The Takeover Roadmap

2022

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Contents

The law in this area can be complicated and very technical. This guide is not comprehensive and is not a substitute for detailed legal advice. This guide is current as at August 2022.

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Introduction

Takeovers in Australia are highly regulated by the Corporations Act and other legislation, and by policy guidance from regulators.

This guide provides a high level overview of:

- the 20% takeover threshold in Australia, and other key shareholding levels
- types of control transaction, and how to choose between them
- details on takeover bids and schemes of arrangement, the main types of control transaction
- how a bidder can prepare for a bid
- how a target responds to a takeover proposal
- disclosure obligations in relation to interests in shares
- the regulators who are likely to be relevant to a control transaction.

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The 20% takeover threshold and other key shareholding levels

What entities do the takeover laws apply to?

Australian takeover laws in Chapter 6 of the Corporations Act only regulate Australian incorporated entities. All listed Australian companies, managed investment schemes (such as REITs), and stapled entities are regulated. So are unlisted public companies with more than 50 shareholders. References in this guide to companies and shares generally apply in the same way to units in other regulated entities.

The ASX Listing Rules do not separately regulate takeovers in any significant respect. This means that non-Australian companies which are listed on the ASX will generally be regulated only by the takeovers laws of their home jurisdiction, and will not be subject to Australian takeover regulation.

90%
At 90% a shareholder can compulsorily acquire the remaining minority shares, either after a takeover bid (at the bid price) or without a bid (at fair value)

75%
The shareholder can unilaterally pass special resolutions, such as to amend the company's constitution or approve delisting from ASX.

50%
This is a key control level, where any or all directors can be voted in or out with a simple majority vote.

20%
Acquisitions above the 20% takeover threshold are highly regulated, and can only be made using one of the gateways in the Corporations Act.

Foreign bidders may also require FIRB approval above this level.

10%
ASX Listing Rules start to regulate some transactions with a 10% shareholder, potentially requiring approval by a shareholder vote

5%
Substantial holder disclosure starts at 5%, and again at every 1%+ change

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There are a number of gateways to acquire (or to increase) a shareholding above the 20% threshold. Some are only suitable for smaller incremental acquisitions above the threshold. To get 100% control a bidder will generally need to use a takeover bid or a scheme of arrangement.

20% 90% 100%

Up to 20%: not regulated by takeover laws

Creeping acquisitions: Once a 19% holding is reached, an additional 3% can be acquired every 6 months

Shareholder approval: Specific acquisitions (either an issue of new shares or purchase of existing shares) can be approved by a resolution of the other shareholders, with an independent expert's report on whether the transaction is "fair and reasonable" to non-participating shareholders

Takeover bid: This is a regulated offer to buy target company shares, made on the same terms to each target company shareholder. Depending on the level of acceptances, the bidder can acquire partial control (if it ends up with less than 90%) or 100% full control (generally if it reaches the compulsory acquisition threshold of 90% of total shares on issue). A bid can be conditional on reaching 90%, meaning that the bidder need not proceed if it will not secure 100% control

Compulsory acquisition: The bidder can buy out remaining shares at the bid price.

Scheme of arrangement: This is a Court supervised transaction, under which a bidder can acquire all of the shares in the target company. A scheme requires approval from both the Court and a vote of target company shareholders. The main shareholder voting threshold is 75% by number of shares that are voted. A scheme is "all or nothing" meaning that if the voting threshold is not met, the entire scheme does not complete.

Calculating your "voting power"

- The law uses the defined term "**voting power**" to calculate the 20% threshold. This is a broad concept, which aggregates the "**relevant interests**" held by a person (a term which widely draws in all direct and indirect holdings), together with the relevant interests of the person's "**associates**". Associates include related bodies corporate, and other shareholders with whom the person is acting in concert in relation to the company in question.
- Relevant interests in shares can arise up front where there is a contingent future acquisition of shares, such as by entering into a call option or pre-emptive right with another shareholder. Great care is needed to avoid breaching the 20% limit.
- Only issued "voting shares" count in calculating a person's voting power. For instance, certain preference shares with limited voting rights, or options or convertible notes over unissued shares, do not count.

Pro rata rights issues and underwriting

- A shareholder can increase its percentage holding in a company by taking up its pro-rata entitlement in a rights issue. This exception also extends to an acquisition of shortfall shares by an underwriter or sub-underwriter to the issue.
- However, ASIC and the Takeovers Panel have cautioned that this exception should not be abused (in particular where a major shareholder is the underwriter), and the offer should be structured to avoid control effects if possible. Often this will involve all shareholders being given the opportunity to apply for some of the shortfall shares before they are taken up by the underwriter.

Acquiring 100% control by using a selective share cancellation

- Takeovers and schemes are the principal methods used to acquire 100% control. An alternative, but less used, method is to acquire control by cancelling all target company shares held by shareholders other than the bidder, leaving the bidder as the sole shareholder. This can be achieved by way of a selective capital reduction, which requires approval by a special resolution (75% vote) of shareholders whose shares are to be cancelled. There is no Court approval required, unlike a scheme of arrangement.
- Selective capital reductions are less common because the acquisition price is paid directly by the target company as a return of capital to its shareholders (although the price can be indirectly funded by the bidder), and this kind of distribution can sometimes have adverse tax implications.
- An advantage of this structure is that can be easier to accommodate existing large shareholders who want to retain their equity in the privatised company by excluding them from the cancellation.

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Choosing an acquisition structure: takeover bid or scheme?

Takeovers and schemes are different ways of reaching 100% control. Choosing the best structure for an acquisition depends on a number of factors, some of which are summarised below. More detail on the specific features of takeovers and schemes is set out in Chapters 3 and 4.

