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## WHITE PAPER

September 2018

### ASIC Review of Corporate Finance: Priorities in the First Half of 2018

The Australian Securities and Investments Commission (“ASIC”) recently released the “ASIC regulation of corporate finance: January to June 2018” report that demonstrates ASIC’s increased preparedness to take action on takeover bids and capital raisings—including through the use of formal orders, participation in Takeovers Panel proceedings and, in two cases involving bids, criminal prosecution.

This Jones Day *White Paper* examines the highlights of this report.

## REPORT HIGHLIGHTS

- The volume of fundraising in dollar terms increased by almost 35 percent on the prior year. ASIC's levels of intervention in fundraising transactions also materially increased.
- ASIC has observed a slight increase in the number of control transactions by way of scheme of arrangement,<sup>1</sup> with a notable decrease in takeover bids,<sup>2</sup> compared to the six months ending 31 December 2017.
- Truth in takeovers policy is an area of strong focus. ASIC has intervened in numerous deals and announced its intention to review its regulatory guidance in this area.
- ASIC has flagged the risks associated with last minute amendments to scheme of arrangement terms and has urged parties in this position to approach ASIC first.
- Shareholders who fail to disclose all contemporaneous agreements in an unredacted form in their substantial holding disclosures are at risk of ASIC complaining to the Takeovers Panel.
- Financial services businesses seeking to list on ASX are now required to provide candid prospectus risk disclosures arising from relevant issues raised in the Royal Commission.
- Directors should consider climate risks when addressing their company's legal disclosure obligations in relation to material business risks.

## HEIGHTENED REGULATORY ACTION: FUNDRAISING AND M&A

ASIC has reported intervening more often in fundraising transactions.<sup>3</sup> For example, the number of interim stop orders issued in respect of prospectuses was materially higher than the prior period, and ASIC raised disclosure concerns with almost 20 percent of prospectuses. New or amended disclosure was the result of ASIC's concerns in 88 percent of those cases.<sup>4</sup>

ASIC has also been active in taking regulatory action in change of control transactions during the review period. For example, ASIC brought criminal charges against directors relating to two separate bids (one example related to an alleged failure to make offers in compliance with the *Corporations Act 2001* (Cth) ("Corporations Act") and the other example related to allegations of dishonesty and false or misleading information).

Separately, ASIC noted that it has been an active participant in a number of Takeovers Panel proceedings in the period, of which there were 11 initial applications and four review applications for declarations of unacceptable circumstances. An additional three applications were received by the Takeovers Panel relating to orders during the period.

## INCREASED FOCUS ON TRUTH IN TAKEOVERS— PRACTICAL GUIDANCE AND POLICY REVIEW

ASIC is concerned about the importance that investors place on last and final or truth in takeovers statements and stepped up its level of intervention accordingly during the first half of 2018.

By way of example, ASIC cited the well-publicised Takeovers Panel matter concerning Eastern Field Developments' bid for Finders Resources. The proceedings involved a substantial shareholder, Taurus Funds Management ("Taurus"), and two of the target's directors departing from statements that they did not intend to accept into the bid. After three proceedings before the panel<sup>5</sup>, the bidder recently sought judicial review of the findings of the review panel that provided for the cancellation of Taurus's acceptance (subject to a right to put the shares at the offer price to the bidder in the future) and ordered Taurus to pay compensation to affected investors.

In another situation, ASIC queried the acquirer under a scheme after a newspaper article cited comments made by its chief executive that it 'will not move on price' without qualification. The acquirer subsequently issued a clarification that it reserved its right to increase its offer.

ASIC's report contains practical guidance for market participants to follow in making truth in takeovers statements. ASIC emphasises the importance of monitoring the media on a daily basis during a transaction and ensuring that any authorised spokesperson is aware of the risks of making unqualified statements.

ASIC urges caution when inviting shareholders to make intention statements to limit the risk of an association arising that may have the potential to result in a breach section 606 of the Corporations Act.

ASIC has said that it intends to review and update its Regulatory Guide 25 (“Takeovers: false and misleading statements”) for the purpose of providing greater certainty to the market about the application and enforceability of the truth in takeovers policy.

## LAST MINUTE CHANGES TO SCHEME TERMS

The Billabong scheme of arrangement earlier this year provided a good reminder of the inherent flexibility in schemes of arrangement. In that deal, the chairman announced during the scheme meeting that—following a last minute negotiation—the cash price payable under the scheme would be increased. This amendment was, notably, without the court’s prior approval. Billabong shareholders were asked to approve the original form of resolution (as the legislation requires), and the court subsequently approved the price increase at the approval hearing relying on its power in section 411(6) of the Corporations Act.

ASIC did not object to the scheme at the time of the meeting for a variety of reasons (in essence, due to evidence that the resolution would have been approved even if the scheme consideration was not increased). ASIC makes it clear in its report that it remains concerned about the risks associated with last minute amendments to scheme terms.

