ASIC regulation of corporate finance: January to June 2018

August 2018

Report 589

About this report

This report is for companies, lawyers, corporate advisers and compliance professionals working in corporate finance. It discusses our key observations for the period from 1 January to 30 June 2018, and our areas of focus for the next six months.

About ASIC regulatory documents

In administering legislation ASIC issues the following types of regulatory documents.

Consultation papers: seek feedback from stakeholders on matters ASIC is considering, such as proposed relief or proposed regulatory guidance.

Regulatory guides: give guidance to regulated entities by:

- explaining when and how ASIC will exercise specific powers under legislation (primarily the Corporations Act)
- explaining how ASIC interprets the law
- describing the principles underlying ASIC's approach
- giving practical guidance (e.g. describing the steps of a process such as applying for a licence or giving practical examples of how regulated entities may decide to meet their obligations).

Information sheets: provide concise guidance on a specific process or compliance issue or an overview of detailed guidance.

Reports: describe ASIC compliance, regulatory or relief activity or the results of a research project.

Disclaimer

This report does not constitute legal advice. We encourage you to seek your own professional advice to find out how the Corporations Act and other applicable laws apply to you, as it is your responsibility to determine your obligations

Contents

About this report

ASIC's Corporations team regulates public corporate finance activity and control transactions in Australia. We also play a key role in corporate governance and handle reports of misconduct about directors.

This report sets out what we did over the period 1 January 2018 to 30 June 2018. It gives key statistics and observations from our oversight of transactions during the period. The report also explains what we will be focusing on for the July to December 2018 period.

Corporate finance meetings in your capital city

We host Corporate Finance Liaison meetings twice a year in Sydney, Melbourne, Brisbane, Perth and Adelaide.
This report covers issues to be discussed at our meetings in September 2018. We will also discuss issues that have arisen since 30 June 2018 and answer your questions.

Our activity in January to June 2018 at glance

Fundraising

229 original disclosure documents lodged

33% of fundraisings required additional disclosure

24 interim stop orders issued

61 applications for relief regarding fundraising

$8.6bn in offers (total sought to be raised)

143 supplementary or replacement documents lodged

2 final stop orders issued

72% of fundraising relief applications granted

Mergers and acquisitions

16 transactions launched via takeover bid

$27.5bn total implied value of targets subject to control transactions

65 applications for relief regarding takeovers

18 applications for relief from substantial holding provisions

13 control transactions launched via scheme

17 approvals under item 7, s611

68% of takeover relief applications granted

56% of substantial holding relief applications granted

Other corporate governance transactions

116 notices of meeting with related party benefits

43 requests for no-action letter regarding non-compliance with financial reporting provisions

87 applications for financial reporting relief

$3.4bn of share buy-backs were undertaken by 110 companies

95 s218 applications to reduce lodgement period

0% of requests for no-action were granted

48% of financial reporting relief applications granted

Note 1: The statistics for applications granted are based on those that were decided before the end of the period. The applications that were not granted were either undecided, withdrawn or refused.

Note 2: The low percentage of financial reporting applications that were granted partly reflects the fact that many of these applications were made without legal advice and were incomplete or incorrect.

Note 3: The total amount sought to be raised in offers was corrected on 18 September 2018.

Lodgement and fees

What documents can I lodge electronically?

The following documents can now be lodged electronically:

- prospectuses, including supplementary and replacement prospectuses
- bidder's and target's statements, including supplementary statements
- Pt 5.1 scheme documents
- notices of meeting, including for related party transactions.

You can continue lodging in hard copy if you prefer. Continue to send applications to applications@asic.gov.au

Action: Lodging a document electronically

To lodge an eligible document electronically, you need to comply with the terms of the Email Lodgement Service User Agreement:

- email the document to corporations.lodgements@asic.gov.au
- the document must be a machine-readable PDF with an electronic signature
- complete and attach the email lodgement form
- the email and attachments must not be more than 10 MB in total
- agree to pay fees for the lodgement.

For more information on lodging fundraising and takeover documents by email, and to download the email lodgement form, see ASIC's website.

Industry funding model

Most of ASIC's regulatory costs are now being recovered from the industry sectors we regulate, through a combination of general industry levies (90%) and fees for service that are attributable to an individual entity (10%).

Invoices for industry levies will be issued to regulated entities in January 2019 for the 2017–18 financial year.

Fees for service

New fee-for-service pricing took effect from 4 July 2018. In most cases, for corporate finance related matters, the fee for an exemption, modification, consent, approval or no-action letter is **$3,487**. The fees for common document lodgements are set out on page 5.

Apart from the fee amount, the way in which fees are charged has not changed from the approach set out in Regulatory Guide 21 *How ASIC charges fees for relief applications* (RG 21). For example, this means that the total fees paid for an application is calculated per head of power (per chapter of the *Corporations Act 2001* (Corporations Act)) and per entity.

ASIC does not have the power to waive these fees and we cannot refund fees if you decide to withdraw an application after it has been made.

Payment

The best way to pay fees for applications and lodgement of documents is by cheque. Please send cheques in an envelope addressed to:

FE Registration Services, ASIC
PO Box 9827
Sydney NSW 2000 *or* Melbourne VIC 3001

Fees for commonly-lodged documents

Fundraising

Prospectus	$3,206
Supplementary prospectus	$802
Replacement prospectus	$802
Document incorporated by reference	$321

Other corporate transactions

Notice of meeting for related party benefit	$802
Application to shorten period of notice to ASIC under s218(2)	$3,487
Application under Ch 2M, Ch 6, Ch 6C, Ch 6D	$3,487
Notice of meeting with a proposed shareholder resolution under item 7 of s611	$0

Mergers and acquisitions

Bidder's statement – Off-market bid	$5,264
Bidder's statement – Market bid	$5,130
Target's statement	$2,565
Supplementary bidder's or target's statement	$802
Notice of variation of bid	$802
Pt 5.1 draft explanatory statement	$5,290
Application for statement of no-objection from ASIC under s411(17)(b)	$3,487
Registration of Pt 5.1 explanatory statement	$321

For more information, see Information Sheet 30 *Fees for commonly lodged documents* (INFO 30).

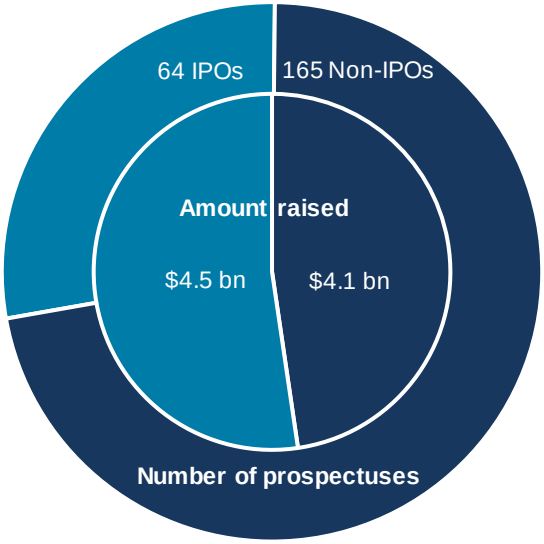
Fundraising

Key statistics for the January to June 2018 period

In the period, there were 229 original disclosure documents, seeking to raise approximately $8.6 billion: see Figure 1. This compares with 329 original disclosure documents last period, seeking to raise $5 billion.

Note: This paragraph was corrected on 18 September 2018 to amend the amount sought to be raised.

Figure 1: Types of offers



Note 1: See Table 3 in Appendix 2 for the data shown in this figure (accessible version).

