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Responding to a takeover approach

A guide for boards in navigating bids and defending value

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1 Introduction

Against a backdrop of continued economic uncertainty and geopolitical tensions, public company takeover activity continues to be a prominent feature of the Australian market – some 70 bids for ASX-listed companies were announced in the year ended 30 June 2024 (FY24) with a total deal value of almost $50 billion.

Over 80% of these were recommended offers, with only 12 hostile bids, and ultimately 90% of all offers were successfully completed – by way of either a takeover bid or a scheme of arrangement. Schemes of arrangement have increasingly been the favoured approach for 'friendly' deals, accounting for over 70% of all transactions.

The larger deals included the takeovers of Altium, Boral, CSR and Alumina (all over $3 billion), whilst the vast majority of transactions involved smaller targets with deal values in the range $20 – 500 million. Energy and resources, materials and the IT sector accounted for three-quarters of all deals.

With IPO activity continuing to be subdued despite the ASX trading at an all-time high, takeover activity has resulted in a net exodus of companies from the ASX, which correlates with a rise in the prominence of private capital. With substantial funds to deploy and seeking ever larger deals, around 20% of all takeovers in FY24 were public-to-private transactions led by a private equity funds, including TPG Capital (InvoCare), Paine Schwartz Partners (Costa Group) and Madison Dearborn (APM Human Services). In prior years, we have also seen substantial direct investments led by superannuation and asset management funds focused on infrastructure assets, including Sydney Airport Holdings ($24bn), AusNet Limited ($10bn) and Spark Infrastructure ($5.2bn).

Notably, there has also been a significant increase in takeovers by foreign bidders, which accounted for over half of all successful bids and over 75% by value in FY24, compared to around one-third in number and ~60% by value over the previous five years. This has been accompanied by an increase in the number of bids which have been subject to FIRB or international regulatory approvals. European, Japanese and US companies have been particularly active in targeting Australian listed companies. With the ACCC moving to a single, mandatory merger notification regime (subject to thresholds) from 1 January 2026, we can also expect to see an increase in referrals to the competition regulator.

Looking ahead, we expect to see a consistent level of takeover activity in the public markets in 2025, with private capital continuing to play a key role in targeting ASX listed companies – particularly those facing challenges which can be addressed away from the scrutiny of the public markets – with a view to a subsequent trade sale or return to a public listing. Foreign takeover activity is also likely to remain prominent, particularly with the recent fall in value of the Australian dollar against other major currencies.

A takeover approach often comes without prior notice and boards therefore need to be well prepared to respond promptly and decisively. This report is intended to equip boards with key commercial insights needed to navigate a takeover bid, from the initial response and evaluation of the offer to negotiating with the bidder and mounting an effective defence if the bid turns hostile. It also highlights the importance of having a takeover response plan, as well as a clear strategy to ensure consistent and effective communications with shareholders and the market. With the right preparation and strategic approach, boards can ensure that shareholder value is maximised – whatever the outcome of the bid.

Justin Audcent
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2 The board's role and responsibilities

A takeover bid involving a public company is one of the most demanding situations a target's board of directors is likely to face, in view of the significance of the decision to be made by shareholders, the tight timeframes and the legal and regulatory environment which they will need to navigate. Hostile bids and competitive bid situations are particularly demanding on the time and energy of the board and management team.

Ultimately the target's shareholders will decide whether to accept the offer, either individually in response to a takeover offer or by voting whether to approve a scheme of arrangement. However, it is the responsibility of the board to manage the target's response to the approach, decide whether to engage with the bidder and ultimately make a recommendation to shareholders whether to accept the offer.

In the case of a recommended offer, the board will be responsible for overseeing the due diligence process and negotiating the offer terms with the bidder. In a hostile bid situation, the board will need to implement an effective defence strategy. The board therefore plays a key role in determining the ultimate outcome of the takeover offer.

