Mergers & Acquisitions

Jurisdictional comparisons **First edition 2012**

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Foreword

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In today's global economy, M&A activity is truly global. As the emerging and developing economies progress, in-country M&A will grow and become more sophisticated, and as the developing economies get larger, they will join the developed economies in the cyclical M&A activity that the Western world has experienced since the latter part of the 19th century.

As matters stand today, the US economy has stabilised and is beginning to evidence growth. However, the uncertainty caused by the expansion of leverage that led to the collapse in 2008 and the ensuing sharp recession, the failure to achieve even a minimal political consensus as to how to deal with the debt issues, the looming presidential election and the implications of the European financial crisis have eroded business confidence and continue to retard M&A activity, particularly the larger transactions. Nevertheless, the continuing emphasis on deleveraging and strengthening of corporate balance sheets makes cost-saving M&A synergies particularly valuable, especially for those companies that have exhausted their internal cost-cutting opportunities. Global market pressures, economic volatility and industry-specific factors across a wide array of industries put pressure on corporations to increase scale, diversify their asset base and/or spread R&D costs across larger platforms.

Global and cross-border M&A volume has increased in both absolute and relative terms since the dramatic drop in 2009, representing not only an increasing portion of M&A in both the United States and globally, but also including a more diverse variety of industries, target countries and sources of acquisition capital than in prior years. During the first half of 2011, global M&A continued the resurgence that began in the second half of 2010, but markets cooled in the second half of 2011, resulting in aggregate volume of $2.38 trillion in 2011 (down seven per cent compared with 2010). Stock market volatility, fear of a 'double dip', concerns over European sovereign debt and the future of the eurozone, and regulatory uncertainty in the United States and Europe have created uncertainty in the market and put a number of deals on hold; however, would-be acquirors' considerable cash stockpiles, strengthened balance sheets, access to attractive financing (for many investment grade borrowers), and need to expand into new markets are continuing to drive acquisitions. Cross-border transactions have increased since 2009 but remain well below the 2007 high water mark, perhaps due to uncertainty regarding Europe and other markets. In the United States, acquisitions by non-US acquirors totaled $145 billion, down 34 per cent from 2010, with European acquirors sitting on the sidelines, Asian acquirors focusing largely on regional consolidation and emerging market opportunities,

and other emerging market players' enthusiasm for US deals also dampening. The United States and Europe continued to drive global M&A, accounting for two-thirds of deal activity in 2011. European deal volume rebounded slightly in Q4 following a sharp drop earlier in the year, although volume still declined seven per cent from 2010 to 2011. The United States and Japan were the only regions to experience M&A growth in 2011 compared with 2010, with the 10 largest global deals involving a US or Japanese acquiror and eight of those 10 deals involving both a US acquiror and US target.

A number of jurisdictions are moving towards a more permissive acquisition regime. For example, the 2011 amendments to Russia's foreign investment regime are expected to somewhat liberalise the rules applicable to companies in designated strategic sectors, although control acquisitions of such companies will remain subject to additional governmental approval requirements. In the United States, despite a few well-publicised examples of thwarted deals, sophisticated market participants have come to understand that most acquisitions can be effected through careful advance preparation, strategic implementation, and deal structures that anticipate likely concerns. The most notable exceptions to the general rule are the defence sector and other highly sensitive areas, such as sophisticated technology sectors or core infrastructure industries. However, the United States remains fundamentally an open market that welcomes foreign capital and investment. As with purely domestic transactions, cross-border deals involving investment into the United States are more likely to fail because of poor planning and execution than due to fundamental legal restrictions or requirements. Even in the most open of M&A markets, there is no substitute for advanced planning.

