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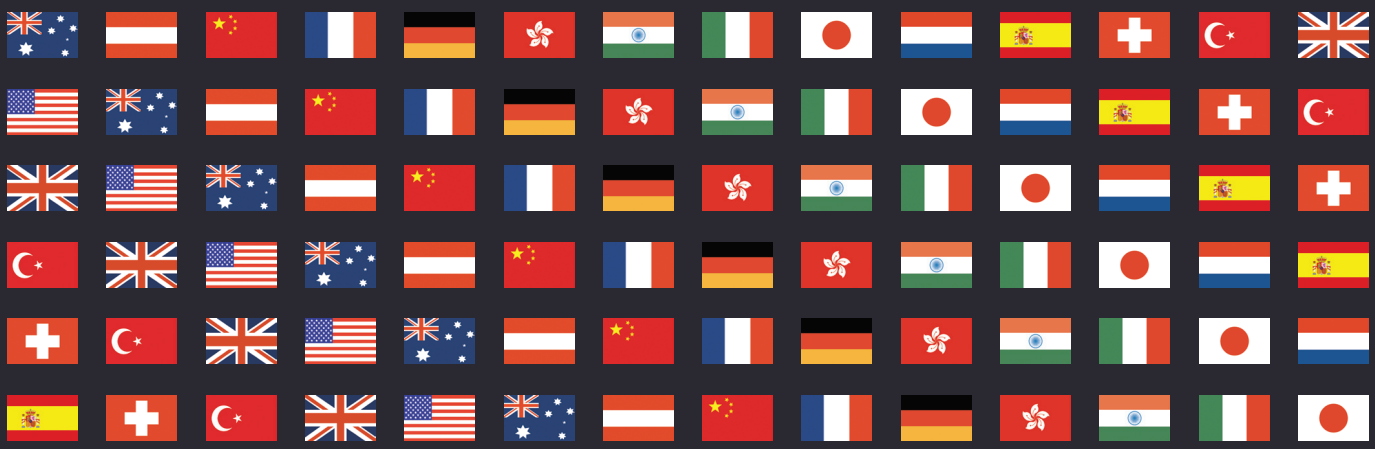
William M Regan, Jon M Talotta and Ryan M Philp



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Providing valuable strategic and litigation counseling from the outset of an M&A transaction through post-closing disputes.

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William M Regan, Jon M Talotta and Ryan M Philp
Hogan Lovells US LLP

Lexology Getting The Deal Through is delighted to publish the second edition of *M&A Litigation*, which is available in print and online at www.lexology.com/gtdt.

Lexology Getting The Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique Lexology Getting The Deal Through format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes new chapters on Australia, Austria and China.

Lexology Getting The Deal Through titles are published annually in print. Please ensure you are referring to the latest edition or to the online version at www.lexology.com/gtdt.

Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Lexology Getting The Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editors, William M Regan, Jon M Talotta and Ryan M Philp of Hogan Lovells US LLP, for their continued assistance with this volume.

LEXOLOGY
Getting The Deal Through

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Australia

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TYPES OF SHAREHOLDERS' CLAIMS

Main claims

1 Identify the main claims shareholders in your jurisdiction may assert against corporations, officers and directors in connection with M&A transactions.

The main types of claims that shareholders may assert against companies, officers and directors in connection with M&A transactions include:

- a statutory claim under the Corporations Act 2001 (Cth) (Corporations Act) for oppressive or unfair conduct;
- a statutory claim under the Corporations Act for breach of duties owed by the directors and officers to the company, or an equivalent common law claim for breach of fiduciary duties;
- a statutory derivative claim under the Corporations Act, by which a shareholder (with leave of the court) can bring proceedings on behalf of the company;
- a claim against a publicly traded company for breach of the company's continuous disclosure obligations; or
- a statutory claim under the Corporations Act, the Australian Securities and Investments Commission Act 2001 (Cth) or the Australian Consumer Law in relation to misleading or inadequate disclosure documents, misleading or deceptive conduct, or false or misleading representations.

Other claims that shareholders may assert against companies, officers and directors, although perhaps less common in connection with M&A transactions, include:

- a claim by shareholders to enforce a personal right (for example, rights pursuant to an express contract or to enforce the company's constitution as a contract between the company and each shareholder); or
- seeking an order for the winding-up of the company on various grounds, including: directors have acted in their own interests rather than the interests of the company as a whole; there has been oppressive or unfair conduct; or it is just and equitable that the company be wound up.

