



ASIC
Australian Securities &
Investments Commission



ASIC regulation of corporate finance: July to December 2018

Report 612 | March 2019

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 July 2018 to 31 December 2018, and our areas of focus for the next six months.

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Overview

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 July 2018 to 31 December 2018 (the period). It gives key statistics and observations from our oversight of transactions during the period. This report also explains what we will be focusing on for the 1 January 2019 to 30 June 2019 period.

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 March and April 2019. We will also discuss issues that have arisen since 31 December 2018 and answer your questions.

About ASIC regulatory documents

In administering legislation ASIC issues the following types of regulatory documents: consultation papers, regulatory guides, information sheets and reports.

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. Examples in this report are purely for illustration; they are not exhaustive and are not intended to impose or imply particular rules or requirements.

Our activity at a glance: July to December 2018

Fundraising

296	original disclosure documents lodged	143	supplementary or replacement disclosure documents lodged
\$7.6bn	sought to be raised under offers	\$5bn	actually raised under offers seeking over \$30 million
17%	of fundraisings required additional disclosure		
11	interim stop orders issued	2	final stop orders issued
70	applications for relief regarding fundraising	75%	of fundraising relief applications granted

Mergers and acquisitions

20	transactions launched via takeover bid	24	control transactions launched via scheme and trust scheme
\$18.6bn	total implied value of targets subject to control transactions	25	approvals under item 7, s611
73	applications for relief regarding takeovers	49%	of takeover relief applications granted
21	applications for relief regarding substantial holding provisions	37%	of substantial holding relief applications granted

Other corporate governance transactions

160	notices of meeting with related party benefits	49	s218 applications to reduce lodgement period
17	requests for no-action letters regarding financial reporting	2	requests for no-action granted
138	applications for relief regarding financial reporting	76%	of financial reporting relief applications granted
\$14bn	of share buy-backs undertaken by 113 companies		

Note 1: For fundraising, the amount 'actually raised' (\$5 billion) includes funds raised under original prospectuses seeking to raise \$30 million or more where the offer opened during the period and was completed as at 20 February 2019, and the results of the fundraising were announced publicly. It excludes foreign mutual recognition scheme offers. The amount 'sought to be raised' (\$7.6 billion) includes the amount sought for all original prospectuses lodged during the period.

Note 2: The statistics for applications granted are based on those that were decided before 20 February 2019. The applications that were not granted were either withdrawn or refused.

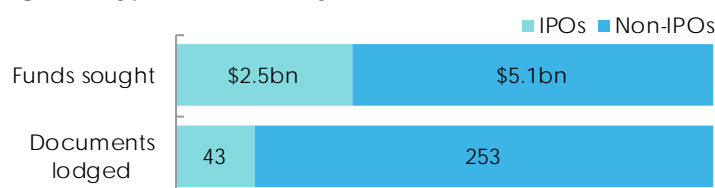
Note 3: The total implied value of all bids and schemes includes \$6.55 billion for two trust schemes. The figure does not include the proposed APA Group trust scheme, which did not proceed.

Fundraising

Key statistics for the July to December 2018 period

In the period, 296 original disclosure documents were lodged, seeking to raise approximately \$7.6 billion: see Figure 1. This compares with 229 original disclosure documents in the period 1 January 2018 to 30 June 2018 (previous period), seeking to raise \$8.6 billion.

Figure 1: Types of offers (July to December 2018)



Note 1: This figure shows the maximum amount sought under prospectuses lodged during the period, not the amount actually raised under the prospectuses.

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

This period saw a significant decrease in the magnitude of the largest fundraising offers, with total amounts actually raised in the top 10 fundraisings decreasing from \$9.4 billion in the previous period to \$5 billion in this period: see Table 1.

Table 1: Top 10 fundraisings by amount raised (July to December 2018)

Company	Amount sought	Amount raised	Offer type
Commonwealth Bank of Australia	\$750,000,000	\$1,590,000,000	Hybrids
Westpac Banking Corporation	\$750,000,000	\$1,423,058,000	Hybrids
Coronado Global Resources Inc.	\$1,392,000,000	\$773,743,536	Initial public offering (IPO), CHESSE depository interests (CDIs)
Hearts and Minds Investments Limited	\$500,000,000	\$500,000,000	IPO, listed investment company (LIC)
Nickel Mines Limited	\$200,000,000	\$200,000,000	IPO
Tribeca Global Natural Resources Limited	\$300,000,000	\$157,499,998	IPO
Perpetual Equity Investment Company Limited	\$101,240,000	\$101,245,229	LIC
RCR Tomlinson Limited	\$100,000,000	\$100,283,551	Entitlement offer
Poseidon Nickel Limited	\$68,771,552	\$68,975,319	Entitlement offer
Revasum Inc.	\$30,714,286	\$30,714,286	IPO, CDIs

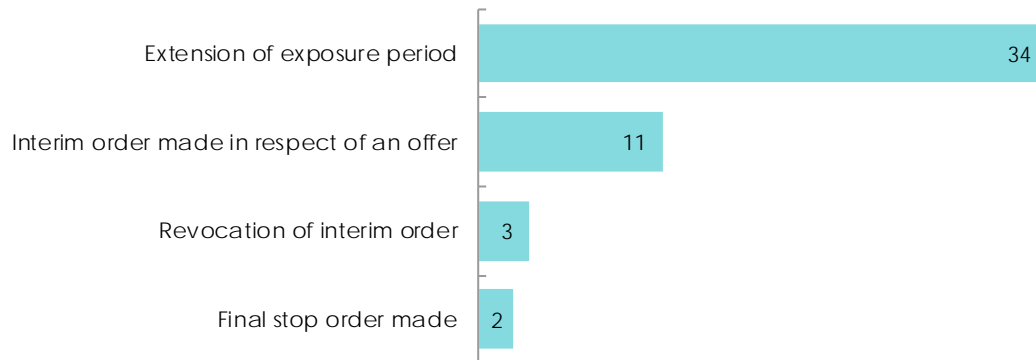
Note 1: These figures only include prospectuses that sought to raise \$30 million or more where the offer opened during the period and closed by 20 February 2019, and where the results of the fundraising were announced publicly. It excludes foreign mutual recognition scheme offers.

Note 2: The amount actually raised under the top 10 fundraisings shown in this table may be larger than the amount sought to be raised under all prospectuses lodged during the period shown in Figure 1. This is because a number of the largest fundraisings raised significantly more than the amount sought.

ASIC intervention in fundraising

There were significantly fewer interim stop orders this period (11 compared with 24 during the previous period): see Figure 2.

Figure 2: Form of ASIC intervention in prospectus disclosure (July to December 2018)

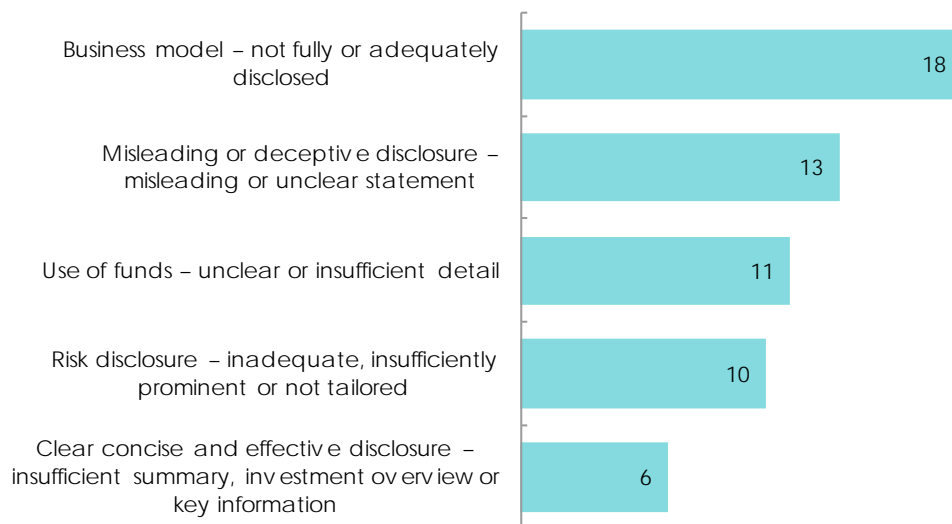


Note 1: The two final stop orders were issued in relation to ATC Alloys Limited and Greenway Investor Holdings Limited.