Note 2: The data in this figure was corrected on 18 September 2018 to amend the amount raised by non-IPOs.

Fundraising by banks for regulatory capital purposes (hybrids) continues to dominate corporate finance. A more recent trend is the emergence of listed investment companies (LICs) in the top 10: see Figure 2.

Figure 2: Top 10 fundraisings by amount raised

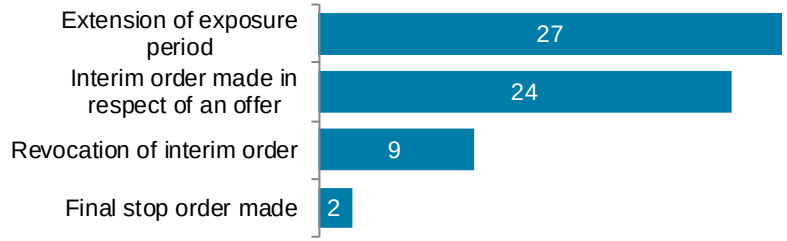
Note 1: See Table 4 in Appendix 2 for the data shown in this figure (accessible version).

Note 2: The data in this figure was corrected on 11 September 2018 to include Jupiter Mines Limited and on 18 September 2018 to include Macquarie Group Limited and Cromwell Property Group.

ASIC intervention in fundraising

There were significantly more interim stop orders this period (10.5%, compared with 1.8% during the July to December 2017 period): see Figure 3.

Figure 3: Form of ASIC intervention in prospectus disclosure

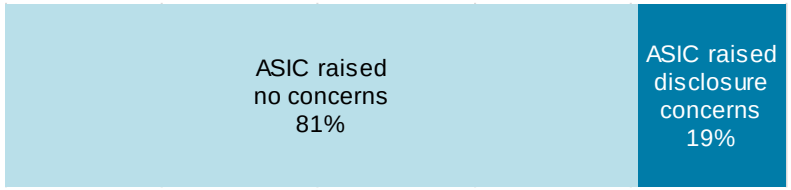


Note 1: See Table 5 in Appendix 2 for the data shown in this figure (accessible version).

Note 2: The two final stop orders were issued in relation to Zaige Waste Management Holding Group (Aus) Limited and Luddenham Property Limited.

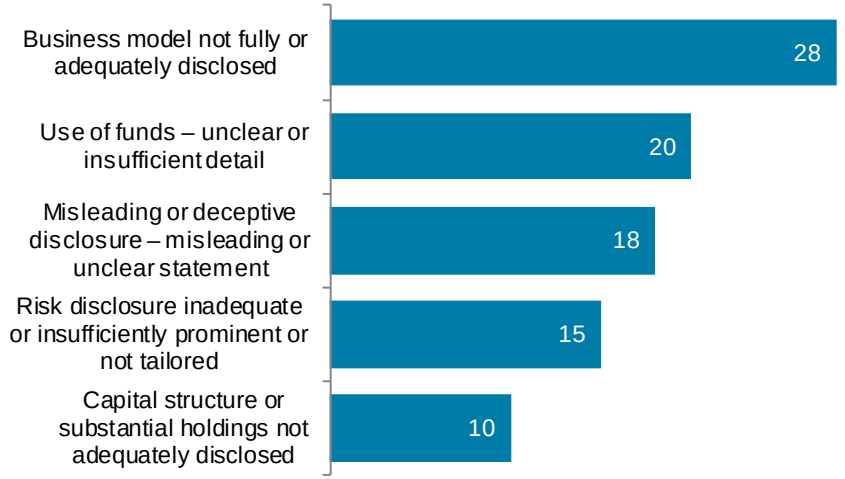
Figure 4 shows how often we intervened in fundraisings and Figure 5 shows why. Figure 6 shows the results we achieved by raising our concerns.

Figure 4: Percentage of prospectuses ASIC raised concerns with



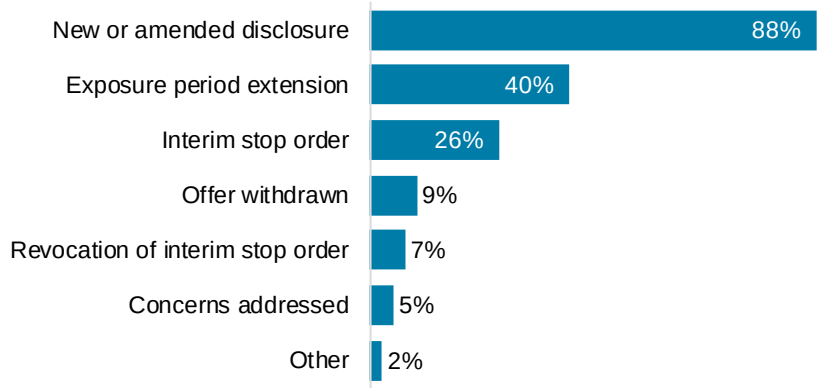
Note 1: See Table 6 in Appendix 2 for the data shown in this figure (accessible version).

Figure 5: Top five disclosure concerns most frequently raised



Note: See Table 7 in Appendix 2 for the data shown in this figure (accessible version).

Figure 6: Results of ASIC raising concerns



Note: See Table 8 in Appendix 2 for the data shown in this figure (accessible version).

Focus on: Promotion of IPOs

Over the next six months we will continue to focus on information about IPOs that appears outside formal disclosure documents. Our research on IPOs last year showed that retail investors can be heavily influenced by this type of information: see paragraph 13 of Report 540 *Investors in initial public offerings* (REP 540).

The law significantly restricts promotion of IPOs outside the prospectus because otherwise retail investors are at risk of making their decisions on incomplete and unbalanced information. However, in our experience, compliance with s734 can be poor:

- For smaller IPOs, we have found some promotional material is misleading (see Case study 1).
- For larger IPOs, there is often a problem with the media citing detail from investor education reports (see 'ASIC takes aim at leaked investor education reports').

See Regulatory Guide 234 *Advertising financial products and services (including credit): good practice guidance* (RG 234).

Case study 1: Forcing corrective advertising

A small resource company was required to remove some misleading statements from their prospectus under an interim stop order, but we subsequently discovered the same statements being used in advertising.

We prepared a modification to Ch 6D that would have prevented the company from accepting any offers until they published a retraction of the statements in a form acceptable to ASIC. The company withdrew the IPO at this point.

ASIC takes aim at leaked investor education reports

Don't leak information to the media about an upcoming IPO or the offer could be disrupted by ASIC intervention.

We are concerned that references to investor education reports are made public through the media, often before the prospectus is lodged with ASIC.

Sometimes articles based on these reports appear to promote the IPO in a way that may be misleading, particularly for retail investors. For example, they refer to the analyst's valuation or long-term forecasts that do not appear in the prospectus. An investor cannot assess this information if they do not have access to the full report. We also note that institutional investors tend to treat investor education reports with some scepticism due to perceived conflicts of interests (see paragraph 121 of REP 540), which retail investors may not appreciate.

In these circumstances, we may require the IPO company to publish a retraction. The retraction will explain the information does not come from the prospectus and should not be relied on.

We may also obtain investor education reports and review them for compliance with Regulatory Guide 264 *Sell-side research* (RG 264). This may result in further regulatory actions that may be detrimental to the IPO. We encourage investment banks and licensees involved in managing IPOs to have robust processes to ensure their investor education reports do not become public.

Royal Commission and IPOs

The Royal Commission into misconduct in the banking, superannuation and financial services industry should be carefully considered for financial service businesses seeking to list.