	Takeover bid	Scheme of Arrangement
Control of the process	The bidder generally controls the process. Once started, the bidder can decide whether to waive conditions, extend the bid, or increase the bid price. A takeover, unlike a scheme, can proceed with or without the target board's continued support or recommendation.	The target runs the scheme process, including preparing shareholder meeting documents, ASIC filings, and making applications to the Court. A target can end a scheme process if a termination event arises under the Scheme Implementation Agreement such as a superior offer from a third party, generally leaving the bidder with a break fee as its only remedy.
Going hostile	It is possible to make a hostile or unsolicited bid, going directly to target company shareholders.	Not possible, because it is a target-driven structure. However, the bidder may approach the target on an unsolicited basis with a scheme proposal (which may be publicly announced) with the aim of putting pressure on the target board to provide due diligence access and negotiate the proposal.
Approval threshold to reach full control	The bidder needs to achieve a 90% shareholding to proceed to compulsory acquisition of the remaining shares. A higher test applies if the bidder's pre-bid holding exceeds 60%, in which case the bidder must receive acceptances for at least 75% of the shares it did not own at the start of the bid. However, a bidder can declare its bid "unconditional" at any acceptance level it chooses if it does not require 100% control.	There are dual voting thresholds at the shareholder meeting: · 75% by number of *shares* voted; and · 50% by number of *shareholders* who vote. In each case, the test is based on only those shares which are actually voted. Court approval is also required.
Effect of pre-bid shareholding	Any existing shareholding counts towards the 90% compulsory acquisition threshold, making it easier to achieve. An existing holding exceeding 60% will increase the threshold (see above).	The bidder and its associates cannot vote their own shares in favour of the scheme. A call option over a third party's shares, however, will not always disqualify the third party from voting.
Certainty of outcome	A bidder will usually have to declare its bid unconditional at an acceptance level below 90% to entice sophisticated shareholders to accept for their shares. An Institutional Acceptance Facility can help overcome this impasse, but often a bidder has to accept some risk of falling short of 90% when it goes unconditional. This can make debt financing more difficult. A takeover structure can be to a bidder's advantage if it is content with majority control, as the bid does not need to be conditional on reaching compulsory acquisition thresholds.	Schemes have a binary "all or nothing" outcome depending on whether the approval thresholds are met, and will generally complete on a specific date agreed in advance by the bidder and target. A scheme is generally preferable from a debt financier's perspective for this reason. Unlike a takeover bid, a bidder under a scheme of arrangement cannot end up with only partial success (such as majority control).
Timetable and completion process	As there is no Court approval process, a takeover bid can be launched relatively quickly. A bidder can take early acceptances (if the bid is unconditional) to gain control in a matter of weeks. However, a takeover offer will often take some time to reach compulsory acquisition thresholds, as this depends on how quickly the remaining shareholders accept the offer. The timetable for a takeover is ultimately uncertain for this reason.	A scheme starts more slowly than a takeover as it requires review and approval of scheme documents by both ASIC and the Court before they can be sent to shareholders, and then there is a minimum 28 days' notice to hold the shareholders' meeting. Unlike a takeover, the completion date of the scheme process can be fixed in advance, with the result that all the target shares are acquired by the bidder shortly after shareholder and Court approvals.
Offer price	An off-market bidder can offer cash, securities, debentures, or any combination of alternatives. All target shareholders must be offered the same choices. An on-market bid can only offer cash.	Separate and different offers are allowed, for example equity in the bid vehicle may be offered only to target management, with cash offered to other shareholders. This can create separate classes of shareholders for voting purposes, each of which will have to separately vote on and approve the scheme.
Ability to respond to rival bid	A takeover bid is very flexible in relation to amending its terms. The bidder can unilaterally: · waive conditions (one at a time, or all at once); · extend the bid one or more times; · increase the offer price by any amount; or · accelerate payment terms for acceptances, at its discretion and at any time during the bid (although some restrictions apply in the final 7 days of the bid period). This flexibility allows a bidder to respond quickly to a rival bidder.	The terms of a scheme cannot be amended as easily. Any variation after the shareholders' meeting has been convened will usually require ASIC and Court approval, and depending on the timing of the proposed variation, may require the meeting to be postponed which will delay the timetable. Payment terms cannot be accelerated for "early acceptances" before the shareholders' meeting as it is an "all or nothing" process. These features make it more difficult for a scheme bidder to respond to a rival bid, and mean that a rival bid can easily disrupt the scheme timetable.

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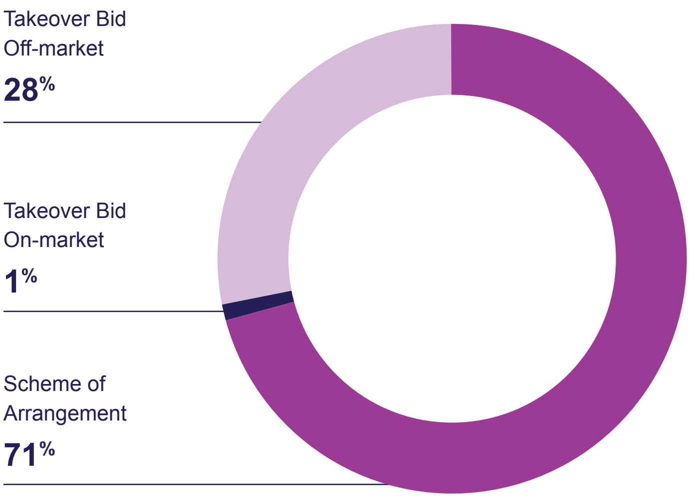
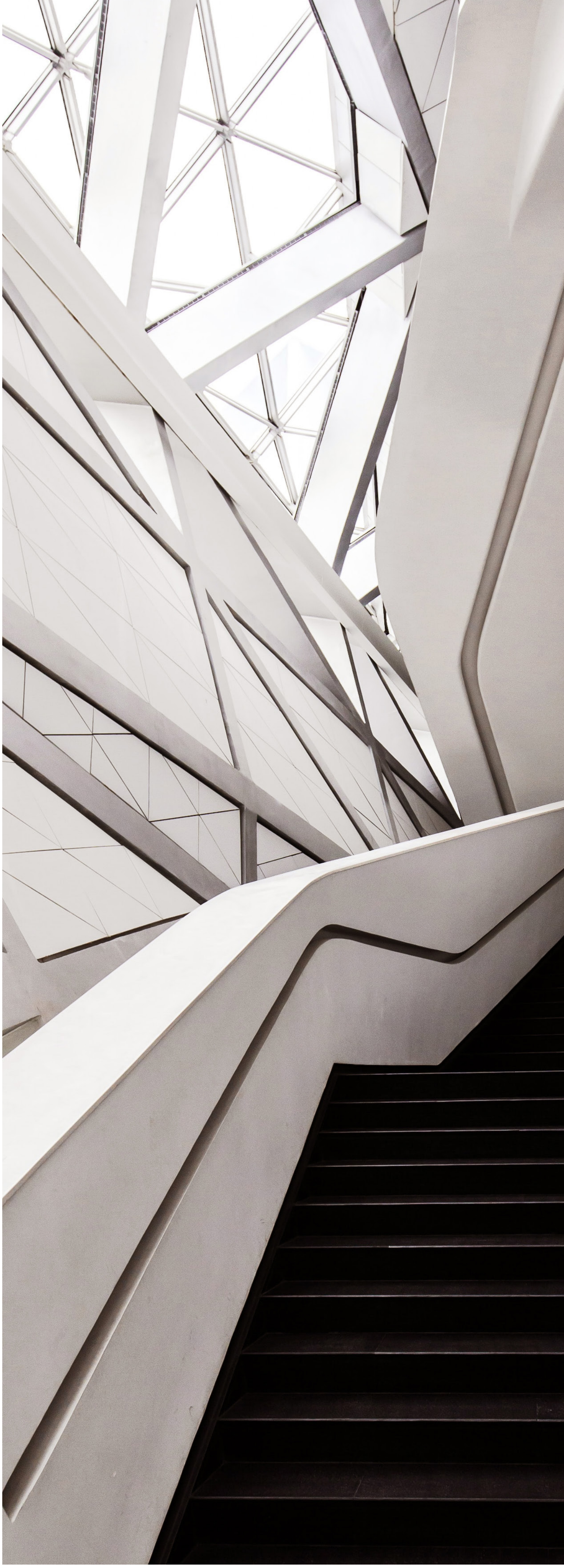
Which structure do bidders usually choose?

- In recent years, large value control transactions in Australia are much more often undertaken by way of a scheme of arrangement than a takeover bid.
- The "all or nothing" outcome of a scheme generally makes it a favoured acquisition structure for friendly or agreed transactions. In leveraged acquisitions, where it is essential to obtain 100% control on a certain date, it may be necessary to proceed by way of scheme for this reason. Likewise, a "top-hat" restructure, where all classes of shares and convertible securities are to be simultaneously exchanged for equivalent securities in a new holding company, will generally also have to be structured as a scheme.
- A scheme of arrangement might also be attractive where special corporate actions need to be undertaken in connection with the acquisition, such as where part of the acquisition price is in the form of a share buy-back or capital return that requires approval by a shareholder vote.
- However, in a hostile situation a takeover bid is the only feasible structure because a scheme requires the target's agreement and initiative to implement.