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

In this period, the most common reasons we raised concerns with prospectuses remained largely consistent with the previous period: see Figure 3.

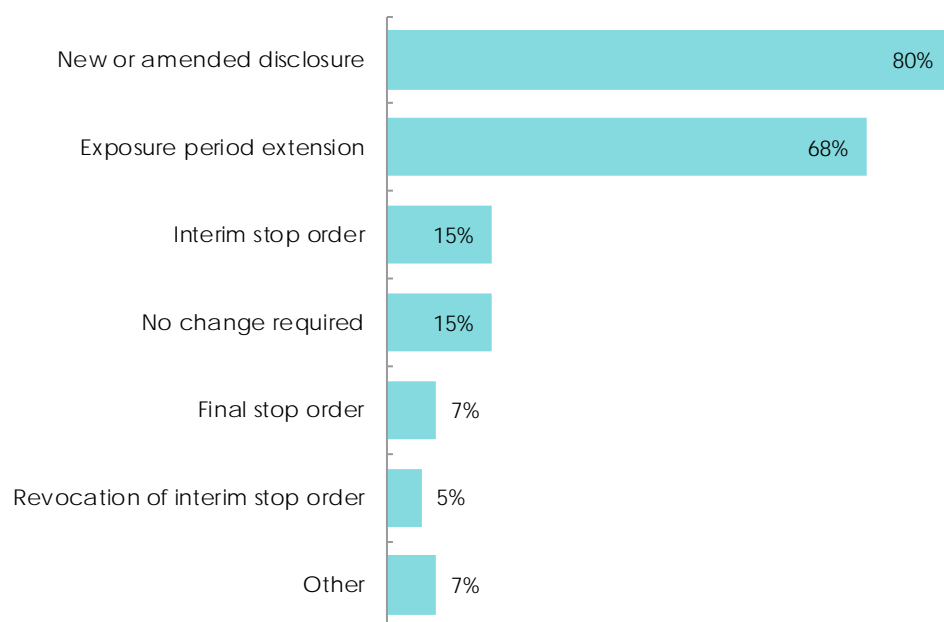
Figure 3: Top five disclosure concerns most frequently raised (July to December 2018)



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

When we raised concerns with prospectuses, the most common result was the issuer providing new or amended disclosure: see Figure 4.

Figure 4: Results of ASIC raising concerns (July to December 2018)



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

Financial information in prospectuses

Accounting judgements and estimates

Generally, when disclosing financial information in a prospectus, market practice is to not include extensive disclosure of notes to the financial statements. However, many, but not all, issuers include disclosure about key 'accounting judgements and estimates' that have been made in the financial statements. We encourage issuers to include this type of disclosure to give potential investors greater insight into the areas of the financial statements that are subject to judgements and their potential effect.

Focus on: Roll up listings – Is your historical financial disclosure sufficient?

We continue to receive queries from issuers that are proposing to acquire, or have acquired, a large number of businesses around the time of a proposed IPO. Many issuers propose to not disclose two-and-a-half or three years of audited historical financial information for these businesses. They instead intend to rely on circumstances where reduced disclosure may be appropriate for roll up acquisitions, as outlined in [Regulatory Guide 228 Prospectuses: Effective disclosure for retail investors \(RG 228\)](#). In most cases, we do not accept these proposals.

In certain limited circumstances, it may be reasonable for an issuer to provide a minimum of 75% of historical audited financial information for no less than one year for roll up listings. These circumstances are very narrow and do not apply when there is a legacy or predecessor business. In situations involving legacy or predecessor businesses, the predecessor company will most likely need audited accounts for the usual two-and-a-half or three-year period, with the acquisitions subject to the normal 25% significance test, as outlined in RG 228.

Forward-looking information beyond explicit forecast periods

It is common market practice for companies with an operating history to disclose prospective financial information for a forecast period in their prospectuses. Some companies also wish to disclose additional forward-looking information beyond the explicit forecast period of the prospective financial information.

For example, a manufacturing company in the commercialisation phase, which was seeking to conduct an IPO, wished to disclose in its prospectus production capacity and costs well beyond the proposed financial forecast period. Fundamental to understanding the company's prospects was that the company was forecasting an increased number of production lines and decreased per-unit production costs. The IPO would fund the expansion of a portion of the new production lines.

To disclose prospective financial information, a company must have, and must disclose the basis for, reasonable grounds for the information. When companies are seeking to disclose forward-looking information beyond the explicit forecast period, we expect the company to provide clear evidence that they have reasonable grounds for the information. In some cases this means an external expert's report needs to be provided to support the reasonableness of any assumptions.

On-market buy-backs

Recently, we have become aware of some instances of companies undertaking purported 'on-market' buy-backs within the 10/12 limit and without shareholder approval when it appears the buy-back trades are not executed on-market in the ordinary course of trading. When this occurs, the buy-back may be a selective buy-back that requires shareholder approval.

Focus on: On-market buy-backs

Companies need to ensure that on-market buy-backs are truly 'on-market' and carried out 'in the ordinary course of trading'. Companies retain legal liability for buy-backs conducted through an agent, such as a market participant.

'On-market' transactions are trades effected during trading hours by the matching of trading messages on the trading platform of that market.

In the 'ordinary course of trading' means trading in strict order of price-time priority, with indifference as to the identity of counterparties and no pre-agreements or selection of counterparties.

Trades such as block trades, trades with price improvement and out of hours trades, as defined in [ASIC Market Integrity Rules \(Securities Markets\) 2017](#), are not 'on-market' and are not carried out 'in the ordinary course of trading'.

Cooperatives and mutuals reform

In March 2016, following a referral from the Senate, the Senate Economics References Committee tabled its report, [Cooperative, mutual and member-owned firms](#), on the role, importance and overall performance of this sector in the Australian economy. The report included 17 recommendations to support the cooperative and mutual sector.

As noted in [Report 567](#), *ASIC regulation of corporate finance: July to December 2017* (REP 567), in November 2017, Treasury released the [Australian Government response to the Senate Economics References Committee report: Cooperative, mutual and member-owned firms](#). The response addressed both the recommendations made in the Senate Economics References Committee's report and in the [Independent facilitator review: Report on reforms for cooperatives, mutuals and member-owned firms](#), provided by Greg Hammond OAM to the Government in July 2017.

Following extensive engagement with industry, ASIC and the Australian Prudential Regulation Authority (APRA), Treasury published proposed legislative amendments in exposure drafts of the Treasury Laws Amendment (Mutual Entities) Bill 2018 and explanatory memoranda:

- › the [first tranche](#), released on 4 October 2018, introduced a definition of mutual entity, and removed uncertainty around the demutualisation provisions in Pt 5 of Sch 4 to the Corporations Act
- › the [second tranche](#), released on 26 November 2018, introduced a bespoke capital instrument able to be issued by all eligible mutual entities.

