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PRIVATE MERGERS AND ACQUISITIONS

ACC Association of Corporate Counsel

Private mergers and acquisitions in Australia: overview

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CORPORATE ENTITIES AND ACQUISITION METHODS

1. What are the main corporate entities commonly involved in private acquisitions?

The main corporate entities involved in private acquisitions are:

- Proprietary limited companies.
- Public companies, which includes all Australian-listed companies.
- Unit trusts with corporate trustees.
- Discretionary trusts with corporate trustees.

The choice of purchasing structure depends on various factors, such as:

- Asset protection (however, there are legislative trends toward imposing personal liability on directors).
- Domestic and international tax considerations.
- Financial aims, such as maximising trading income or the return on a sale.
- Funding requirements, with public companies having more fundraising options.

2. Are there any restrictions under corporate law on the transfer of shares in a private company? Are there any restrictions on acquisitions by foreign buyers?

Restrictions on share transfer

Shares in private companies are not subject to transfer restrictions under the Corporations Act 2001 (*Cth*), assuming that the company is not under administration or has not commenced winding up.

However, private companies typically have restrictions in:

- Their constitution.
- Shareholders' agreements.

These restrictions can include:

- **Board power to refuse registration.** Directors having discretion to refuse to register a transfer of shares.
- **Pre-emption rights.** Rights of first offer or first refusal for shareholders to acquire the shares being sold at an agreed price, and in proportion to those shareholders' percentage holdings, before they can be transferred to a third party.
- **Change of control.** The company's material contracts may prohibit a transfer that results in a change of control of the company. A change of control is typically a transfer that results in a change of more than 50% of voting rights and can sometimes include a change in practical influence that can be exerted on company issues.

Foreign ownership restrictions

Foreign persons can be required to obtain approval under Australia's foreign investment framework, which includes the Foreign Acquisitions and Takeovers Act 1975 (*Cth*) (FATA).

A foreign person includes:

- A corporation or a trustee of a trust in which either:
  - an individual not ordinarily resident in Australia, a foreign corporation or a foreign government holds:
  - an interest of at least 20% in the corporation; or
  - a beneficial interest in at least 20% of the trust's income or property.
  - two or more persons (each of whom is an individual not ordinarily resident in Australia, a foreign corporation or a foreign government) hold either:
  - an aggregate interest of at least 40% in the corporation; or
  - an aggregate beneficial interest in at least 40% of the trust's income or property.
- General partners of limited partnerships where:
- an individual not ordinarily resident in Australia, a foreign corporation or a foreign government holds at least 20% in the limited partnership; or
- two or more persons (each of whom is an individual not ordinarily resident in Australia, a foreign corporation or a foreign government) hold an aggregate interest of at least 40% in the limited partnership.
- A foreign government, including entities in which a foreign government or separate government entity holds a prescribed interest.
- In certain circumstances, a foreign person's associate.

The Foreign Investment Review Board examines proposals and advises on their national interest implications. With the benefit of this advice, the Federal Treasurer decides whether a proposal is contrary to Australia's national interest.

Once the Treasurer is satisfied that a proposal is either:

- **Not contrary to the national interest.** The Treasurer issues a no objection notification allowing the acquisition to proceed, subject to any conditions that the Treasurer considers necessary.
- **Contrary to the national interest.** The Treasurer can either:

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- prohibit the proposed transaction; or
- if the transaction has been consummated, order the foreign person to dispose of its interest.

The FATA categorises transactions into:

- Significant actions, where notification is voluntary. In practice, foreign persons choose to notify the Treasurer because of the certainty afforded by a no objection notification.
- Notifiable actions, where notification is mandatory. Failure to notify can attract criminal liability and civil penalties and orders.

Foreign persons must notify and get prior approval before acquiring an interest in, or control of:

- 20% or more in:
  - an Australian business that is valued above the relevant threshold described below; or
  - an offshore company whose Australian subsidiaries or gross assets are valued above the relevant threshold described below.
- 5% or more in the media sector, regardless of value.

For an enterprise or a national of the US, New Zealand, Chile, China, Japan or Korea, the threshold values for notification are:

- Non-sensitive businesses: A$1.094 billion.
- Sensitive businesses: A$252 million.
- Media: A$0.
- Agribusiness:
  - for Chile, New Zealand and the US: A$1.094 billion.
  - for China, Japan, and Korea: A$55 million (based on the value of the consideration).

For other acquirers, the thresholds are:

- Any business sector (other than media): A$252 million.
- Media: A$0.
- Agribusinesses: A$55 million (based on the value of the consideration for the acquisition plus the total value of other interests held by the foreign person and associates in the entity).

Foreign governments must always notify:

- All direct interests in an Australian entity or Australian business. A direct interest is generally an interest of at least 10% or an interest that gives the acquirer the ability to influence, participate in, or determine, the business' or entity's management or policies.
- When starting a new Australian business.

Other legislation, limits and requirements apply to acquisitions in land and in specific industries, such as banking, transport and telecommunications.

On 1 July 2017, regulations made under FATA were amended to introduce a new exemption certificate for programs to acquire interests in the assets of an Australian business and/or securities in an entity (including interests acquired through the business of underwriting) (Business EC).

A Business EC allows a foreign person to apply once before making any acquisitions and seek prior approval for multiple acquisitions. This can (among other things) reduce the cost and regulatory burden of separate applications for large investment funds. It also benefits investors without defined target acquisitions when they seek approval but intend to make a series of passive investments in sectors or industries that are typically not considered sensitive from a national interest perspective. Business ECs are considered on a case-by-case basis.

Specific advice should be sought before undertaking an acquisition, due to the complexity of the foreign investment framework.

3. What are the most common ways to acquire a private company? What are the main advantages and disadvantages of a share purchase (as opposed to an asset purchase)?

The most common ways to acquire a private company are to:

- Acquire some or all of the assets which comprise the business.
- Acquire the shares in the company that operates or controls the business, which gives the buyer control over all business assets.

For businesses operated by companies acting as the trustee of a trust, the trustee company has no beneficial ownership of the trust's assets. An acquisition of the shares in the trustee company alone is worth nothing. In this case, an acquisition typically involves:

- For discretionary trusts: an asset acquisition.
- For unit trusts: an asset acquisition or an acquisition of the shares in the trustee company, together with the units.