Structure Used 2020 - 2022*



*Current or successful bids only, by number of transactions.



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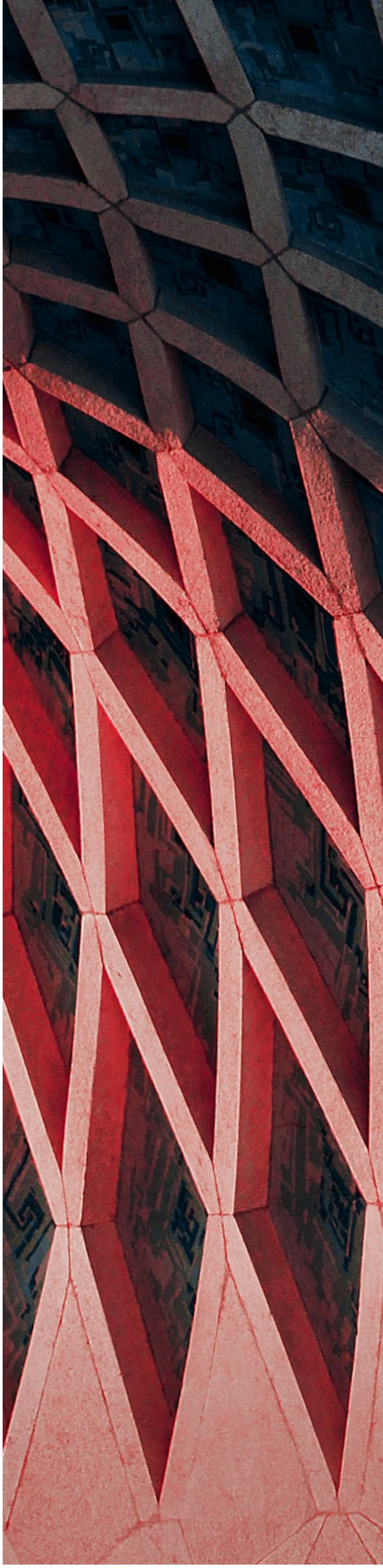
More detail on takeover bids



A takeover bid is essentially a regulated offer to buy target company shares which is made on identical terms to each target company shareholder.

Types of takeover bid

Takover bids can be either:

Off-market bid	• The offer is made by sending personalised, formal, written offers to every target company shareholder on identical terms. Shareholders accept by responding directly to the bidder. • Off market bids are flexible because they can be made for listed or unlisted public companies, and can extend to non-quoted securities such as options. The offer price can be cash, securities (such as shares in the bidder), or any combination. • Off market bids can also be conditional, for example on the bidder obtaining any regulatory approvals it needs, on the bidder reaching the compulsory acquisition threshold (if it wants an "all or nothing" outcome), and on no material adverse change in the target during the bid period. The bidder can waive conditions in its discretion. • The offer can be a full bid for 100% of each shareholder's shares, or a partial offer for up to a fixed proportion (such as 50%) of each holder's shares.
On-market bid	• On market bids involve the bidder's broker standing in the market to buy 100% of the target's shares at the offer price. Shareholders accept by selling on market in the normal way, and settle sales on a standard T + 2 basis. • Because it is an on market transaction, an on market bid can only offer cash, and must be unconditional. Further, it can only be made for quoted securities in a listed company. • Partial bids cannot be made on market

For these reasons, off-market bids are far more common in Australia than on-market bids.

Bid documentation – Bidder's Statement and Target's Statement

- Both the bidder and target send a regulated disclosure document to shareholders. The bidder's document is called the **Bidder's Statement**, and for an off market bid it includes the terms and conditions of the offer to buy target shares. The document must contain a range of specific information, as well as general disclosure of all information (including confidential information) that would be material to a shareholder's decision about the offer.
- The specific information requirements include details of the bidder (including controllers and associates), funding sources and arrangements for any cash portion of the offer price, and the bidder's intentions for the target's business, assets, and employees. Significantly, if the bid price includes securities (such as shares in the bidder), then the Bidder's Statement has to contain prospectus-level disclosure about those securities, and pro forma disclosure of the combined bidder / target group assuming a successful bid. If the bidder is listed on ASX then it can use "short form" disclosure, relying on prior ASX disclosures to reduce the detail in the Bidder's Statement.
- The target's document is called the **Target's Statement**. This too has specific content requirements, most notably a recommendation from the directors in relation to the bid together with their reasons for the recommendation (or an explanation why no recommendation can be made). The directors of the target must also disclose any information known to them (including confidential information) that would be relevant to a shareholder's decision about the offer.
- The target will be required to obtain an **independent expert's report (IER)** to be sent out with its Target's Statement where the bidder starts the bid with more than a 30% interest in the target, or where the bidder and target have one or more directors in common. A target may commission an IER even if not legally required, such as in response to a hostile bid where the target believes the offer undervalues its shares. An IER will set out the expert's conclusions on whether the offer is "fair" (valuing the target on a control basis) and "reasonable" (based on factors other than valuation).

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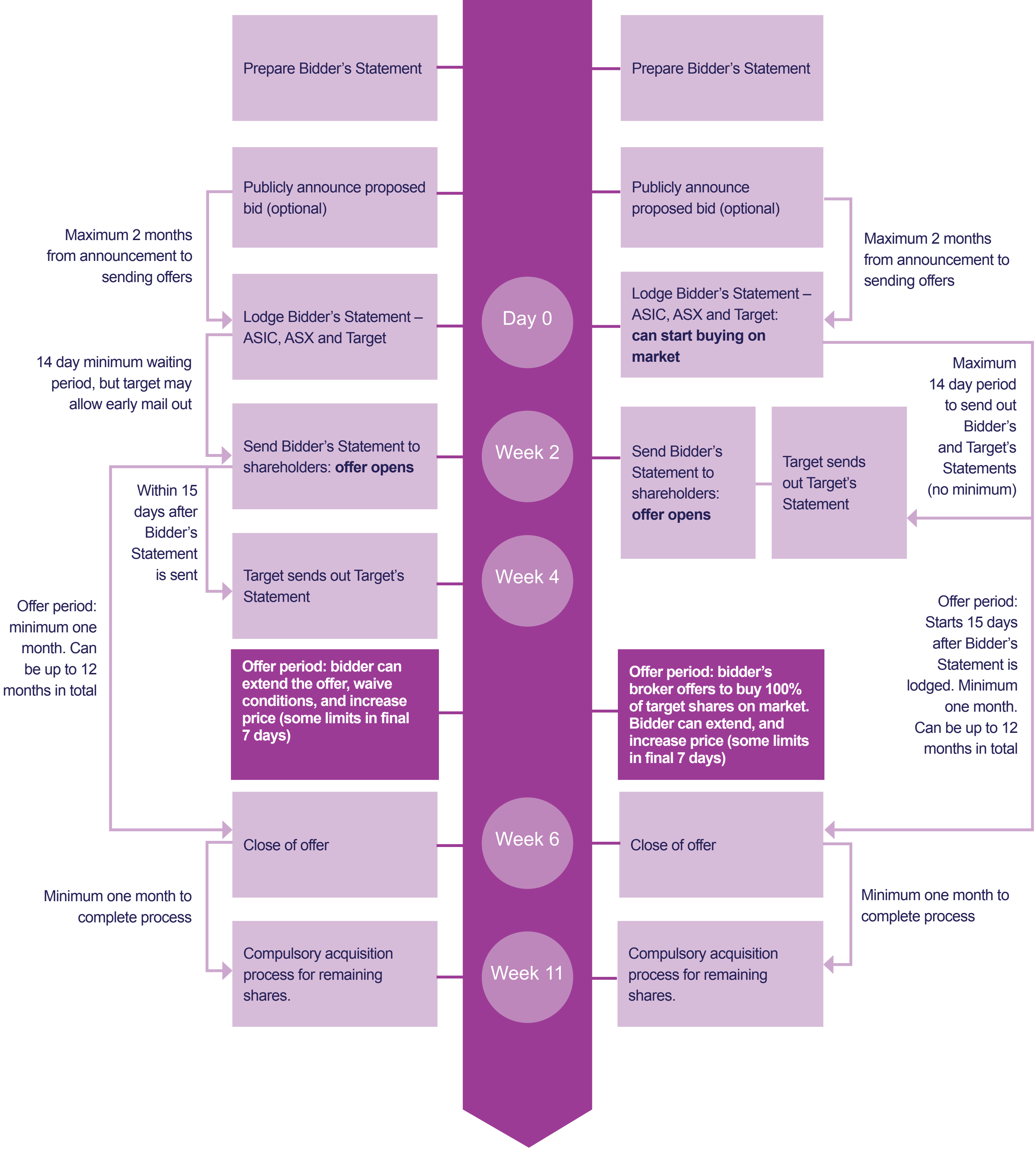
Timetables