Two engines of growth of M&A loom large in the future. To a considerable extent China is the focal point. The Chinese experience will be a template for future M&A activity in other rapidly developing countries. First, there will be pressure to roll-up and integrate horizontally first-generation companies into larger companies in order to achieve the benefits of scale. This activity will be not unlike the wave of horizontal merger activity that took place in the US in the latter part of the 19th century and the early part of the 20th century and which is already under way in China. Second, as companies gain scale, they will seek to gain the advantage of vertical integration back toward raw materials and forward through finishing and distribution to the ultimate user. Here again, this activity will be not unlike what took place in the US in the early part of the 20th century and which is taking place today in the efforts by Chinese companies to acquire sources of raw materials.

While the pace of M&A activity will ebb and flow with the global economy and the economies of regions and countries, M&A is an integral part of industrial market economies and will continue to be a major factor in the future. It is a pleasure to see works such as this one, which brings together leading practitioners representing a broad spectrum of the world economy, as we seek to better understand, and perhaps in some cases harmonise, M&A practice across the globe.

New York, February 2012

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Australia

King & Wood Mallesons
Robert Hanley & Hannah Jones

1. MARKET OVERVIEW

1.1 Please give a brief overview of the public M&A market in your jurisdiction

Regulation of public M&A in Australia is well developed.

The primary market in Australia on which public companies list their securities is the Australian Securities Exchange (ASX). The ASX is the eighth largest market in the world (based on free-float market capitalisation), with A$1.2 trillion market capitalisation and 2,222 listed companies (as at 31 December 2011). The largest sectors of the Australian market are the resources and financial services sectors, each representing approximately 30 per cent of the total market.

Relative to the rest of the world, Australia's public M&A market has been buoyant during the global financial crisis. In 2010, the total value of announced M&A transactions in Australia was at a record high.

Australia has continued to see growing levels of inbound foreign investment over recent years, particularly from China. Demand for Australian resources continues to drive M&A activity in the resources sector and related infrastructure sectors. These trends are expected to continue in the coming years despite the increasing strength of the Australian dollar.

1.2 What are the main laws and regulations which govern the conduct of public M&A activity in your jurisdiction?

Takeovers of entities listed on the ASX are regulated under Chapter 6 of the Corporations Act 2001 (Cwlth) (Corporations Act) and, to a lesser extent, the listing rules of the ASX.

The general takeovers prohibition contained in Chapter 6 of the Corporations Act prohibits a person from acquiring (whether by way of purchase of existing securities or issue of new securities) a 'relevant interest' in securities in an Australian company if, because of the acquisition:

- any person's 'voting power' in the company would increase from below 20 per cent to more than 20 per cent; or
- any person's 'voting power' in the company that is above 20 per cent and below 90 per cent would increase,

unless the acquisition is expressly permitted by one of the exceptions or 'gateways' through the 20 per cent prohibition (see section 2.1, below).

The concepts of 'relevant interest' and 'voting power' are critical to an understanding of the takeover provisions. A person (including an entity) has a 'relevant interest' in a security if the person:

- is the holder of the security;
- has the power to exercise or control the exercise of the voting power attached to the security; or
- has the power to dispose of or control the disposal of the security.

A person's voting power in a company is the proportion of the votes attaching to all voting securities in which the person and their associates have a relevant interest relative to the total number of votes attached to all voting securities in the company. An associate of a person is defined in very broad terms, but in summary two persons will be associated if:

- one controls the other or they are under the common control of another person;
- there is an agreement, understanding or arrangement (whether legally enforceable or not) between them for the purpose of controlling or influencing the target company's board or affairs; or
- they are acting or proposing to act in concert in relation to the target company's affairs.

As a result of these broad concepts, the regulatory ambit of the Australian takeovers prohibition casts a wide net.

1.2.1 What entities are covered?

The regime under Chapter 6 of the Corporations Act applies to:

- entities listed on the ASX; and
- unlisted companies which have more than 50 members.

Australian takeover law also purports to have extra-territorial force. The takeovers prohibition may apply to a transaction involving a non-Australian company if the transaction affects the control of voting power in an Australian company (for example, if an acquirer assumes control of a non-Australian company which itself holds 20 per cent or more of the voting power in an ASX-listed company). However, an exception may be available for indirect 'downstream' acquisitions (see section 2.1, below).

