FDI and M&A Legal Guideline: M&A in Australia

1. M&A laws and regulations & regulatory approvals

1.1. What are the principal laws and regulations applicable to M&A transactions in relation to listed and private company in your jurisdiction? What are the major issues dealt with in such laws and regulations?

The principal laws and regulations that regulate M&A transactions of Australian entities (as opposed to operations that operate in Australia) are:

- the *Corporations Act 2001 (Cth)* (**Corporations Act)** and regulations made under that Act including the *Corporations Regulations 2001* (**Corporations Regulations**). These prescribe (among other things):
  - procedures and processes for arrangements (being a common takeover structure) under which a company's assets and obligations may be transferred to the acquirer;
  - obligations in relation to takeover bids and the process;
  - obligations in relation to schemes of and
  - notice periods for convening shareholder meetings which may apply where a proposed transaction requires shareholder approval;
- in certain cases (where applicable), the following:
  - the FATA and FATR; and
  - the *Competition and Consumer Act 2010* (Cth) and regulations made under that act;
- government policy – including policies developed by the Australian Securities and Investments Commission (ASOC) and the Takeovers Panel);
- for listed Australian entities, listed Australian managed investment schemes and unlisted Australian companies with more than 50 shareholders, the rules in Chapter 6 of the Corporations Act and related regulation (together, the **Takeover Rules**); and
- for listed entities – the rules of the relevant stock exchange.

For private companies in Australia, it is common to see constitutions, shareholders agreements, or other contractual arrangements that restrict or impose procedural obligations on shareholders or the target company in respect of sales of shares in the target or sales of assets by the target (as the case may be).

1.2. Are there any foreign investment review required for foreign buyers in M&A? If so, please give brief details (such as trigger threshold, relevant authority and timing requirements).

See above section.

1.3. Are there any merger control required in M&A? If so, please give brief details (such as trigger threshold, relevant authority and timing requirements).

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For entities that are subject to the Takeover Rules, a key threshold is the 20% rules which prohibits the acquisition of a "relevant interest" in voting securities of an entity if that the acquisition would result in any person's (even a person other than the acquirer) "voting power" going from below 20% to 20% or more, or from above 20% to below 90% (**20% Rule**) unless an exception applies. For this purpose:

- the concept of "relevant interest" is broad and covers any situation where a person has direct or indirect control over the voting or disposal of a security;
- "voting power" in an entity is the aggregate of that person's "relevant interests" in voting securities and the "relevant interests" of that person's associates;
- the percentage threshold is determined by reference to the aggregate voting power of a person as a percentage of all voting shares or interests on issue; and
- "association" has a broad meaning including all entities within the same corporate group and persons who are deemed to be working together.

Exceptions to the 20% rule include acquisitions of relevant interests:

- under a takeover bid;
- as part of a scheme of arrangement with the approval of shareholders in the targe;
- under a "creep" acquisition (i.e. 3% every 6 months);
- under a downstream acquisition (i.e. acquisitions of shares in listed entities which hold securities in a target;
- under a rights issue; or
- as a result of exercising a security interest.

1.4. Are there any other governmental and regulatory approvals required for foreign buyers in M&A? If so, please give brief details (such as trigger threshold, relevant authority and timing requirements)?

See section 2 above.

2. M&A in relation to listed company

2.1. What are the principle methods of acquisition?

Commonly used takeover structures are:

- Takeover bid – an offer by the bidder to shareholders in the target entity. If the bidder acquires at least 90% of the securities in the target, the bidder will be entitled to compulsorily acquire the outstanding securities in the target.

- Scheme of arrangement – which is a statutory procedure between a target company and its shareholders under which a bidder acquires all of the shares in the target company. The transaction must be approved:
  - by target shareholders at a general meeting of the target (**Scheme Meeting**); and
  - by the court.

  A scheme, once approved, will bind all target shareholders.

  Similar regimes apply to acquisitions of interests in entities that are not companies (e.g. trusts or managed investment schemes). For simplicity the following focuses on the treatment of schemes of

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arrangements for companies.

Less commonly used takeover structures include:

- for a company – selective capital reductions/buybacks – where all other shareholders' are bought out; and
- for other entities – equivalent transactions which operate to reduce the interests of securityholders in that entity.

2.2. In what circumstances (if any) is a mandatory bid obligation incurred?

A takeover bid is mandatory where a person acquires a "relevant interest" that triggers the 20% Rule without an exception applying to that increase.

Determining a person's relevant interest requires a detailed analysis of the nature of the interests held by both the person and the person's associates, and who qualifies as an associate also requires a detailed review of the nature of the relationship.