This reform process has now entered its final stage, with the Treasury Laws Amendment (Mutual Reforms) Bill 2019 introduced into the Senate on 13 February 2019. We will update you on its progress in future reports.

Update on Financial Markets Authority exemption for same class offers

The Financial Markets Authority of New Zealand (FMA) has issued the [Financial Markets Conduct \(Same Class Offers ASX/NZX-Quoted Financial Products\) Exemption Notice 2018](#). The exemption notice, which commenced on 17 December 2018, facilitates offers of financial products of the same class as ASX-quoted financial products in New Zealand by ASX-listed entities.

Initial coin offerings

On 31 January 2019, Treasury released an issues paper on initial coin offerings (ICOs). The paper invited interested parties to make submissions on a range of topics, including:

- › the definitions of ICOs and tokens
- › the opportunities and risks posed by ICOs
- › the current regulatory framework that applies to ICOs
- › whether changes to the regulatory framework are necessary or desirable.

Based on our review of ICOs in the past 12 months, businesses and individuals are using ICOs for public capital raising and investments. Many of the ICOs or crypto-assets that we have considered have involved a regulated 'financial product' under the Corporations Act – as a managed investment scheme or offers of other types of financial products such as securities. We remind potential ICO issuers and their advisers that it is the legal substance of the offer – not what it is called – that will determine whether Australian laws apply.

ASIC plans to update [Information Sheet 225](#) *Initial coin offerings and crypto-currency* (INFO 225) to provide further guidance on when an ICO may involve the issue of a financial product and on the relevant disclosure requirements that may apply, and to urge further caution around promotional statements to ensure they are not misleading or deceptive.

Experts

Critiques of expert valuations

We continue to be concerned by the approach taken by some bidders when commenting on independent expert reports on the value of target securities.

We remind bidders that they should take care when commenting on the value of target securities. This includes challenging the expert's valuation of the target securities – through analysis by the bidder or by its own expert – as to what the expert engaged by the target should have concluded had different assumptions been adopted. For more information as to our views on what a bidder may or may not comment on, see [Report 589 ASIC regulation of corporate finance: January to June 2018](#) (REP 589).

We also note that when a bidder or its expert do not fairly represent the original statement of the expert engaged by the target, the bidder may not be able to rely on the relief in [ASIC Corporations \(Consents to Statements\) Instrument 2016/72](#).

Case study 1: Commenting on the value of target securities

A bidder engaged an expert to provide a critique of the valuation undertaken by the independent expert engaged by a target. The critique included a recalculation of the expert's valuation using different inputs. This report was disclosed to the market in a supplementary bidder's statement.

On review of the report, we identified concerns with its potential to mislead shareholders because it expressed a view of what the target's expert should have concluded, without undertaking its own analysis in accordance with [Regulatory Guide 111 Content of expert reports](#) (RG 111).

In response to our concerns, the bidder's expert issued an amended report. This report retracted references to value adjustments that the bidder's expert judged ought to be made to the target's expert report. The bidder disclosed this amended report to the market in a further supplementary bidder's statement.

Funding requirements

During the period, we reviewed certain expert reports where a company's capital expenditure funding requirements had not been properly accounted for in the valuation. These funding requirements are often implicitly reflected in certain methodologies (e.g. the quoted price for listed securities). For other methodologies, we remind experts that they may need to expressly determine to take funding requirements into account. This is because the valuation may not reflect the dilutive effects of future equity fundraisings. Our policy on this issue is in [RG 111](#): see the note to RG 111.15.

Technical specialists

During the period, we raised concerns with reports by technical specialists, and their compliance with relevant codes and requirements, in both the mergers and acquisitions (M&A) and fundraising contexts. We remind parties commissioning technical specialists and experts to:

- › consider the nature of the information being prepared
- › ensure that the qualifications and experience of the technical specialist or expert suit these requirements.

Case study 2: Foreign technical specialists

We reviewed an IPO prospectus containing a technical assessment of mineral assets located in Australia and overseas. A foreign technical specialist was engaged to report on the overseas assets.

The foreign technical specialist stated that its report was prepared in accordance with the [VALMIN Code](#) (2015). However, the report had a number of deficiencies. This meant that the report did not meet the requirements for a 'public report', as expressly provided for in the VALMIN Code. This included the specialist not undertaking a review of resources and reserves or making inquiries as to the status of tenure.

These deficiencies raised concerns that the foreign specialist may not have had significant prior experience or expertise in preparing reports in accordance with the VALMIN Code. In response to the concerns raised, the foreign technical report was amended.

Case study 3: Qualifications of technical specialists

We raised concerns about a prospectus for a mining exploration company that included a report prepared by a tenement manager who lacked appropriate qualifications to provide a legal opinion.

The report detailed searches of tenement registers and described how relevant legislation applied to the company's tenements. We queried the expertise of the tenement manager to opine on the application of legislation to specific tenements and expressed concerns when it was identified that the preparer was not a legal practitioner.

In response to our concerns, the company had the tenement report reviewed by a legal practitioner and technical corrections were made. The legal practitioner provided a statement in the prospectus that they had reviewed the report and gave consent to be named as reviewer of the report.

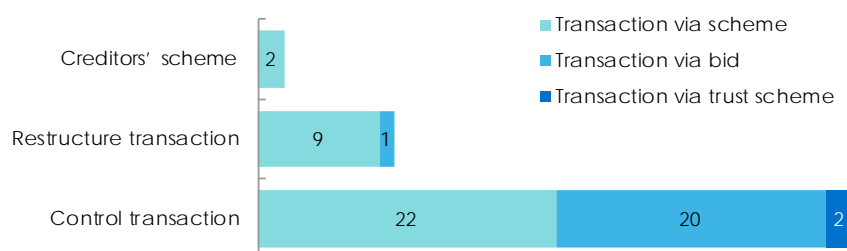
When technical specialists are engaged to provide opinions involving the application of legislation, we consider it necessary that the report is prepared by an appropriately qualified legal practitioner to allow investors to make an informed assessment of its reliability.

Mergers and acquisitions

Key statistics for the July to December 2018 period

This period saw the number of independent control transactions commenced increase to 44, compared with 29 in the previous period. The number of restructure transactions also increased to 10, compared with two in the previous period. The period saw two creditors' schemes, compared with none in the previous period: see Figure 5.

Figure 5: Independent control and restructure transactions (July to December 2018)

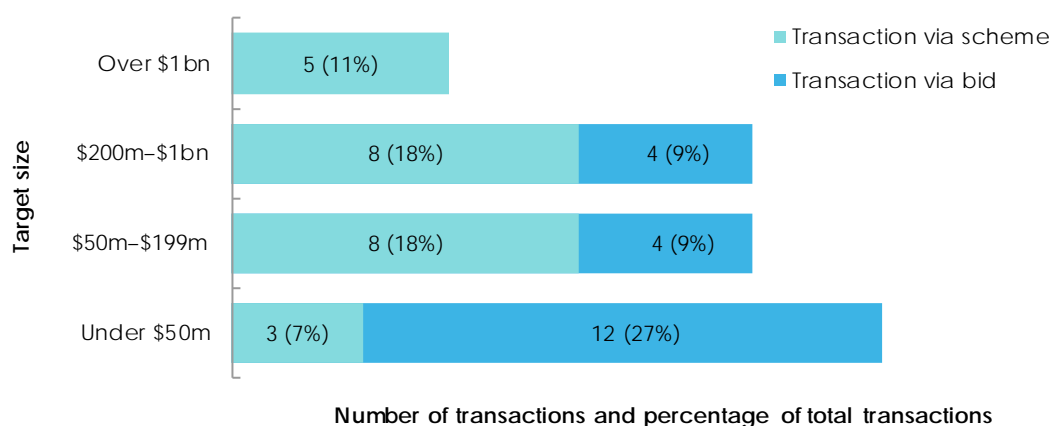


Note 1: When a single transaction involved multiple schemes or bids, it has only been counted once. For example, one restructure involved 114 related entities.