1.2.2 Who is the regulator?

There are a number of regulators who supervise takeovers in Australia, the primary bodies being the Australian Securities & Investments Commission (ASIC) and the Takeovers Panel (the Panel).

ASIC supervises the operation of companies and securities laws in Australia, including takeovers law. ASIC is responsible for monitoring compliance with the Corporations Act and has wide powers to investigate, amongst other things, the conduct and security trading activities of parties involved in a takeover. ASIC also has powers to modify the operation of, and grant parties exemptions from, various provisions of Chapter 6 and the wider provisions of the Corporations Act. ASIC publishes detailed guidance on its interpretation of the legislation and when it may consider granting such modifications and exemptions. ASIC also reviews many of the documents issued by parties involved in a takeover.

The Panel is a non-judicial body comprised of a small full-time executive and a part-time panel of representatives from industry and the legal, finance

and accounting professions. During a takeover bid, the Panel displaces the courts as the primary forum for resolving disputes in relation to the bid.

The Panel has broad statutory powers to:

- make declarations of 'unacceptable circumstances' regarding the affairs of a company in relation to a takeover or acquisition of a substantial interest in the company and make a wide range of interim and final orders (enforceable by the courts); and
- review decisions of ASIC which relate to modifying the operation of or granting exemptions from the provisions of Chapter 6 relating to takeovers.

In addition to its dispute resolution powers, the Panel also has authority to make rules governing takeover bids provided that they are not inconsistent with the provisions of Chapter 6 of the Corporations Act. While the Panel has not made substantive rules, it has published guidance notes on a variety of topics. Prior decisions and guidance notes released by the Panel provide important sources of advice for parties on key issues which arise during takeover bids.

Other regulatory bodies may also become involved in certain circumstances, for example:

- ASX may become involved in a takeover if it is concerned that its listing rules are not being complied with by the parties involved in a takeover;
- if an acquirer is a foreign person for the purposes of the Foreign Acquisitions and Takeovers Act (FATA), in many circumstances the acquisition must also be approved by the Treasurer of Australia acting on the advice of the Foreign Investment Review Board (FIRB);
- the Australian Competition and Consumer Commission (ACCC) may also become involved in a takeover if the acquisition would have the effect, or be likely to have the effect, of substantially lessening competition in a substantial market in Australia; and
- industry bodies such as the Australian Broadcasting Authority and the Australian Prudential Regulatory Authority (APRA) may become involved in takeovers involving participants in particular sectors such as media, banking and insurance.

1.3 Other than in relation to anti-trust, are there other applicable regulations such as exchange and investment controls?

In addition to takeover provisions, the ASX listing rules and Australian foreign investment rules may be applicable to a takeover.

The ASX listing rules may impact various aspects of a takeover, including:

- continuous disclosure obligations – listed entities are required to notify the ASX of price sensitive information. This can impact pre-announcement strategy (see section 2.2, below);
- related party transactions – listed entities are prohibited from undertaking certain transactions, such as the sale of a substantial asset, with related parties without the approval of shareholders; and
- significant transactions – if an ASX listed entity intends to make a significant change to the nature or scale of its activities it must notify the ASX and the ASX may require the entity to seek the approval of shareholders for the transaction.

There are no specific reserve bank approvals in Australia. However, where the bidder (or its parent) is foreign, FATA and Australia's Foreign Investment Policy (Policy) may impact the transaction. Under FATA and Policy, certain proposed investments by foreign persons should be notified to FIRB and a statement of no-objection obtained. There are also special rules under FATA and Policy applying to acquisitions in the banking, civil aviation, telecommunication, airports and airlines, shipping, media and resource sectors.

Specialist industry legislation may also apply. For example, in the financial sector regulated entities may need to comply with prudential regulations and in some cases seek the approval of APRA.

2. PREPARATION AND PRE-ANNOUNCEMENT

2.1 What are the main structural means of obtaining control of a public company? If there is more than one, what are the key advantages and disadvantages of each route? Is one route more commonly used than others?