Off market takeover bid

This indicative timeline is based on the minimum timetable for a bid.

On market takeover bid

This indicative timeline is based on the minimum timetable for a bid.



Other features of takeover bids

Compulsory acquisition of minorities – with or without a bid

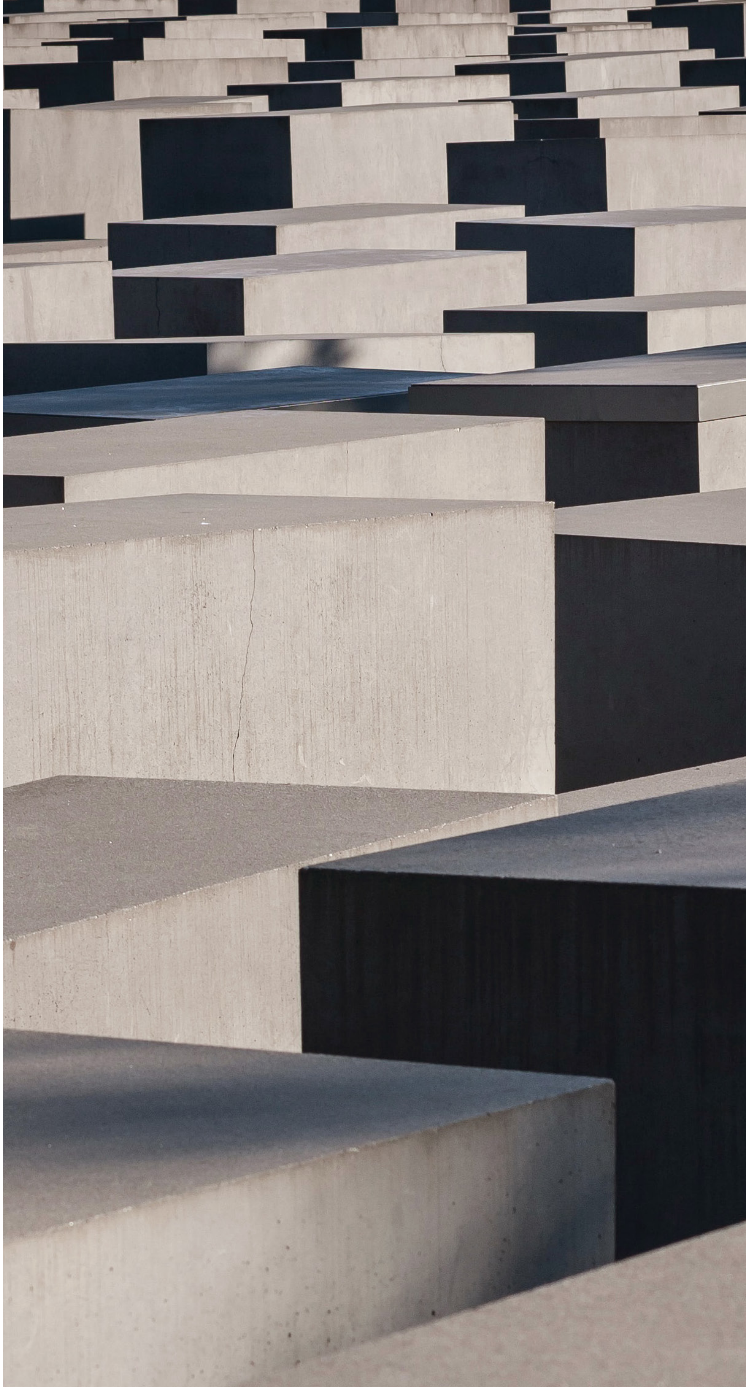
- The most common situation where a bidder can compulsorily buy out the remaining shares is after a takeover bid (on or off market) where it reaches 90% ownership of all issued shares. A higher test applies if the bidder's pre-bid holding exceeds 60%, in which case the bidder must receive acceptances for at least 75% of the shares it did not own at the start of the bid. The buy-out price is the same as the final bid price, and the process has to be started within one month after the close of the bid.
- A 90% shareholder can also compulsorily buy out the remaining shares without making a bid. In that case the price has to be fair value, which is to be supported by an independent expert's report. This power can only be exercised within 6 months after the shareholder first reaches 90%.
- The non-bid buy-out power also extends to securities other than shares, such as options and convertibles, if the shareholder holds at least 90% of all votes and 90% of the total value of all shares and convertibles on issue.
  This is useful for buying out unquoted options following a successful takeover bid for the company's shares.

Truth in takeovers

- ASIC's "truth in takeovers" policy requires bidders, targets, and even shareholders to be precise and accurate in all market announcements and other public statements. The Takeovers Panel can (and does) enforce compliance with this policy.
- A bidder may be forced to comply with a "last and final statement", such as that there will be no increase in the bid price or that the offer period will not be extended. Examples could include a media release saying "the offer is full and final" or "the offer expires next week". A bidder would have to expressly qualify such statements, for example by reserving the right to increase the bid price if a competing bid is announced.
- To manage the risk of derailing a bid, bidders should restrict media contact to one or two individuals who are well briefed on what can and cannot be said.

Extending the offer period

- A takeover offer (on or off market) has to be open for at least one month. The bid can be extended one or more times by the bidder up to a maximum offer period of 12 months. In some circumstances the offer period will be automatically extended by up to a further 14 days by operation of law, such as where the bidder crosses 50% ownership in the last 7 days of the offer period.
- Extending an off-market bid by more than one month (in total) while it is still conditional will give shareholders who had already accepted the offer a right to withdraw their acceptance.