During the period:

- in one live IPO, we closely examined and queried the adequacy of disclosure about the risks associated with a wealth management company's vertical integration model
- another company involved with the provision of credit decided to withdraw its IPO at the last minute after discussions with ASIC about its loan agreements.

If a financial services company raises funds through an IPO over the coming period, we consider that investors should be given candid information about how the business may be affected by the issues being raised in the Royal Commission. Depending on the business model, this may include:

- relevant historical and current interaction with regulators and possible outcomes
- the specific regulatory risks that the business may encounter, including risks relating to treatment of consumers.

We encourage you to discuss these issues with the Corporations team before the prospectus is lodged.

We have discussed the potential implications of the Royal Commission for financial service firms with the industry – see:

- *How financial services firms can act to meet community expectations through transparency and accountability*, speech by ASIC Deputy Chair, Peter Kell, ASIC Regulatory Update, Pritchitt Partners, Melbourne, 17 July 2018
- *The trust deficit and superannuation*, speech by ASIC Chair, James Shipton, Financial Services Council Summit 2018, Melbourne, 26 July 2018

Pre-commitment by institutional investors

Statements about pre-commitment to an IPO by institutional investors (also called 'cornerstone investors') may be influential to retail investors and should be made with care. There is a risk that these statements could be misleading and/or cause issues for market integrity.

Retail investors may interpret a large pre-commitment by institutional investors as a sign the IPO is a good investment and decide to follow suit. Our research found that investors perceived 'market interest' as a strong indication that an IPO was likely to perform well: see Whereto Research, *Factors that influence retail investors in IPOs* (PDF 761 KB), attachment to REP 540, p. 49.

The issues that might arise when there is a pre-commitment by institutional investors will depend on the circumstances. In general, issues that we may consider may include:

- the nature of the pre-commitment (e.g. is it binding or just a statement of intention, is it conditional and, if so, what are the conditions?)
- the price at which the institutional investor has made their commitment
- if the institutional investor is effectively an underwriter, whether any fees or interests they receive have been disclosed (as required under s711(2)–(4)).

Omitting half-year comparative financial information

Ordinarily, an IPO of an existing business will require at least two years of audited financial information plus the most recent half year of reviewed information and prior period comparative information: see Regulatory Guide 228 *Prospectuses: Effective disclosure for retail investors* (RG 228) at RG 228.89. However, on rare occasions we have permitted companies to omit comparative information where it was either difficult to compile in the circumstances or not material.

Case study 2: No half-year comparatives

A company proposed disclosing two years and nine months of audited information (rather than two years of audited information and an interim six months of reviewed information). In this situation, the company did not have reviewed financial information for the prior nine-month comparative period.

To ensure the financial information was current, we accepted that providing investors with the most recent nine months of audited information was preferable to providing two years of audited information, six months of reviewed information and six months of reviewed prior comparative information.

In another case, the company's business had not commenced during the comparative period (even though the company was in existence) and we therefore accepted the company only providing one year of audited information and six months of reviewed information.

Initial coin offerings and crypto currency

Over the last six months, ASIC's action on initial coin offerings (ICOs) due to misleading or unlicensed conduct has resulted in a number of ICOs being withdrawn or significantly modified.

If you are advising on an ICO, you will need to consider the legal character of the coin or token being offered: it could involve a managed investment scheme, a derivative or a share. If an ICO involves an offer of a financial product, it will need to comply with the Corporations Act.

You also need to consider the Australian financial services (AFS) licensing requirements and whether any platform for secondary trading would be a financial market (requiring a market licence).

Regardless of whether the coin or token offered is a financial product, any promotional material must not be misleading – ASIC has powers to take action on such material under both the Corporations Act and Australian Consumer Law: see Case study 3.

For more information on these issues, see Information Sheet 225 *Initial coin offerings and crypto-currency* (INFO 225).

Case study 3: ICO a preference share

A company proposed to raise funds from investors using an ICO but we had concerns about compliance with the Corporations Act. We imposed a stop order under s739 because:

- the promotional material appeared to be misleading
- the tokens were preference shares and an offer to retail investors would have required a prospectus
- the offeror was a proprietary company and prohibited from making an offer of securities that required disclosure

Chinese company seals

If you have a client that is a company incorporated in the People's Republic of China (PRC), you will need to be familiar with issues and risks relating to the company seal or 'chop'.

Each PRC company is required to have a Company Official Chop, which is registered with the Public Security Bureau. The chop represents the company towards third parties and is binding even without a signature. Poor controls can result in very adverse consequences.

Action: Chops and IPOs

We will look for disclosure about what chops a PRC company has and how their security is managed. The prospectus should explain:

- the procedure for use of the chops and whether logbooks are kept to record transactions
- whether the chops are stored with third-party custodians, such as reputable accountants or lawyers.

We may issue notices to obtain evidence of these controls and procedures.

Experts

Focus on: Independence

Over the next six months, we will be focusing on the independence of experts, including geologists and technical specialists, due to recent problems in this area that are highlighted in the following case studies.

It may seem more cost effective and efficient to get the same expert twice, but not if we require a fresh independent expert report mid-transaction.

Action: Steps toward independence

Consider the following issues to ensure the independence of your expert:

- Start with the engagement. Consider any limitations on providing a genuine opinion during the engagement stages and ensure any actual or perceived risks are managed.
- Consider self-review issues. Will an expert's ability to be objective be compromised by their previous work on the same asset or transaction?
- Experts should engage technical specialists directly, so that the expert has some control over the specialist's work.
- Experts should make inquiries about specialists and consultants engaged for an independent expert report to ensure the existence and application of procedures that comply with the expert's licensing obligations.

For more information, see Regulatory Guide 112 *Independence of experts* (RG 112).

Case study 4: Experts reviewing own work

Experts should not review their own work for 'independent' engagements.

A geologist prepared a JORC estimate and was subsequently engaged to prepare an 'independent valuation' of the same asset in accordance with VALMIN. The VALMIN valuation required a critical assessment of their own previous JORC resource estimate.

In response to our concerns, a different geologist was engaged for the VALMIN assessment. The second geologist came to a very different view about the reliability of the original JORC resource estimate and a substantially different valuation.

Case study 5: Licensee for hire

An expert was engaged after another party had already negotiated the scope and fee payable. The arrangement provided for the licensed expert to receive a portion of the agreed fee in exchange for peer review services, research support and independent expert report sign-off. The other party prepared most of the report and was paid most of the fee but was only licensed to advise wholesale clients.

This type of 'licensee for hire' arrangement involves potential contravention of licensing requirements by the wholesale licensee.

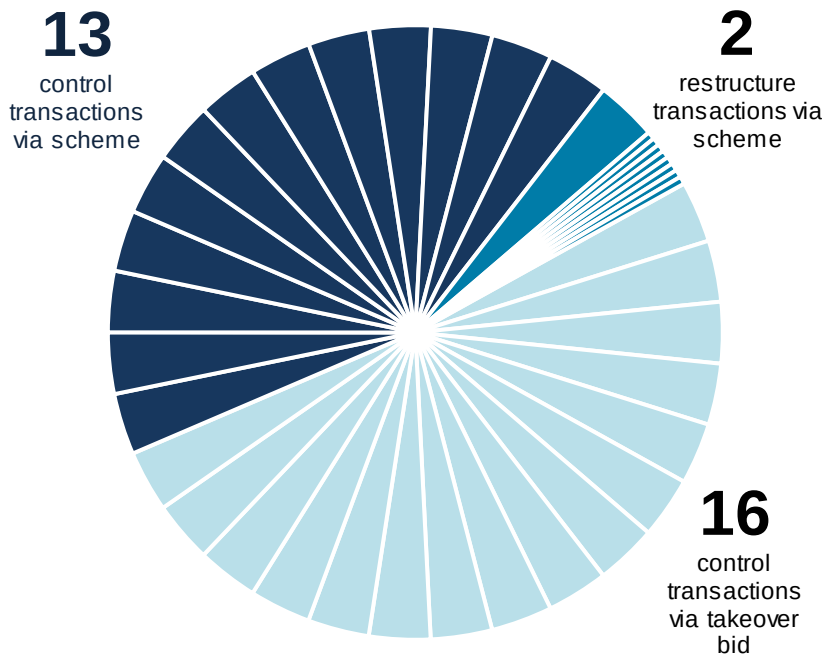
Our independence concern is that the expert's compliance systems, including conflict checks and control over the engagement (including communications with the commissioning party) may not extend to the wholesale licensee. In this case we required another expert to prepare an independent expert report for the transaction.