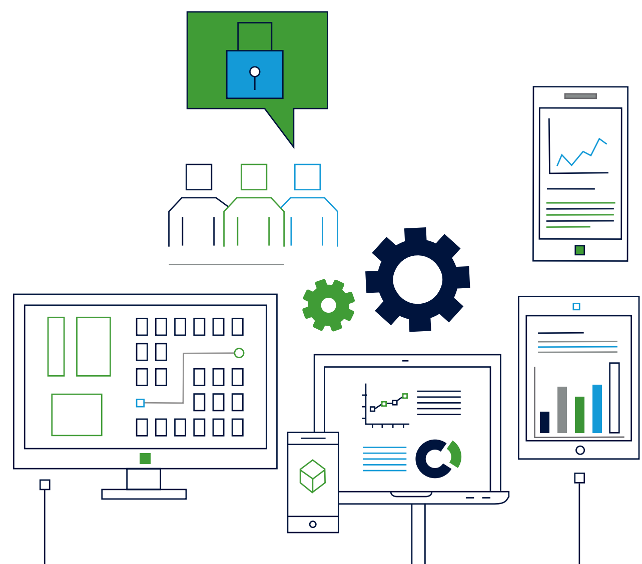
The nature of a takeover offer is such that the board of directors is likely to be under considerable pressure from all sides – whether from the bidder, the target's management team, its shareholders or the media. There may also be unexpected events during the bid process such as leaks to the media and enquiries from regulators, which the board will need to address. In practice, the board's response to a takeover offer is often judged with the benefit of hindsight by shareholders, analysts, the media and other stakeholders. It is therefore important that the board takes its time to properly evaluate the offer and ensure that it has a sound basis for its actions including, but not limited to, the decision as to whether to recommend a bid.

As in all matters, directors must not allow personal interests or relationships to impact on their decision-making and need to ensure they avoid conflicts of interest which are relevant to the board's consideration of a takeover offer. It is therefore important at the outset to identify and address any conflicts of interest – or matters that could be perceived as such by shareholders or other stakeholders.

Common conflict issues in takeover situations include a target director being a nominee of the bidder (where the bidder already has a substantial shareholding in the target), a target director also being on the board of – or having some other close association with – the bidder, or where the bid includes an offer to a director to join the board of the bidder, particularly if this role involves a significant increase in remuneration or a substantial sign-on bonus (including an issue of shares or options).

It is common for directors and senior executives to have a shareholding in the target, or they may hold options, performance rights or other share-based incentives. Whilst such holdings will not necessarily exclude a director from participating in the board's assessment of a takeover offer, all such matters should be considered from the perspective of whether the director has personal interests which differ materially from the company's shareholders as a whole. In practice, this is most likely to arise where the director has a substantial interest in the company's shares. Consideration should also be given to any consequences of a successful takeover bid, such as accelerated vesting of options and other share-based incentives, which would confer a benefit not available to other shareholders.

> Boards are well advised to consult with their lawyers in formulating protocols to ensure conflicts of interest are avoided or managed appropriately throughout the bid process.



3 The initial response

On being informed of a proposed bid, all directors should be notified immediately and a board meeting convened for initial consideration of the bid as soon as possible – ideally the same day.

Key objectives of the board meeting will be to provide directors with all relevant information relating to the proposed bid, determine the need for any immediate announcement, and agree upon the process and protocols for assessing the offer.

In most cases, the board will not be in a position to decide upon a response to the proposed bid at this initial meeting. The directors are likely to require further information in relation to the bid and more time to properly evaluate the offer, before being able to determine whether it is in the best interests of the shareholders.

A key agenda item for the board meeting will be whether to make an immediate announcement to the market in relation to the bid.

If an approach has been made to the company on a strictly confidential basis with any discussions between the parties being preliminary in nature and no announcement having been made by the bidder, there will be no requirement for disclosure to the ASX. In these circumstances, a board will usually prefer to continue discussions with the bidder on a confidential basis with a view to determining whether agreed terms can be reached, prior to making any announcement.