Requirements for successful claims

2 For each of the most common claims, what must shareholders in your jurisdiction show to bring a successful suit?

Claims for oppressive or unfair conduct
To bring a successful claim under section 232 of the Corporations Act for oppressive or unfair conduct, a shareholder must show that the conduct or the affairs of the company, an actual or proposed act or omission by or on behalf of the company, or a resolution or proposed resolution of members of the company, is either:

- contrary to the interests of shareholders as a whole; or
- oppressive to, unfairly prejudicial to, or unfairly discriminatory against a shareholder or shareholders.

Claims for breach of duties by directors or officers
A statutory or common law claim for breach of duty by a director or officer is generally actionable by the company, and a shareholder may need to seek leave to bring the proceeding as a statutory derivative claim (that is, in the name of the company), although the applicant may show that a director or officer has breached their statutory or common law duties, that is, the director or officer has:

- failed to exercise their powers and discharge their duties with the degree of care and diligence that a reasonable person would exercise if they were a director or an officer in a corporation in the same circumstances of that corporation, and occupied the position and had the same responsibilities within the corporation as that director or officer;
- failed to exercise their powers and discharge their duties in good faith in the best interests of the corporation;
- failed to exercise their powers and discharge their duties for a proper purpose; or
- improperly used their position, or information gained in their position, to gain an advantage for themselves or someone else, or to cause detriment to the company.

Statutory derivative claim
See question 8.

Claims for breach of continuous disclosure obligations
To bring a successful claim for breach of continuous disclosure obligations, a shareholder must show that:

- a publicly listed entity that is required to disclose information to the market operator has information that the Australian Securities Exchange (ASX) Listing Rules require be notified to the market operator;
- that information is not generally available to the market and is information that a reasonable person would expect, if it were generally available, to have a material effect on the price or value of the securities of the entity;
- the entity failed to notify the market operator of that information in accordance with the disclosure requirements under the ASX Listing Rules and the Corporations Act; and
- the shareholder suffered damage as a result of the contravention (although a number of courts have recently accepted indirect market-based causation in such claims).

Claims in relation to inadequate disclosure documents
To bring a successful claim in relation to inadequate disclosure documents, a shareholder must show that:

- the relevant disclosure document contained a misleading or deceptive statement (or that in relation to certain documents, there was an omission of material required to be included in the document by the Corporations Act);
- the misleading or deceptive statement or omission is materially adverse from the point of view of the holder of securities to whom the document is given; and
- the shareholder suffered loss or damage as a result.

Claims in relation to inadequate disclosure documents may more commonly be made to the Takeovers Panel (see further question 4).

Publicly traded or privately held corporations

3 | Do the types of claims that shareholders can bring differ depending on whether the corporations involved in the M&A transaction are publicly traded or privately held?

Shareholders in publicly traded and private companies are equally eligible to bring the claims explained in question 2. In addition, further claims or grounds for claims may arise in the following instances:

- in respect of public companies, by virtue of their regulation by the Takeovers Panel and, where their shares are publicly traded, the ASX Listing Rules. For example, public companies are required to continuously disclose information that may have a material effect on the price or value of its securities. The Corporations Act also imposes additional obligations on public companies for certain transactions. For example, member approval is required for giving financial benefits to related parties such as directors and their spouses. This is to ensure the interests of a public company's members as a whole are protected; and
- in respect of private companies, by virtue of any additional obligations or restrictions imposed under the company's constitution or any shareholders' agreement.

A breach of these obligations may, in certain circumstances, be actionable by shareholders.

Form of transaction

4 | Do the types of claims that shareholders can bring differ depending on the form of the transaction?

The basis of any claim is likely to be one of the claims outlined in questions 1 and 2. However, the formulation of the claim may differ depending on the form of the transaction that is the subject of the dispute.

Control transactions in Australia for entities listed on the ASX are primarily effected by way of a takeover bid or a scheme of arrangement. The Takeovers Panel is the primary forum for resolving disputes about these types of transactions.

In a takeover bid, the acquiring company makes a regulated offer to the target's shareholders to buy shares. The bidder must comply with disclosure obligations by sending a Bidder's Statement to all target shareholders. Any inadequacies or perceived inadequacies with disclosure may become grounds of complaint to the Takeovers Panel.

