

ASIC corporate finance update

17 April 2019

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Key issues:

- The Australian Securities and Investments Commission recently released its latest report on regulation of corporate finance.
- ASIC continues express concerns around fundraising disclosure, financial information provided in prospectuses and critiques of expert valuations and technical specialists.
- There was a general increase in M&A activity during the period, largely driven by overseas bidders or acquirers. ASIC has been particularly focused on M&A matters involving novel or complex considerations.
- ASIC continues to highlight its new enforcement approach and abilities.

The Australian Securities and Investments Commission (**ASIC**) recently released its latest report on regulation of corporate finance (**ASIC Report**). The ASIC Report discusses ASIC's key observations in their regulation and oversight of fundraising, mergers and acquisitions transactions, corporate governance and other general corporate finance matters for the period of 1 July 2018 to 31 December 2018 (**Relevant Period**). The ASIC Report is wide-ranging and reveals key themes or issues that ASIC is currently alert to, providing useful guidance for companies and their advisers.

Those key themes are summarised below.

Fundraising

ASIC noted an increase in the number of disclosure documents lodged in the Relevant Period compared to the previous period (up from 229 to 296), but a decrease in the total funds sought (down from approximately \$9.6 billion to approximately \$7.6 billion), reflecting increased activity in smaller capital raisings.

As a result, ASIC's main concerns regarding fundraising disclosure include:

- inadequate disclosure of an entity's business model;
- misleading or deceptive disclosure;
- unclear or insufficient disclosure regarding proposed use of funds;
- risk disclosure that was inadequate, insufficiently prominent or not tailored to the entity; and
- insufficient summary, investment overview or key information.

In response to its disclosure concerns, ASIC noted that it had:

- extended the exposure period 34 times; and
- made 11 interim stop orders and two final stop orders,

with ASIC's concerns generally addressed by the issuer providing new or amended disclosure.

ASIC intervention adds time and cost to a fundraising, making it critical for companies to ensure their disclosure is tailored and complete from the get-go.

Financial Information

ASIC raised specific concerns regarding financial information (in prospectuses) in relation to accounting judgements and estimates, roll up listings and forward-looking financial information.

ASIC had previously encouraged issuers to include disclosure about key 'accounting judgments and estimates' made in financial statements, to give potential investors greater insight into which areas of the financial statements are subject to judgments and their potential effect.

On roll up listings (where an entity acquires many immaterial businesses without audited financial statements in the same sector), ASIC noted that in most cases it will not accept issuers relying on the reduced disclosure allowances outlined in Regulatory Guide 228 (**RG 228**) to provide less than three years audited historical financial information. ASIC indicated that in certain, very narrow circumstances, it may be reasonable for an issuer to provide less financial information, but did not expand on those circumstances.

ASIC also confirmed that companies wishing to disclose additional forward-looking information, beyond explicit forecast periods, must disclose the reasonable grounds providing the basis for the additional information. Whilst forward looking information may be appropriate in certain circumstances (e.g. where there is ongoing or expected litigation), ASIC may require an external expert's report to support the reasonableness of any assumptions underlying the forward-looking information.

Experts

ASIC has raised concerns about critiques of expert valuations and technical specialists.

Expert Valuations

In critiques of expert valuations, ASIC stressed that a bidders' comments on independent expert reports should be made carefully, particularly when alternate assumptions are used by an expert engaged by the target to come to a different conclusion than the bidders' expert.

Technical Specialists

On technical specialists, ASIC is concerned by the compliance of technical specialists with relevant codes and requirements. ASIC has advised that parties commissioning technical specialists and experts must consider the nature of the information being prepared and ensure that the qualifications and experience of the technical specialist or expert, suit these requirements.

ASIC noted a specific concern about a report in mining exploration company's prospectus, which described how legislation applied to the company's tenements, but was prepared by a tenement manager lacking legal qualifications. ASIC advised that, where opinions involving the application of legislation are expressed, the report should be prepared by an appropriately qualified legal practitioner.

Mergers & Acquisitions

ASIC reported a general increase in M&A activity during the Relevant Period, including:

- 44 independent control transactions, up from 9 in the previous period;
- 10 restructure transactions, up from 2 in the previous period; and
- 2 creditors schemes, compared with none in the previous period.

A breakdown of transactions by the target's implied value indicated that larger control transactions were generally undertaken via a scheme and were predominantly cash proposals. Notably, overseas bidders or acquirers were behind 78% of all deal value, and were a key driver of takeovers during the Relevant Period.

ASIC relief and intervention

Voluntary escrow relief remained the most sought after relief from ASIC, followed by relief relating to acquisition of relevant interests.

ASIC intervened most frequently in schemes and responded in a large part to scheme disclosure issues encompassing offer terms, 'truth in takeovers' statements, shareholder classes and bid structures.

Novel or complex consideration

ASIC also reported that it intervened in numerous matters during the Relevant Period involving novel or complex considerations. This includes:

- offering shares in a proprietary company to a large number of target security holders, including retail investors; and
- consideration that is different in form or substance between certain security holders.

ASIC will likely scrutinise novel or complex consideration in schemes that raise issues of class composition, fairness or public policy concerns. During the Relevant Period, ASIC intervened in schemes involving stub-equity, split consideration structure and a scheme requiring a separate class.

Where different consideration is offered to different target security holders, ASIC expects entities to:

- clearly consider and address any potential class issues likely to arise before structuring the transaction; and
- expect extra scrutiny by ASIC if the transaction lacks the traditional mechanisms for managing class issues (e.g. voting in separate classes).

Corporate Governance

Fees for Service

ASIC has revised the application fees for an abridgement of the period of notice for related party transactions. The fee has now been reduced to \$130 from \$3,487. ASIC states that this revision more accurately reflects the regulatory cost associated with granting this type of relief.

Corporate Governance Taskforce

Since the inception of ASIC's Corporate Governance Taskforce in August 2018, ASIC has manned the Taskforce with 20 staff to undertake in-depth reviews of corporate governance practices in large listed entities. The two work streams of review are:

- director and officer oversight of non-financial risk; and
- board/ officer decisions regarding the granting and vesting of variable remuneration to key management personnel.

A large number of entities have been selected to be subject to both work streams of review, while a further group of listed entities has been selected for remuneration review only for the time being.

ASIC has also indicated that its monitoring activities are not just covering financial entities, but larger corporations more generally.

ASIC aims to publish the Taskforce findings in August 2019.

Enforcement

In light of the Royal Commission, ASIC has also noted it will now be taking a “*Why not litigate?*” approach to achieving enforcement outcomes. In terms of their supervisory approach, ASIC will be undertaking close continuous monitoring to identify issues early on and improve their relationship with corporate actors.

ASIC also discussed its now [enhanced penalty powers](#) as a result of the passing of the Treasury Laws Amendment (Strengthening Corporate and Financial Sector Penalties) Bill 2018, which strengthens existing penalties and introduces new penalties for certain breaches of the Corporations Act. For a greater analysis of the impact of the Bill, please see our [previous article](#).

For more information or discussion, please contact HopgoodGanim Lawyers’ [Corporate advisory and governance](#) team.

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