If the bidder has already announced the bid to the market (with or without a Bidder's Statement having been despatched to shareholders), the target will need to make an announcement as soon as possible.

On the basis that the board will not have had sufficient opportunity to fully consider the proposed bid, such an announcement will usually be a holding statement acknowledging the bid or approach and advising shareholders to take no action pending further consideration by the board and management.

If the target is informed of the proposed offer prior to the public announcement of a bid, the board will need to consider whether a trading halt should be requested until the bid is announced.

It is common practice to establish a bid response team to evaluate the bid and make a recommendation to the board, generally comprising both board members and senior executives of the company, with support from the company's legal, corporate and public relations advisors.

The role of the bid response team will typically focus on:

- comparing the value of the offer against both the current share price and an internal view of the company's value
- assessing other key terms of the offer, including the form of the consideration (cash/scrip) and any conditions associated with the offer
- considering the prospect of obtaining alternative bids at a higher value
- exploring other options to maximise value for shareholders
- monitoring market activity (including trading in the company's shares) and media coverage relating to the bid
- communications with shareholders and other stakeholders, if details of the bid are already or become public

> In connection with the establishment of the bid response team, it is important to establish agreed communications protocols to retain control of the company's messaging and ensure there is no ambiguity with respect to statements made on behalf of the company and its board.

If the board has not already done so, it will need to engage with its advisors immediately and ensure they have the capacity to provide support through the bid process. At a minimum, the company will usually need to appoint:

- lawyers to advise on the legal and regulatory obligations of the company and its directors and assist with drafting of documentation including (as applicable) the Target's Statement, bid or scheme implementation agreement, and other associated legal documentation
- corporate advisors to assist in the evaluation and negotiation of the bid, advise on commercial aspects of the transaction, and manage any defensive strategy or competitive bid process
- public relations consultants to assist the company in relation to its media and communications strategy

4 Evaluating the offer

The board will need to consider all aspects of the bid – not just the offer price, but also other key offer terms, the strategic rationale for the transaction, and other potential risks and benefits for shareholders, in order to decide whether it will recommend the bid. In discharging its duty, the board will need to ensure it has access to all relevant information and may need to seek expert advice.

In evaluating the offer, key questions to be considered will include:

- What are the strategic and commercial drivers for the proposed takeover?
- Does the offer price fully value the company?
- Does the bidder have funding in place to complete the bid?
- If the offer consideration includes scrip, what are the risks and benefits to shareholders in holding shares in the bidder?
- What are the intentions of the bidder with respect to the company's strategy, management and operations?
- Will the bid require any regulatory approvals (eg FIRB, ACCC) and, if so, what is the risk of such approvals not being obtained?
- Are there any other 'red flags' in relation to the proposed offer?
- Is there a prospect of alternative, and potentially superior, bids emerging?
- If the board does not engage with the bidder, is it likely to mount a hostile bid?

In the case of a cash offer, the value of the offer can easily be compared to the board's own assessment of the company's value as well as the premium offered above its current share price. However, if there is infrequent or only low volume trading in the company's shares, caution should be exercised as the quoted market price may not be a meaningful indicator of value.

If the consideration includes shares in the bidder (scrip) – or an option to choose between cash and scrip – the target's board will also need to consider the fair market value of those shares, as well as other factors such as the track record and growth prospects of the bidder, its reputation, the quality of its board and management, and other risks associated with an investment in the bidder, including the liquidity of its shares.

Where there is either a common director or the bidder already holds shares with voting power of 30% or more in the target, the Corporations Act requires an independent expert to opine on whether the bid is 'fair and reasonable' to the non-associated shareholders (or, in the case of a scheme, whether it is 'in the best interests' of the shareholders).