A scheme of arrangement is an agreement, approved by the court and the target's shareholders, to acquire all shares in the target company. Before a vote is taken, the target is required to send a disclosure document to its shareholders with a view to informing the shareholder's decision. The Scheme Booklet will contain similar information to the Bidder's Statement mentioned above, and as such may form grounds for a Takeovers Panel complaint. Furthermore, schemes of arrangement are more readily open to shareholder opposition owing to the court approval process involved.

Negotiated or hostile transaction

5 | Do the types of claims differ depending on whether the transaction involves a negotiated transaction versus a hostile or unsolicited offer?

In principle, the types of claims available would not differ. However, as outlined in question 4, the nature of the transaction may affect the formulation of a claim, noting in particular the different position of directors, officers and shareholders of a company as between a negotiated transaction and a hostile or unsolicited officer. A negotiated transaction must be approved by directors but may not require approval by shareholders (for example, if it is the sale of a subsidiary or an acquisition), whereas a hostile offer for a public company would not, at least when made, be recommended by the directors of the target company although the offer will only be successful if a sufficient number of shareholders accept the offer.

Claims made in control transactions involving entities with more than 50 shareholders, or entities listed on a stock exchange, must be made to the Takeovers Panel.

Takeovers Panel claims are more likely to be made in hostile situations as parties seek tactical advantages from doing so. Complaints to the Takeovers Panel about the takeover bid generally can be made on the broad grounds of 'unacceptable circumstances', and the Takeovers Panel can declare that circumstances are unacceptable circumstances whether or not the circumstances constitute a contravention of the Corporations Act.

Party suffering loss

6 | Do the types of claims differ depending on whether the loss is suffered by the corporation or by the shareholder?

Yes. Claims for loss suffered by the company may be brought by a shareholder pursuant to the statutory derivative action, and such claims require leave of the court (see question 8).

Claims for loss suffered by a shareholder may include the following types of claims:

- oppressive or unfair conduct;
- breaches of the company's continuous disclose obligations;
- misleading or inadequate disclosure documents, misleading or deceptive conduct, or false or misleading representations;
- enforcing contractual rights (for example, rights under a shareholders' agreement between shareholders, or rights under a contract between the company and the shareholder);
- enforcing the company's constitution as a contract between the company and each shareholder; and
- seeking an order for the winding-up of the company.

COLLECTIVE AND DERIVATION LITIGATION

Class or collective actions

7 | Where a loss is suffered directly by individual shareholders in connection with M&A transactions, may they pursue claims on behalf of other similarly situated shareholders?

Collective or class action by shareholders is possible under Australian law. This can be conducted in a number of ways, including:

- commencing 'representative proceedings' in the Federal Court of Australia and in certain State Supreme Courts, where a wider group of claimants are represented by one or more representative claimants;
- consolidation of claims by the courts; or
- claims being brought jointly by shareholders.

Derivative litigation

8 | Where a loss is suffered by the corporation in connection with an M&A transaction, can shareholders bring derivative litigation on behalf or in the name of the corporation?

Shareholders (including former shareholders or a person entitled to be registered as a shareholder) can apply for leave to bring a derivative action in the name of the company under Part 2F.1A of the Corporations Act. The court must grant leave to the applicant shareholder if the court is satisfied that:

- it is probable that the company will not itself bring the proceedings, or properly take responsibility for them or the steps in them;
- the applicant is acting in good faith;
- it is in the best interests of the company; and
- there is a serious question to be tried.

Where the proceedings involve a third party, there is a rebuttable presumption that granting leave will not be in the best interests of the company, if the company decided not to bring, defend or continue proceedings, and where the directors who made that decision acted in good faith and for a proper purpose, did not have a material personal interest in the decision, informed themselves about the subject matter of the decision to the extent they reasonably believed to be appropriate, and rationally believed that the decision was in the best interests of the company.

INTERIM RELIEF AND EARLY DISMISSAL

Injunctive or other interim relief

9 | What are the bases for a court to award injunctive or other interim relief to prevent the closing of an M&A transaction? May courts in your jurisdiction enjoin M&A transactions or modify deal terms?