Minimum bid price, and increasing the offer price

- The bid price has to be at least the highest price paid (or agreed to be paid) by the bidder or any of its associates during the 4 months before the bid. If two or more alternatives are offered (for example, cash or scrip) then the value of each alternative has to comply with the minimum bid price rule. The same price must be offered to all shareholders.
- The bidder can increase the price in its discretion during the bid period. Under an off-market bid, the increased price is to be paid to all shareholders who accept the offer, even those who accepted before the bid price was increased. However, under an on-market bid the increased price is paid only to those shareholders who sell into the offer after the price has been increased.

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More detail on schemes of arrangement

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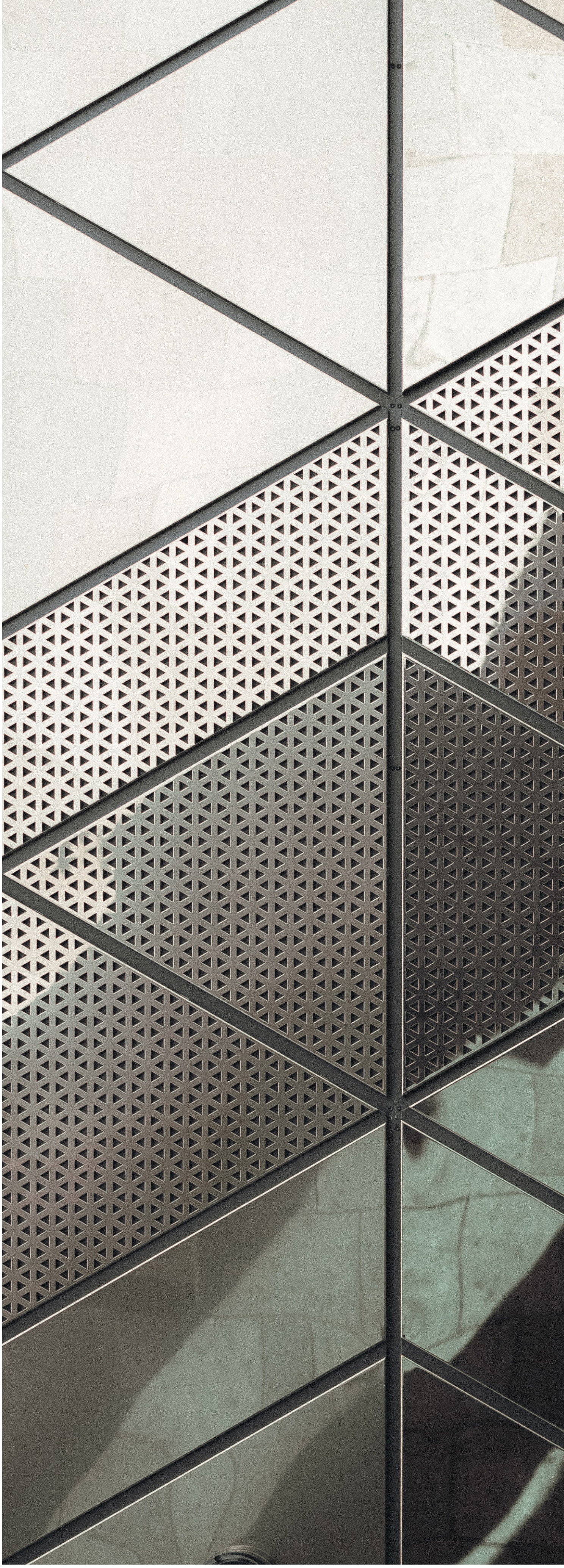

More detail on schemes of arrangement

- A scheme of arrangement is a popular structure for agreed control transactions in Australia. The process involves a shareholder vote and Court approval, rather than offers being accepted incrementally by each shareholder (as occurs in a takeover bid).
- Implementation of a scheme usually involves a transfer of all target company shares to the bidder in return for the offer price which, like a takeover, can involve cash, securities, or any combination. The target company then becomes a wholly owned subsidiary of the bidder.
- Once a scheme is approved by the necessary voting thresholds and confirmed by the Court it binds all of the target company's shareholders, including those who voted against it (or did not vote at all). But if the shareholder vote falls short of the thresholds then the scheme does not become effective at all, even for shareholders who voted to approve it.
- A scheme is a very flexible legal structure, and in addition to takeover transactions it can be used to effect corporate reconstructions such as demergers (spin-offs), top-hat restructures, and share buy-backs. Creditors' schemes can also be used to restructure debt arrangements with a company's creditors.

Scheme process steps and documentation

A scheme is a multi-step process, involving an agreement between the bidder and target, ASIC review, two Court hearings, and a shareholder meeting.

Scheme Implementation Agreement with the bidder	Following due diligence, the first step is for the bidder and the target to negotiate and execute a Scheme Implementation Agreement **(SIA)** and announce the transaction. From here, the target effectively leads each further step in the scheme process. The SIA sets the commercial terms of the transaction and gives the bidder some level of contractual control over the scheme process to ensure it proceeds on the agreed terms. The SIA will set out the conditions precedent to completion of the scheme (such as any necessary regulatory approvals), and will usually have deal protection provisions in favour of the bidder such as exclusivity and a break fee.
Scheme Booklet for shareholders	The target prepares the Scheme Booklet for its shareholders, which is the combined notice of meeting, detailed explanatory statement, and independent expert's report **(IER)**. The IER sets out the expert's opinion on whether the scheme is in the "best interest" of target shareholders, which in practice is very similar to the "fair and reasonable" assessment which may be undertaken for a takeover bid.
ASIC review of Scheme Booklet	Once the draft Scheme Booklet is ready it is lodged with ASIC for review. ASIC has a 14 day review period under the Corporations Act, which can be extended in unusual situations such as for a very complex scheme. ASIC will often have comments on the draft Scheme Booklet, which the target can take into account by lodging updated drafts until ASIC has no further comments (the draft Scheme Booklet is not yet public at this stage). If ASIC still has unresolved issues at the end of the review period it can take the step of attending the first Court hearing to make submissions to the judge, although this is fairly rare.
First Court hearing	Shortly after the end of the ASIC review period the final draft Scheme Booklet is filed with the Court, and the target applies for approval to send it out to shareholders to convene the scheme meeting to vote on the scheme. Sometimes the Court will require additional changes to the draft Scheme Booklet. Once approved by the Court, the final Scheme Booklet is registered by ASIC and sent to all target company shareholders. At this point the Scheme Booklet becomes public.
Shareholder meeting and vote	The two shareholder approval thresholds for a scheme are: • **Headcount test** - approval from more than 50% of the number of *shareholders* who vote at the meeting, regardless of how many shares they hold; and • **Special resolution** – approval from at least 75% of the number of *shares* voted on the resolution. In each case, the voting threshold is based on only those shares which are actually voted (either in person or by proxy). Shares which are not voted do not count as "no" votes. If the headcount test fails due to deliberate share splitting or another form of exploitation, then the Court has a discretion to waive this test and approve a scheme where only the voted shares test is satisfied. This discretion will only be exercised in clear and exceptional circumstances. Where there is more than one class of security being acquired in the scheme (for example, shares and options), each class of security holder has to separately vote and pass the relevant voting thresholds.
Second Court hearing	If shareholders vote to approve the scheme then the second Court hearing will be held soon afterwards. At this hearing the Court will be asked to approve the scheme as the final step for it to become effective. The Court's focus at the second hearing is primarily on ensuring that the procedural and voting requirements for the shareholder meeting were complied with, and that all conditions precedent in the SIA have been satisfied.
Orders filed and scheme implemented	Immediately after the scheme is approved at the second Court hearing the Court order is filed with ASIC and the scheme becomes effective, meaning that it is legally binding on the target and all shareholders. The record date to determine entitlements to participate in the scheme is 3 business days after the effective date. Implementation of the scheme (including transfer of shares to the bidder and payment of scheme consideration to target company shareholders) occurs soon after the record date.