Share purchases: advantages/asset purchases: disadvantages

The advantages of share purchases include:

- **Simple acquisition.** The assets of the target company are acquired when the shares are transferred to the buyer. There is no need to transfer each asset. This makes a share purchase well-suited for complex businesses where transferring each asset is impractical.
- **Continuation of contracts.** The target company's existing contracts continue after closing, subject to any change of control provisions.
- **Continuation of employees.** Employees remain employed by the target company after closing.
- **No duty.** Duty on the sale of shares has essentially been abolished in all Australian states and territories, except where land interests are involved (*see Question 25*).
- **No goods and services tax (GST).** No GST is payable.
- **Tax losses and franking credits.** The buyer can inherit the target company's tax losses and franking credits, which can be used in the future.
- **Capital gains tax (CGT) discount.** The seller can be entitled to a CGT discount on any gain made on the share sale of:
  - 50% for individual or trust sellers; or
  - 33.3% for superannuation fund sellers.

The disadvantages of asset purchases include:

- **Multiple transfers.** Some assets, such as business records, can be transferred by delivery. Other assets require separate documented transfers, such as land, trade marks and motor vehicles.
- **Contract complexities.** All contracts must be assigned or novated to the buyer, or renegotiated. The consent of each counterparty is often required.
- **New employment required.** New offers of employment must be made to employees, which must be accepted by each employee (*see Question 6*).

- **Duty.** Duty on the sale of assets is payable in some states and territories (*see Question 25*).
- **GST payable.** GST may need to be paid if the transaction does not fall within the going concern exemption (*see Question 29*).
- **Tax losses remain.** Losses incurred by the target company remain with the seller.

Share purchases: disadvantages/asset purchases: advantages

The disadvantages of a share purchase include:

- **Liabilities are inherited.** The buyer inherits all known and unknown liabilities of the target company. While this risk can be mitigated by warranties, indemnities and insurance, the post-closing creditworthiness of the seller and warranty limitations can render claims ineffective.
- **Minority shareholders.** A share sale can be frustrated by minority shareholders who do not want to sell their shares.
- **Due diligence.** More detailed, time-consuming and costly due diligence is required because the buyer inherits the target company's liabilities.
- **Tax losses.** The target company's losses remain with the seller's tax consolidated group.
- **GST.** Full input tax credits might not be available, resulting in GST leakage on transaction costs.
- **Unwanted assets.** If the buyer or seller wants to exclude an asset, it must be transferred out of the target before closing.

The advantages of an asset purchase include:

- **Liabilities are isolated.** The buyer is only responsible for the seller's pre-completion liabilities that it agrees to assume or those that transfer automatically (*see Question 6*).
- **Cherry-picking assets.** The buyer can choose which assets to acquire, employees to retain and contracts to be assigned or novated to it.
- **Resetting tax basis.** The tax basis of assets can be reset to their market value. This can reduce the seller's CGT liability that might arise at a future date.

Share purchases: Minimising liabilities

A tax-effective method of reducing the risk of historical liabilities associated with a share acquisition is for the buyer to:

- Form a consolidated group and GST group after closing that includes the target company to allow the target's assets to be transferred from the target to another group member without CGT, duty or GST.
- Deregister the target company after all required assets have been transferred, ensuring that the deregistration is done while the company is solvent to avoid insolvency-related claims against directors.

4. Are sales of companies by auction common? Briefly outline the procedure and regulations that apply.

The use of auctions varies according to:

- **Buyer sentiment.** Buyers avoid competitive sale processes when the broader economic climate or industry outlook is unfavourable or perceived to be so.
- **Attractiveness.** Auctions are more popular where the target is attractive, or perceived to be attractive, to multiple prospective acquirers. The competitive tension here may produce a better commercial result for sellers.

The typical auction process is as follows:

- The seller circulates an information memorandum about the target company or holds a management presentation to provide information.
- Prospective buyers execute a confidentiality agreement before receiving the information memorandum or attending the presentation.
- The seller may ask prospective buyers to mark-up the seller's sale agreement and submit this with indicative offers.
- Bidders are shortlisted, given access to a data room and requested to submit firm offers.
- The selected bidder and seller follow the usual process for acquisitions, with other shortlisted bidders sometimes kept on the sidelines to soften the selected bidder's bargaining position.

Auction participants should be aware of:

- **Misleading and deceptive conduct.** This can arise if sellers misrepresent the number of other interested bidders or their activities.
- **Bid-rigging.** Bid-rigging is an arrangement between competitors to rig a bidding process by agreeing on value, timing or terms of a bid, or by suppressing or withdrawing bids. Collaborative arrangements between bidders or intermediaries can raise competition concerns.

PRELIMINARY AGREEMENTS

5. What preliminary agreements are commonly made between the buyer and the seller before contract?

Letters of intent

The buyer and seller sometimes enter into letters of intent (LOIs) (also known as a memorandum of understanding, heads of agreement or term sheet). An LOI:

- Summarises the essential terms of the transaction.
- Is entered into in the early stages of a transaction.
- Can reduce the time and costs spent on preparing and negotiating the formal acquisition agreement because it may be entered into without legal review, although skipping the LOI and immediately preparing the formal agreement can sometimes be more efficient for simple transactions.

LOIs can cover:

- The parties.
- Whether the transaction is an asset, business or share sale.
- The purchase price, price assumptions, deposit, price adjustment terms and earn-outs.
- Conditions precedent, such as the completion of due diligence investigations, and the timing for the satisfaction of conditions.
- Security or guarantees expected to be provided by each party.
- Exclusivity.
- Confidentiality obligations.
- Break fees and/or reverse break fees, which require a party to pay the other party a pre-determined sum of money if an exclusivity agreement is breached (which must be a genuine pre-estimate of the costs incurred in connection with the transaction to avoid being void as an unlawful penalty).
- The transfer or retention of employees.

- The indicative scope of restraints of trade and to whom they will apply.
- The timing for the preparation and execution of formal agreements and the party responsible for preparing the first draft.
- The responsibility for costs (usually each party is responsible for its own costs).
- Dispute resolution.
- Governing law and jurisdiction.

LOIs can be binding, non-binding and partially binding (sometimes referred to as a hybrid term sheet). The express wording in the LOI, and usual contract formation principles (such as consideration and certainty of terms), determine its binding nature.

An LOI is typically drafted so that only particular terms (such as confidentiality and exclusivity) are binding. This also helps to avoid lengthy negotiations over terms in the LOI and to progress the transaction towards the final agreement.

It is usual for an LOI to contain a statement that it is not a contract and that no party is required to proceed with the transaction until formal agreements are executed.

Exclusivity agreements

Exclusivity agreements (or lock-out or no-shop agreements) that prohibit the parties from negotiating with others are common and are typically included in confidentiality agreements or LOIs.

To be enforceable, exclusivity agreements must satisfy the elements of contract formation, such as:

- **Certainty.** The exclusivity period must be certain.
- **Consideration.** Usually expressed as a party expending costs and evaluating the transaction.