Courts have a wide discretion to make appropriate orders for relief at general law, including to make orders for:

- an interim injunction where there is a serious issue to be tried and the balance of convenience requires that an order be made; or
- a final injunction where an applicant has established a legal or equitable right and the court considers it just in exercising its discretion to make such an order.

Courts also have a broad statutory jurisdiction to grant an injunction to prevent the closing of an M&A transaction if it constitutes or would constitute: a contravention of the Corporations Act; an attempted contravention; aiding, abetting counselling or procuring, inducing or attempting to induce, being directly or indirectly knowingly concerned in or a party to a contravention; or conspiring with others to contravene the Corporations Act. A statutory injunction can be granted on an interim or final basis, with similar tests as under the common law. Supplementary orders can also be made.

Although courts have a wide discretion to grant appropriate relief, a court is unlikely to make an order preventing a transaction from closing or to modify or redraft the terms of a proposed transaction. However, in interpreting a contract that has been entered into, the court can:

- imply a term into a contract to give business efficacy to the contract;
- sever a term from the contract if the court considers the term to be unlawful or unenforceable; or
- 'rectify' a contract so that it reflects, at the time that an agreement has been entered into, the true intentions of the parties.

Early dismissal of shareholder complaint

10 | May defendants seek early dismissal of a shareholder complaint prior to disclosure or discovery?

A defendant can seek early dismissal of a shareholder complaint by applying under the procedural rules or the inherent power of a court:

- for summary dismissal of a claim if it appears to the court: that the proceedings are frivolous or vexatious; that no reasonable cause of action is disclosed; or that the proceedings are an abuse of process; or
- for pleadings to be struck out in whole or part if the pleading: discloses no reasonable cause of action; has a tendency to cause prejudice, embarrassment or delay in the proceedings; or is otherwise an abuse of process.

Additional avenues for early dismissal of a shareholder complaint are available depending on the type of claim being brought, for example:

- if a shareholder commences a statutory derivative claim, a defendant might oppose the grant of leave to the applicant – while this is not an early dismissal per se, it will prevent the claim being brought; or
- if representative proceedings are commenced on behalf of a group of shareholders, the defendant can apply (or the court can of its own motion) order that proceedings no longer continue if it is satisfied that it is in the interests of justice to do so.

ADVISERS AND COUNTERPARTIES

Claims against third-party advisers

11 | Can shareholders bring claims against third-party advisers that assist in M&A transactions?

It may be open to shareholders to bring claims against third-party advisers that assist in an M&A transaction, including where it can be established that the third-party advisers:

- owed a duty of care to the shareholder, were in breach of that duty, and this breach caused loss to the shareholder;
- made false or misleading representations to the shareholder; or
- engaged in misleading or deceptive conduct.

Shareholders may, additionally, be able to bring a statutory derivative claim on behalf of the company against a third-party adviser (see question 8).

The liability of professional advisers may be capped or limited by statute.

Additionally, the ability of a shareholder to bring a claim (or the liability in respect of any such claim) may be limited by transaction documents (including for example, a due diligence report), which may impose a cap on liability in respect of the relevant advisers, limit reliance on those documents by third parties, or require a party to rely solely on their own investigations/diligence.

Claims against counterparties

12 | Can shareholders in one of the parties bring claims against the counterparties to M&A transactions?

Yes, shareholders can bring derivative claims against counterparties to an M&A transaction (being claims on behalf of the company). Shareholders might also have personal rights against counterparties to M&A transactions in relation to, for example, misleading or deceptive conduct.

In addition, if shareholders bring a claim for unfair or oppressive conduct, the court has a wide discretion as to the appropriate relief to be granted and such relief may, depending on the nature of the conduct in question, directly affect a counterparty to an M&A transaction.

LIMITATIONS ON CLAIMS

Limitations of liability in corporation's constitution documents

13 What impact do the corporation's constituting documents have on the extent board members or executives can be held liable in connection with M&A transactions?

Directors have a duty to comply with a company's constitutional documents, which may impose more rigorous standards than those in the Corporations Act.

A company's constitution cannot contract out of, or limit or dilute the statutory duties set out in the Corporations Act, however the constitution can limit the role that directors play in managing the entity, which in turn may impact upon the applicability of those duties to the relevant actions of the company. As mentioned in questions 21 and 24, the Corporations Act places limits on indemnification of directors and insurance premiums for certain liabilities.

