



ASIC
Australian Securities &
Investments Commission

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Committee member	Senator Pratt

Question:

Senator PRATT: My last question is on a different topic. I'm concerned that, when ASIC or the takeovers panel is weakened standing up for fair value in takeovers, whether that's share purchases or compulsory takeovers—for example, in the case of shares held in mineral exploration—it impacts on the preparedness of people to invest in such exploration. Is that a concern that ASIC shares? And what's your role in oversight of that?

CHAIR: Mr Longo, do you want to direct that question to an appropriate officer?

Mr Longo: I can't say it's a concern we have at the moment. It's essentially a matter for the panel, which is very specialised and now runs quite a sophisticated role in MNA. Can I take that question on notice and we will respond to it?

Senator PRATT: Okay. And if you have any precedents that you're looking at. I'm concerned that this is actively happening and I want to know what ASIC's doing about it

Answer:

ASIC has oversight of a number of different control transactions under the Corporations Act 2001. This includes takeover bids under Chapter 6 of the Act, schemes of arrangement under Part 5.1 of the Act, compulsory acquisitions and buyouts under Chapter 6A of the Act and transactions that rely on exceptions to the takeovers provisions in Chapter 6 of the Act.

Takeover bids and schemes of arrangement

Our regulatory role in the administration and conduct of takeover bids and schemes of arrangements primarily involves:

- (a) the review and monitoring of documentation, disclosures and conduct in relation to takeover bids and schemes of arrangement to ensure compliance with the relevant provisions and the purposes underlying Chapter 6 of the Act; and
- (b) providing regulatory guidance and relief that improves commercial certainty and balances the protections of Chapter 6 with the facilitation of takeover transactions.

In relation to schemes of arrangement which are also subject to approval by the court, our role is also to represent the interests of investors and creditors (where in many cases those parties may not be represented in court) and helping to ensure that all matters relevant to the court's decision are properly brought to its attention.

In relation to both takeover bids and schemes of arrangements, ASIC administers the regulation of control with regard to the underlying purposes set out in Chapter 6 of the Act,

known as the “Eggleston Principles”. These principles broadly set out 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.

The coordination of our approach across both takeover bids and schemes of arrangement seeks to ensure that, as far as practicable, similar principles and protections are applied regardless of whether a control transaction is structured as a scheme or a bid.

However, ASIC's role does not extend to intervening on the merits of a control proposal. In fulfilling our role, we do not assess whether a control proposal offers fair value or whether the value of a proposed control transaction is fair to the investors of an entity. Rather, ASIC is concerned to ensure that investors receive information to enable them to make an informed decision, have an equal opportunity to participate in a control proposal if they wish to do so and that control proposals are made in an efficient and competitive market.

There are a number of ways in which ASIC intervenes in control proposals to ensure that these priorities are met. Examples of the ways in which we have intervened include:

- ensuring that appropriate disclosure is provided to investors so that they have access to all information they need to make an informed decision;
- where some shareholders may receive different benefits under a scheme of arrangement to other shareholders, ensuring that shareholders who are treated differently vote in different classes from non-interested shareholders. Each class must separately vote to approve the scheme for it to proceed so this ensures voting occurs in a way that prevents interested shareholders from unduly influencing the vote compared to non-interested shareholders;
- ensuring that control proposals do not include conditions that unfairly discriminate between shareholders or that may result in shareholders receiving different value because of certain characteristics of their holding;
- ensuring that the consideration that shareholders may receive is disclosed with as much certainty as possible before they vote on a scheme of arrangement proposal or accept an offer under a takeover bid; and

requiring directors to commission an independent expert report where the directors do not have the requisite skill or qualifications to opine on value.

Compulsory acquisitions and buyouts

ASIC monitors compulsory acquisition and buyout procedures to ensure compliance with the provisions and purposes underlying Chapter 6A and also provide regulatory guidance and relief where necessary.

Exceptions to the takeovers provisions

ASIC also has oversight over transactions which rely on the exceptions to the takeovers provisions in Chapter 6 of the Act, including acquisitions approved by members and acquisitions under rights issues. We regularly review and monitor transactions involving reliance on an exception to ensure compliance with the provisions and purposes of Chapter 6.

Independent expert reports

In many of the control transactions that ASIC regulates as mentioned above, entities are required to commission an independent expert report or may do so voluntarily to assist security holders to make an informed choice. This is generally to ensure that security holders receive an independent analysis of the transaction including as to the value of any consideration offered or proposed to be paid for the acquisition of control.

In opining on many of the control transactions that ASIC regulates, an expert is often required to consider whether the offer is 'fair' and 'reasonable' to investors. ASIC's guidance, as set out in ASIC Regulatory Guide 111 *Content of expert reports*, is that an offer is 'fair' if the value of the offered consideration is equal or greater than the value of the securities the subject of the offer. However, even where an expert concludes that an offer is 'not fair' under that test, the expert may nevertheless decide that the offer is 'reasonable' having regard to other factors of the transaction or entity's circumstances. For example, an expert may consider that an offer is 'not fair' but 'reasonable' where a target entity is in financial distress and the alternative methods of remedying the financial distress are likely to be less attractive to security holders than a successful offer.

ASIC monitors the independent expert sector and regularly reviews the reports they provide. ASIC can raise concerns or request changes to a report if there are material issues with the content of the report or if there are concerns about the independence of the expert.

Examples of the ways in which ASIC has intervened (i.e. precedents) to ensure that these priorities are met in relation to independent expert reports include:

- ensuring that an independent expert is independent of the interested parties in the transaction and that the opinion expressed by the expert is a genuine opinion and a product of their professional judgment;
- ensuring that the expert uses an appropriate valuation methodology for the circumstances of the entity and transaction it is opining on and that the use of established valuation methodologies is consistent;
- ensuring that experts disclose the material assumptions relied on in their valuations and the reasonable grounds on which those assumptions are based; and

ensuring that independent expert reports address the information needs of investors, clearly explain the expert's opinion and highlight key information.

The Takeovers Panel

ASIC's regulatory surveillance, relief and day-to-day administration role with respect to takeovers is complemented by the role of the Takeovers Panel as the main forum for resolving disputes concerning acquisitions of control or substantial interests in entities.

The Panel is a peer review body established under section 171 of the Australian Securities and Investments Commission Act 2001 and given powers under Part 6.10 of the Corporations Act. The Panel's primary power is to declare circumstances unacceptable in relation to a takeover or the control of an Australian company or a listed managed investment scheme. In deciding whether circumstances are unacceptable, the Panel is required to consider the effect of the circumstances and whether the effect appears to be unacceptable having regard to control or potential control of an entity, the acquisition or proposed acquisition of a substantial interest in the entity, the purposes of Chapter 6, or because of a contravention of Chapters 6-6C of the Act. However, the Panel's jurisdiction to consider these issues is limited to where a person who has standing makes an application to the Panel.

ASIC may apply to the Takeovers Panel where it considers that circumstances regarding control of a relevant entity constitute unacceptable circumstances.