2.3. Is there a minimum price at which the offer must be made?

An offer for securities under a takeover bid must be:

- at a bid price that is not lower than the price which the bidder paid for a target security within the previous 4 months;
- Must be the same to all recipients;
- the offer period must be no less than 1 month and no more than 12 months;
- include no special terms for individual target security holders; and
- not be subject to self-triggering bid conditions.

2.4. How can the function of the board of directors of the target impact a proposed acquisition?

Takeover bids – The board of directors of the target must issue a "target statement" setting out the target board's recommendation in respect of a takeover bid. While a negative recommendation does not legally restrict an offeree from accepting a takeover bid, the target company's recommendation may discourage offerees from taking up the offer.

Schemes of arrangement – Schemes require participation from the target, and the board of directors of the target can approve or reject the target's entry into a scheme.

2.5. What key documentation is needed in the acquisition?

While documentation can be extensive, we have set out the key documents below.

Takeover bids:

- a "bidder's statement" is required to be lodged with ASIC and after publication of that document;
- a bidder's statement must contain all offer terms, the conditions applicable to the bid, and other relevant information related to the bid, e.g. the source of funding for the bid and the intention of the bidder's in respect of the target; and

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- independent expert's report including a recommendation as to whether or not the proposed scheme is in the best interests of target securityholders if the bidder has an interest in 30% or more of the securities in the target entity.

Schemes of arrangement:

- scheme implementation agreement between the bidder and the target which will typically contain:
  - the steps that the bidder and target must perform to implement the scheme;
  - the conditions to the scheme;
  - restrictions on the target's conduct of business before the scheme becomes effective; and
  - deal protection mechanisms, for example in relation to break fees, exclusivity, matching rights and voting agreements;
- scheme booklet – prepared by the target with input from the bidder in respect to certain sections. The scheme booklet must explain the effect of the scheme and contain all the information that is material to a shareholder's decision as to whether to vote in favour of the scheme and convene a Scheme Meeting. If new information arises, or there is a variation to the terms of the scheme, after the scheme booklet has been sent to target shareholders, that development will need to be drawn to the attention of the target shareholders as a supplementary disclosure. The dispatch of the scheme booklet requires approval of the court;
- independent expert's report including a recommendation as to whether or not the proposed scheme is in the best interests of target shareholders – required if:
  - the bidder has an interest in 30% or more of the shares in the target company; or
  - the bidder and the target company have one or more common directors,

  and the usual market practice for schemes is for an independent expert's report to be commissioned and provided to shareholders and ASIC even if not legally required;
- scheme of arrangement – the document that records the terms and conditions of the proposed scheme between the target and its shareholders. This document requires approval by:
  - shareholders; and
  - the Court; and
- deed poll containing an undertaking by the bidder in favour of all target shareholders to perform its obligations under the scheme if approved.

2.6. Do acquisition documents require pre-approval by any regulatory body prior to publication?

Yes, in relation to schemes (but not takeover bids which are lodged with ASIC after publication):

- ASIC must have a reasonable opportunity (generally 14 days) to examine the scheme documents and make submissions in court in relation to the proposed scheme before the first court hearing. This is less an approval process and more a procedural requirement.
- Scheme documents require court approval for implementation and dispatch, as described under section 3.5.

3. M&A in relation to private company

3.1. Are there any special rules in relation to the transferring of a business (compare with the simple share or asset acquisition)?

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Not generally, however many industries are subject to particular rules or licencing requirements that apply to that field and which may require approvals or consents to be provide by third parties.

3.2. Do labor unit, works councils and other stakeholders (other than the vendors of the target) play a role in M&A?

Not generally.   Employees and employment organisations may have a larger role in specific transactions where there are highly unionised workforces, although these concerns tend to be social and political rather than legal.

3.3. What are the principle minority shareholder rights given by law?

Minority shareholders have, under the Corporations Act, may have rights to:

(a) minimum notice periods for the convening of shareholder meetings;
(b) information material to voting on resolutions; and
(c) mandatory approvals required for transactions under which directors or their related parties receive benefits.

Of the above, (b) and (c) are typically more applicable to shareholders in public companies (listed or unlisted). This is because sales of interests in private companies - being processes which normally require shareholder (including minority shareholder participation) are a fundamentally different from transactions relating to public companies.

Certain other rights also exist under the Corporations Act, but often do not apply due to the provisions of a company's constitution overriding them.   This is usually a subject of due diligence prior to entering into transactions.

The series on the investment and M&A laws in the member countries of RCEP is launched by DeHeng Law Offices. In each article of the series, a leading local law firm is invited to offer an overview of investment and M&A laws in the jurisdiction.

The above answers are prepared by
Jane Liu, Consultant
Anthony Latimer, Partner
Ivan Rubinstein, Partner
Albert Cheung, Lawyer

*from **Kardos Scanlan** in Australia by April 8th, 2022.*

For more information, please contact us via crossborder@dehenglaw.com