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

While the number of control transactions commenced via a scheme was similar to the number of control transactions commenced via a bid, the breakdown of transactions by the implied value of the target shows that larger control transactions were generally undertaken via a scheme: see Figure 6.

Figure 6: Control transactions by implied target size (July to December 2018)



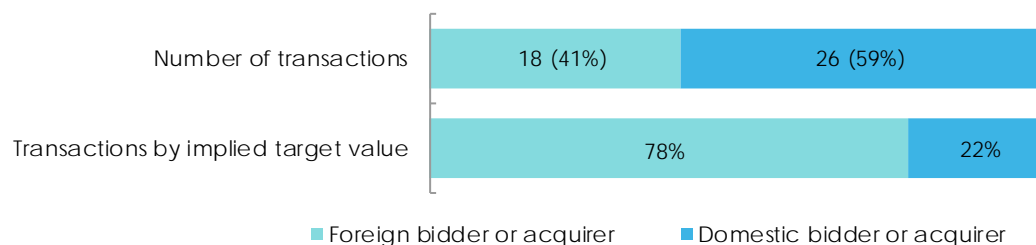
Note 1: There were two trust schemes over \$1 billion, which represent 4.55% of total transactions in the period.

Note 2: Percentages do not add up to 100 due to rounding.

Note 3: See Table 9 in Appendix 2 for the data shown in this figure (accessible version).

Overseas bidders or acquirers were again a key driver of takeovers via bids and schemes during the period: see Figure 7. Foreign bidders or acquirers were behind 78% of all deal value (based on the collective and implied value of all targets).

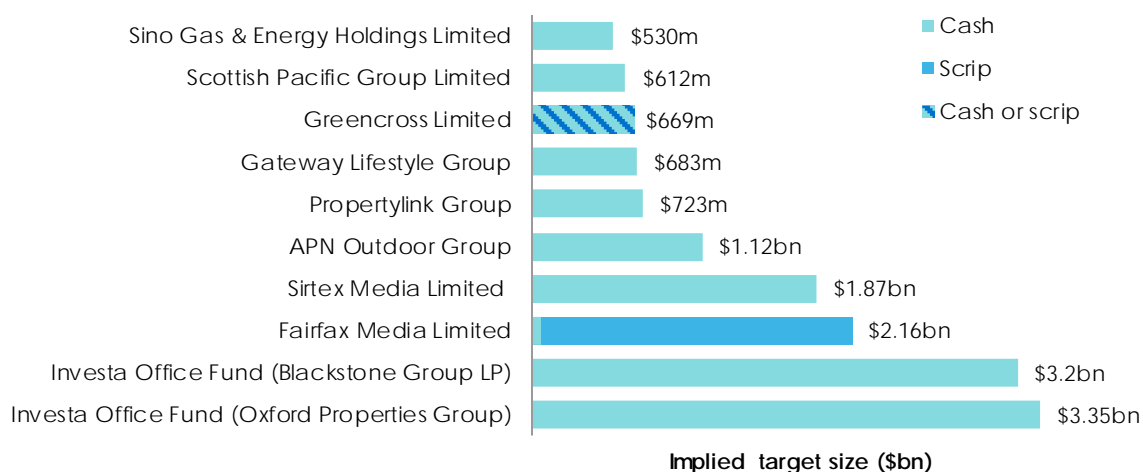
Figure 7: Foreign and domestic offerors (July to December 2018)



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

Consistent with the previous period, the largest control transactions during this period were, in most cases, offers of cash, rather than scrip, as consideration: see Figure 9.

Figure 8: Largest control transactions via bid or scheme, by implied target size (July to December 2018)



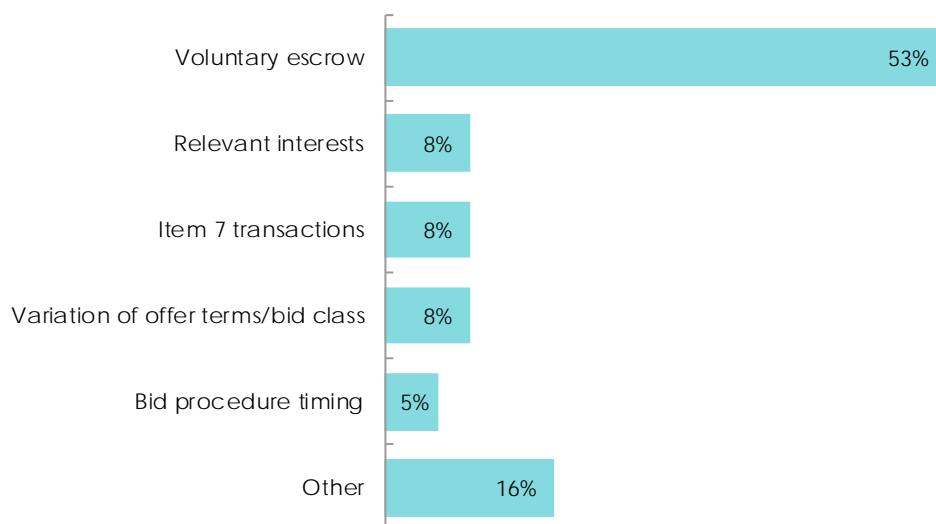
Note: See Table 11 in Appendix 2 for the data shown in this figure (accessible version).

ASIC relief and intervention in control transactions

Consistent with the previous period, voluntary escrow relief remained the most common relief sought from ASIC in relation to the takeovers provisions of the Corporations Act. Relief relating to relevant interests, item 7 transactions and variation of offer terms or bid class were the next most commonly sought relief types: see Figure 9.

Note: Voluntary escrow relief applications do not generally relate to mergers or acquisitions, but are common in IPOs. For more information, see [Regulatory Guide 5 Relevant interests and substantial holding notices \(RG 5\)](#).

Figure 9: Applications received for relief relating to control transactions (July to December 2018)

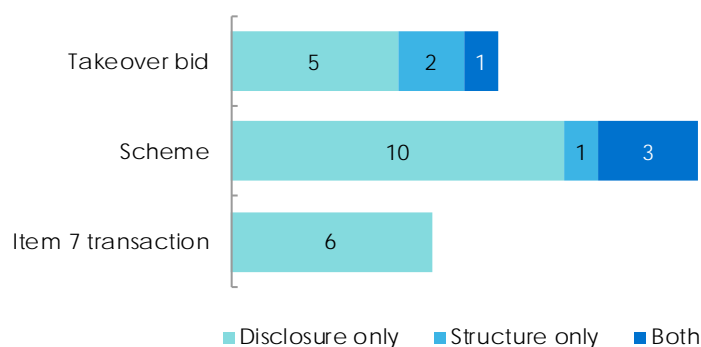


Note 1: Percentages do not add up to 100 due to rounding.

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

Most of ASIC's regulatory interventions in control transactions this period related to schemes of arrangement: see Figure 10. We raised issues with offer terms, 'truth in takeovers' statements, shareholder classes and bid structures.