Statutory or regulatory limitations on claims

14 Are there any statutory or regulatory provisions in your jurisdiction that limit shareholders' ability to bring claims against directors and officers in connection with M&A transactions?

If members of a company ratify or approve conduct of directors and officers in connection with M&A transactions, the Corporations Act provides that an applicant is not precluded from bringing a statutory derivative claim under Part 2F.1A of the Corporations Act, although the court may take such ratification or approval into account in determining what order or judgment to make in proceedings brought or intervened in under that part. In doing this, the court must have regard to how well informed about the conduct the members were when they decided to ratify or approve the conduct, and whether the members who ratified or approved the conduct were acting for proper purposes.

If a claim is brought against directors and officers in connection with an M&A transaction for a breach of their duties, a number of defences are available under the Corporations Act. Depending on the claims being brought, these defences may include:

- where the director or officer: has made a 'business judgement' (that is, a decision to take or not take action in respect of a matter relevant to the business operations of a corporation, including in connection with an M&A transaction) in good faith and for a proper purpose; does not have a material interest in the subject matter of the judgement; informed themselves about the subject matter of the business judgement to the extent they reasonably believed to be appropriate; and rationally believe that the judgment is in the best interests of the company; or
- where the director or officer delegated a duty to another person, believed on reasonable grounds (in good faith and after making appropriate enquiries) that the person to whom they delegated was reliable and able in relation to that duty, and believed on reasonable grounds that the person to whom they delegated would exercise the relevant power in accordance with the duties set out in the Corporations Act and the constitution of the company.

The courts also have the power to wholly or partly relieve a director of liability for:

- a contravention of the Corporations Act; or
- negligence, default, breach of trust or breach of duty in their capacity as a director or officer of the company.

If the person has acted honestly and, having regard to the circumstances of the case, the person ought fairly to be excused. The court can even grant such an order before proceedings are commenced (that is, if a director or officer has reason to apprehend that any claim will or might be made against them).

Common law limitations on claims

15 Are there common law rules that impair shareholders' ability to bring claims against board members or executives in connection with M&A transactions?

At common law, a shareholder does not have standing to litigate in respect of wrongs characterised as done to the corporation rather than the shareholder individually, unless the member can bring proceedings pursuant to the statutory derivative action (see question 8) or the member has a personal right to bring proceedings (see question 6).

Further to question 14, which sets out the statutory consequences of ratification by shareholders, there are also common law rules that provide that ratification will be ineffective in certain circumstances, including if the ratification:

- relates to a breach of duties in relation to which the majority shareholders participated or the majority vote was made for an illegitimate purpose, such that the ratification would amount to a fraud on the minority shareholders;
- is in respect of breaches of statutory duties imposed upon directors; or
- would have the consequence of removing the personal right of a shareholder.

STANDARD OF LIABILITY

General standard

16 What is the standard for determining whether a board member or executive may be held liable to shareholders in connection with an M&A transaction?

The Corporations Act prescribes a standard for directors and officers of a company. A board member is a director of the company. An executive will be an officer of the company (for the purposes of the Corporations Act) if they:

- make or participate in making decisions that affect the whole or a substantial part of the business of the company;
- have the capacity to significantly affect the company's financial standing; or
- the directors of the company are accustomed to acting in accordance with their instructions or wishes.

If a board member or executive is a director or officer of the company, the Corporations Act requires them to exercise their powers and discharge their duties (including in connection with an M&A transaction):

- with the degree of care and diligence that a reasonable person would exercise if they were a director or an officer in a corporation in the same circumstances of that corporation, and occupied the position and had the same responsibilities within the corporation as that director or officer;
- in good faith in the best interests of the corporation; and
- for a proper purpose.

A similar standard applies under common law.

Note that a director or officer who makes a 'business judgement' is taken to have exercised their powers and discharged their duties with the appropriate degree of care and diligence (that is, the first bullet point above) if they:

- made the judgment in good faith and for a proper purpose;

- do not have a material personal interest in the subject matter of the judgement;
- inform themselves about the subject matter of the judgement to the extent they reasonably believe to be appropriate; and
- rationally believe that the judgement is in the best interests of the corporation.

Type of transaction

17 | Does the standard vary depending on the type of transaction at issue?

No.