The ability to successfully make ‘last minute’ changes to the terms of a scheme of arrangement ultimately will be heavily fact dependent. The more orthodox practice of deferring the scheme meeting would most likely need to be followed in instances where:

- The amendment cannot be easily (and immediately) understood by target shareholders and, therefore, requires increased disclosure to be made;
- The amendment would impact the likelihood of success of the vote (which it didn’t in Billabong);
- There was any evidence to suggest that the amendments may have a coercive effect; or
- The amendments were made in the context of an actual or likely auction of control for the target.

## DISCLOSURE OF ALL RELEVANT SUBSTANTIAL HOLDING AGREEMENTS

ASIC has reminded shareholders of their legal obligations to provide full and unredacted copies of all relevant agreements when making substantial holding disclosures. ASIC’s preference is that all contemporaneous agreements relating to a substantive transaction are disclosed—rather than just the preliminary agreement which technically gave rise to the change in voting power.

ASIC raised concerns when parties to a joint venture filed substantial holding notices attaching a copy of a standstill and exclusivity agreement, but not a copy of the substantive and definitive agreements signed on the following day. ASIC therefore seems to be alive to parties staggering the signing of agreements through the use of preliminary agreements to avoid disclosing later signed substantive agreements that are essential to understanding the ongoing association between the relevant parties, or that otherwise “contributed” to the situation giving rise to the person needing to file the notice. While the joint venture parties agreed to disclose the definitive agreements in response to ASIC’s concerns, ASIC still was not happy when the agreements contained redactions.

ASIC has foreshadowed its powers to seek a declaration and orders from the Takeovers Panel in these circumstances in order to compel full compliance.

## ROYAL COMMISSION AND IPOS OF FINANCIAL SERVICES BUSINESSES

ASIC suggests that any financial services business seeking an IPO must provide candid disclosure in its prospectus regarding how its business may be affected by issues being raised in the Royal Commission into misconduct in the banking, superannuation and financial services industry.

ASIC has noted that relevant information for market disclosure will be dependent on the business model that has been adopted and may include relevant historical and current interaction with regulators and *possible* outcomes, as well as risks relating to the treatment of customers and any other specific regulatory risks that the business may encounter.

ASIC has not provided any further guidance as to the depth of disclosure required or how such risks should be disclosed. We note that there is a degree of difficulty for a financial services business to determine appropriate disclosure in the context of an ongoing Royal Commission<sup>6</sup> and in an environment where they are in continual discussions with regulators. This may explain why ASIC has encouraged affected parties to approach ASIC's corporations team before the prospectus is lodged.

Businesses should carefully monitor the Royal Commission after lodging their prospectus and keep track of their interaction with regulators during the exposure period and prior to settlement of the IPO in case any circumstances arise that would require revised disclosure.

## DISCLOSURE OF CLIMATE RISKS

As to matters of corporate governance, ASIC's view is that the legal disclosure obligations of listed companies may extend to climate risk and ASIC has reminded directors of their obligations to consider the possible impact of climate risk on their company's prospects and businesses.

ASIC's comments follow a speech by ASIC Commissioner John Price in June 2018<sup>7</sup> in which he referred to an opinion by Noel Hutley QC and noted ASIC's support of Hutley QC's view that directors who fail to consider climate risk leave themselves open to the risk of later being found to have breached their duty of care and diligence.

We expect that climate change will be an area of continued focus for ASIC. As part of its current activities in this area, ASIC reported that it is undertaking a review of climate risk disclosures across the ASX 300 to better understand current market practices and will publish its findings later in 2018.

## LAWYER CONTACTS

For further information, please contact your principal Firm representative or one of the lawyers listed below. General email messages may be sent using our "Contact Us" form, which can be found at [www.jonesday.com/contactus/](http://www.jonesday.com/contactus/).

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## ENDNOTES

- 1 See page 22 of REPORT 567: ASIC regulation of corporate finance: July to December 2017, which reported 11 schemes of arrangement.
- 2 See page 22 of REPORT 567: ASIC regulation of corporate finance: July to December 2017, which reported 24 takeover bids.
- 3 See page 7 of REPORT 589: ASIC regulation of corporate finance: January to June 2018 which notes the increase of interim stop orders in the review period (10.5% compared with 1.8% during the July to December 2017 period).
- 4 See page 7 of REPORT 589: ASIC regulation of corporate finance: January to June 2018.
- 5 Finders Resources Limited [2018] ATP 6; Finders Resources Limited 02 [2018] ATP 9; Finders Resources Limited 03R [2018] ATP 11.
- 6 In respect of which an interim report is due by 30 September 2018 and a final report due by 1 February 2019.
- 7 Keynote address by John Price, Commissioner, ASIC, Centre for Policy Development: Financing a Sustainable Economy, Sydney, Australia, 18 June 2018 (<https://asic.gov.au/about-asic/media-centre/speeches/climate-change/>)

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