The most common ways of acquiring an interest in more than 20 per cent of an Australian listed company are:

- a takeover bid, either off-market or on-market; and
- a scheme of arrangement approved by the court.

There are other 'gateways' through the 20 per cent prohibition and some of these are also described below.

A takeover bid is a procedure for the acquisition of all of the shares in a target company by means of a bidder making separate but identical offers to all shareholders to acquire their shares. When a shareholder accepts the offer, an agreement for the acquisition of their shares results. The overall result of the bid is determined by the total level of acceptances by shareholders.

Takeover bids in Australia can be either off-market bids or on-market bids. Off-market bids are the most common form of takeover and are described in detail below. On-market bids (ie, offers for quoted securities made only through the ASX) are rare in Australia, largely due to the requirement that they be cash-only and unconditional.

Takeover bids are often classed as friendly or hostile depending upon whether the bidder has secured the support of the target's board in recommending acceptance of the bid. However, unlike a scheme of arrangement, the co-operation of the target company's board is not essential for a takeover bid.

One of the main advantages of a takeover bid is the flexibility it provides to bidders in terms of making changes to the offer (eg, increasing the offer price, waiving offer conditions and extending the offer period). Off-market takeover bids are often made conditional upon the satisfaction or waiver of a number of conditions, such as the bidder reaching a minimum level of acceptances (usually 50 or 90 per cent) or obtaining specified regulatory approvals such as FIRB or ACCC. A bidder must obtain 90 per cent or more acceptances in order to invoke the compulsory acquisition procedure under the Corporations Act (described in section 10, below). This may be considered a disadvantage of a takeover bid where achieving 100 per cent control of the target is important to

the bidder. Another issue to note is that no 'collateral benefits' may be offered by a bidder to third parties during the offer period (see section 2.5, below).

Under a scheme of arrangement, a company, with the approval of its creditors or shareholders, can effect a reconstruction of its capital, assets or liabilities through a court approved procedure. Schemes may be used to effect a wide range of corporate restructures, including transfers of all or a specified proportion of securities to a bidder, cancellations of existing securities or issues of new securities to a bidder, and as such can be used as an alternative to a takeover bid to effect a change of control or merger of companies. Indeed, in past years schemes have become as common as takeovers as a means of effecting friendly acquisitions in Australia.

A scheme has an 'all or nothing' outcome, and a bidder will have the certainty of knowing that it will either acquire 100 per cent of the securities to which the scheme relates, or nothing if it is not successful.

A successful scheme needs the approval of 75 per cent by value and 50 per cent by number of each class of security holders present and voting at a scheme meeting (excluding any votes cast by the bidder or any of its associates) plus the court to exercise its general discretion to approve the scheme. There is therefore a risk in a scheme that a court may refuse to sanction a scheme of arrangement even if the requisite levels of shareholder approval have been obtained at the scheme meeting.

The flexible structure of a scheme is a key advantage over the relatively prescriptive regime for takeover bids, and allows an acquisition simultaneously to incorporate additional complexities such as the transfer or demerger of specified assets or liabilities or the reduction of a target's capital. As with off-market bids, schemes of arrangement can be made conditional upon the occurrence or non-occurrence of specified events or actions.

It is generally considered essential for a scheme to be proposed and supported by the target company, because of the positive obligations on the target to, amongst other things, issue the scheme documentation to and convene meetings of target shareholders. As a result, schemes of arrangement in Australia to date have proceeded on a friendly rather than hostile basis.

Other frequently used 'gateways' through the 20 per cent prohibition are:

- shareholder approval – acquisitions which have the approval of an ordinary resolution of the target company (excluding any votes by any of the parties to the acquisition or their associates);
- creeping acquisitions – acquisitions that increase a person's stake to not more than three per cent higher than they had six months before the acquisition; and
- 'downstream' acquisitions – acquisitions which increase an acquirer's indirect voting power in an ASX listed company beyond the 20 per cent threshold are exempt if the securities in the upstream company are listed on the ASX or other foreign financial market approved by ASIC.