The independent expert's report (IER) will be included in the Target's Statement and essentially compares the value of the offer consideration to the assessed fair market value of a share in the target company (on a controlling interest basis), in order to consider whether the offer is 'fair'.

The concept of 'reasonableness' is much broader and has regard to other factors that shareholders should consider when deciding whether to accept the offer (or approve a scheme). However, it is common for a board to commission an IER even when not required by law, in order to provide the company and its shareholders with an informed and independent assessment with respect to the value of the offer.

The board will also need to consider the general tax consequences for shareholders of accepting the takeover offer, which will depend on whether the consideration is in the form of cash, scrip or a combination of both. If there is a material cash component, this may trigger significant capital gains tax (CGT) liabilities for shareholders, particularly if the target has experienced strong share price growth. Equally, shareholders may crystallise a capital loss if there has been a significant decline in the value of the target company.

> If the bid includes scrip consideration, there may be rollover relief available to Australian resident shareholders and potentially residents of overseas jurisdictions, depending on the rules applying in each jurisdiction. However, the terms of the offer will need to satisfy the scrip-for-scrip rollover conditions for selling shareholders to be able to defer the tax liability associated with the capital gain.

This will be a material consideration for the target's shareholders – particularly if there are restrictions on the sale of the scrip received. Target boards are therefore well advised to engage with their tax advisers early on to review the tax specific terms of the proposed offer, and may need to seek a definitive position on eligibility for rollover relief by way of a class ruling from the ATO.

If the issuer of the scrip is an overseas company, there may be other important tax considerations for the target's shareholders, including with respect to the taxation of future dividends and other distributions.

5 Providing access for due diligence

Bidders will generally want to undertake due diligence on the target company before finalising the terms of their offer. From the target's perspective, providing access to senior management and to non-public information on the company and its business may enable the bidder to better understand the drivers of value and can therefore assist in negotiating an improved offer.

However, it is important to consider carefully how much access to provide to the bidder – and at what stage – particularly in relation to the most commercially sensitive information. The board will therefore need to implement specific due diligence protocols. It is also common practice to establish a committee including representatives of the target, its lawyers and financial advisors, to review and approve the release of information to the bidder.

Before providing access for due diligence, the board will need to have a non-disclosure agreement in place with the bidder. Such agreements usually also include a 'standstill' provision, whereby the bidder is restricted from acquiring securities in the target for an agreed period of time, other than pursuant to an agreed offer.

This prevents the bidder from building a strategic stake in the company prior to making a bid, and also protects the target company from the risk of a 'tipping' insider trading offence by providing price sensitive information to a party who may acquire shares in the target.

The bidder may also seek exclusivity to restrict the target from engaging with other potential bidders, which is often in the form of 'no talk' and 'no shop' provisions. The target's board should seek legal advice on such clauses to ensure they do not prevent directors from exercising their fiduciary duty to shareholders – for this reason, they usually include a carve-out which enables the target to respond to potentially superior proposals.

The target will generally want to keep any exclusivity period short in order to accelerate confirmation of a firm offer, noting that the time period can always be extended if due diligence is progressing well and there is a genuine need for additional time.

The bidder's due diligence is likely to involve considerable senior management time over a short period, and it will be important to ensure that the business is not disrupted during this time. In addition, in a full or partial scrip bid, the company and its advisors will need to conduct appropriate due diligence on the bidder.

> In the case of a hostile bid, the target's board has no obligation to engage with or provide any information to the bidder, which will then be reliant on information in the public domain in order to formulate its offer and launch a takeover bid.

6 Negotiations with the bidder

If the target board decides to recommend a bid, the parties will generally negotiate the terms of a bid implementation agreement (BIA) (for a takeover bid) or will enter into a scheme implementation agreement (SIA). Either of these documents will set out the agreed terms, including the offer price, form of consideration, any conditions and the recommendation by the target directors.

