



## **An Introduction to Public Company Acquisitions**

**A courtesy guide prepared by Swaab Attorneys**

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## Takeovers

The rules relating to takeovers in the *Corporations Act 2001* apply not only to listed companies, but also to unlisted companies with more than 50 shareholders and to listed Managed Investment Schemes.

The general rule is that a person must not acquire shares in a company where that person's voting power increases from 20% or less to more than 20%, or increases at all from a starting point of between 20% and 90%.

However, this type of acquisition is permitted:

- § where a bidder makes a binding offer to acquire all or part of the shares in a company from all the shareholders (*takeover*)
- § where the acquisition is *approved by a resolution* of the shareholders of the company in which the acquisition is made
- § where the acquisition is by a person who has held at least 19% of the shares for the period of six months prior to the acquisition, and that person's voting power in the company does not increase by more than 3% every six months (*creep exemption*)
- § where shares are offered to all shareholders on equal terms (*rights issue*).

## On market and off market takeovers

Takeovers can be either *on-market* or *off-market*.

On-market acquisitions are effected by a broker through the Australian Stock Exchange (ASX).

Off-market acquisitions may take the form of a bid (through an offer document), a scheme of arrangement (which requires court and shareholder approval), or through a dual listed company (where two companies conduct business as a single economic entity).

## Takeover bids

A strict timetable is imposed and there are restrictions on dealing in shares during a bid.

The bidder will make an ASX announcement and issue its offer document. The target may issue a statement in response to the offer. Bids can be either recommended by the target board or can proceed on a hostile basis.

Pre-bid acceptance agreements (or irrevocable undertakings) with shareholders of the target will count towards the shareholding of the bidder in relation to the 20% threshold, so the bidder must take care not to trigger a mandatory bid before it is ready.

External factors, such as the influence of ASX movements during the bid process and public conceptions as to the advantages and disadvantages of the bid, may affect the outcome of the bid.

No stamp duty is payable on the transfer of listed securities.

## Offers of shares to the public

*Section 707 of the Corporations Act 2001* states that an offer of securities for sale requires disclosure if it is *off-market* (a sale by a majority shareholder of unquoted shares) or an *indirect sale* (a sale within 12 months of an issue made to allow the shareholder to on-sell the shares) unless it falls within one of the exemptions.

This means that a public company (a company with 50 or more non-employee shareholders) can offer shares for sale providing that it complies with the disclosure requirements in Chapter 6D (which sets out the requirements for the issue of a prospectus or equivalent document to prospective investors).

*Section 734 of the Corporations Act 2001* contains a restriction on advertising (except where the offer is exempt from disclosure).

*Section 736 of the Corporations Act 2001* contains a restriction on hawking securities by unsolicited phone calls or meetings (although it appears that email is not covered by this section).

Where documents are issued to the public, the law relating to deceptive and misleading conduct applies.

*Section 1308 of the Corporations Act 2001* makes it an offence to include misleading statements in a Corporations Act document.

*Section 52 of the Trade Practices Act 1974* makes it an offence to engage in misleading or deceptive conduct relating to trade or commerce.

*Section 1041H of the Corporations Act 2001* makes it an offence to engage in misleading or deceptive conduct relating to financial services or products.

*Section 12DA of the ASIC Act 2001* makes it an offence in trade or commerce to engage in misleading or deceptive conduct relating to financial services.

## Shareholder voting rights

5%	Can requisition an Annual General Meeting.
10.1%	Can block compulsory acquisitions under <i>sections 661/664 of the Corporations Act 2001</i> (see below).
25.1%	Can veto special resolutions in general meeting, including: <ul style="list-style-type: none"> <li>§ adoption or alteration of Constitution</li> <li>§ change of name</li> <li>§ change of company type</li> <li>§ selective reduction of share capital</li> <li>§ selective buy back of shares</li> <li>§ provision of financial assistance</li> <li>§ variation of class rights where no Constitution exists</li> <li>§ resolution to wind up the company voluntarily.</li> </ul>
50.1%	Can veto or pass ordinary resolutions in general meeting, including: <ul style="list-style-type: none"> <li>§ remove directors from board</li> <li>§ authorise a final dividend</li> <li>§ authorise capitalisation of reserves</li> <li>§ approve transaction with connected party</li> <li>§ removal of auditor prior to the expiry of his term.</li> </ul> <p>Note the distinction between a <i>simple majority</i> (50.1% of those present) and an <i>absolute majority</i> (50.1% of those entitled to vote).</p>
75%	Can pass special resolutions in general meeting (see above).

## Acquisition thresholds

5%	Must notify target and Australian Securities and Investments Commission ( <i>ASIC</i> ) of the shareholding and any subsequent changes of 1% or more.
15%	Foreign Investment Review Board ( <i>FIRB</i> ) approval may be required if a foreign entity acquires 15%.
20%	<p><b>Unconditional offer</b> is required for a listed company or an unlisted company with 50 or more shareholders, where a shareholder reaches 20% or where the holding is increased between 20% and 90% (subject to the exemptions in <i>section 611 of the Corporations Act 2001</i>).</p> <p><b>Creep Rule</b> – no requirement for an unconditional offer to be made if the holding of a shareholder with more than 19% increases by less than 3% every 6 months.</p>
90%	Compulsory acquisition of minority shareholders possible under <i>sections 661/664 Corporations Act 2001</i> .

The corporate team at Swaab Attorneys is committed to working with companies to help them meet their ambitions. If we can help you with any of the issues raised in this publication, please contact either Fred Swaab or Alistair Jaque. We would be very pleased to discuss any issues with you.

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This document is intended to give an overview of the issues involved in public company acquisitions in Australia. It is not intended to be fully comprehensive or to be a substitute for legal advice.