2.2 What secrecy and disclosure obligations are placed on bidders and target companies ahead of any formal announcement of a bid?

Where the target company and/or bidder are listed on the ASX, the

ASX listing rules require them to notify the ASX (and the wider market) immediately of any information concerning the company that a reasonable person would expect to have a material effect on the price or value of its securities. Proposed takeover activity is always likely to fall within the category of disclosable price-sensitive information, unless a permitted exception to the general disclosure obligation applies.

Generally speaking the details of a takeover proposal will not require disclosure if:

- a reasonable person would not expect the information to be disclosed;
- the information is confidential; and
- the information concerns an incomplete proposal or negotiation.

For this reason, any approach to a target company prior to announcement of a takeover bid is often made on a strictly confidential basis and any discussions surrounding any proposal are typically emphasised as being preliminary in nature (with commercial terms of any offer to be finalised in due course after negotiations) with no formal offer being proposed, to enable the parties to rely on the exception and avoid the need to disclose the approach.

Nonetheless, if the proposal is leaked to the market confidentiality may be lost, at which point the exception will no longer apply and the parties may be obliged to make an immediate announcement to the market.

2.3 Are there any constraints over the ability of a bidder to carry out due diligence on the target?

The extent of the due diligence enquiries which can be made in a public takeover will largely depend upon whether a bid is friendly or hostile.

In a friendly acquisition, where the target is willing to enter into discussions with a view to recommending a bid or scheme to its shareholders, it is likely that a potential bidder will seek access to detailed confidential information regarding the target prior to finalising the terms of an offer and announcing the takeover.

The level of access which a target may grant will often depend upon the relative bargaining strengths of the parties and the target's willingness to enter into an agreed transaction at the bidder's indicative price. There is no formal requirement in Australia for a target to provide equal information to all potential bidders, but a failure to treat all bidders equally may result in the Panel finding unacceptable circumstances in the absence of the specific compelling reasons for the unequal treatment.

If a target is not willing to enter into negotiations or provide information, or if a potential bidder wishes to preserve its anonymity prior to announcing a bid or approaching a target, the bidder will be limited to conducting its enquiries based upon publicly available information.

A hostile bidder may seek to compel a target to provide access to due diligence by making the provision of information or confirmation of specific items a condition of a takeover proceeding. Although these conditions are not considered inherently objectionable, the Panel has indicated that it will not generally force a target of a takeover bid to comply with them and provide information. Such conditions have historically had little success in the Australian market.

Bidders must be mindful of insider trading laws with respect to any non-

public price-sensitive information that they become aware of as a result of due diligence enquiries (see section 2.5, below).

2.4 Is it possible for a target company to grant a bidder exclusivity and/or a break fee? Are there any other steps which can be taken to provide greater certainty to a bidder that its bid will be successful?

Negotiated lock-up devices (or 'deal protection' measures) such as exclusivity arrangements and break fees are not prohibited as such. However, depending on the circumstances of a transaction, they may lead to a declaration of unacceptable circumstances by the Panel. A lock-up device will be impermissible if it has a significant anti-competitive effect on rival bidders or has a significant coercive effect on target shareholders, making them unlikely to consider alternative offers.

'No-shop' exclusivity provisions are commonly agreed to prevent a target from touting itself to other rival bidders for a specified period, to allow the bidder a period of time in which to consummate its transaction. A no-shop operates by preventing the target from soliciting, encouraging or initiating negotiations with other parties with a view to obtaining a rival proposal to acquire the target or its assets. 'No-talk' exclusivity provisions go further than no-shop provisions, and seek to prevent a target from entering into any negotiations with potential rival bidders, even where an approach is unsolicited.

'Break fees' have also become common in agreed bids and schemes whereby a target agrees to pay a break fee to a bidder if certain specified events occur which cause the transaction to fail (such as the target board withdrawing its recommendation of the proposal). As a general rule of thumb, fees not exceeding more than one per cent of the equity value of a target will generally not be considered unacceptable, although that view may change if payment is subject to unduly excessive or sensitive triggers.