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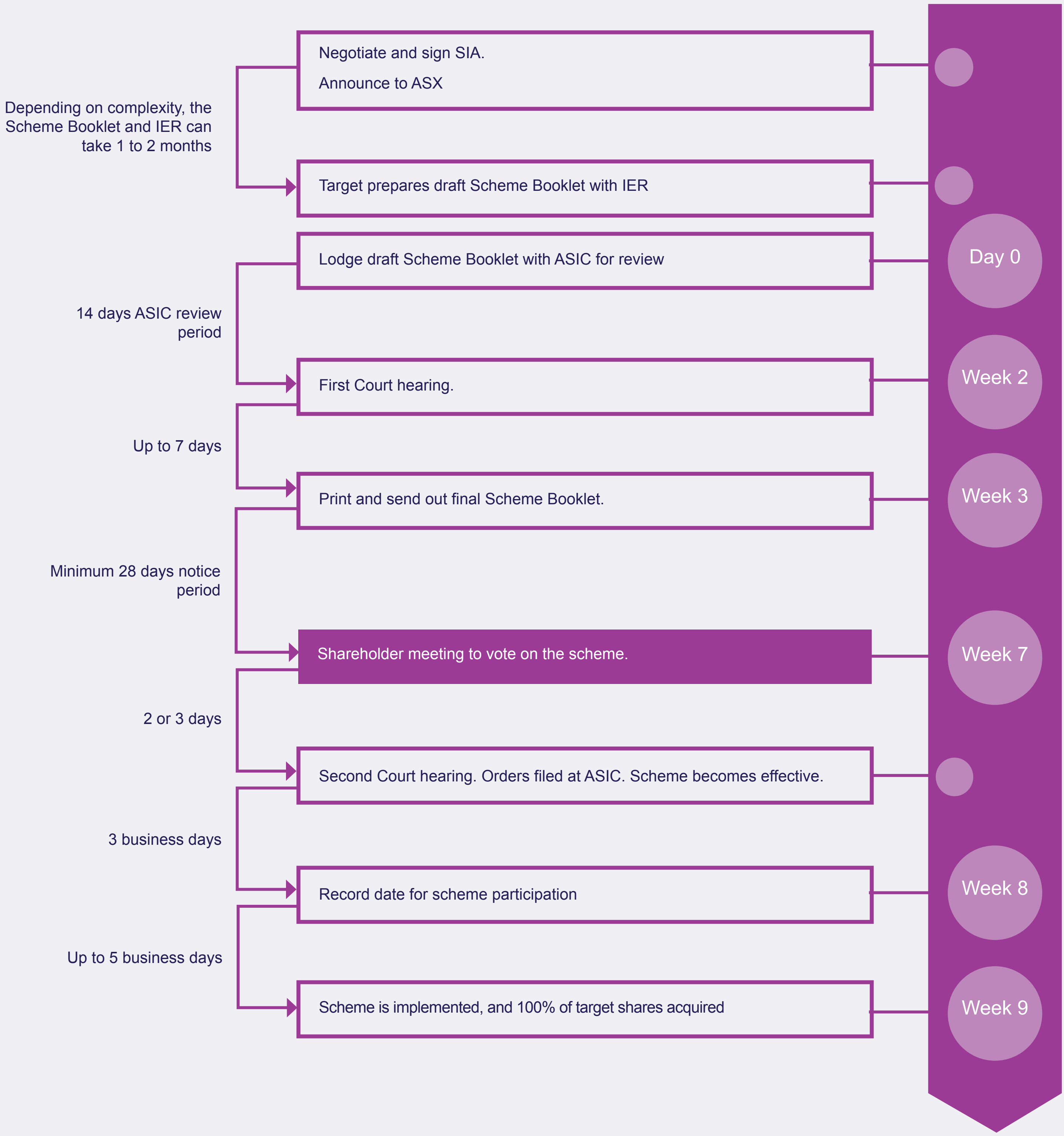
Timetable

This indicative timeline is based on the minimum timetable for a scheme.



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Other features of schemes

Dealing with multiple classes of securities in a scheme

- A scheme has the structural benefit that it can deal with multiple classes of securities in a target (such as shares and options), and can also create and deal separately with different classes of shareholders. A separate class of shareholders could be created where they are offered a different price from other shareholders, for example in a management buy-out where management is to receive equity in the bid vehicle and other shareholders are offered only cash. In contrast,a takeover bid has to offer the same price to all target shareholders.
- Where separate classes are created, each class of shareholders votes separately, and the 75% and 50% voting thresholds have to be passed by each class. This can give a small class of holders a potential veto power over the whole scheme, so the creation of different classes needs to be done with care.

Call option as deal protection

- A bidder and its associates cannot vote their own shares in favour of a scheme of arrangement. However, Courts have accepted that where a bidder has a call option over shares held by another shareholder (the “grantor”), and the grantor remains free to vote its shares as it chooses, then the call option does not disqualify the grantor from voting its shares on the scheme. This method is especially effective when paired with a voting intention statement (see Chapter 5 below).
- A call option can therefore be a useful method of deal protection for a scheme bidder. A call option over, say, 20% of shares from one or more grantors will allow those grantors to vote in favour of the scheme if they support it, but if a rival bid emerges then the original bidder can exercise the call option to secure a 20% holding. A holding of this size would usually be enough to block a rival scheme vote, and so the call option (even if not exercised) will act as a deterrent to rival bidders who are seeking 100% control.

Getting around a blocking stake – parallel takeover bid

- In a competitive bid situation one bidder might have the advantage of an existing stake - either a direct holding or a call option over another shareholder’s shares. A 20% stake can be an effective blocking stake for a rival scheme proposal, because it can be voted against a rival scheme.
- To counter the blocking stake, the rival bidder can make a takeover bid in parallel with its scheme proposal. While it seems counter-intuitive to bid against your own scheme, this tactic involves the takeover bid having a lower acceptance condition (such as 50.1%) so that the first bidder’s 20% stake is no longer a blocker to the rival bidder obtaining control.
- The tactic does risk the rival bidder ending up with only partial control, but if that is acceptable then it is a powerful signal to the market and allows the two proposals to compete directly on offer price.

Trust schemes

- Technically, the scheme of arrangement procedure in the Corporations Act can only be used by a company, and not by a unit trust (such as a REIT). However, a similar acquisition structure known as a “trust scheme” can be used instead, which also involves approval by a 75% vote of those units which are actually voted. Unlike a company scheme of arrangement there is no additional 50% by number of unitholders “headcount” test.
- Although not strictly necessary, a trust scheme will follow other aspects of the company scheme process, including providing an IER to unitholders and seeking Court approval.

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Pre-bid arrangements by the bidder

Before announcing either a takeover bid or a scheme of arrangement, there are pre-bid arrangements with the target and/or its shareholders that a bidder will often want to undertake in order to improve its prospects of success.