Type of consideration

18 | Does the standard vary depending on the type of consideration being paid to the seller's shareholders?

No.

Potential conflicts of interest

19 | Does the standard vary if one or more directors or officers have potential conflicts of interest in connection with an M&A transaction?

The role of a director in an M&A transaction will be considered in the context of the directors duties enshrined in the Corporations Act (see question 16). The standard of care owed by a director or officer does not vary depending on whether he or she has a potential conflict of interest in connection with an M&A transaction, although a director or officer will not be able to rely on the 'business judgement rule' set out in the response to question 16.

Note also that, under section 191 of the Corporations Act, directors have a duty to notify other directors of a material personal interest in a matter that relates to the affairs of the company in circumstances where a conflict may arise, and failure to notify other directors is an offence of strict liability. The Constitution of the company may also provide for specific criteria in relation to conflicts of interest in connection with an M&A transactions or otherwise.

Controlling shareholders

20 | Does the standard vary if a controlling shareholder is a party to the transaction or is receiving consideration in connection with the transaction that is not shared rateably with all shareholders?

The standard of care owed by a director or officer does not vary, although a director or officer also must not use their position or information gained because of their position to gain an advantage for themselves or someone else or cause detriment to the company.

INDEMNITIES

Legal restrictions on indemnities

21 | Does your jurisdiction impose legal restrictions on a company's ability to indemnify, or advance the legal fees of, its officers and directors named as defendants?

The Corporations Act prohibits companies from exempting a liability to the company incurred as an officer of the company.

Companies will typically indemnify directors and officers for legal costs and liabilities by entering into a deed of access and indemnity with the director or officer, although the Corporations Act limits the indemnities that a company can provide.

Indemnities for liabilities other than legal costs

A company or a related body corporate must not indemnify a person against any of the following liabilities incurred as a director or officer of the company:

- a liability owed to the company or a related body corporate;
- a liability to pay a penalty or compensation order under the Corporations Act; or
- a liability that is owed to someone other than the company or a related body corporate and did not arise out of conduct in good faith.

Indemnities for legal costs

A company or a related body corporate must not indemnify a person against legal costs incurred in defending an action for a liability incurred as a director or officer of the company if the costs are incurred:

- in defending proceedings in which the person is found to have a liability for which they could not be indemnified, as outlined above;
- in defending criminal proceedings in which the person is found guilty;
- in defending proceedings brought by the Australian Securities and Investment Commission (ASIC) or a liquidator for a court order if the grounds for making the order are found by the court to have been established; or
- in connection with proceedings for relief to the person under the Corporations Act in which the court denies the relief.

Insurance

Access and indemnity deeds will often require a company to, or a company may otherwise, obtain directors' and officers' insurance to protect directors and officers from loss resulting from claims made against them in relation to the discharge of their duties (see further question 24). However, a body corporate is not permitted to pay a premium to insure an officer of the company against liability arising out of:

- conduct involving a wilful breach of duty in relation to the company; or
- conduct involving misuse of position or company information.

M&A CLAUSES AND TERMS

Challenges to particular terms

22 | Can shareholders challenge particular clauses or terms in M&A transaction documents?

A shareholder has no express personal right to challenge the terms of an M&A transaction document.

However, in principle, a shareholder may be able to challenge a particular term of an M&A transaction documents as follows:

- if those terms were oppressive to, unfairly prejudicial to or unfairly discriminatory against, a shareholder, or was contrary to the interests of the shareholders as a whole, then a shareholder may be able to challenge the term by bringing a claim for oppressive or unfair conduct;
- if a particular term is damaging to a company's interests, a shareholder may be able to argue that in agreeing to that term, a director or officer of the company has acted in breach of duty;
- a concerned shareholder may apply to the Takeovers Panel for a declaration of unacceptable circumstances on the basis that they are a person whose interests are affected by the relevant circumstances; or
- a shareholder may exercise indirect rights by calling a general meeting or proposing resolutions to remove directors.

PRE-LITIGATION TOOLS AND PROCEDURE IN M&A LITIGATION

Shareholder vote

23 What impact does a shareholder vote have on M&A litigation in your jurisdiction?

See questions 14 and 15.

Insurance

24 What role does directors' and officers' insurance play in shareholder litigation arising from M&A transactions?

Directors' and officers' (D&O) insurance policies may cover losses or legal fees that a company or its directors and officers incur in defending a shareholder action.