In conjunction with the exclusivity arrangements and/or break fees, a bidder may also seek to obtain additional rights, such as a notification right to be informed of the details of any competing proposal received by a target, or a matching right entitling the bidder to match any superior proposals received before the target is permitted to announce a competing transaction. Notification and matching-right bidder-protection provisions are becoming increasingly common and are generally considered acceptable by the Panel provided their scope is appropriately restricted.

2.5 Are there any restrictions on a bidder obtaining commitments from a target company's shareholders ahead of the announcement of a bid?

A bidder can enter into pre-bid discussions with major shareholders of a target with a view to either acquiring some or all of their securities outright or obtaining agreement to accept a future takeover bid for those securities but in each case only up to the maximum 20 per cent takeover threshold.

However, bidders must carefully plan and execute pre-bid arrangements to avoid a number of legal pitfalls. Areas of particular concern include:

- confidentiality – bidders need to ensure that appropriate confidentiality

agreements are entered into to prevent the triggering of disclosure obligations and increased deal risk;

- insider trading – bidders must comply with Australian insider trading laws, which prevent dealing in securities by persons who have material price sensitive information that is not generally available. Whilst bidders have the benefit of the 'own intentions' exception to any 'dealing' offence (in relation to the price sensitive information that they themselves intend to launch a bid), to avoid a 'tipping' offence they must ensure that any shareholders who enter into pre-bid discussions are prohibited from dealing in securities of the target with third parties whilst in receipt of inside information about a future bid;
- association – it is important to ensure during pre-bid discussions that no 'agreement, arrangement or understanding' (written or otherwise) arises between a bidder and any shareholder for the purposes of controlling or influencing a target's board or affairs or in relation to target securities. Such arrangements may create an association between the parties, requiring aggregation of the parties' relevant interests and potentially resulting in premature disclosure obligations or a breach of the 20 per cent takeover threshold. Discussions therefore typically take place on a tentative and non-binding basis until such time as the parties are ready to enter into a formal agreement;
- collateral benefits – it is unlawful for a takeover bidder to offer a benefit selectively to some (but not all) shareholders that is likely to induce a shareholder to accept a takeover offer. While collateral benefits are not prohibited in the context of a scheme, a shareholder who receives such a benefit may constitute a separate class of shareholder for the purposes of voting on the scheme, which can have adverse consequences in reaching the necessary approvals thresholds;
- pricing issues – while it is possible for a bidder to acquire a pre-bid stake at a lower price than the eventual offer price, the price paid for any securities acquired in the four-month period prior to a bid will operate as a minimum price for that eventual bid; and
- disclosure of shareholdings – an acquirer must give notice to a target and the ASX if it, either alone or together with associates, acquires an interest in five per cent or more of the voting securities of the target (see section 7, below).

2.6 Are the directors of the target company under any particular obligations or duties in the period leading up to a bid?

Directors of the target company do not owe any special duties in the context of a takeover bid. However, their general duties become more acute (and subject to greater scrutiny) in the period leading up to, and during, a takeover bid.

The fundamental obligation of directors is to act *bona fide* in the interests of the company and for a proper purpose. Directors must also act with due care, skill and diligence in assessing any proposal. This will include obtaining appropriate information in order to assess the company's value. Where necessary, directors need to obtain professional advice, such an engaging an independent expert.

Directors must ensure that material provided to shareholders remains current and correct after it has been published and ensure compliance with the company's continuous disclosure obligations under the ASX listing rules.

Directors must also take care that any of their actions, including defensive actions, must not give rise to a declaration of unacceptable circumstances by the Panel. Action by the target's directors to frustrate a bid or a potential bid (in particular, any action taken by the target which could trigger a condition to the bidder's offer or may otherwise lead to that offer being withdrawn or not proceeding) may constitute unacceptable circumstances because it deprives shareholders of the opportunity to consider the bid.