Pre-bid arrangements with the target

Approach	• An initial approach from a bidder is often by way of a confidential, non-binding indicative offer (**NBIO**). This will outline a potential bid price, and request due diligence to firm up the underlying assumptions. • If the indicative bid price is attractive then the target's board may engage. • But if the board does not engage then the bidder can go hostile (without due diligence), or possibly come back after acquiring a pre-bid stake from shareholders.
Engage	• Due diligence and price negotiations will be done under a **Confidentiality Agreement**. The agreement may also cover additional steps towards documenting an agreed bid, in the form of a more comprehensive **Process Deed**. • A bidder may ask for limited exclusivity at this stage for the period of due diligence. • In exchange, the target may ask for a **standstill** from the bidder, preventing it from building a pre-bid stake outside an agreed bid.
Agreement	• Following due diligence and agreement on offer price, the bidder and target enter into an **Implementation Agreement.** • This will also contain deal protection terms such as: - Exclusivity terms (see below) - Break fee, with triggers such as being overbid by a rival, the target board failing to recommend the bid, or material breach of the agreement. Takeovers Panel policy generally sets a maximum fee of 1% of bid value. - Sometimes a reverse break fee to the target, if the bidder breaches the agreement.
Announce	• Signing the Implementation Agreement is immediately announced to ASX by the target, with full details of any exclusivity and break fee. • Or, if there is no agreement, the bidder can announce its hostile takeover bid and go directly to shareholders with its offer (a scheme can only be done by agreement with the target).

Exclusivity arrangements in takeovers and schemes

Typical exclusivity terms in favour of a bidder in an agreed takeover or scheme include:

- **No shop:** the target cannot actively solicit competing offers from other bidders.
- **No talk / no due diligence:** the target cannot engage with an unsolicited competing offer, including by providing due diligence access. However, this restriction is not absolute because the Takeovers Panel requires it to be subject to a **fiduciary out** where a failure to respond to a superior, unsolicited proposal would breach directors' duties.
- **Notification:** the target must inform the bidder of the details of any unsolicited, competing approaches or proposals it receives.
- **Matching right:** the target cannot agree or recommend a superior competing proposal unless the bidder has first been given a short time (typically 3 to 5 business days) to match or better it.

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Pre-bid arrangements with shareholders in the target

Pre-bid stake	There are pros and cons of acquiring a pre-bid stake (see below), and If the bidder has had due diligence access then insider trading restrictions may prevent it from building such a stake. Types of pre-bid stake can include: • An **outright purchase** of shares. • A **call option** over shares (particularly useful in a scheme – see Chapter 4 above). • **Bid acceptance agreement**, which may permit the shareholder to accept a higher rival bid that is not matched. • **Equity swap** or other derivative with an investment bank. This can be cash settled, which does not create a relevant interest and so can be built more stealthily until the 5% threshold is reached.
Shareholder intention statements	• In addition to any pre-bid stake, a bidder may seek to demonstrate support for its bid by obtaining and disclosing shareholder intention statements when its bid is announced. • These are public statements of a shareholder's intentions to accept a bid or vote for a scheme, and when made with the shareholder's consent they are treated as binding under ASIC's "truth in takeovers" policy. • Such statements have to be qualified as being "in the absence of a superior proposal", otherwise they risk the bidder obtaining a relevant interest in the shares and potentially breaching the 20% limit. These types of statements therefore fall short of an unconditional commitment.
Disclose	• A pre-bid stake will normally give the bidder a relevant interest in the shares in question. Once the relevant interest of the bidder and its associates reaches 5% it has to be disclosed to ASX (see Chapter 7 below), so timing of execution is critical. • Even a purely economic interest under an equity swap has to be disclosed too at this point, under Takeovers Panel policy. • If the target board previously refused to engage with a bidder's NBIO approach then this kind of disclosure can force the target back to the negotiating table.

Pre-bid stakes: pros and cons

Pros	Cons
The target's board is forced to take the proposal seriously, and to engage with the bidder	It may be viewed by the target as hostile, and provoke a defensive response such as seeking out a "white knight"
The bidder can deter potential rival bidders with a blocking stake	It could cause the market price to run up on bid speculation, and reduce the perceived "bid premium" being offered under the bid
An existing holding counts towards the 90% compulsory acquisition threshold in a takeover bid	A bidder in a scheme cannot vote its own shares, so a pre-bid holding can be counter-productive to the success of a scheme
It can reduce the overall average acquisition cost if purchased at less than the bid price	If the bid is unsuccessful, the bidder could suffer a loss on the investment (unless it can sell to a higher, rival bid)

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The target's response to a bid

The target's response to a bid

Responding to an NBIO or a bid

Once an unsolicited NBIO or bid is received, the target company and its directors become subject to the bidder's timetable, legal disclosure obligations, and other restrictions. A quick response is needed.

First response points include:

- Engage legal, financial, and accounting advisers.
- If any insiders are participating in the bid, form an IBC and implement appropriate protocols (see below).
- If the target board decides to engage with the bidder, put in place pre-bid arrangements to negotiate the offer price and other terms (see Chapter 5 above).
- If the bid is hostile, consider a Takeovers Panel application regarding the offer document or other bidder conduct.
- Set up a data room with financial, operational, legal and other documents and information to assist negotiations with the bidder, or to help solicit a competing offer.
- Consider releasing updates to ASX on recent financial results or business successes if not reflected in the share price.
- Send out tracing notices to get intelligence on beneficial share holdings (see Chapter 7).
- Start preparing the response document (Target's Statement or Scheme Booklet), and consider obtaining an IER.

Defensive tactics

The target's directors have limited defensive tactics open to them once a hostile takeover bid has been announced.
Restrictions include:

- Share issues are restricted under ASX Listing Rules for 3 months following a bid announcement, except with prior shareholder approval. Pre-existing commitments and pro rata offers to all shareholders are permitted.
- Asset deals and other transactions that would breach a condition precedent in the takeover offer are restricted by Takeovers Panel policy on "frustrating action", which generally requires prior shareholder approval so that target shareholders are given a choice of outcome.

The measures that a target board is able to take include:

- Before any bid is announced, ensure the share price reflects the target's potential by effective communication of strategy and results, and possibly by on-market share buy-backs.
- Before any bid is announced, consider a share placement to a supportive strategic partner
- After a bid is announced, Takeovers Panel action to force corrective or complete disclosure by the bidder is a common step (although only creates a short delay in the bid timetable).
- Create an auction by attracting competing bidders to improve the bid price. A target can be selective in due diligence access, and need not treat all bidders the same.
- Try to influence the market's perception of the bid by getting intention statements from key shareholders saying they will not accept at the bid price.

Target insiders participating in a bid

If target insiders are involved in the bid, Takeovers Panel policy is that appropriate protocols should be established a by the target's board to ensure that the bidder does not have an advantage over potential competing bidders or over target shareholders generally. An "insider" is any director, senior management, or external adviser who has access to the target's confidential information, or can influence the target's response to a bid. For example, if the bidder and target have a director in common on both boards then an **Independent Board Committee (IBC)** should be set up by the target.

The protocols should exclude the participating insider from the target's consideration of the bid, while at the same time ensuring that the IBC has access to the insider's knowledge of the target's business for the benefit of any other competing bids that the IBC decides to solicit. The participating insider should also be excluded from dealing on behalf of the target with the target's staff, regulators, customers and suppliers during the bid process.

