
3. Billabong International Ltd (No 2) [2018] FCA 496. See our previous article [The Billabong scheme of arrangement - last-minute price increase](#).

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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