Mergers and acquisitions

Key statistics for the January to June 2018 period

Figure 7 shows the number of independent control and restructure transactions via bids or schemes of arrangement lodged or registered during the period and the number of bids or schemes involved in each.

Figure 7: Independent control and restructure transactions

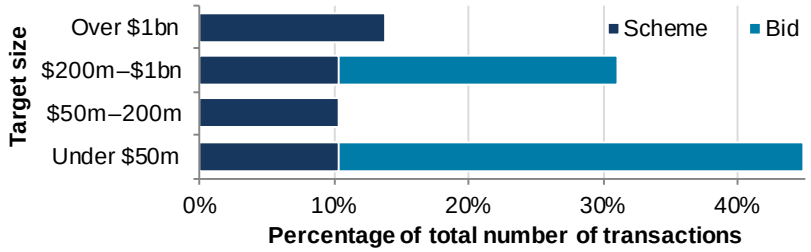


Note 1: One restructure transaction involved eight separate schemes.

Note 2: See Table 9 in Appendix 2 for the data shown in this figure (accessible version).

Figure 8 shows the breakdown of transactions by the implied value of the target, and within those categories, by scheme and bid.

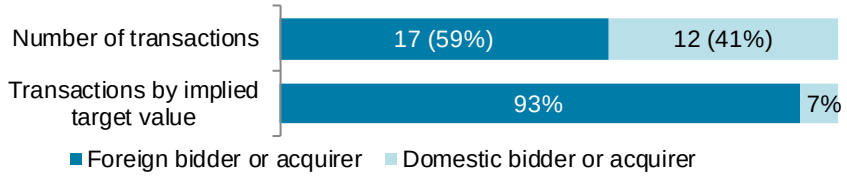
Figure 8: Control transactions by implied target size



Note: See Table 10 in Appendix 2 for the data shown in this figure (accessible version).

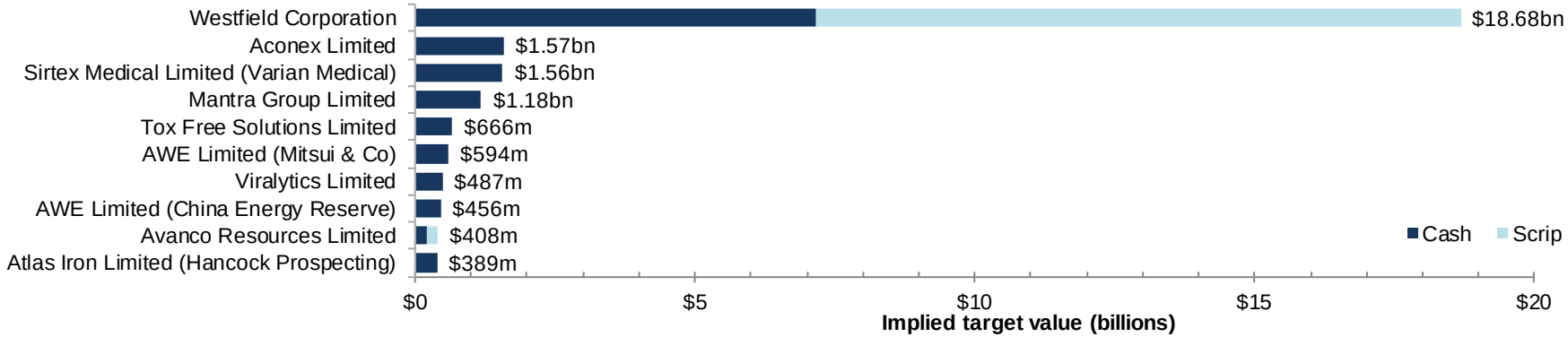
Overseas bidders and acquirers were a key driver of takeovers via bids and schemes during the period, led by Unibail-Rodamco SE's offer for Westfield Corporation: see Figure 9. Even excluding the Westfield scheme, foreign bidders and acquirers were behind 78% of all deal value (based on the collective implied value of all targets).

Figure 9: Foreign and domestic offerors



Note: See Table 11 in Appendix 3 for the data shown in this figure (accessible version)

Figure 10: Largest control transactions via bid or scheme during the January to June 2018 period, by implied target size

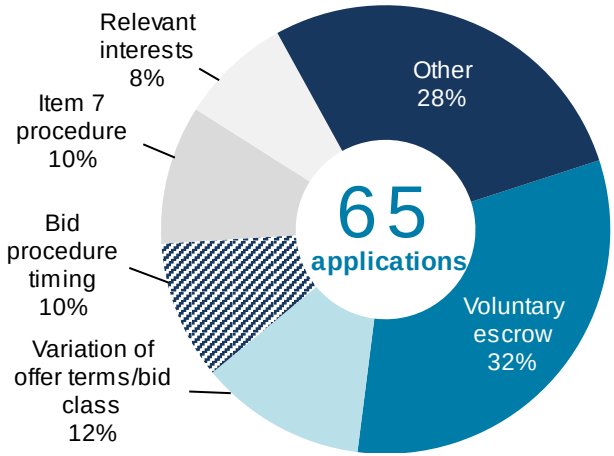


Note: See Table 12 in Appendix 2 for the data shown in this figure (accessible version).

ASIC relief and intervention in control transactions

Figure 11 shows the most common types of Ch 6 relief we considered.

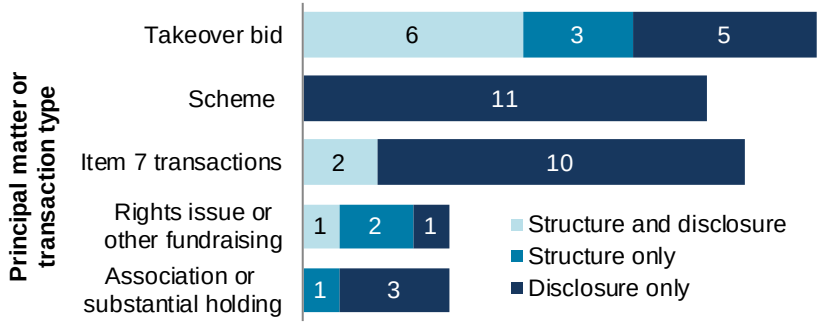
Figure 11: Applications for relief under s655A received during the January to June 2018 period



Note: See Table 13 in Appendix 2 for the data shown in this figure (accessible version).

Most of ASIC's regulatory intervention in control transactions related to takeover bids. In numerous matters, we raised issues with offer terms, 'truth in takeovers' statements and bid structure: see Figure 12.

Figure 12: ASIC intervention during the January to June 2018 period



Note: See Table 14 in Appendix 2 for the data shown in this figure (accessible version).