Figure 10: ASIC's regulatory interventions in control transactions (July to December 2018)



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

Novel or complex consideration in schemes of arrangement

Novel or complex consideration in schemes that raise issues of class composition, fairness or public policy concerns is likely to attract our scrutiny. In this period, we intervened in numerous matters of this kind. Some examples are:

- › offering shares in a proprietary company to a large number of target securityholders, including retail investors
- › consideration that is different (in form or substance) between certain securityholders
- › consideration structures that allow for share splitting and the use of other devices that detract from equality of treatment and an efficient, competitive and informed market.

Case study 4: Offering shares in a proprietary company as consideration ('stub equity')

We withheld a 'no-objection' letter and opposed approval of a scheme involving the offer of scrip consideration in the bid vehicle, an Australian proprietary company. This type of offer is commonly called 'stub equity'. The offer was to a large and diverse group of shareholders and included the option to subscribe for additional shares. The transaction avoided two key restrictions placed on proprietary companies under s113 of the Corporations Act – namely:

- › the requirement for proprietary companies to have no more than 50 non-employee shareholders (the scheme proposed the use of a nominee or custodian to hold scrip consideration on behalf of shareholders to overcome this requirement)
- › the prohibition on fundraising activities that would require disclosure to investors (the scheme proposed reliance on an exception in s708 of the Corporations Act for offers made under a scheme of arrangement).

We took the view that it was contrary to the public policy underlying the specific prohibitions and legislative intent of the provisions governing proprietary companies to make a broad offer of scrip to more than 50 potential investors, and to combine the offer with the use of a custodian arrangement to ensure it remains a proprietary company. The court approved the scheme in the circumstances, while noting that it found the use of the proprietary company and custodian arrangement troubling.

Focus on: Scrip consideration and custodian arrangements

We intend to issue a consultation paper seeking views on a proposed legislative instrument to prevent similar kinds of offers in control transactions. We may also consider making individual instruments to prevent these offers for control transactions announced before the conclusion of our consultation: see [Media Release \(18-376MR\) ASIC to consult on measures to restrict offers to retail investors of stub equity in proprietary companies](#) (13 December 2018).

Case study 5: Scheme with a split consideration structure

We closely considered a scheme involving a split consideration structure, under which shareholders were entitled to receive:

- › cash consideration for the first 20,000 shares they held
- › scrip in a foreign entity for any balance of their holdings.

We were principally concerned that the split consideration structure:

- › gave rise to issues of fairness in circumstances where consideration that was materially different in nature would be received by target holders depending on the size of their respective holding
- › potentially incentivised shareholders to split their holdings and to engage in market trading that arbitrated the difference in value of smaller and larger holdings.

The consideration structure was amended with the implementation of a 'marker date', after which any holdings created would not be eligible to receive cash for the first 20,000 shares (similar in operation to s618(2)-(2D), as notionally inserted under [Class Order \[CO 13/521\]](#) *Takeover bids*). Such measures should be adopted when the transaction is announced.

The court has a discretion at the second court hearing for a scheme to disregard votes. We requested a voting report to inform our position on whether the court should exercise its discretion on fairness grounds, in recognition of the potentially divergent interests of smaller and larger target holders. We resolved to provide a no-objection letter only after concluding from the report that there were no differences in voting patterns between smaller and larger target holders. The fact that there were no differences in voting patterns between the groups suggested that:

- › the outcome of voting by each group would likely be the same
- › the potential divergence of interests between the two groups was not determinative of whether the statutory thresholds were achieved.

Focus on: Fairness and equality (class issues)

We may raise concerns when target holders are offered different consideration. If you propose to do this, you should:

- › clearly consider and address any potential class issues likely to arise before structuring the transaction
- › expect extra scrutiny by ASIC if the transaction lacks the traditional mechanisms for managing class issues (e.g. voting in separate classes).

In novel circumstances when class issues are not able to be addressed through the usual measures, you should consult with ASIC before finalising a scheme structure.

Case study 6: Scheme requiring a separate class

We raised concerns in a scheme of arrangement where a small number of shareholders who were also management employees were able to elect to receive different consideration from all other shareholders, but where it was proposed that all shareholders vote in the same class.

The management shareholders were entitled to elect to receive cash consideration or, for half of their shareholding, scrip consideration in the holding company of the bidder. Non-management shareholders were only offered cash consideration.

After we raised concerns regarding management and non-management shareholders voting in the same class despite their differing rights, the scheme was amended to create a separate class for management shareholders.

Market and procedural integrity

We continued to intervene in a number of schemes and bids during the period when we had concerns about voting intention and other public statements.

We continue to seek to ensure bidders and scheme acquirers properly recognise the limits of agreements, arrangements and understandings they may reach with target holders.

Case study 7: Relevant agreement

We formed the view that an acquirer had entered into a relevant agreement with a shareholder by making an increase in consideration conditional on a shareholder publicly committing to vote in favour, and the shareholder doing so: see also [Report 489 ASIC regulation of corporate finance: January to June 2016](#) (REP 489), pages 162–70, and *Unity Mining Limited (No. 3) [2016] VSC 831* for other examples.

We required the acquirer to file a substantial holding notice recognising that interest. Although the interest was below the 20% takeover threshold, we also required the acquirer to commit to not acquiring further securities if doing so would take the disclosed interest above 20% and trigger the takeover provisions.

Case study 8: Listing statements

We raised concerns about an acquirer's proposal to remove a condition of a scheme that scrip consideration on offer be admitted to quotation on ASX. It was proposed that the scheme proceed on the basis that the acquirer disclose that it would seek listing on its best endeavours. We raised concerns about proceeding on this basis given the policy underlying s625(3) of the Corporations Act as it applies in takeover bids.

Our concerns were resolved when the listing condition was reinstated.

Disclosure of underwriting arrangements

Sometimes, underwriting agreements state that the underwriter will not be issued with a portion of the shortfall shares to the extent that such issue would result in the underwriter breaching the takeover threshold ('excess shortfall'). The agreement may provide that instead, the underwriter may provide the full funding upfront and, over a period of time, the underwriter may direct the issuer to issue the excess shares to new subscribers.

When an offer is described as 'fully underwritten', this is generally understood to mean that the underwriter:

- › guarantees funding, *and*
- › will be issued with the shortfall shares at the end of the offer.

When a term in the underwriting agreement may prevent the issue of shares to the underwriter at the end of the offer, any reference to 'full' underwriting must be clearly qualified and explain:

- › the extent of underwriting, including details of an excess shortfall that may arise
- › the potential impact on control arising from third parties taking up their entitlement where there is an excess shortfall
- › details of the terms on which the sale of the excess shortfall may occur.

Corporate governance during takeover transactions

The target board plays an important role in a takeover. We have a close focus on governance and conflicts issues that may undermine the ability of the target board to carry out its important duties and, in turn, the integrity of the takeover process.

Focus on: 'Fiduciary outs'

'Fiduciary outs' play an important role in ensuring exclusivity and other lock-ups do not unduly restrict a target board from carrying out its duties. Recent examinations of restrictions on fiduciary outs have raised concerns. We remind practitioners of the need to ensure that these clauses are not drafted in a way that unnecessarily interferes with the board's role. In particular, you should:

- › not include an objective 'reasonableness' requirement on the target board in determining what are its fiduciary and statutory duties: see *Ross Human Directions* [2010] ATP 8 (we requested amendments to a number of implementation agreements during the period to address this issue)
- › carefully consider any tailoring that may prevent the target board from relying on the exception when its duties may otherwise require (e.g. requiring unanimity in the board's decision: see *Terry White Group Limited No. 1* [2018] QSC 254).

