



Treasury consultation on takeovers

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Key Messages

On 1 April 2022, Treasury released a consultation paper relating to corporate control transactions, including takeover bids and schemes of arrangement. Treasury consulted on broadening the role of the Takeovers Panel to include members' schemes and advance rulings. Treasury also sought submissions on the operation of schemes and takeover bids generally.

The consultation closed on 3 June 2022. No submissions have been made available on Treasury's website. The Law Council of Australia published its submission.

The regime applying to corporate control transactions and the role of the Panel is a policy matter for the Government to determine. ASIC will continue to liaise with Treasury on proposals in this space.

ASIC is responsible for reviewing disclosures and conduct in members' schemes and takeover bids. ASIC also assists the court in schemes by ensuring issues are brought to its attention and providing a no-objection letter.

Background

On 30 April 2021, Treasury announced a public consultation process to consider broadening the role the Takeovers Panel plays in control transactions, including potentially giving advance rulings and expanding the Panel's remit to include members' schemes of arrangement. A consultation paper was released on 1 April 2022 and sought feedback on:

- the operation of takeovers and schemes generally, and whether they are meeting the broader policy objectives in respect of control transactions in Australian law
- the role of the Takeovers Panel and ASIC in regulating takeovers generally
- the role of the Court, the Takeovers Panel and ASIC in regulating schemes generally.

The consultation paper particularly consulted on whether:

- schemes used to effect a change in corporate control should continue to be regulated primarily by the court, or should instead be regulated by primarily by the Takeovers Panel
- schemes should continue to be regulated by the court and a new type of scheme should be created that is regulated by the Takeovers Panel
- the Takeovers Panel should be empowered to give advance rulings.

ASIC's role

Our regulatory role in the administration and conduct of members' schemes of arrangements and takeover bids primarily involves the review and monitoring of documentation, disclosures and conduct to ensure compliance with the relevant provisions and the purposes underlying Chapter 6 of the Act.

Members' schemes are also subject to oversight by the court. Our role is to represent the interests of investors (where in many cases those parties may not be represented in court) and to ensure that all matters relevant to the court's decision are properly brought to its attention. In this role, ASIC may provide a 'no-objection' statement to the court indicating that it has no objection to the scheme or may appear at the court hearings to raise concerns.

Takeovers bids may also be subject to proceedings in the Takeovers Panel, as the main forum for resolving disputes relating to bids. ASIC is included as a participant in all proceedings in the Panel.

We regulate members' schemes and takeover bids with regard to the underlying purposes set out in Chapter 6 of the Act (the "Eggleston Principles"). This is broadly that the acquisition of control should occur in an efficient, competitive and informed market, there should be transparency about persons who control an entity, and all holders should be given an equal opportunity to benefit from a control proposal. Our approach seeks to ensure that, as far as practicable, similar principles and protections are applied regardless of how a control transaction is structured.

Increasing popularity of schemes

Schemes of arrangement are generally as popular as takeover bids as a method to acquire control. The popularity of schemes as an acquisition method briefly dropped in CY2020 likely due to market uncertainty caused by COVID-19 but has since returned to popularity.

	H12022	2021	2020	2019	2018	2017	2016
Schemes (control)	22	48	18	38	35	30	32
Takeover bids	14	35	30	32	36	38	31
Schemes (%)	61%	58%	38%	54%	49%	44%	51%

The above:

excludes members' schemes not for control purposes (e.g. corporate restructures or redomiciliations). The consultation paper did not propose that these would fall in the Panel's remit;

includes only independent control transactions (e.g. a target may affect multiple separate schemes as part of a single transaction of a bidder acquiring control).

ASIC Action

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