Focus on: 'Truth in takeovers'

Over the last six months, we have intervened on numerous 'last and final' or 'truth in takeovers' statements by market participants.

These statements have the potential to influence investors' decisions and, given their significance, we may seek to hold market participants to them.

Action: Truth in takeovers

Take the following steps when making truth in takeovers statements:

- Remind any authorised spokesperson about the risk of making unqualified statements.
- Monitor media reporting daily throughout a transaction.
- If a target shareholder will not be bound under Regulatory Guide 25 *Takeovers: False and misleading statements* (RG 25), ensure this is clear in any statement published. Seek clarification if necessary.
- Ensure any consents for third-party statements cover the form and context of the statement's use.
- If a third-party statement is uncertain or unclear, do not publish it merely because the person has provided consent to do so.
- Do not refer in aggregate to non-uniform intention statements or qualifications that are different.
- Present qualifications to statements clearly and with equal prominence to the statement.
- Exercise caution when inviting shareholders to make intention statements in circumstances that mean or imply there is a relevant agreement regarding voting or acceptance that may breach s606.

Case study 6: Clarification required

A newspaper article cited comments made by the chief executive of an acquirer under a proposed scheme. The article quoted the executive as saying the acquirer 'will not move the offer price' without any qualification to the statement. After a query from ASIC, the acquirer issued a clarification that it reserved its right to increase the offer.

In another case, a bidder announced shareholder intention statements for over 20% of the target's shares. While checking whether the bidder had exceeded the takeover threshold, we discovered that the bidder's announcement failed to disclose the shareholders reserved their rights to depart from the statements. We required immediate clarification.

Case study 7: Unacceptable circumstances

We applied to the Takeovers Panel seeking a declaration of unacceptable circumstances because a major target shareholder, Taurus Funds Management Pty Ltd, and two of the target's directors departed from earlier statements that they did not intend to accept the bid by Eastern Field Developments Ltd for Finders Resources Limited.

The initial panel found Taurus should be held to its statement and ordered the cancellation of Taurus' acceptance. The panel did not consider it necessary to cancel the directors' acceptances.

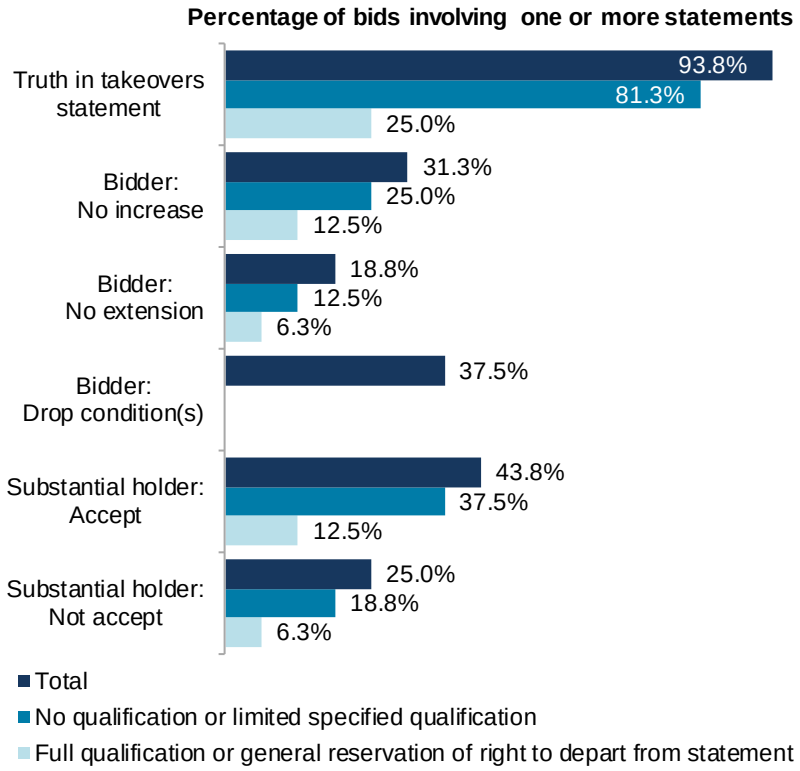
A review panel, in a split decision, cancelled Taurus' acceptance but gave Taurus the right to put the shares at the offer price to the bidder in the future. Taurus was also ordered to compensate investors who acquired shares on market above the offer price after the intention statements were made.

Eastern Field has sought judicial review of the review panel's decision in the Federal Court.

How common are truth in takeovers statements?

'Truth in takeover' statements have become commonplace in Australian takeovers with statements by bidders and target holders the most frequent: see Figure 13.

Figure 13: Truth in takeover statements in takeover bids during the January to June 2018 period



Note: See Table 15 in Appendix 2 for the data shown in this figure (accessible version).

Truth in takeovers – Policy review

We have decided to review RG 25, due to the frequent reliance on the policy and market practices that have emerged since the guidance was published in 2002. We will consider how RG 25 could be updated to provide greater certainty to the market about the application and enforceability of the 'truth in takeovers' policy.

The importance of truth in takeovers is also reflected in the Takeover Panel's recent efforts to provide greater certainty by establishing a timeframe for returning with a new bid after declaring a previous one 'last and final': see Takeovers Panel, *Public Consultation Response Statement: Guidance Note 1 – Unacceptable circumstances*, July 2018.

Bidder versus expert: Commenting on target value

We have been concerned by the approach of some bidders when commenting on expert reports or the value of target securities.

A bidder needs to take care when commenting on the value of target securities – including when challenging an expert's valuation of a target. Importantly:

- a bidder may not have the same level of information as the target's expert (see *Lepidico Limited* [2017] ATP 11)
- disclosures made during a bid on the value of the target securities should meet the requirements in Regulatory Guide 111 *Content of expert reports* (RG 111) and RG 112 to ensure target holders receive a consistent standard of disclosure.

When discussing an expert's report, bidders usually rely on ASIC Corporations (Consents to Statements) Instrument 2016/72, which gives relief from the consent provisions. A requirement of this relief is that the bidder must fairly represent the statement in its commentary.

Analysis by the bidder or the bidder's expert as to what the target's expert should have concluded, had different assumptions been adopted, may not fairly represent the original statement and is unlikely to fall within the scope of this relief.

Action: Bidder commenting on an expert report

Bidders may, where appropriate:

- critique the expert's material assumptions
- highlight apparent inconsistencies in the report.

Bidders should avoid:

- giving an opinion on what the expert should have concluded target securities are worth (whether by substituting and valuing changes in key assumptions, correcting perceived valuation errors, or otherwise)
- introducing a preferred or implied valuation by referring to one or more specific values where the expert has produced a valuation range (even if only as an example within that range)
- referencing a sensitivity analysis selectively or as if it formed part of the expert's adopted assumptions or valuation range, rather than a demonstration of the sensitivity of the valuation and/or assumptions
- including their own valuation that does not meet the equivalent disclosure and independence standards of RG 111 and RG 112.

Top-up clauses in pre-bid agreements

Recently we have seen a few pre-bid acceptance agreements that aim to compensate pre-bid holders if the bidder ends up selling the shares into a higher competing bid (a 'top-up clause').

In our view, top-up clauses can effectively mean a different offer is made to the pre-bid shareholder from that made to other holders – contrary to the equality principle and the purposes underpinning s619(1), and the framework established by s621(3), 622 and 623.

Case study 8 highlights recent examples where we have intervened to address top-up clauses. We will continue to monitor pre-bid agreements and take action where we see agreements that we consider are contrary to the equality principle.