Case study 9: Director resignations during bid period

We intervened in a bid when all of the independent directors of the target purported to resign from their positions shortly after the bidder obtained voting power of over 50%, which was weeks before the bid closed. Without independent directors, we were concerned that the board was unlikely to be able to provide effective oversight during the remainder of the bid period – including approving relevant target disclosures, addressing new events and maintaining a recommendation.

After raising our concerns, the independent directors' resignations were withdrawn.

Focus on: Director benefits

Practitioners should ensure that all benefits received by the target's directors in connection with a transaction are fully disclosed. This includes benefits relating to the acceleration and vesting of incentives, retirement and offers of employment from the bidder. Disclosure of benefits is important to ensure target holders can properly weigh up the deal and the directors' recommendations.

Criminal actions relating to takeovers

Contraventions of the Corporations Act in relation to a control transaction can result in criminal prosecution and potential imprisonment. The matter below is being prosecuted by the Commonwealth Director of Public Prosecutions.

Case study 10: False or misleading statements made to ASIC

We made inquiries to identify parties that had a relevant interest in certain shares of Northwest Resources Limited, which were held by two companies incorporated in the British Virgin Islands and operating from Hong Kong. We made the inquiries to ensure that the market was properly informed of the identity of all parties that had an interest in a substantial shareholding in Northwest Resources Limited.

During those inquiries and in response to ASIC's directions to disclose, John Lindsay Merity knowingly made false or misleading statements to ASIC by stating that he had no interest in the shares when, in fact, he did.

Mr Merity has pleaded guilty to two counts of making false or misleading statements to ASIC contrary to s1308(2) of the Corporations Act. Each offence carries a maximum penalty of five years imprisonment.

The matter is listed for a hearing on 15 July 2019: see [Media Release \(18-336MR\)](#) *Man pleads guilty to misleading ASIC about shareholding* (7 November 2018).

Corporate governance

Climate risk disclosure

In September 2018, we published [Report 593](#) *Climate risk disclosure by Australia's listed companies* (REP 593). Our report followed our review of climate risk disclosures:

- › by 60 listed companies in ASX 300
- › in 25 recent IPO prospectuses
- › across 15,000 annual reports.

We found that:

- › 17% of listed companies in our sample identified climate risk as a material risk in their operating and financial reviews (OFRs)
- › general (as opposed to specific) risk disclosure is common, but it is not useful for assessing climate risk exposures, with fragmented climate risk disclosure practices making comparisons difficult
- › the majority of ASX 100 companies in our sample had, to some extent, considered climate risk to the company's business
- › there is limited climate-risk-related disclosure outside of ASX 200.

The 2018 annual general meeting (AGM) season again highlighted that climate risk is seen as an important issue by investors: see [Report 609](#) *Annual general meeting season 2018* (REP 609).

Recommendations for listed companies

[REP 593](#) sets out a number of high-level recommendations for listed companies. We encourage listed companies and their directors to:

- › **Consider climate risk:** directors and officers should adopt a probative and proactive approach to emerging risks, including climate risk.
- › **Develop and maintain strong and effective corporate governance:** strong and effective corporate governance helps in identifying, assessing and managing material risks.
- › **Comply with the law:** s299A(1)(c) of the Corporations Act requires disclosure of material business risks affecting future prospects in an OFR, which may include climate change: see [Regulatory Guide 247](#) *Effective disclosure in an operating and financial review*(RG 247).
- › **Disclose useful information to investors:** specific disclosure is more useful than general disclosure. The voluntary framework developed by the Task Force on Climate-related Financial Disclosures (TCFD) may help listed companies consider how to disclose material climate risks and what type of information to disclose. Companies with material exposure to climate risk should consider reporting voluntarily under the TCFD framework.

Corporate Governance Taskforce

In August 2018, ASIC received specific funding to undertake in-depth reviews of corporate governance practices in large listed entities. We have formed a taskforce of 20 staff to conduct these reviews. We are conducting two workstreams of review:

- › director and officer oversight of non-financial risk
- › board and officer decisions regarding the granting and vesting of variable remuneration to key management personnel.

We have selected a number of large financial services entities that are subject to both workstreams of review. A further cohort of large listed entities has also been selected to be included in the executive remuneration review only, including entities from non-financial services sectors. Some of these entities may be the subject of the director and officer oversight workstream in a later period.

We have issued the relevant entities with information requests and have received information from a number of these entities. In addition to reviewing the content received from these entities, the manner in which the entities are responding to these requests and their engagement with the corporate regulator is also of interest to ASIC.

We will next be arranging discussions with the relevant entities to further understand their corporate governance practices.

We have also engaged an expert to undertake behavioural analysis of the entities. This aspect of the taskforce's review is aligned with the work of foreign regulators that have recognised the important role that behaviour and culture play in matters such as board effectiveness.

We are aiming to publish reports on the governance practices observed in this review in August 2019. The reports will include observations on the practices observed across the various cohorts in the workstreams. It will highlight actual practices, deficiencies as well as good practices, and ASIC's recommendations regarding practices requiring improvement.

Lodgement and fees

Industry funding invoices

Industry funding invoices were issued on 31 January 2019 to all entities regulated by ASIC. This includes listed and unlisted public companies, and large proprietary companies.

Invoices were due for payment by 15 March 2019. Any invoices not paid by the due date will incur penalties. Penalties are calculated at 20% per annum of the overdue amount.

ASIC issued industry funding invoices:

- › through the [ASIC Regulatory Portal](#) (to those that were registered), or
- › by mail to the registered company address.

More information on ASIC's [industry funding invoices](#) is available on our website.

Update to the electronic lodgement form

Last year, ASIC published an instrument to facilitate electronic lodgement of fundraising and takeover documents that have historically been provided to the Corporations team in hard copy. In response to feedback about declarations in the electronic lodgement service (ELS) form, we issued version 1.1 of the [ELS form](#) (PDF 42 KB) with declaration 6 removed entirely and declaration 2(b) modified for when agents affix signatures. If you have created a precedent document from ASIC's ELS form, please ensure it is updated.

Continue to send documents for electronic lodgement to Corporations.Lodgements@asic.gov.au and direct any queries about electronic lodgement to Corporations.Queries@asic.gov.au. More information on [lodging fundraising and takeover documents by email](#) is available on our website.

One further change is that cheques should now only be sent to ASIC's Brisbane offices at GPO Box 9827, BRISBANE QLD 4001.

Fees for service

Since new fee-for-service pricing took effect last year, one revision has been made to the regulations in respect of Corporations transactions. The fee for item 80A, which relates to applications to ASIC for an abridgement of the period of notice to ASIC for related party transactions, has been revised. The fee for this item has been scheduled at \$130, a reduction from \$3,487. This revision more accurately reflects the regulatory cost associated with granting this type of relief because the majority of regulatory effort is spent reviewing meeting materials to be put to members, for which there is a separate fee.

More generally, 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 fee paid for an application is calculated per head of ASIC relief power 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.