The implementation agreement will also include warranties to be given by the target to the bidder. Unlike a private company sale, the warranties are generally limited to fundamental matters such as title and capacity, incorporation, solvency and compliance with continuous disclosure rules. Since the bidder has no subsequent recourse to the target's shareholders, the effect of such warranties is to enable the bidder to terminate the agreement in the event of a warranty breach prior to completion of the transaction.

The implementation agreement will also almost certainly include a 'no-shop' clause, which restricts the target from soliciting, encouraging or initiating negotiations with another potential bidder, and a 'no-talk' clause, which prevents the target from entering into discussions or negotiations with a rival bidder, even if it has not initiated such discussions. Boards should ensure that such clauses provide a carve-out to enable the company to respond to approaches which may lead to a superior offer, in order to ensure they are not in breach of their fiduciary duties.

> It is usual for the target to agree to pay a break fee to the bidder in certain circumstances where the bid does not proceed, such as the target's board withdrawing its recommendation.

Break fees are typically around 1% of the equity value of the target. In recent years, it has also become increasingly common for targets to require the bidder to pay a reverse break fee if the takeover does not proceed for reasons such as the bidder failing to obtain required regulatory approvals or a breaching a material term of the implementation agreement. Reverse break fees are also typically around 1%, however there have been recent examples of reverse break fees of up to 4% of the deal value.

The agreement will always include a material adverse change (MAC) clause, which enables the bidder to walk away from the deal if certain circumstances arise. This will typically include measures relating to the target's financial performance (usually EBITDA) and financial position (usually net assets), and may also include qualitative matters, which often relate to tenure or other permits and licences which are fundamental to the assets or operations of the business. The board will need to consider carefully the specific MAC items and thresholds, particularly if they are linked to break fees. Companies with a volatile or uncertain short term earnings outlook should be particularly cautious in relation to the financial metrics. Boards should also ensure the MAC clause includes the usual carve-outs for general economic and industry conditions, as the intent of the clause should be isolated to company-specific matters.

7 Hostile bids and defence strategies

If the board concludes that the takeover proposal is not in the best interests of shareholders and the bidder proceeds to make a hostile bid, the directors will need to consider an appropriate defence strategy.

In doing so, it is important to ensure that any actions are taken in good faith and for a proper purpose, and the directors will need to be cognisant of their obligations under both the Corporations Act and ASX Listing Rules.

By their nature, hostile bids more likely trigger referrals to the Takeovers Panel and it is therefore critical to obtain legal advice to ensure that any contemplated actions do not risk a declaration of 'unacceptable circumstances'.

As a general principle, the Takeovers Panel seeks to ensure that shareholders are given the opportunity to consider genuine takeover offers, and that targets do not take actions which are designed to frustrate a bid which could be in the best interests of shareholders.

As a starting point, the board will need to clearly articulate to shareholders the reasons for not recommending the bid and why the board considers it in their best interests not to accept the offer. This will usually include a view that the offer undervalues the company and will outline how the company's strategy will deliver greater value to shareholders.

There may be other aspects of the offer that the board wishes to highlight to shareholders, particularly in the case of a scrip offer, where the shareholders will be exposed to the risks of holding shares in the bidder.

Other options which are open to a board include:

- Identifying any legal or regulatory non-compliance in relation to the bid or the actions of the bidder, which may be the basis for an application to the Takeovers Panel or a complaint to ASIC;
- Encouraging supportive major shareholders to increase their stake in the company, which may make it more difficult for the bidder to achieve any minimum acceptance threshold (in a takeover bid) or approval of a scheme, and/or may encourage the bidder to increase its offer;
- Seeking alternative takeover offers by approaching a favoured bidder ('white knight') or initiating a competitive auction with a view to maximising value for shareholders;
- Considering other ways to deliver value to shareholders, which could include an alternative transaction such as a demerger, divestment of certain businesses, restructuring, return of capital or extraordinary dividend.