An agreement to negotiate during a specified time period (called a lock-in agreement) might not be enforceable due to uncertainty. Enforceability can be bolstered by:

- Including a good faith or best endeavours obligation to negotiate.
- Outlining clear and objective requirements to meet these obligations.

Despite the commitment to exclusivity, a "fiduciary out" provision is sometimes included. The allows the seller's or target company's directors to be relieved of an exclusivity obligation (or aspects of it) where it conflicts with their duties. This might come into play, for instance, when a more favourable acquisition offer is made by a third party.

Lock-out agreements are preferred and recommended over lock-in agreements.

The party in breach of the exclusivity agreement is liable for damages for breach of contract. Damages tend to be limited to the costs and expenses incurred by the other party in conducting due diligence investigations, and in evaluating and negotiating the transaction.

A break fee arrangement can be included to require the seller to pay the buyer an agreed genuine estimate of transaction costs expended by the buyer (or a percentage of the proposed purchase price) if the seller decides not to proceed with the sale.

While it may be possible to obtain an injunction to prohibit a party from negotiating with third parties, this might not be strategic because the breaching party may not be fully invested in the transaction.

Non-disclosure agreements

Non-disclosure agreements (or confidentiality agreements) typically require the potential buyer to:

- Keep disclosed and derived information (confidential information), and the proposed transaction, confidential.
- Use confidential information only for the purposes of due diligence and negotiating the transaction.

There is a risk that a buyer might use confidential information if the transaction does not proceed, and it can be difficult to prove that the confidential information is being used for the buyer's benefit. To minimise this risk, a seller can:

- Provide access to limited or aggregate information before contracts are exchanged (which also limits further price negotiations based on disclosed information).
- Provide full access after contracts are exchanged (with the buyer protected by warranties that pre-contract disclosed information is accurate).

Restraints

The agreement can also prohibit the potential buyer from doing the following for a specified period of time if the transaction does not proceed:

- Soliciting the seller's or target company's employees, officers and customers.
- Competing with the seller or target, if the potential buyer operates in a different market or industry.
- Dealing with suppliers.

To be enforceable, the scope, duration and geographic operation of the restraints must be no greater than is reasonable to protect the seller's interest.

Depending on the market, restraints that lessen competition can contravene competition law.

Disclosure restrictions

If confidential information is subject to confidentiality obligations owed to a third party, disclosure can breach those obligations. The third party's consent may need to be obtained before disclosure.

Personal information is information or an opinion about an individual whose identity is apparent, or can reasonably be ascertained, from the information or opinion. Personal information is regulated by the Privacy Act 1988 (*Cth*). If the seller is required to comply with the Privacy Act, then the seller should:

- Disclose personal information only when necessary.
- Wait until the transaction is more certain.
- Limit disclosure to select personnel and advisers of the buyer.
- Require the buyer to secure personal information.
- Require the buyer to comply with the Privacy Act even if it does not apply to the buyer.

Enforceability

If prepared as a simple contract, the agreement is enforceable if it satisfies contract formation requirements. For example, consideration is required. This is usually expressed as the seller providing confidential information in exchange for the buyer maintaining confidentiality.

The agreement is commonly executed as a deed (*see Question 21*). When restraints of trade are included, a deed is recommended.

Remedies for breach

The available remedies for breach of a confidentiality obligation or a restraint are:

- Damages for breach of contract based on the loss suffered by the seller.
- An injunction to prohibit further breaches.

ASSET SALES

6. Are any assets or liabilities automatically transferred in an asset sale that cannot be excluded from the purchase?

Employees

Employees do not transfer automatically. The buyer must offer employment to employees (or key employees) that it wants to retain in the business. The offer is typically made on terms that are no less favourable than the employees' existing terms.

The buyer must take on the accrued personal and long service leave entitlements of employees who accept that offer of employment where there is a transfer of business, as defined in the relevant legislation, which covers most going-concern business acquisitions.

The buyer can choose to take on the accrued annual leave entitlements of those employees. If the buyer refuses to assume this liability, the seller will need to pay out those amounts.

Leave entitlements are liabilities and have associated tax issues. In practice, there is an adjustment to the purchase price in favour of the buyer that takes transferred entitlements into account, but the parties may also structure this as a payment from the seller to the buyer to access tax deductions.

The adjustment is usually a reduction to the price of an amount equal to 70% or 71.5% of the value of the entitlements, since the buyer (assuming that it is a company) gets a tax deduction when the entitlements are eventually paid. With the company tax rate at 28.5% or 30%, this payment of entitlements by the buyer is partially paid for via the tax deduction claim as an expense.

The buyer is also bound by certain industrial instruments that covered the employees before closing, such as enterprise agreements.

The seller may be exposed to redundancy payments where employees are not offered new employment by the buyer.

Land

Where land is involved, some liabilities run with the land. These include:

- Land tax.
- Utility rates.
- Environmental liabilities (*see Question 35*).

Security interests and encumbrances

Security interests (for instance, a perfected security interest over personal property, such as equipment or intellectual property) and encumbrances (such as a mortgage over land) attach to the asset.

A failure to identify security interests and encumbrances, or obtain a release or discharge at closing, means that the relevant asset may remain encumbered after closing. If the seller subsequently becomes insolvent or defaults under its security agreement (which transferring the asset to the buyer is likely to be), the security holder can enforce its interest by seizing the asset or selling it.

7. Do creditors have to be notified or their consent obtained to the transfer in an asset sale?

Creditors do not have to be notified, or their consent obtained, in an asset sale if the seller is solvent. However, the seller may have a contractual obligation to notify a creditor of a transfer of an asset in which the creditor has an interest.

If a creditor has registered a mortgage, caveat or security interest over an asset, then it is common practice to require that the creditor's security be released before the transfer (*see Question 6*).

A transfer of a liability by novation to the buyer also requires the creditor's consent.

SHARE SALES

8. What common conditions precedent are typically included in a share sale agreement?

The conditions precedent included in a share sale agreement vary between transaction size, target and industry. They can include:

- Each party's board approving the transaction and the execution of transaction documents.
- Shareholder approval where the transaction will fundamentally change the nature of the buyer's or the seller's business or where it involves a holding company disposing of all or substantially all of its assets and business.
- Regulatory approvals or notifications that the transaction is not prohibited, such as in relation to foreign investment or under competition laws.
- Industry-specific notifications, such as notices to the Australian Prudential Regulatory Authority by a target company regulated by it.
- Obtaining contract counterparty consents to the change of control.
- The buyer obtaining finance, or raising funds, sufficient to close the transaction.
- No material adverse change occurring before closing.
- No material breach of warranties arising before closing.

SELLER'S TITLE AND LIABILITY

9. Are there any terms implied by law as to the seller's title to the shares in a share sale? Is any specific wording necessary and do buyers normally impose a higher standard than is implied by law?