Appendix 1: Takeover bids and schemes

Table 2: Takeover bids in respect of which a bidder's statement was lodged with ASIC (July to December 2018)

Target	Bidder	Lodged	Type	Securities	Consideration
IPE Limited [IPE]	Mercantile Investment Company Limited [MVT]	4/07/2018	Off-market	Ordinary shares	Cash
Asia Pacific Digital Limited [DIG]	Trimantium GrowthOps Limited [TGO]	6/07/2018	Off-market	Ordinary shares	Scrip
Gateway Lifestyle Operations Limited (stapled as part of Gateway Lifestyle Group) [GTY]	Hometown Australia Holdings Pty Ltd	23/07/2018	Off-market	Ordinary shares (stapled)	Cash
Residential Parks No. 2 Trust (stapled as part of Gateway Lifestyle Group) [GTY]	Hometown Australia Holdings Pty Ltd	23/07/2018	Off-market	Units (stapled)	Cash
Rawson Oil and Gas Ltd [RAW]	Lakes Oil NL [LKO]	8/08/2018	Off-market	Ordinary shares	Scrip
Yellow Brick Road Holdings Ltd [YBR]	Mercantile Investment Company Limited [MVT]	20/08/2018	Off-market	Ordinary shares	Cash
Wealth Defender Equities Limited [WDE]	WAM Capital Limited [WAM]	30/08/2018	Off-market	Ordinary shares	Scrip
Explaurum Limited [EXU]	Ramelius Resources Limited [RMS]	10/09/2018	Off-market	Ordinary shares	Cash and scrip
Summit Resources Limited [SMM]	Paladin Energy Ltd [PDN]	11/09/2018	Off-market	Ordinary shares	Scrip
Dampier Gold Ltd [DAU]	Vango Mining Limited [VAN]	17/09/2018	Off-market	Ordinary shares	Scrip
AIC Resources Limited [A1C]	Intrepid Mines Limited [IAU]	3/10/2018	Off-market	Ordinary shares	Scrip
Asia Pacific Data Centre Holdings Limited (stapled as part of Asia Pacific Data Centre Group) [AJD]	NEXTDC Limited [NXT]	8/10/2018	Market	Ordinary shares (stapled)	Cash
Asia Pacific Data Centre Trust (stapled as part of Asia Pacific Data Centre Group) [AJD]	NEXTDC Limited [NXT]	8/10/2018	Market	Units (stapled)	Cash
UIL Energy Limited [UIL]	Strike Energy Limited [STX]	24/10/2018	Off-market	Ordinary shares	Scrip
UIL Energy Limited [UIL]	Strike Energy Limited [STX]	24/10/2018	Off-market	Preference shares	Scrip
Watpac Limited [WTP]	BESIX Group SA	29/10/2018	Off-market	Ordinary shares	Cash

Target	Bidder	Lodged	Type	Securities	Consideration
Henry Morgan Limited [HML]	John Bridgeman Limited [JBL]	31/10/2018	Off-market	Ordinary shares	Scrip
Benjamin Hornigold Limited [BHD]	John Bridgeman Limited [JBL]	31/10/2018	Off-market	Ordinary shares	Scrip
Benjamin Hornigold Limited [BHD]	John Bridgeman Limited [JBL]	31/10/2018	Off-market	Options	Scrip
Stanmore Coal Limited [SMR]	Golden Investments (Australia) Pte. Ltd	19/11/2018	Off-market	Ordinary shares	Cash
Propertylink (Holdings) Limited (stapled as part of Propertylink Group) [PLG]	ESR Cayman Limited	19/11/2018	Off-market	Ordinary shares (stapled)	Cash
Propertylink Australian Industrial Partnership (stapled as part of Propertylink Group) [PLG]	ESR Cayman Limited	19/11/2018	Off-market	Units (stapled)	Cash
Propertylink Trust (stapled as part of Propertylink Group) [PLG]	ESR Cayman Limited	19/11/2018	Off-market	Units (stapled)	Cash
The Reject Shop Limited [TRS]	Allensford Pty Ltd ATF the Allensford Unit Trust	21/11/2018	Market	Ordinary shares	Cash
Calibre Group Limited	Jupiter Civil Pty Ltd ATF The Jupiter Unit Trust	10/12/2018	Off-market	Ordinary shares	Cash
PrimaryMarkets Limited	Linqto Inc.	20/12/2018	Off-market	Ordinary shares	Scrip

Note 1: This table lists each takeover bid for which an initiating bidder's statement was lodged with ASIC during the period. When 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. When a bidder is a (direct or indirect) wholly-owned subsidiary of another entity, the controlling entity may be listed as bidder.

Note 2: All off-market bids are full bids unless otherwise indicated.

Note 3: 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 3: Schemes of arrangement in respect of which an explanatory statement was registered or otherwise released (July to December 2018)

Target	Acquirer	Registered	Type	Securities	Received
SRG Limited [SRG]	Global Construction Services Limited [GCS]	20/07/2018	Members	Ordinary shares	Scrip
Sino Gas & Energy Holdings Limited [SEH]	LSF X U.S. Holdings, L.P and Lone Star Fund X (Bermuda), L.P. (funds advised by Lone Star Global Acquisitions, Ltd)	27/07/2018	Members	Ordinary shares	Cash

Target	Acquirer	Registered	Type	Securities	Received
Sirtex Medical Limited [SRX]	CDH Genetech Limited and China Grand Pharmaceutical and Healthcare Holdings Limited	1/08/2018	Members	Ordinary shares	Cash
Excelsior Gold Limited [EXG]	Spitfire Minerals Limited [SPI]	13/08/2018	Members	Ordinary shares	Scrip
APN Outdoor Group Ltd [APO]	JCDecaux SA	10/09/2018	Members	Ordinary shares	Cash
Folkestone Limited [FLK]	Charter Hall Group [CHC]	13/09/2018	Members	Ordinary shares	Cash
ProTen Limited	FSS Trustee Corporation as trustee for the First State Superannuation Scheme	27/09/2018	Members	Ordinary shares	Cash
Zenitas Healthcare Limited [ZNT]	Funds advised by Adamantem Capital Management Pty Ltd and Liverpool Partners Pty Ltd	11/10/2018	Members	Ordinary shares	Cash
Capilano Honey Limited [CZZ]	Wattle Hill RHC Fund 1 and ROC Capital Pty Limited	11/10/2018	Members	Ordinary shares	Cash or scrip or cash and scrip
Fairfax Media Limited [FXJ]	Nine Entertainment Co. Holdings Limited [NEC]	12/10/2018	Members	Ordinary shares	Cash and scrip
Spookfish Limited [SFI]	EagleView Technology Corporation	12/10/2018	Members	Ordinary shares	Cash
Kangaroo Resources Limited [KRL]	PT. Bayan Resources, Tbk	17/10/2018	Members	Ordinary shares	Cash
Mitula Group Limited [MUA]	LIFULL Co., Ltd	26/10/2018	Members	Ordinary shares	Cash and scrip or scrip
Scottish Pacific Group Limited [SCO]	SME Capital Investments III Pty Ltd (owned by funds managed or advised by Affinity Equity Partners Limited and/or its affiliates)	26/10/2018	Members	Ordinary shares – other holders	Cash
Scottish Pacific Group Limited [SCO]	SME Capital Investments III Pty Ltd (owned by funds managed or advised by Affinity Equity Partners Limited and/or its affiliates)	26/10/2018	Members	Ordinary shares – management holders	Cash and scrip
Genea Limited	MW Fertility Pte Ltd.	29/10/2018	Members	Ordinary shares	Cash
Decimal Software Ltd [DSX]	Sargon Capital Pty Ltd	31/10/2018	Members	Ordinary shares	Cash
PrimeQ Limited	Accenture Australia Holdings Pty Ltd	5/11/2018	Members	Ordinary shares	Cash
PrimeQ Limited	Accenture Australia Holdings Pty Ltd	5/11/2018	Members	Class A performance shares	Cash
Terry White Group Ltd	EBOS Group Limited	6/11/2018	Members	Ordinary shares	Cash