Target directors also need to carefully consider the implications of entering into any exclusivity arrangements with the bidder, particularly having regard to the fiduciary duties which they owe to the target and its shareholders.

3. ANNOUNCEMENT OF A BID

3.1 At what stage does a bid have to be announced?

As described in section 2.2, above, where the target and/or bidder are listed on the ASX, they will be required to announce a proposed takeover on approach to the target unless the approach and associated discussions with a target fall within a permitted exception to the general continuous disclosure obligations.

Generally speaking this means that a takeover bid must be announced when:

- the parties have signed an agreement or reached agreement on all substantive terms; or
- the takeover is no longer confidential (eg, has been leaked to the market).

3.2 Briefly summarise the information which needs to be announced at this stage

There are no prescriptive requirements for the initial ASX announcement in relation to a takeover. The information announced will depend largely on the driver for announcement and the stage the transaction has reached.

In circumstances of a leak, an announcement may just disclose that the bidder is considering making an offer or that the parties are in discussions in relation to a potential transaction.

If the parties have reached agreement or the terms of a bid are settled, then the initial announcement will need to include any information that a reasonable person would expect to have a material effect on the price or value of the target company's securities. This will commonly include:

- the bid price;
- indicative offer timetable;
- major bid conditions; and
- the proposed financing arrangements.

4. BID TIMETABLE

4.1 Please provide a brief overview of the bid timetable, assuming that the bid is recommended by the board of directors of the target

An uncontested off-market bid will usually take a minimum period of three months from announcement to completion. The following provides a

general overview of an Australian takeover bid timetable:

- announcement – bid is announced to the market;
- bidder's statement – bidder must prepare a bidder's statement, serve it on the target and lodge it with ASX and ASIC within 21 days of announcement. The bidder's statement is then dispatched to all shareholders;
- target's statement – the target must prepare a target's statement, serve it on the bidder and lodge it with ASIC within 15 days of receiving notice from the bidder that the bidder's statement has been dispatched. The target statement is then dispatched to all shareholders;
- offer period – the offer period starts on the day the offer is first made and must be open for a minimum of one month and a maximum of 12 months;
- payment of consideration – consideration must be paid within one month of the later of an acceptance and the offer becoming unconditional;
- compulsory acquisition – subject to meeting the required thresholds, the bidder may compulsorily acquire outstanding shares within one month of the end of the offer period.

4.2 Are there any material differences if the bid is hostile (ie, unsolicited) and/or if there are competing bidders?

If a bid is contested by the target company, or if another bidder announces a competing bid, the period for the takeover bid may be substantially longer while the bidder attempts to secure control or reach the compulsory acquisition thresholds.

4.3 What are the key documents which the shareholders of a target company would typically receive on a bid?

Bidders are required to prepare and dispatch a bidder's statement to shareholders containing prescribed information about the bidder and the terms of the bid (and which also normally contains the formal 'offer' to shareholders). Bidder's statements are lodged with ASIC, ASX and the target and then sent to target shareholders along with acceptance forms to complete and return.

A target is similarly required to lodge and despatch a target's statement to shareholders in response. Target's statements are required to set out prescribed information to assist shareholders in considering their response to a takeover bid, including the recommendations of the target's directors as to whether or not to accept the bid. The target's statement must also be accompanied by an independent expert's report if the bidder and its associates has a voting power of over 30 per cent in the target or both companies share a common director. However, an independent expert's report is commonly produced even when it is not strictly required by law as a target board will often seek to rely on the backing of an independent expert's report to justify its valuation of, and response to, a bid.

5. FUNDING AND CONSIDERATION

5.1 At what stage does a bidder need to have funding in place? Are there any legal or regulatory requirements which the bidder must satisfy to show that its funding is sufficient?

A bidder must have a reasonable expectation of being able to fund a bid

before announcing it (which generally means having sufficient cash reserves and/or binding commitments for debt financing).