There are no implied terms as to title. It is standard for the seller to warrant that:

- It is the legal and, unless selling in the capacity as a trustee, beneficial owner of the shares.
- It has the power to sell the shares.
- At closing, the shares will be free of all security interests and encumbrances.

10. Can a seller and its advisers be liable for pre-contractual misrepresentation, misleading statements or similar matters?

Seller

A seller can be liable for pre-contractual misrepresentation, misleading statements or similar matters. A claim against the seller would most likely be based on misleading and deceptive conduct under the Competition and Consumer Act 2010 (*Cth*) (CCA).

A party cannot contract out of liability under the CCA, but might be able to place temporal and monetary limits on a claim.

The seller can also be liable for:

- Negligent misrepresentation.
- The tort of deceit.
- Fraud.

Seller's advisers

Advisers can also be exposed to these causes of action if they provide advice or make representations to the buyer.

However, because of the absence of a duty of care owed by advisers to the buyer, a claim based on negligence is less likely.

MAIN DOCUMENTS

11. What are the main documents in an acquisition and who generally prepares the first draft?

The main documents in an acquisition are:

- A sale agreement.
- A disclosure letter containing general and specific disclosures that qualify the seller's warranties.
- Releases of security interests and encumbrances.
- Transfer documents and agreements for shares, assets and contracts.

The first draft of the sale agreement is often prepared by the buyer's lawyers. Sometimes, it is drafted by the seller because it (arguably) has better access to the subject matter of the sale. The seller's lawyers will typically prepare the first draft when there is an auction process.

Other documents specific to share and asset sales are also produced at closing (*see Question 20*). Some of these may be produced earlier to satisfy conditions precedent.

ACQUISITION AGREEMENTS

12. What are the main substantive clauses in an acquisition agreement?

An acquisition agreement typically contains the following clauses:

- Definitions and interpretation.
- Agreement to sell and buy the business, assets or shares.
- Conditions precedent.
- Purchase price, price adjustments and earn-outs (including how the consideration is to be satisfied, such as by cash or scrip).
- The buyer's deposit on the purchase price and the party to whom the deposit will be released, depending on the circumstances.
- Pre-closing obligations in relation to the conduct of the business or target company by the seller.
- Pre-closing access to records by the buyer.
- Closing requirements.
- Warranties and indemnities.
- Limitations on liability and claims in respect of warranties and indemnities.
- Post-closing or transitional obligations.
- Restraints of trade.
- Guarantees or security for the parties' obligations.
- Dispute resolution.
- Confidentiality and announcements relating to the transaction.
- GST.
- Costs and duty provisions.
- Boilerplate provisions, such as notices and governing law.

Share acquisition agreements can also include the following clauses:

- **Completion accounts.** Where there will be a post-completion adjustment to the purchase price, completion accounts are prepared by reference to:
  - cash, debt and working capital of the target at closing; or
  - the net assets of the target at closing.
- **Locked box.** Clauses for a transaction that involves a locked box mechanism, where the parties have agreed on the purchase price based on historical accounts before executing the share purchase agreement. As the buyer bears the financial risk of the target between the locked box date and closing, provisions are included to prevent unauthorised leakage of value from the locked box date.
- **Pro forma.** The provision of a pro forma balance sheet reflecting the acquisition.
- **Additional warranties and indemnities.** Additional warranties relating to liabilities, tax, the company and subsidiaries, and tax indemnities.
- **Related party loans.** The repayment of loans between the target and related entities, such as shareholders and officers.
- **Dividends.** Provisions for the payment of dividends to the buyer or seller, including clear terms covering the entitlement to, and the determination of, dividends.

Asset acquisition agreements can also include the following clauses:

- **Completion accounts.** Completion accounts for the adjustment to the purchase price based on the value of certain assets and/or liabilities. Depending on the business, there may be provisions for the valuation of stock or work-in-progress.
- **Employees.** Termination of employees by the seller, their employment by the buyer and employment entitlements (*see Question 6*).
- **Contracts.** The assignment or novation of contracts to the buyer.
- **Price apportionment.** Allocation of the purchase price between each asset being acquired.

- **Income apportionment.** Each party's entitlement to income generated by the business, or received, before and after closing.
- **Expenses responsibilities.** Each party's responsibility for expenses and outgoings in respect of the business and acquired assets before and after closing.
- **Collection of debts.** The collection of pre-closing debts from customers, including prohibiting recovery actions against customers for a specified period.
- **Listing of assets and liabilities.** A listing or general description of each:
  - asset acquired by the buyer;
  - asset retained by the seller;
  - liability assumed by the buyer; and
  - liability retained by the seller.

13. Can a share purchase agreement provide for a foreign governing law? If so, are there any provisions of national law that would still automatically apply?

A share purchase agreement can provide for a foreign governing law.

Australian laws that may still apply despite this governing law choice include:

- Legislation relating to consumer contracts and misleading and deceptive conduct. This depends on relevant circumstances, such as the cause of action, and the drafting of the arbitration, governing law and jurisdiction clauses.
- Laws that relate to the business or transaction, such as competition, foreign investment and employment-related laws.

WARRANTIES AND INDEMNITIES

14. Are seller warranties/indemnities typically included in acquisition agreements and what main areas do they cover?

Reasonable warranties and indemnities are usually included in acquisition agreements. Their main purposes are to:

- Extract information from the seller, or reveal potential value-eroding issues, to supplement the buyer's due diligence investigations.
- Compensate the buyer if the target company or material assets are not what the buyer thought it was acquiring.
- In the case of indemnities, to also cover specific risks that are of particular concern to the buyer.

To increase the prospects of recovering damages for a breach of warranty claim, buyers sometimes require the warranties and indemnities to be given by multiple parties (such as the seller and directors).

The warranties and indemnities given depend on:

- The industry in which the target operates.
- The nature of the transaction, with more limited warranties given for sales by insolvency practitioners and for a management buy-out where the existing management is involved.
- The type of company or business being acquired.
- Issues or risks discovered during due diligence and negotiations.
- The bargaining strength of each party.
- Transaction value.
- The existence of warranty and indemnity insurance.

The main areas covered by warranties include:

- The authority to enter into the acquisition agreement.
- The power of the seller to sell the shares or assets.
- Warranties related to the solvency of the seller and, in a share sale, the target company and subsidiaries.
- Warranties related to the shares or assets being acquired.
- Liability-related warranties, such as tax (in a share sale) and business liabilities.
- Warranties related to employees.
- Warranties related to information, such as that all information disclosed to the buyer is accurate.
- That the assets (in an asset sale) or the shares and the target company's assets (in a share sale) are free of security interests and encumbrances.
- In a share sale, warranties related to the corporate group.
- Contract warranties, such as that there are no subsisting breaches of material contracts.
- Warranties related to compliance with laws and licences.
- That there are no current or anticipated insurance claims, legal proceedings or unsatisfied judgments.
- Warranties related to financial matters, such as that the financial statements give a true and fair view of the target's financial position.
- Trust-related warranties, such as that the trustee has the power to sell the assets or shares.