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Disclosure of interests in shares

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Building a pre-bid stake can be complicated by having to publicly disclose a 5% interest in a listed company.

Substantial holder notices

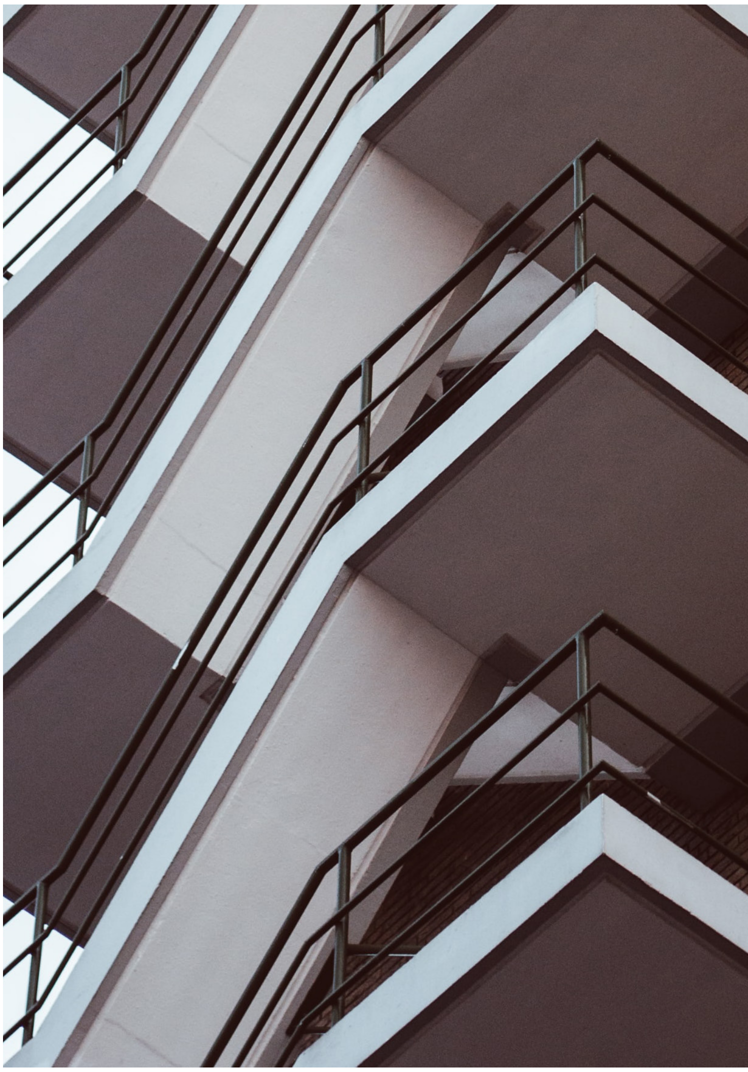
- A person has to file a substantial holder notice when:
  - 5% reached: they (together with their associates) first have relevant interests in shares that reach the 5% disclosure threshold for being a "substantial holder".
  - 1% change: their relevant interests in shares increase or decrease by at least 1 percentage point compared to the most recent filing. For example, an increase from 6% to 7.5% would require a new filing.
  - falling below 5%: they cease to be a substantial holder.
- These filings must generally be made within 2 business days after the relevant event occurs and must include a copy of any document which relates to the relevant change of an interest in shares. Because the filing is made to ASX, those documents become public.
- Filings are required even if the change in percentage interest is passive, for example by being diluted as a result of an issue of shares by the company.

Tracing notices

- A listed company can issue a tracing notice to any shareholder, no matter how large or small the holding.
- Tracing notices are often used by companies on a regular basis to discover details of underlying beneficial holdings behind nominees and custodians, or where there is unusual movement on the share register.
- The recipient of a tracing notice has to respond within 2 business days, disclosing full details of anyone who has a relevant interest in those shares (such as beneficial owners), and anyone who has given the registered holder instructions about the acquisition, disposal, or voting of the shares.
- When the response is received, the company can send further tracing notices to anyone identified in the initial response, even if those people are not themselves shareholders. This can be repeated until the company obtains details of the ultimate controller or beneficial owner.

Disclosure of equity swaps

- Legally, a purely economic interest in shares (such as under a cash settled equity swap or a contract for difference) does not create a relevant interest in shares for substantial holder reporting or tracing notice purposes.
- However, the Takeovers Panel's guidance does require parties to those kinds of derivative arrangements to make substantial holder filings as if they did involve a relevant interest in shares.
- Equity swaps are a common method of building a pre-bid stake by stealth, and bidders have to be careful not to trigger disclosure obligations too early if their combined share holdings and long derivative exposure reaches the 5% threshold.
- Purely economic interests do, though, have advantages when it comes to tracing notice responses, which are not covered by the Takeovers Panel guidance.



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Takeover regulators

A number of government and judicial authorities can be involved in regulating a control transaction. The main ones are:

ASIC
Australian Securities & Investments Commission

Australian Securities and Investments Commission

ASIC is Australia's corporate regulator, and has a major role in control transactions.

In takeover bids the Bidder's Statement is lodged with ASIC for review before it is sent to target shareholders. ASIC will also often make applications to the Takeovers Panel to enforce proper conduct by all parties during bids.

Similarly, in schemes the Scheme Booklet is lodged with ASIC for review before it goes to the first Court hearing.

ASIC has power to modify the Corporations Act to overcome unintended technical issues for bidders and targets, or to promote the clear policy of the law.

Australian Government
Takeovers Panel

Takeovers Panel

The Panel has jurisdiction (to the exclusion of the Courts) to determine disputes raised during a takeover
bid by the bidder, target, shareholders, and ASIC.

The Panel is not limited to applying the law, and can also make orders where it finds there are "unacceptable circumstances" based on the spirit or policy of the law. The Panel issues Guidance Notes about its expectations in this regard.

The Panel's membership is drawn from business, legal, accounting and investment banking fields, to bring commercial experience to disputes and resolve them as quickly as possible.

FEDERAL COURT
OF AUSTRALIA

The Courts

The Courts do not have any significant role in takeover bids, due to the exclusive jurisdiction of the Takeovers Panel.

In schemes of arrangement the Courts have a central role though. At the first Court hearing the Scheme Booklet is reviewed and approved, and following the shareholder vote the scheme is given final approval at the second Court hearing.

The scheme process can be undertaken in either the Federal Court or in a State Supreme Court.

Australian Government
Foreign Investment Review Board

Foreign Investment Review Board

FIRB administers Australia's foreign investment laws.

Generally, a foreign bidder will need FIRB approval to acquire more than 20% of an Australian company. Lower thresholds apply if foreign governments or state owned enterprises have an interest in the bidder.

Exemptions apply for targets valued below certain monetary thresholds, which vary depending on the bidder's home country. Lower exemption thresholds apply for targets in certain sensitive industries, or which have an interest in Australian land.

ACCC
AUSTRALIAN COMPETITION
& CONSUMER COMMISSION

Australian Competition and Consumer Commission

The ACCC administers Australia's competition laws in relation to mergers of companies within an industry or market.

If market concentration tests would be exceeded by the merger, the bidder can seek either informal clearance from the ACCC (this is the most common form of clearance sought), or a more formal merger authorisation if there are public benefits that will offset the lessening of competition.

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