There are no strict legal or regulatory requirements in terms of establishing the sufficiency of funding. However, the bidder must disclose the material details of its funding arrangements in the bidder's statement. Also, the Panel may declare unacceptable circumstances if it is not satisfied that the bidder has a reasonable expectation of funding. Panel guidance indicates that a bidder would be unlikely to have a reasonable basis for external funding that is subject to:

- documentation without a binding commitment;
- internal approval by the lender;
- unusual repayment or expiry provisions that may result in the funding not being available to pay for acceptances; or
- conditions precedent to drawdown, unless it is likely that the conditions will be satisfied or waived when the bid becomes unconditional.

5.2 Can the consideration offered by a bidder take any form? Are there any special requirements the bidder must satisfy if the consideration is otherwise than in cash?

Consideration for an off-market takeover bid may be cash, securities or a combination of both.

If securities are offered as part of the consideration, the bidder's statement must satisfy the prospectus content requirements under the Corporations Act as well as the bidder's statement content requirements. However, in substance these are not dissimilar.

The bidder will also need to consider any relevant foreign securities law issues associated with offering securities to foreign shareholders. Bidders often provide for a sale facility for foreign holders where the foreign shareholders receive the net proceeds of sale of the relevant securities in cash.

6. CONDITIONS

6.1 Can a bid be made subject to the satisfaction of any pre-conditions? If so, is there any restriction on the content of any such pre-conditions?

Yes, an off-market takeover bid may be subject to the satisfaction of pre-conditions (ie conditions precedent to the formation of the takeover contract). If a pre-condition is included in a bid, an acceptance by a shareholder does not result in a takeover contract with the bidder and the shareholder may withdraw its acceptance at any time until the condition is satisfied. This ability to withdraw acceptances may be considered a disadvantage to including such conditions from the bidder's perspective. However, if the bidder is foreign then any FIRB condition (see section 1.3, above), should be drafted as a pre-condition in order to comply with the relevant legislation.

Australian law prohibits certain conditions in takeovers, including a pre-condition or other condition:

- that the offer may be withdrawn if the number of acceptances exceeds a specified number;

- that the bidder may acquire securities from some, but not all, persons accepting offers under the bid;
- that shareholders must approve payment of compensation for loss of office to a director, secretary or executive officer of the target company or a related body corporate; or
- the fulfilment of which depends upon an opinion, belief or other state of mind of the bidder or an associate, or the occurrence of some event within the sole control of the bidder or associate.

6.2 What conditions are usually attached to a bid itself? Other than as a result of law and regulation specific to particular sectors and/or bidders are there any conditions which are mandatory?

The nature and extent of any conditions attached to a bid are largely at the discretion of the bidder. Examples of common conditions for off-market bids include:

- that the bidder receives acceptances in respect of a specified minimum percentage of target securities, usually 50.1 per cent (which normally gives the bidder control of the target) or 90 per cent (which normally allows compulsory acquisition to proceed);
- that no transactions which affect a target's share capital or involve the sale of a substantial part of its business occur in relation to the target or its subsidiaries;
- that certain regulatory approvals are received (for example, FIRB or ACCC approval); and
- that there are no material adverse changes in the financial position of the target.

If the offer consideration includes securities and the bidder's statement states or implies that the securities are to be quoted on a financial market (whether in Australia or elsewhere), the offer is subject to a mandatory condition that:

- an application for admission to quotation will be made within seven days after the start of the offer period; and
- permission for admission to quotation will be granted no later than seven days after the end of the offer period.

6.3 Is the bidder able to rely on the fact that a condition is not satisfied as a means of not proceeding with the bid?

If at the end of the offer period the remaining conditions are not satisfied or waived, all acceptances under the offer are void and no securities are acquired. In such circumstances, the bidder would not be required to proceed with the bid.

However, as noted in section 6.1, above, a condition which relies upon an opinion, belief or other state of mind of the bidder or an associate, or the occurrence of some event within the sole control of the bidder or associate, is prohibited.