If the execution of the acquisition agreement and closing does not occur simultaneously, it is usual for the seller to repeat the warranties at closing.

15. What are the main limitations on warranties?

Limitations on warranties

The main limitations on warranties are:

- A liability cap for damages flowing from warranty breaches.
- A minimum loss threshold before a warranty claim can be made.
- Time-limits for bringing warranty claims.
- An acknowledgement that no party has relied on warranties or representations outside of the acquisition agreement (although this may be ineffective against fraudulent misrepresentations, pre-contractual representations, and statutory misleading and deceptive conduct).
- Qualifying warranties based on the actual or deemed knowledge of certain individuals.
- Exclusions for indirect or consequential loss, such as loss of profits and opportunities.
- No double recovery where the loss or damage is covered by insurance policies.
- Obligations on the buyer to mitigate loss.

- Exclusion of claims for loss due to the buyer's action or due to a change in law.
- Exclusion of claims where provision for the item has been made in particular accounts.

The nature and extent of the limitations should be influenced by the warranties given, and varies between transactions.

Qualifying warranties by disclosure

It is common for warranties to be qualified by disclosure.

The disclosures referred to in an acquisition agreement are usually:

- Documents contained in a virtual data room or on a storage device, or listed in a disclosure letter or schedule to the agreement.
- Search results from government registers obtained before the agreement is executed (such as company extracts from the Australian Securities and Investments Commission).

16. What are the remedies for breach of a warranty? What are the time limits for bringing claims under warranties?

Remedies

The remedies for breach of a warranty can include:

Damages for breach of contract.

A claim for misrepresentation where both warranties and representations are given.

A claim for misleading and deceptive conduct.

A claim under indemnities, which can be greater than breach of contract damages.

Alternatively, for a breach before completion, the acquisition agreement may provide for:

- Termination or rescission of the agreement.
- A reduction in the purchase price.

Acquisition agreements usually provide that payments by the seller for warranty breaches after closing will be treated as a reduction of the purchase price. This can be useful to the seller from a tax perspective.

Time limits for claims under warranties

Acquisition agreements usually limit the time to bring warranty claims to:

- Five to seven years for:
  - fundamental warranties (such as warranties related to the seller's power to sell the assets or shares); and
  - tax warranties.
- One to three years for other warranties.

CONSIDERATION AND ACQUISITION FINANCING

17. What forms of consideration are commonly offered in a share sale?

Forms of consideration

The forms of consideration usually offered are:

- Cash.
- Shares in the buyer or a related corporate body.
- Loan notes or convertible loan notes issued by the buyer or a related corporate body.

Factors in choice of consideration

The choice of consideration is influenced by:

- Tax considerations.
- The buyer's cash position and access to cash.
- Funding costs.
- The liquidity of the shares offered as consideration and the status of the company in which shares are offered. A listed company's shares are not always superior and proper evaluation is recommended.
- Time and costs associated with complying with regulatory requirements (such as preparing disclosure documents).
- An assessment of how best to incentivise sellers who will play key roles in the business after closing.

18. If a buyer listed in your jurisdiction raises cash to fund an acquisition by an issue of shares, how is the issue typically structured? What consents and regulatory approvals are likely to be required?

Structure

The issue is typically structured as either a:

- **Rights issue.** This is an offer to issue shares to existing shareholders of that class of shares on a pro-rata basis and on the same terms.
- **Private placement.** This is an issue of shares to select investors.

Consents and approvals

The Australian Securities Exchange (ASX) must approve the quotation of new securities.

Each transaction should be analysed to determine whether the size and nature of the offer requires approvals from the ASX, shareholders, or Australian Securities & Investments Commission (ASIC).

Requirements for a prospectus

A prospectus or other disclosure document (such as an offer information statement) is needed for all offers unless an exemption applies. There are disclosure exemptions available in certain circumstances, including where:

- The offer is made to sophisticated investors or professional investors (as with a private placement).
- Offers are received outside of Australia (although the disclosure laws of the country in which the offers are received should be considered).
- In relation to a rights issue, where the disclosure relief conditions in the Corporations Act and ASIC regulatory guide are complied with.

19. Can a company give financial assistance to a potential buyer of shares in that company?

Financial assistance issues can arise when the target company:

- Grants a security interest over its assets in favour of:
  - the seller as security for earn-out payments; or
  - the buyer's financiers who funded the acquisition.

- Gives guarantees to the buyer's financiers.
- Makes a dividend payment to the buyer soon after closing.
- Agrees to pay a break fee (although this has not been considered by Australian courts).

Direct and indirect financial assistance are captured by the Corporations Act. The list above is not exhaustive.

Restrictions

A company can give financial assistance to a potential buyer of shares in that company in the following circumstances:

- **Material prejudice.** The assistance does not materially prejudice:
  - the company;
  - shareholders of the company; or
  - the company's ability to pay creditors.
- **Whitewash.** A whitewash procedure is followed where:
  - the assistance is approved by shareholders (and the shareholders of an Australian listed holding company or an Australian unlisted ultimate holding company of the company after the acquisition); and
  - forms relating to the financial assistance and approval are lodged with ASIC.
- **Exempted.** The prohibition on assistance is exempted under the Corporations Act.

Exemptions

The exemptions to financial assistance are limited and rarely available in an acquisition transaction.

The usual method of dealing with financial assistance is to undertake the whitewash procedure.

SIGNING AND CLOSING

20. What documents are commonly produced and executed at signing and closing meetings in a private company share sale?

Signing

Documents commonly produced and executed at signing include:

- The sale and purchase agreement.
- A letter disclosing against the seller's warranties.

Closing

For a share sale, documents commonly produced and executed at closing include:

- Releases of security interests and encumbrances over the assets of the target company and the shares being acquired.
- Share transfer forms.
- The seller's share certificates.
- New share certificates for the buyer.
- Letters of resignation from outgoing officers of the target company, together with an acknowledgement that the officer has no claim against the target company for breach of contract, loss of office, compensation or repayment of loans.
- Letters from the buyer's incoming officers of the target company consenting to their appointment.
- The company register and key records of the target company's business (in practice, other records may remain at the company's offices or be transferred after closing).
- The secure corporate key of the target company, which allows the buyer to perform some company secretarial functions online.
- Authorities for the alteration of the signatories of the company's bank accounts.
- Board resolutions of the target company approving the share transfer and other closing matters (such as the resignation and appointment of officers).