Cover for directors and officers is referred to as 'Side A Cover' and typically includes defence costs, damages/compensation and interest or costs awarded against directors and officers. 'Side B Cover' provides reimbursement to the company in respect of indemnity provided to the directors and officers. Cover in respect of securities claims brought against the company by security holders is known as 'Side C Cover.'

D&O policies provide an important protection for directors and officers, particularly where a company cannot exempt liability or provide an indemnity in favour of the directors and officers (as to which see question 21). However, directors and officers may not be able to rely on the D&O insurance policy depending on the nature of the claim and the terms of the policy (in particular, any exclusion to the policy).

Note also that it is an offence for a company or a related company to pay a premium for a contract insuring a current or former director or officer of the company against a liability (other than for legal costs) arising out of:

- conduct involving a wilful breach of duty in relation to the company; or
- a breach of the duties not to improperly use their position or company information.

Burden of proof

25 Who has the burden of proof in an M&A litigation – the shareholders or the board members and officers? Does the burden ever shift?

The party bringing the claim has the burden of proof. The burden of proof does not shift during proceedings.

Pre-litigation tools

26 Are there pre-litigation tools that enable shareholders to investigate potential claims against board members or executives?

A shareholder may investigate potential claims against board members or executives by:

- applying for an order for preliminary discovery, which may include discovery of documents from either a prospective defendant or from another person (if it appears to the court that the person may have or have had possession of a document that relates to any question in the proceeding), or preliminary discovery in relation to a prospective defendant's identity or whereabouts;
- applying for an order under section 247A of the Corporations Act to inspect the books of the company;
- requesting a copy of the company's constitution pursuant to section 139 of the Act; or
- reviewing publicly available information (including documents or information lodged with either the ASX or the ASIC).

The court will have jurisdiction to grant preliminary discovery if:

- it appears to the court that the shareholder may be entitled to make a claim against the board member or executive;
- the shareholder has made reasonable enquiries but it has been unable to obtain sufficient information to decide whether or not to commence proceedings;
- the board member or executive has documents in its possession that can assist the shareholder to determine whether or not to pursue the claim; and
- inspecting that document would assist in deciding whether or not to commence proceedings against the board member or executive.

Forum

27 Are there jurisdictional or other rules limiting where shareholders can bring M&A litigation?

Shareholder agreements and M&A transaction documents will typically contain a choice of jurisdiction clause or a choice of law clause that may dictate where any proceedings under those documents can be brought. These agreements may also contain an arbitration clause. Absent such provisions, the appropriate forum would ordinarily be the company's place of incorporation.

The nature of a claim being brought by shareholders may also dictate the appropriate forum. For example:

- a statutory claim under the Corporations Act will generally be brought in a court with jurisdiction to hear such statutory claims; and
- a claim in relation to a contract may also be subject to an exclusive jurisdiction clause or an arbitration clause.

Expedited proceedings and discovery

28 Does your jurisdiction permit expedited proceedings and discovery in M&A litigation? What are the most common discovery issues that arise?

Proceedings

Courts can expedite proceedings pursuant to general case management powers, however it is a matter of judicial discretion (and often subject to court availability). Court rules also permit applications for expedited hearings before certain courts of appeal.

Discovery

While the procedure for discovery differs between federal and state courts in Australia, generally, the Court will order discovery after the close of pleadings (for the issues to be defined) but before the parties have exchanged evidence. Courts can also expedite discovery pursuant to general case management powers. (Practically, if the scope of documents sought in discovery can be narrowed between the parties, the discovery process is likely to be quicker.)

Common discovery issues that arise in Australia include:

- claims of legal profession privilege – parties are not obliged to disclose documents that are legally privileged;
- whether a document is within the control of a party – it is not discoverable if it not within their control; and
- disputes regarding the scope of discovery – discovery is not a fishing expedition, and orders for discovery may be opposed if they are too broad or the documents are not relevant to a fact in issue.

DAMAGES AND SETTLEMENTS

Damages

29 How are damages calculated in M&A litigation in your jurisdiction?

Under Australian law, damages are compensatory in nature and not punitive. The precise calculation of damages will depend on, among other things, the nature of the claim, the alleged wrongdoing, and the particular remedy sought.