Case study 8: Top-up clauses

A pre-bid agreement contained the usual terms that enabled the bidder to require the pre-bid holder to accept the bid a certain time after the offer opened. However, it also had a top-up clause allowing for an additional payment if the bidder subsequently sold the holding into a higher competing offer.

Given the circumstances of the matter, we advised the bidder and pre-bid holder that if the top-up clause was triggered, we may apply to the Takeovers Panel for orders that the top-up be paid to all holders.

In another matter post the reporting period involving similar arrangements, we obtained a 'truth in takeovers' public commitment from the bidder that it would not take any steps to trigger the top-up clause.

Bid conditions

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

Before dispatching offers, a bidder should check whether any conditions have been triggered and, if so, ensure the triggering events are carved out from the condition. If a bidder does not want to carve out trigger events in this way, they have the right not to proceed with the bid under s670F.

Changing terms during the scheme meeting

Making a last minute change to scheme terms is risky and you should approach ASIC first.

In *Billabong International Ltd (No 2)* [2018] FCA 496, the court was asked to approve a scheme on amended terms to incorporate a last minute increase in cash consideration that was announced during the scheme meeting.

One of the key underlying principles of takeovers is that shareholders are given all necessary information and adequate time to consider that information in the context of a control transaction. Last minute changes to scheme terms can also be coercive. As such, amending the scheme consideration during or immediately before the scheme meeting creates significant risks, even for an increase to a cash offer, and particularly if there is an active or likely auction for control underway.

In the *Billabong* matter we did not object to the scheme, despite the last minute nature of the amendment. This was because of the evidence that the resolution would have been approved even if the scheme consideration was not increased (as shown by the proxy votes lodged before the increased consideration being announced). Votes cast at the meeting after the increased consideration was announced were not determinative of the outcome. We encourage parties considering scheme amendments to approach ASIC first.

Disclosure of relevant agreements relating to a substantial holding

Shareholders should ensure that, when making substantial holding disclosures in connection with a transaction, they provide full copies of all contemporaneous agreements relating to the substantive transaction. It is not sufficient to only attach a preliminary agreement – even if that technically first gave rise to the person's change in voting power.

We are most likely to take action where the timing and sequencing of entering into final documentation appears to suggest avoidance: see Regulatory Guide 5 *Relevant interests and substantial holding notices* (RG 5) at RG 5.305–RG 5.308.

We also note it is inappropriate to redact documents that are attached to substantial holding notices. Full, unredacted disclosure is important to ensure compliance with both the spirit and letter of s671B and to avoid misleading the market.

Case study 9: Substantive disclosure failure

Parties to a joint venture filed substantial holding notices that included a copy of a standstill and exclusivity agreement, but not definitive agreements signed the following day. The definitive agreements were essential to understanding the ongoing association between the parties. After we informed the parties of our concerns, they agreed to disclose the definitive agreements but with some redactions.

We do not generally consider it appropriate to redact documents relating to substantial holdings, and note the Takeover Panel's comments that 'there is no entitlement under s671B for a party to redact a document required to accompany a notice': see *Investa Office Fund* [2016] ATP 6 at [93].

We will generally insist that all relevant agreements relating to a substantial holding be disclosed on an unredacted basis and may seek a declaration and orders from the Takeovers Panel.

Note: This case study involves a matter that arose after 30 June 2018.

Takeovers Panel

During the January to June 2018 period, the Takeovers Panel received 11 initial applications and 4 review applications for declarations of unacceptable circumstances. ASIC was an active participant in a number of these proceedings.

Note: The Takeovers Panel also received three other applications relating to orders during the period.

Some notable issues considered by the Takeovers Panel during the period include:

- association arising from collective action
- 'truth in takeovers' statements by shareholders
- the role of directors on the target board connected with the bidder.

The Takeovers Panel has set out its 2018 reasons for decisions on its website.

Criminal actions relating to takeovers

Contravention of the Corporations Act in relation to a takeover can result in criminal prosecution and potential imprisonment. Earlier this year we brought criminal charges against directors relating to two separate bids. These matters are being prosecuted by the Commonwealth Director of Public Prosecutions.

Case study 10: Failure to make takeover offers

In April 2012, Palmer Leisure Coolum Pty Ltd lodged a bidder's statement for all the shares in The President's Club Limited. We allege that Palmer Leisure failed to make an offer for The President's Club within the two months required by s631(1).

Clive Palmer, a director of Palmer Leisure, has been charged with contravening this provision through the operation of s11.2 of the *Criminal Code Act 1995*. The charges carry a maximum penalty of two years imprisonment and a fine of $11,000 for an individual ($55,000 for a corporation).

The matter has a directions hearing on 30 August 2018: see Media Release (18-095MR) *Clive Palmer and his company Palmer Leisure Coolum charged over breaches of takeover law* (6 April 2018).

Case study 11: Takeover leads to criminal charges

In July 2015, G8 Education Limited announced takeover bids for all the shares in Affinity Education Group Limited. G8 had a stake of 19.98% in Affinity and, shortly after the announcement of the bid, entities that we allege were associated with G8's chairperson, Jennifer Hutson, acquired Affinity shares. These entities promptly accepted G8's bid, taking G8's relevant interests in Affinity to 24.48%. Affinity commenced proceedings in the Takeovers Panel, which made a declaration of unacceptable circumstances and remedial orders.

In early 2018, Ms Hutson was charged with criminal offences for conduct relating to this bid: see Media Release (18-088MR) *Former chair of G8 Education Limited charged* (3 April 2018). The charges included dishonestly failing to discharge duties as a director under s184(1), dishonest use of position as a director under s184(2), authorising the giving of false or misleading information to an operator of a financial market, attempting to pervert the course of justice under s43 of the *Crimes Act 1914*, and giving false or misleading information under s64 of the *Australian Securities and Investments Commission Act 2001*.

Two other people (Mary-Anne Greaves, a lawyer, and David Burke) have also been charged with giving false and misleading information during our investigation: see Media Release (18-093MR) *Queensland lawyer charged with misleading investigation* (6 April 2018) and Media Release (18-094MR) *Queensland man charged with misleading ASIC investigations* (6 April 2018).

The matters are listed for a mention hearing on 26 October 2018.

Corporate governance

Corporate governance taskforce

On 8 August, the Australian Government announced a $70.1 million funding package that will expand ASIC's enforcement and supervisory work. This will include the creation of a corporate governance taskforce to identify and pursue failings in large listed companies. Various teams across ASIC will contribute to this taskforce and we look forward to updating you on the initiatives.

Disclosure of actual corporate governance practices

The Royal Commission has uncovered serious corporate governance failures within financial services entities. In this context, we are concerned that disclosures in entities' corporate governance statements can be unhelpful and, in some cases, meaningless – entities often only disclose the existence of corporate governance policies, rather than how the entity implements those polices in practice.

'Boilerplate' disclosure of corporate governance policies does not greatly assist investors' understanding of a company's governance practices: the focus should be on how effective those policies are at ensuring entities engage in good corporate governance practices in the context of their operations.

We provided a submission to the ASX Corporate Governance Council's recent consultation on the proposed fourth edition of their Principles and Recommendations.

ASIC's submission (PDF 378 KB) proposed an alternative disclosure model, involving:

- a standalone document describing the entity's corporate governance framework
- an annual statement setting out the entity's implementation of that corporate governance framework.

Climate risk

Assessment of climate risk and anticipating related regulatory responses involves a level of uncertainty. Regardless, we encourage directors to consider climate risk and the possible impact of this risk on their company's prospects.

We also remind companies of their disclosure obligations in this area. The law requires listed companies to disclose material business risks (e.g. in an operating and financial review under s299A(1)), and many listed companies also disclose climate risk on a voluntary basis.