For an asset sale, closing documents include:

- Releases of security interests and encumbrances over the assets being acquired.
- Title documents for assets being acquired, such as land title certificates.
- Transfers documents, such as vehicle registration and domain name licence transfers.
- Assignment or novation deeds for contracts, such as a lease assignment deed.
- Certificates of registration, such as trade mark registration certificates.
- Employment agreements executed by employees who will be hired by the buyer.
- Business records.
- Forms for the change of a corporate seller's company name.

For both share and asset sales, where the purchase price is:

- Paid in cash by electronic funds transfer, evidence of that transfer is produced by the buyer at closing.
- Satisfied by the issue of shares or notes in the buyer and their allocation to the seller, the buyer typically produces board resolutions of the buyer company approving that issue and allocation, and relevant share or note certificates.

21. Do different types of document have different legal formalities? What are the formalities for the execution of documents by companies incorporated in your jurisdiction?

There are different formalities for simple contracts and deeds.

Deeds are enforceable without consideration and are used where the presence of consideration is not obvious, such as when covenants in restraint of trade are given by the target company's officers in an acquisition agreement.

Australian companies usually execute major agreements either:

- In accordance with section 127 of the Corporations Act.
- By a power of attorney appointed by the company using a deed (which must then be executed in accordance with section 127).

Section 127 is central to execution because it sets out the assumption that a contract or deed has been duly executed by the company if the document is either:

- Signed by:
  - two directors.
  - a director and a company secretary; or
  - the sole director for a proprietary company that has only one director who is also the sole company secretary.

- Affixed with the company's common seal and the fixing of the seal is witnessed by any one of the categories of people listed above.

Outside of section 127, a contract (but not a deed) can also be executed by a person acting with the company's express or implied authority. However, because the contract counterparty will not be able to rely on the assumption under section 127, execution in this manner is only acceptable for immaterial contracts.

22. What are the formalities for the execution of documents by foreign companies?

A foreign company executing a document must:

- Comply with the requirements of its place of incorporation.
- Do so in accordance with its organisational documents.
- Meet the requirements of the applicable state or federal jurisdiction in Australia.

A legal opinion may also be requested to confirm the proper execution of the contract and that the contract is valid, binding and enforceable against the foreign company.

23. Are digital signatures binding and enforceable as evidence of execution?

Digital signatures are generally binding and enforceable.

The Commonwealth, State and Territory Electronic Transactions Acts (ETAs) enable digital signatures to be binding and enforceable as evidence of execution if:

- The requirements for a signature given by electronic communication (such as e-mail) are met.
- The applicable ETA does not exclude the use of a signature given by electronic communication for that transaction or document.

However, the ongoing debate about the application of section 127 of the Corporations Act (*see Question 21*) to digital signatures means that some parties to major contracts, such as acquisition agreements, insist on execution using hardcopy ink signatures.

24. What formalities are required to transfer title to shares in a private limited company?

The formalities required to transfer title to shares in a private company are:

- Execution of a share transfer form.
- Passing of a board resolution approving the transfer of shares and registration of the buyer as a shareholder.
- If required, payment of duty and stamping of the share transfer form.
- Delivering to the company:
  - the original share certificate of the share to be transferred; and
  - the executed and, if required, stamped share transfer form.
- Updating the company's register of members to enter the buyer as a shareholder.
- Issuing a new share certificate to the buyer.

ASIC is subsequently notified of the share transfer so that the public register is updated to show the buyer as the holder of the shares.

TAX

25. What transfer taxes are payable on a share sale and an asset sale? What are the applicable rates?

Share sale

Duty on the transfer of shares in unlisted companies without significant interests in real property has effectively been abolished in all Australian states and territories.

Where the target company (including downstream entities) has certain real property holdings or interests (including mining and petroleum tenements) that exceeds the relevant value or percentage threshold, the transfer of shares may trigger landholder or land-rich duty. This applies where the land is located, with each state and territory having a different duty rate and threshold. Duty is usually charged on a sliding scale at the same rates that apply to land transfers (up to 7%) on the greater of the purchase price or the market value of the land, and on the value of goods transferred with land (in some jurisdictions).

Asset sale

Duty is payable on the transfer of business assets (including intangible assets such as goodwill), but differs between jurisdictions from Victoria (generally no duty) to Queensland (virtually every asset).

An acquisition can be payable in other states and territories even if the business' head office is in a state or territory where duty is not payable. When acquiring a business that provides goods or services to customers in these states and territories, legislative formulae for the calculation of duty apply.

Rates are calculated using a formula or on *ad valorem* rates (up to 5.75%) on the dutiable value (generally, the greater of the purchase price and the market value of all dutiable property acquired).

Where an asset sale involves a transfer of land or interests in land, that transfer is dutiable (*see above, Share sale*).

26. What are the main transfer tax exemptions and reliefs in a share sale and an asset sale? Are there any common ways used to mitigate tax liability?

Share sale

Where the transfer of shares between members of a corporate group gives rise to landholder or land-rich duty, most states and territories grant duty relief for transactions that are solely for the purpose of a corporate reconstruction.

In some jurisdictions, unless an exception applies, relief is only available where the transferor and transferee:

- Have been part of the same corporate group for up to three years before the transaction.
- Remain in the same corporate group for up to three years after the transaction.

Corporate consolidation exemptions are also available in most states and territories where a corporation or unit trust is interposed between an existing corporation or unit trust and its shareholders or unitholders.

Asset sale

The transfer of assets or interests in land between corporate group members can also benefit from corporate reconstruction relief and corporate consolidation exemptions (*see above, Share sale*).

27. What corporate taxes are payable on a share sale and an asset sale? What are the applicable rates?

The corporate tax rate is:

- 28.5% for companies with an annual turnover (including the turnover of businesses connected or affiliated with it) of below A$2 million.
- 30% for other companies.

There are plans to reduce the tax rate for all companies gradually over time to 25% in the 2026-27 income year.

Share sale

The sale of shares can give rise to CGT at the corporate tax rate on the sale price, less its cost base.

The cost base of shares is generally the cost of the shares when acquired, including other costs associated with acquiring, holding and disposing of the shares.

Where the share sale results in the target company leaving a tax consolidated group, then the cost base for the sale shares is the excess of the underlying tax cost base of the target company's assets over its liabilities at the time that it leaves the group.

Asset sale

Liability for CGT arises on the sale of CGT assets (such as goodwill).

Not all assets sold are considered CGT assets (and so no CGT liability arises). Exceptions include sales of the following (which can instead attract corporate income tax):

- Depreciable assets (such as plant and equipment) sold for more than their written down value.
- Stock.