The court has broad discretion in relation to the remedies it may award for a statutory oppression claim or derivative action under the Corporations Act, including orders that a company be wound up, regulating the conduct of the company's affairs in the future, and for the purchase of shares. Compensation can also be sought for the company and shareholders in respect of loss suffered.

Under the Corporations Act, a court may order a person to compensate a company where that person has contravened certain provisions of the Act in relation to the company (including breaching duties as directors or continuous disclosure obligations), and damage resulted from that contravention. In determining the amount of compensation to be awarded, profits resulting from the contravention that are incurred by a person will be taken into account.

Settlements

30 What are the special issues in your jurisdiction with respect to settling shareholder M&A litigation?

If shareholder M&A litigation is commenced as a representative proceeding (ie, class action), court approval is required before such proceedings are settled or discontinued. If the court does give its approval, it may make such orders as are just with respect to the distribution of any money under the settlement. The court will consider, among other things, whether the proposed settlement is a fair and reasonable compromise of the claims of the group members.

THIRD PARTIES

Third parties preventing transactions

31 Can third parties bring litigation to break up or stop agreed M&A transactions prior to closing?

It is unlikely that third parties will have standing to bring litigation to break up or stop M&A transactions that have been agreed prior to closing, unless they can argue that they are a person whose interests are affected by the relevant circumstances and seek a declaration of unacceptable circumstances from the Takeovers Panel.

Other tactics, such as acquiring a shareholding in the company, or intervening on the basis that the board is not acting in accordance with their duties, may be used in an effort to prevent transactions from proceeding.

Additionally, where Australian Competition and Consumer Commission approval is required for the transaction to proceed, it will generally seek submissions from interested third parties, and during such submissions and subsequent consultation, third parties may raise objections to a transaction proceeding. Where a third party is dissatisfied with a determination, it may apply under the Competition and Consumer Act 2010 (Cth) to the Australian Competition Tribunal for a review of a determination. Where the Australian Competition Tribunal is satisfied that this third party has a 'sufficient interest' in the determination, it will review it.

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Third parties supporting transactions

32 Can third parties in your jurisdiction use litigation to force or pressure corporations to enter into M&A transactions?

Third parties cannot use litigation to force corporations to enter into M&A transactions; however it is open to third parties to consider all commercial options (which may include the use of litigation if they have any rights to enforce or protect or standing to bring proceedings, or an application to the Takeovers Panel for a declaration of unacceptable circumstances if their interests are affected by the relevant circumstances) to pressure a party to enter into M&A transactions.

UNSOLICITED OR UNWANTED PROPOSALS

Directors' duties

33 What are the duties and responsibilities of directors in your jurisdiction when the corporation receives an unsolicited or unwanted proposal to enter into an M&A transaction?

The duties of directors are set out in the response to question 2.

If a corporation receives an unsolicited or unwanted proposal to enter into an M&A transaction by way of a bidder's statement, the directors will need to consider, among other things:

- engaging and briefing advisers or independent experts (for example, to value the company);
- advising shareholders;
- to the extent that the corporation is listed on a stock exchange or the transaction is regulated by the Corporations Act, ensuring that applicable rules and statutory provisions are complied with; and
- if required, applying to the Takeovers Panel (for example, if there are issues in relation to the bidder's statement).

COUNTERPARTIES' CLAIMS

Common types of claim

34 Shareholders aside, what are the most common types of claims asserted by and against counterparties to an M&A transaction?

Litigation between counterparties to an M&A transaction most commonly involve the following types of claims:

- conditions precedent not being met before closing;
- disputes regarding due diligence and disclosure documents;
- breaches of representations or warranties;
- indemnity claims;
- post-completion adjustments (such as working capital and net debt adjustments);
- restraint of trade clauses; and
- misleading and deceptive conduct or similar claims (although M&A transaction documents typically seek to limit the ability of parties from making statutory or contract claims, to the extent possible).

Differences from litigation brought by shareholders

35 How does litigation between the parties to an M&A transaction differ from litigation brought by shareholders?

The types of claims brought between parties to an M&A transaction (as set out in question 34) differ significantly from the types of claims brought by shareholders (as set out in the responses to questions 1 and 2). The remedies sought often differ between these claims, although the precise remedies will, of course, depend on the nature of the claim.

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