Target	Acquirer	Registered	Type	Securities	Received
Tawana Resources Ltd [TAW]	Alliance Mineral Assets Limited	8/11/2018	Members	Ordinary shares	Scrip
Greencross Limited [GXL]	'Vermont Aus Pty Ltd an entity ultimately owned by funds managed by TPG Asia VII SF Pte Ltd and TPG Growth IV SF Pte Ltd'	20/12/2018	Members	Ordinary shares	Cash or cash and scrip
Beadell Resources Limited [BDR]	Great Panther Silver Limited	21/12/2018	Members	Ordinary shares	Scrip
Century Australia Investments Limited [CYA]	WAM Leaders Limited [WLE]	21/12/2018	Members	Ordinary shares	Scrip
Opus Group Limited [OPG]	Not applicable – redomiciliation	26/07/2018	Members	Ordinary shares	N/A
J.P. Morgan Australia Pty Limited	Not applicable – reconstruction / amalgamation	27/07/2018	Members	Ordinary shares	N/A
J.P Morgan Administrative Services Australia Limited	Not applicable – reconstruction / amalgamation	27/07/2018	Members	Ordinary shares	N/A
J.P. Morgan Markets Australia Pty Limited	Not applicable – reconstruction / amalgamation	27/07/2018	Members	Ordinary shares	N/A
J.P. Morgan Operations Australia Limited	Not applicable – reconstruction / amalgamation	27/07/2018	Members	Ordinary shares	N/A
JPMorgan Investments Australia Pty Limited	Not applicable – reconstruction / amalgamation	27/07/2018	Members	Ordinary shares	N/A
Wesfarmers Limited [WES]	Not applicable – demerger	5/10/2018	Members	Ordinary shares	Scrip – demerger
Ardent Leisure Limited (stapled as part of the Ardent Leisure Group) [AAD]	Not applicable – restructure	10/10/2018	Members	Ordinary shares	Scrip – restructure
Lendlease Capital Services Pty Ltd Group	Not applicable – restructure	10/10/2018	Members	Ordinary shares	N/A
Genea Limited	Not applicable – demerger	29/10/2018	Members	Ordinary shares	N/A
Boart Longyear Limited [BLY]	Not applicable – redomiciliation	29/10/2018	Members	Ordinary shares	N/A
Barrick Mining Company (Australia) Pty Limited	Not applicable – reconstruction / amalgamation	2/11/2018	Members	Ordinary shares	N/A
Ethanol Technologies Limited	Not applicable – restructure	20/12/2018	Members	Ordinary shares	Scrip – restructure

Target	Acquirer	Registered	Type	Securities	Received
Quintis Ltd [QIN]	Not applicable – senior debt	N/A	Creditors	Secured notes	N/A
Ardent Leisure Trust (stapled as part of the Ardent Leisure Group) [AAD]	Not applicable – restructure	10/10/2018	Members	Units	Scrip – restructure

Note 1: 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) between 1 July and 31 December 2018 (inclusive)
- each proposed compromise or arrangement between a Pt 5.1 body and its creditors or a class of its creditors for which a draft explanatory statement, previously provided to ASIC for consideration in accordance with s411(2), was made available to creditors on a date between 1 July 2018 and 31 December 2018 (inclusive).

This table does not include trust schemes or the one creditors' scheme that was not public.

Note 2: When an acquirer or scheme company is listed on a prescribed financial market, its name is accompanied by the ticker code under which it trades. When an acquirer is a (direct or indirect) wholly-owned subsidiary of another entity, the parent entity may be listed as acquirer.

Note 3: 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.

Note 4: One reconstruction scheme, listed above as Lendlease Capital Services Pty Ltd Group, involved 114 schemes of arrangement, being one scheme for each of the participating 114 entities in the corporate group.

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 4: Types of offers (July to December 2018)

Offer type	Documents lodged	Funds sought
IPO	43	\$2.5bn
Non-IPO	253	\$5.1bn

Note: This is the data shown in Figure 1.

Table 5: Form of ASIC intervention in prospectus disclosure (July to December 2018)

Form of intervention	Number
Extension of exposure period	34
Interim order made in respect of an offer	11
Revocation of interim order	3
Final stop order made	2

Note: This is the data shown in Figure 2.

Table 6: Top five disclosure concerns most frequently raised (July to December 2018)

Disclosure concern	Number
Business model – not fully or adequately disclosed	18
Misleading or deceptive disclosure – misleading or unclear statement	13
Use of funds – unclear or insufficient detail	11
Risk disclosure – inadequate, insufficiently prominent or not tailored	10
Clear concise and effective disclosure – insufficient summary, investment overview or key information	6

Note: This is the data shown in Figure 3.

Table 7: Results of ASIC raising concerns (July to December 2018)

Result	Percentage
New or amended disclosure	80%
Exposure period extension	68%
Interim stop order	15%
No change required	15%
Final stop order	7%
Revocation of interim stop order	5%
Other	7%

Note: This is the data shown in Figure 4.

Table 8: Independent control and restructure transactions (July to December 2018)

Transaction type	Number
Control transactions via schemes	22
Restructures via schemes	9
Creditors' schemes	2
Control transactions via trust schemes	2
Control transactions via bids	20
Restructure via bid	1

Note: This is the data shown in Figure 5.

Table 9: Control transactions by implied target size (July to December 2018)

Implied target size	Scheme	Bid
Over \$1 billion	5 (11%)	0
\$200 million to \$1 billion	8 (18%)	4 (9%)
\$50 million to \$199 million	8 (18%)	4 (9%)
Under \$50 million	3 (7%)	12 (27%)

Note: This is the data shown in Figure 6.

Table 10: Foreign and domestic offerors (July to December 2018)

Type of bidder or acquirer	Number of transactions and percentage of total transactions	Transactions by implied target value (percentage)
Foreign bidder or acquirer	18 (41%)	78%
Domestic bidder or acquirer	26 (59%)	22%

Note: This is the data shown in Figure 7.

Table 11: Largest control transactions via bid or scheme, by implied target size (July to December 2018)

Target (acquirer)	Implied target value	Cash value	Scrip value	Cash or scrip value
Investa Office Fund (Oxford Properties Group)	\$3.35bn	\$3.35bn	\$0	\$0
Investa Office Fund (Blackstone Group LP)	\$3.2bn	\$3.2bn	\$0	\$0
Fairfax Media Limited	\$2.16bn	\$2.1bn	\$57m	\$0
Sirtex Medical Limited	\$1.87bn	\$1.87bn	\$0	\$0
APN Outdoor Group	\$1.12bn	\$1.12bn	\$0	\$0
Propertylink Group	\$723m	\$723m	\$0	\$0
Gateway Lifestyle Group	\$683m	\$683m	\$0	\$0
Greencross Limited	\$669m	\$0	\$0	\$669m
Scottish Pacific Group Limited	\$612m	\$612m	\$0	\$0
Sino Gas & Energy Holdings Limited	\$530m	\$530m	\$0	\$0

Note: This is the data shown in Figure 8.

Table 12: Applications received for relief relating to control transactions (July to December 2018)

Application topic	Percentage
Voluntary escrow	53%
Relevant interests	8%
Item 7 transactions	8%
Variation of offer terms/bid class	8%
Bid procedure timing	5%
Other	16%

Note: This is the data shown in Figure 9.

Table 13: ASIC's regulatory interventions in control transactions (July to December 2018)

Transaction type	Disclosure only	Structure only	Both
Takeover bid	5	2	1
Scheme	10	1	3
Item 7 transaction	6	0	0

Note: This is the data shown in Figure 10.