Earn outs

Special CGT rules apply when the transaction involves earn-out arrangements.

Qualifying earn-out arrangements are eligible for "look through" CGT treatment, so that:

- CGT payable on the earn-out arrangement is deferred until the earn-out is paid.
- Earn-out payments adjust the seller's capital gain or loss, and the buyer's cost base, in respect of the underlying assets (including shares) sold.

Parties should seek advice on whether or not the "look through" treatment provides a better tax outcome for their particular transaction.

Non-residents and foreign residents

Generally, non-residents are liable for CGT only on assets that have a connection with "Taxable Australian Property". This is:

- Australian real property and land interests (including interests in mining, quarrying and prospecting rights).
- Indirect interests in land, where:
  - the non-resident and its associates hold equity interests of 10% or more; and
  - the market value of the entity's Australian land assets is more than 50% of the total market value of all assets of the company.
- Assets used at any time in carrying on a business through a permanent establishment in Australia.
- An option or a right to acquire any of the above assets.

A buyer must withhold 10% of the purchase price and pay that amount to the Australian Taxation Office when buying from a foreign resident seller:

- Taxable Australian real property
- Indirect Australian real property interests, which captures shares and units in land-rich companies and trusts.
- An option or right to acquire either of the above.

The taxable Australian real property or indirect Australian real property interests acquired must have a market value of at least A$2 million before this non-final withholding tax applies. Other exclusions may also apply and specific advice should be sought.

28. What are the main corporate tax exemptions and reliefs in a share sale and an asset sale? Are there any common ways used to mitigate tax liability?

Share sale

Liability for CGT can be deferred with scrip-for-scrip roll-over relief. This is where shares in the target are sold in consideration for shares in the buyer company (or its ultimate parent).

If so, any capital gain made on the sale of the shares in the target company is deferred until the consideration shares are disposed of.

Asset sale

Corporate income tax and CGT do not generally arise for asset sales between members of the same tax consolidated group.

Roll-over relief can also be available for the transfer of Taxable Australian Property (*see Question 27*) to, from or between two non-resident companies that are members of the same wholly-owned group.

Deferring liability

A CGT event (such as a share or asset sale) triggers the CGT liability. The timing of the event is the execution of the acquisition agreement.

A CGT event and associated liability can be delayed by entering into put and call options so that the parties are bound to the transaction if the options are exercised, but the CGT event is postponed to the date that the option is exercised.

Small business relief

Small business entity concessions are available on the sale of active assets (generally, assets used in, or forming an integral part of, a business). This includes shares in a company, and units in unit trust, if at least 80% of the value of their assets are active assets.

The seller must satisfy one of the following two tests:

- **Maximum net assets test.** An individual seller, entities connected with that individual, the person's spouse and children under 18 years old must have net assets of less than A$6 million.
- **Small business entity test.** The company or trust carrying on the business must have a turnover of less than A$2 million per annum.

There are additional tests to be satisfied when shares or units are sold.

If the relevant tests are passed, then the following concessions may be available:

- **15-year exemption.** If the taxpayer has owned the asset for more than 15 years, then the proceeds of sale are tax free.
- **50% reduction.** The capital gain is reduced by 50%.
- **Retirement exemption.** A CGT exemption up to a lifetime limit of A$500,000.
- **Small business rollover.** If an active asset is disposed of and a replacement asset is acquired within two years after the disposal (such as using sale proceeds to acquire another business), then CGT is deferred until the replacement asset is disposed of.

Price apportionment

The value attributed to capital items acquired by the buyer, such as goodwill, forms the cost base deducted from any capital gains on a subsequent sale. As that sale may occur years after the acquisition, a buyer may wish to maximise short-term income tax deductions.

This can be achieved by maximising the amount of the purchase price that is allocated to assets for which deductions are available (such as plant and equipment) since the buyer can claim depreciation annually on those assets as a tax deduction. The seller may resist this as it can increase the seller's liability for income tax.

Parties should be aware of the consequences of Part IVA of the Income Tax Assessment Act 1936 (*Cth*), which voids any artificial arrangement to reduce income tax.

29. Are other taxes potentially payable on a share sale and an asset sale?

Assets

GST at the rate of 10% is payable if an asset sale does not fall within the going concern exemption. This is usually paid by the buyer in addition to the purchase price.

For the exemption to apply and for the sale to be GST-free:

- The seller must supply to the buyer all of the things that are necessary for the continued operation of an enterprise. An enterprise includes activities such as leasing, licensing and trading operations.
- The seller must carry on the enterprise until closing.
- The sale must be for consideration.
- The buyer must be registered, or required to be registered, for GST.
- The seller and the buyer must have agreed in writing (usually in the acquisition agreement) that the supply is of a going concern.

Parties sometimes disagree on whether everything necessary for the continued operation of the enterprise is supplied in a transaction. Things that are necessary for the continued operation of the enterprise are those without which the business could not function, depending on the nature of the business, and not everything in the business. They include:

- Necessary assets, such as plant and equipment and the business premises.
- Its operating structure and processes, such as introductions to existing suppliers.

Cashflow is the key benefit of the going concern exemption. When a transaction is GST-free, the buyer does not need to use funds to pay the GST component upfront. Those funds can be used for the business or other investment instead.

Shares

No GST is payable on an acquisition of shares.

30. Are companies in the same group able to surrender losses to each other for tax purposes? For example, can interest expenses incurred by a bid vehicle incorporated in your country be set off against profits of the target before tax?

Australia's consolidation regime allows wholly-owned corporate groups to operate as a single entity for income tax purposes. This allows losses to be transferred between members of the group (which must be Australian entities).

If the target is consolidated with a bid vehicle, then interest expenses incurred by the bid vehicle can shelter the target's profits.

EMPLOYEES

31. Are there obligations to inform or consult employees or their representatives or obtain employee consent to a share sale or asset sale?

Asset sale

The seller is only required to inform and consult with employees or their representatives in an asset sale if an award or enterprise agreement that applies to those employees requires consultation.

While awards and enterprise agreements differ, consultation generally requires the employer to:

- Consult with employees and their representatives when there is a major workplace change that is likely to have a significant effect on them.
- Provide relevant information to them.
- Discuss the effects of the change with them (although consent is not required).

Share sale

Awards and enterprise agreements do not usually contain a consultation requirement when there is a share sale as there is no change in the employing entity. This should be verified by reviewing the relevant consultation clause in each applicable award and enterprise agreement.

If the buyer decides to introduce a major change to the business after the acquisition, then the consultation requirements may be triggered.

32. What protection do employees have against dismissal in the context of a share or asset sale? Are employees automatically transferred to the buyer in a business sale?

Automatic transfer of employees

Employees do not automatically transfer to the buyer in a business sale (*see Question 6*).