We encourage companies making climate risk disclosures to consider the recommendations of the Task Force on Climate-Related Financial Disclosures. These recommendations are designed to help companies produce information that is useful for investors.

Over the next six months, we will be doing the following work relating to climate change:

- By late 2018 we expect to finalise a review of our relevant regulatory guidance to ensure that it continues to provide appropriate principles and high-level guidance that stakeholders can apply in meeting their disclosure obligations.
- We are continuing our focus on impairment testing and asset values in our upcoming review of 30 June 2018 financial reports.
- We are also undertaking a review of climate risk disclosures across the ASX 300 to better understand current market practices. We will publish our findings later this year.

Note: See our previous corporate finance reports, Report 539 *ASIC regulation of corporate finance: January to June 2017* (REP 539) and Report 567 *ASIC regulation of corporate finance: July to December 2017* (REP 567).

Proxy adviser practices

We recently reviewed proxy adviser engagement practices due to concerns raised at a roundtable in May 2017.

We observed that engagement by proxy advisers with companies that were the subject an 'against' recommendation occurred in 65 of 80 cases (81%). There was a variety of reasons why engagement did not occur in the remaining cases.

Proxy advisers should be transparent in their reports about their engagement, including disclosing the nature, extent and outcome of engagement with the company.

We also encourage proxy advisers to notify companies of any 'against' recommendations, and to explain the reasons for their recommendations. This will help companies understand concerns held by the proxy adviser and respond to investors on those concerns.

Action: Engage with proxy advisers

When engaging with proxy advisers, companies should:

- seek out information about the engagement practices of proxy advisors and engage proactively with them outside peak periods
- release their notices of meeting to the market as early as possible and ensure that the disclosure in those notices is 'clear, concise and effective'.

For more information on proxy adviser engagement, see Report 578 *ASIC review of proxy adviser engagement practices* (REP 578).

Enforcement action against directors

Report 568 *ASIC enforcement outcomes: July to December 2017* (REP 568) set out that, in 2018, we would continue to focus on the conduct of gatekeepers, including directors and auditors. Below are some case studies showing actions we have taken.

Case study 12: Misleading annual report

In March 2018, we brought proceedings in the Federal Court against Rio Tinto Limited, its former chief executive officer, Thomas Albanese, and its former chief financial officer, Guy Elliott, in relation to alleged misleading or deceptive statements in Rio Tinto's 2011 annual report.

These proceedings also concern allegations that Rio Tinto failed to recognise an impairment of a wholly owned subsidiary, Rio Tinto Coal Mozambique: see Media Release (18-119MR) *ASIC takes further action against Rio Tinto Limited and its former CEO and CFO* (1 May 2018).

Case study 13: Duties of care and diligence

We commenced proceedings against the former managing director of Quintis Limited for failing to discharge his duties as a director under s180. We allege that Frank Wilson failed to disclose to the Quintis board that key contracts with Nestle-owned Galderma had been terminated and that, as a result, he did not discharge his duties to Quintis with the degree of care and diligence that a reasonable person in the position of managing director would exercise.

Our investigation is ongoing and the matter is before the Federal Court: see Media Release (18-174MR) *ASIC launches civil penalty proceedings against former Quintis managing director Frank Wilson* (14 June 2018).

Appendix 1: Takeover bids and schemes

Table 1: Takeover bids in respect of which bidder's statements were lodged with ASIC (1 January 2018 to 30 June 2018)

Target	Bidder	Lodged	Type	Securities	Consideration
Norwood Park Limited	Propel Funeral Partners Ltd [PFP]	12/01/2018	Off-market	Ordinary shares	Cash
Norwood Park Limited	InvoCare Limited [IVC]	16/01/2018	Off-market	Ordinary shares	Cash
AWE Limited [AWE]	China Energy Reserve and Chemicals Group Co., Ltd	25/01/2018	Off-market	Ordinary shares	Cash
AWE Limited [AWE]	Mitsui & Co,. Ltd	09/02/2018	Off-market	Ordinary shares	Cash
Realm Resources Limited [RRP]	T2 Resources Fund Pty Ltd (an entity wholly owned by an trust for which Taurus Funds Management Pty Ltd is trustee)	23/02/2018	Off-market	Ordinary shares	Cash
Primary Gold Limited [PGO]	Hanking Australia Investment Pty Ltd	2/03/2018	Off-market	Ordinary shares	Cash
Bullseye Mining Limited	Red 5 Limited [RED]	29/03/2018	Off-market	Ordinary shares	Scrip
Godfreys Group Limited [GFY]	Arcade Finance Pty Ltd	09/04/2018	Off-market	Ordinary shares	Cash
Avanco Resources Limited [AVB]	OZ Minerals Limited [OZL]	10/04/2018	Off-market	Ordinary shares	Cash and scrip
Mineral Deposits Limited [MDL]	ERAMET SA	27/04/2018	Off-market	Ordinary shares	Cash
Tap Oil Limited [TAP]	Risco Energy Investments (SEA) Limited	02/05/2018	Market	Ordinary shares	Cash
TMK Montney Ltd	Calima Energy Limited [CE1]	15/05/2018	Off-market	Ordinary shares	Scrip
TSV Montney Ltd	Calima Energy Limited [CE1]	15/05/2018	Off-market	Ordinary shares	Scrip
Andina Resources Limited	Titan Minerals Limited [TTM]	23/05/2018	Off-market	Ordinary shares	Scrip
Marine Produce Australia Limited	Barramundi Asia Pte. Ltd	29/05/2018	Off-market	Ordinary shares	Cash
Atlas Iron Limited [AGO]	Hancock Prospecting Pty Ltd	18/06/2018	Off-market	Ordinary shares	Cash

Note: This table lists each takeover bid for which an initiating bidder's statement was lodged with ASIC during the period.

Where a bidder or target was listed on a prescribed financial market at the time of the takeover, its name is accompanied by the ticker code under which it traded. Where a bidder is a (direct or indirect) wholly owned subsidiary of another entity, the controlling entity may be listed as bidder.

All off-market bids are full bids unless otherwise indicated.

While every effort is made to update the above table with the most recent information to hand, the type of consideration listed may not reflect all variations occurring after lodgement of the bidder's statement

Table 2:Schemes of arrangement in respect of which explanatory statements registered or otherwise publicly released (1 January 2018 to 30 June 2018)