> In all cases, the board will need to ensure that it maintains open and transparent communication with shareholders and be conscious of its overriding responsibility to ensure they have all the information reasonably required in order to make an informed decision in relation to the bid.

8 Communications

An effective communications strategy is critical for targets in responding effectively to a takeover offer and keeping both shareholders and the market informed. The board will need to decide who is authorised to communicate with shareholders, regulators, the media and other stakeholders on behalf of the company.

The board will further need to ensure that its messaging is clear and consistent, and that any announcements and other communications are accurate and not misleading.

The ASX Listing Rules require immediate notification to the market of any information concerning the company that a reasonable person would expect to have a material effect on the price or value of its securities.

A confidential takeover proposal which has not progressed to a formal bid will generally not require disclosure, however legal advice should always be sought in relation to compliance with the continuous disclosure rules.

However, there is always a risk that a takeover approach may be leaked to the market in advance of a bid being announced, in which case in may be necessary for the target to make an immediate announcement to the market.

The content of the announcement will largely depend on whether the leak is simply a rumour or speculation, or contains specific details such as the identity of the bidder or the terms of the proposed offer, as well as the extent of any unusual movements in the target's share price.

Target boards should ensure that the company continuously monitors the media for any leaks, as well as any materially incorrect information in relation to the bid, and is prepared to respond promptly.

Similarly, close attention should be paid to trading in the company's shares. As a general rule, boards are well advised to make disclosure if there is any risk that a leak has occurred.

Empowering you to face the future with confidence

9 Being prepared for an approach

Given the short timeframes within which a board will need to consider and respond to a takeover approach, directors need to be well prepared and should also be vigilant in anticipating potential bids.

The board will be in the best position to respond promptly and decisively to an approach or announced bid if it already has a takeover response plan in place. The plan should provide guidance to assist the directors in fulfilling their fiduciary duties to shareholders and ensure that both they and the company comply with their respective legal and regulatory obligations. A bid response plan will also set out the steps to be taken in a range of bid scenarios, and should address matters including the composition of the bid response team, roles and responsibilities, key advisors and communications protocols. It will also generally include drafts of ASX announcements, non-disclosure agreements and other key documents.

> The objective of a bid response plan should not be simply to frustrate or defend takeover bids, but rather to ensure that bids are properly evaluated, negotiated and pursued where the bid is in the best interests of shareholders.

It is recommended that boards at all times have a clear view on the value of the company, against which a takeover offer can be measured, and keep abreast of broker and analyst valuations, commentary and buy/sell recommendations, including share price targets. In order to deter opportunist bids, a board will want the company at all times to be fully valued in the market, and will therefore need to ensure that its performance, strategy and growth prospects are clearly articulated and well understood. This comes down to effective and timely communication of key developments and updates through ASX announcements, investor updates, analyst briefings and dealings with the media.

Situations where a company is more likely to become a target include a lacklustre share price, lack of liquidity in the market for the company's shares, and general unrest amongst shareholders with respect to the company's performance and delivery against its strategic plans, particularly where it appears to be undervalued relative to its peers. Regular meetings with major shareholders will provide an opportunity to gauge their support for the company's strategy and performance – and for its board and management – and form a view as to their likely response in the event of a takeover offer.

If the board considers it likely the company may become a target, it should seek to identify and evaluate the range of potential bidders, including their strategic drivers and potential to realise synergies, and form a view as to how to respond in the event they make an approach. It will also be advisable to monitor closely share trading volumes, price movements and the emergence of substantial shareholders on the register, as potential bidders may seek to build a stake in the company prior to launching a takeover bid. The board should also pre-emptively identify supportive institutional or other major shareholders and have its preferred legal and corporate advisors selected and 'ready to go' at short notice.

However, the board will ultimately be in the best position to either negotiate favourable bid terms or defend a hostile bid if its board and management have strong support from its major shareholders, which will be influenced by the company's track record of delivering on its strategic growth plans and creating shareholder value.

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