Redundancy

In an asset or business sale, employees who are not employed by the buyer may be redundant and entitled to redundancy payments. The seller is responsible for this since it is the seller who has made the positions redundant.

After the closing of a share sale, an employee can be entitled to redundancy payments by the target company if the following are satisfied:

- The buyer does not require the employee's job to be performed by anyone.
- There is no position suitable for redeployment of the employee with the target company or its associated entities.
- The target company employs fewer than fifteen employees.
- The employee has been continuously employed by the target company for less than 12 months.
- The employee is not a casual employee, or employed for a stated period of time, for an identified task or project or for a particular season.
- The employee is not terminated because of serious misconduct.

Unfair dismissal

When the redundancy requirements (*see above, Redundancy*) are satisfied and the employing entity has complied with the consultation requirements in the applicable award or enterprise agreement, the redundancy of an employee is considered a "genuine redundancy".

An employee may be able to bring an unfair dismissal claim against the employer if:

- The employee:
  - has been continuously employed for at least six months (or 12 months for an employer with 15 employees or less); and
  - earns no more than A$138,900 (as at 1 July 2016).
- There is no genuine redundancy, such as where:
  - the employee can be redeployed to other available positions with the employer or associated entities; or
  - the employee's role is filled by someone else.

A successful unfair dismissal claim can result in:

- A reinstatement order.
- Compensation payable by the employer of up to six months' wages.

General protection claims

An employee can make a general protection claim if there is genuine redundancy, but that employee is selected because of either:

- Having exercised a workplace right, such as making a complaint in relation to employment.
- That employee's personal attributes, such as race, sex, age or disability.

PENSIONS

33. Do employees commonly participate in private pension schemes established by their employer? If an employee is transferred as part of a business acquisition, is the transferee obliged to honour existing pension rights or provide equivalent rights?

Private pension schemes

Australia's pension scheme, called superannuation, is a contribution system that generally requires employers to make superannuation guarantee contributions at the rate of 9.5% (as at 1 July 2017) of ordinary time earnings for employees.

Private pension schemes established by employers are known as corporate (or employer-sponsored) superannuation funds. Membership of these funds are restricted to the employees of the sponsoring employer. Corporate superannuation funds constitute only a small fraction of all superannuation accounts.

Effect of business acquisition

When an employee becomes employed by the buyer in a business acquisition:

- For a member in a defined contribution fund (common): accrued rights are not usually affected.
- For a member in a defined benefit fund (rare): the effect depends on the rules of the fund.

After the acquisition, the buyer must make superannuation guarantee contributions to the superannuation fund of the employee's choice or, if no choice is made, to a default superannuation fund.

COMPETITION/ANTI-TRUST ISSUES

34. Outline the regulatory competition law framework that can apply to private acquisitions.

Triggering events/thresholds

The Competition and Consumer Act 2010 (*Cth*) (CCA) prohibits direct and indirect mergers and acquisitions that have, or would be likely to have, the effect of substantially lessening competition in any market in Australia.

This also applies to mergers and acquisitions outside Australia that result in the acquisition of a controlling interest in an Australian entity.

Notification and regulatory authorities

Merger notification is voluntary. The Australian Competition and Consumer Commission (ACCC) administers the CCA and encourages parties to notify it of a transaction where both of the following apply:

- The products or services of the parties are either substitutes or complements.
- The merged entity will have a post-transaction market share of more than 20% in a market.

Parties are expected to adopt a conservative definition of the "market" by considering:

- Overlaps between the goods or services, or geographic regions, supplied by the parties.
- Other economic relationships (such as vertical relationships or complementary goods or services supplied by the parties).

In practice, parties involved in mergers and acquisitions that might have an appreciable effect on competition voluntarily notify the ACCC before the transaction proceeds.

A proposed merger can be notified using three separate processes:

- Informal clearance, which is used in an overwhelming number of transactions.
- Formal clearance, which has never been used.
- Australian Competition Tribunal (ACT) authorisation, which has only been used twice.

Substantive test

For informal and formal clearances, the substantive test is whether the merger will have the effect, or likely effect, of substantially lessening competition in a market in Australia.

In evaluating a proposed transaction, the ACCC considers one or more of following factors:

- Actual and potential level of import competition.
- Barriers to entry.
- Market concentration.
- Countervailing power.
- Acquirer's ability to significantly and sustainably increase prices or profit margins post-acquisition.
- Availability of substitutes.
- Dynamic characteristics of the market, including growth, innovation and product differentiation.
- Removal of a vigorous and effective competitor.
- Degree of vertical integration.
- The potential for co-ordinated effects.
- Any other factors the ACCC considers relevant.

For ACT authorisation, the substantive test is whether the merger gives rise to a net public benefit, including:

- Significantly increasing the real value of exports.
- A significant substitution of domestic products for imported goods.

Parties usually advance a range of public benefits that support the authorisation of the transaction by the ACT.

The ACT also takes into account of all other relevant matters that relate to the international competitiveness of any Australian industry.

A legislative bill is before Parliament to implement the 2014 recommendation by the Harper Panel Competition Policy Review that the formal merger clearance and the authorisation processes be combined, which could change the substantive test in the future.

ENVIRONMENT

35. Who is liable for clean-up of contaminated land? In what circumstances can a buyer inherit and a seller retain liability in an asset sale and a share sale?

Liability

Multiple persons can be liable for the clean-up of contaminated land. The order of responsibility for contamination is:

- The person that caused, or contributed to, the contamination.
- The owner or occupier who has changed the use of the land resulting in remediation.
- The owner.

Asset sale

While the seller can pass liability to the buyer by contract, the seller retains principal liability for pre-closing contamination.

The buyer, as the owner or occupier of the site, can be deemed to be liable by statute.

Share sale

The buyer acquires the target company with its liabilities for contamination. However, warranties given by the seller, and indemnities in favour of the buyer, in the share purchase agreement can provide relief to the buyer.

ONLINE RESOURCES

Australian Government Federal Register of Legislation

W *www.legislation.gov.au*

Description. Official up-to-date Australian legislation website maintained by the Australian government.

Practical Law Contributor profiles

Narin Xavier de Saini, Consulting Principal

Professional qualifications. Australia, Lawyer; New York, Attorney.

Areas of practice. Mergers and acquisitions; corporate law; commercial law; ecommerce; technology; financial services; cross-border.

Non-professional qualifications. LLB, Monash University; BA (Politics major; Psychology minor), Monash University.

Recent transactions

- Advising on mergers and acquisitions involving domestic, foreign and international listed and unlisted companies.
- Advising on commercial, corporate and cross-border matters in financial services, technology, digital, eCommerce, education, consumer goods, professional services, real estate and construction industries.