Target	Acquirer	Registered	Type	Securities	Received
Aconex Limited [ACX]	Oracle Corporation	09/02/2018	Members	Ordinary shares	Cash
Billabong International Limited [BBG]	Boardriders, Inc.	14/02/2018	Members	Ordinary shares	Cash
Altona Mining Limited [AOH]	Copper Mountain Mining Corporation	16/02/2018	Members	Ordinary shares	Scrip
Tox Free Solutions Limited [TOX]	Cleanaway Waste Management Limited [CWY]	02/03/2018	Members	Ordinary shares	Cash
Lifehealthcare Group Limited [LHC]	Pacific Health Supplies BidCo Pty Limited (an entity wholly owned by funds advised by Pacific Equity Partners)	29/03/2018	Members	Ordinary shares	Cash
Sirtex Medical Limited [SRX]	Varian Medical Systems, Inc	29/03/2018	Members	Ordinary shares	Cash
Mantra Group Limited [MTR]	Accor S.A.	04/04/2018	Members	Ordinary shares	Cash
Bulletproof Group Limited [BPF]	Klikon Group Holdings Pty Limited	10/04/2018	Members	Ordinary shares	Cash
Westfield Corporation Limited [WFD]	Unibail-Rodamco SE	12/04/2018	Members	Ordinary shares	Cash and scrip
Westfield Corporation Limited [WFD]	Not applicable – Demerger	12/04/2018	Members	Ordinary shares	Not applicable
RHS Limited [RHS]	PerkinElmer, Inc.	17/04/2018	Members	Ordinary shares	Cash
Signature Gold Ltd	StratMin Global Resources PLC	19/04/2018	Members	Ordinary shares	Scrip
Viralytics Limited [VLA]	Merck & Co. Inc.	20/04/2018	Members	Ordinary shares	Cash
YWCA of Albury Wodonga Inc	Not applicable – Reconstruction	23/04/2018	Members	Member shares	Not applicable
YWCA of Darwin Incorporated	Not applicable – Reconstruction	23/04/2018	Members	Member shares	Not applicable
YWCA Queensland	Not applicable – Reconstruction	23/04/2018	Members	Member shares	Not applicable
YWCA Victoria	Not applicable – Reconstruction	23/04/2018	Members	Member shares	Not applicable
YWCA NSW	Not applicable – Reconstruction	23/04/2018	Members	Member shares	Not applicable
Young Women’s Christian Association of Perth Inc	Not applicable – Reconstruction	23/04/2018	Members	Member shares	Not applicable
Women’s Christian Association of Adelaide Incorporated	Not applicable – Reconstruction	23/04/2018	Members	Member shares	Not applicable

Target	Acquirer	Registered	Type	Securities	Received
The Young Women's Christian Association of Broken Hill Incorporated	Not applicable – Reconstruction	23/04/2018	Members	Member shares	Not applicable
Watpac Limited [WTP]	BESIX Group SA	26/04/2018	Members	Ordinary shares	Cash

Note: This table lists each proposed members' scheme of arrangement under Pt.5.1 for which an explanatory statement was registered by ASIC under s412(6).

Where an acquirer or scheme company is listed on a prescribed financial market its name above is accompanied by the ticker code under which it trades. Where an acquirer is a (direct or indirect) wholly owned subsidiary of another entity the parent entity may be listed above as acquirer.

While every effort is made to update the above table with the most recent information to hand, the type of consideration listed may not reflect all changes to the scheme occurring after registration or the initial public release of the explanatory statement.

Appendix 2: Accessible versions of figures

This appendix is for people with visual or other impairments. It provides the underlying data for each of the figures included in this report.

Table 3: Types of offers

Type of prospectus	Number	Value ($)
IPOs	64	4.5bn
Non-IPOs	165	4.1bn

Note 1: This is the data contained in Figure 1.

Note 2: This table was amended on 18 September 2018: see Figure 1 (Note 2).

Table 4: Top 10 fundraisings by amount raised

Company	Amount raised	Notes
Viva Energy Group Limited	$2,650,002,000	IPO by business
Westpac Banking Corporation	$1,690,000,000	Hybrids
Commonwealth Bank of Australia	$1,365,000,000	Hybrids
L1 Long Short Fund Limited	$1,329,678,286	LIC
Macquarie Group Limited	$1,000,000,000	Hybrids
Wam Global Limited	$465,536,768	LIC
Cromwell Property Group	$366,500,000	Hybrids
Jupiter Mines Limited	$240,000,000	IPO by business
Evans Dixon Limited	$169,458,753	IPO by business
BKI Investment Company Limited	$154,455,255	LIC

Note 1: This is the data contained in Figure 2.

Note 2: This table was amended on 11 September 2018 and 18 September 2018: see Figure 2 (Note 2).

Table 5: Form of ASIC intervention in prospectus disclosure

Form of intervention	Number of fundraisings
Extension of exposure period	27
Interim order made in respect of an offer	24
Revocation of interim order	9
Final stop order made	2

Note: This is the data contained in Figure 3

Table 6: Percentage of prospectuses ASIC raised concerns with

ASIC raised no concerns	81%
ASIC raised disclosure concerns	19%

Note: This is the data contained in Figure 3.

Table 7: Top five disclosure concerns most frequently raised

Disclosure concern	Number of times raised
Business model not fully or adequately disclosed	28
Use of funds – unclear or insufficient detail	20
Misleading or deceptive disclosure – misleading or unclear statement	18
Risk disclosure inadequate or insufficiently prominent or not tailored	15
Capital structure or substantial holdings not adequately disclosed	10

Note: This is the data contained in Figure 5.

Table 8: Results of ASIC raising concerns

Result	Percentage
New or amended disclosure	88%
Exposure period extension	40%
Interim stop order	26%
Offer withdrawn	9%
Revocation of interim stop order	7%
Concerns addressed	5%
Other	2%

Note: This is the data contained in Figure 6

Table 9: Independent control and restructure transactions

Transaction type	Number
Control transaction via takeover bid	16
Control transaction via scheme	13
Restructure transaction via scheme	2

Note: This is the data contained in Figure 7.

Table 10: Control transactions by implied target size

Implied target size	Scheme	Bid
Over $1 billion	13.8%	0%
$200 million to $1 billion	10.3%	31.0%
$50 million to $200 million	10.3%	0%
Under $50 million	10.3%	44.8%

Note: This is the data contained in Figure 8.

Table 11: Foreign and domestic offerors

Type of bidder or acquirer	Number of transactions	Transactions by implied target value
Foreign bidder or acquirer	17 (59%)	93%
Domestic bidder or acquirer	12 (41%)	7%

Note: This is the data contained in Figure 9.

Table 12: Largest control transactions via bid or scheme lodged or registered between 1 January – 30 June 2018 by implied target size

Target (acquirer)	Implied target value	Cash value	Scrip value
Westfield Corporation	$18.68bn	$7.15bn	$11.53bn
Aconex Limited	$1.57bn	$1.57bn	N/A
Sirtex Medical Limited (Varian Medical)	$1.56bn	$1.56bn	N/A
Mantra Group Limited	$1.18bn	$1.18bn	N/A
Tox Free Solutions Limited	$666m	$666m	N/A
AWE Limited (Mitsui & Co)	$594m	$594m	N/A
Viralytics Limited	$487m	$487m	N/A
AWE Limited (China Energy Reserve)	$456m	$456m	N/A
Avanco Resources Limited	$408m	$209m	$199m
Atlas Iron Limited (Hancock Prospecting)	$389m	$389m	N/A

Note: This is the data contained in Figure 10.

Table 13: Applications for relief under s655A received during January to June 2018 period

Application type	Percentage
Other	28%
Voluntary escrow	32%
Variation of offer terms/bid class	12%
Bid procedure timing	10%
Item 7 procedure	10%
Relevant interests	8%

Note: This is the data contained in Figure 11.

Table 14: ASIC intervention during the January to June 2018 period

Principal matter or transaction type	Structure and disclosure	Structure only	Disclosure only
Takeover bid	6	3	5
Scheme	0	0	11
Item 7 transactions	2	0	10
Rights issue or other fundraising	1	2	1
Association or substantial holding	0	1	3

Note: This is the data contained in Figure 12.

Table 15: Truth in takeover statements in takeover bids during the January to June 2018 period

Statements	Total	No qualification or limited specified qualification	Full qualification or general reservation of right to depart from statement
Truth in takeovers statement	93.8%	81.3%	25.0%
Bidder: No increase	31.3%	25.0%	12.5%
Bidder: No extension	18.8%	12.5%	6.3%
Bidder: Drop condition(s)	37.5%	N/A	N/A
Substantial holder: Accept	43.8%	37.5%	12.5%
Substantial holder: Not accept	25.0%	18.8%	6.3%

Note: This is the data contained in Figure 13.