Takeovers Financing –
More than Magic Pudding Required

John Mosley*

Partner
Minter Ellison

The article examines Australian law and practice in the field of debt funding for public company takeover transactions. It is seen that because takeovers are conducted in a public market and can impact market credibility, special rules and practices have evolved to regulate the financing component of the cash consideration payable to target shareholders. These rules and practices require a high level of disclosure about the financing arrangements and mandate that any conditions to the funding are of a mechanical nature only and are within the bidder's sole control. The article looks at how these considerations have given rise to a concept of 'certain funding' and considers the main components of a certain funding loan. The article also mentions differences between practice here and in the UK. Overall, it is seen that the rules and practices in this area deliver a high degree of certainty that is consistent with an efficient and properly functioning investment market.

Introduction

Whilst he was lecturing to his students around 1919, renowned German philosopher and political economist, Max Weber, said:

> "Capitalism could not operate on the basis of belief and so what was required was a form of law which could be counted upon, like a machine, from which religious and magical considerations must be excluded."[1]

Would it be too great a stretch to trace the genesis of Australian law on funding takeovers to Max Weber? This article aims to set out and explain the Australian law relating to the financing of public company takeovers. It will begin by examining the statutory provisions (specifically under the *Corporations Act 2001* (Cth) (the 'Act')) that lay the framework, both in the context of takeovers by way of off-market offer and takeovers by way of scheme of arrangement. It will next consider the *Takeovers Panel Guidance Note 14 – Funding arrangements*, which seeks to set out certain key requirements of takeover funding. Lastly, the article will examine how the legislative framework and the policy from the Takeovers Panel is applied in practice and will note some key differences between the law in Australia and in the UK. It will be seen that where a takeover is to be debt funded there needs to be a very high degree of certainty that sufficient funding will be provided. Perhaps it is a step too far to attribute the detail of the law in this area to Weber, but this article should make it clear that the law on takeover funding is a logical extension of the philosophical position he took.

Off-market offers vs schemes of arrangement

Before the article examines the statutory provisions that lay the framework for this area of law, it is necessary to understand briefly the two main ways that a takeover of a public company can proceed in Australia, namely by way of off-market offer and by way of scheme of arrangement.

Off-market offers

The overriding rule of takeover law is that a bidder cannot acquire a relevant interest in excess of 20% in a public company[2] unless it does so under a permitted gateway, the most common of which are an off-

* The author acknowledges the assistance of Ben Smith (Minter Ellison) with the M&A sections of this article.

[1] Weber, *General Economic History*, Transaction Publishers, 1981, pp. 342-343. (Original German source: Weber, *Wirtschaftsgeschichte* (1923)).

[2] With 50 or more shareholders.

market takeover offer under Chapter 6 of the Act, a scheme of arrangement under Part 5 of the Act or with shareholder approval.[3] Unlike other jurisdictions, there is no right to acquire more than a 20% interest and then to proceed to make a mandatory takeover offer for the remaining target shares. This reflects one of the fundamental tenets of Australian takeover law that change of control transactions take place in an efficient, competitive and informed market. The absence of a mandatory bid rule in Australia coupled with the 20% threshold is designed to ensure that controlling stakes are not prematurely 'locked-up' thereby facilitating competition in change of control transactions.

In an off-market takeover bid, unlike an on-market bid, the offer is not made through the Australian Stock Exchange. Instead the bid is made directly to target shareholders. The bid must be an offer to buy all or a specified proportion of the target shares and all offers made under the bid must be the same.

The bidder's offer must be made within two months of the bidder announcing its intention to do so.[4] A breach of this requirement is a criminal offence. An off-market bid may only be withdrawn in very limited circumstances, and then only from those target shareholders who have not accepted the offer and with the consent of the Australian Securities and Investments Commission ('ASIC').

Off-market bids may be made on a conditional basis. Certain conditions, however, are prohibited by the Act, such as maximum acceptance conditions, discriminatory conditions and conditions the fulfilment of which depends on the bidder's subjective opinion or an event within its sole control. A feature of most off-market bids is the minimum acceptance condition, which prescribes a minimum percentage of the target shares that must be accepted under the bidder's offer. Upon satisfaction or waiver of all of the bid conditions, the bidder must declare its offer unconditional and then proceed to pay accepting shareholders by the earlier of one month after that time or 21 days after the offer formally closes.

The Act requires both the bidder and the target to provide detailed information on the terms of the offer, the target and the bidder and any other information material to a decision by shareholders to accept the offer. The information provided by the bidder is in the form of a bidder's statement and the target responds in the form of a target's statement. The target's statement must include a recommendation from each target director that offers under the bid are either accepted or not accepted (or an explanation as to why a recommendation has not been made). If the bidder has voting power in the target of 30% or more, or the bidder and the target have common directors, there would be a legal obligation on the target to include an independent expert's report in the target's statement. The independent expert's report would be required to state whether in the expert's opinion the takeover offer is fair and reasonable and give the reasons for forming that opinion.

The bidder will have the right to compulsorily acquire target shares following the bid if, during or before the end of the offer period, the bidder and its associates have a relevant interest in at least 90% of target shares and have acquired at least 75% of the target shares the subject of the offer.

Schemes of arrangement

A members' scheme of arrangement is a statutory procedure that allows a solvent company with a large number of shareholders (typically a listed company) to reorganise its capital structure to achieve a desired commercial outcome. Once implemented, the scheme has the effect of re-arranging the rights and obligations of the company's shareholders in the manner set out in the scheme. It is a method commonly utilised by a bidder to achieve 100% ownership of the target in a friendly transaction because, in most circumstances, the approval threshold is easier to achieve than the 90% acceptance threshold required under a takeover bid.

A members' scheme will require the target to obtain shareholder and Court approval for the reorganisation proposal. The scheme must be approved by 50% of the shareholders who vote, whether in person or by proxy, and 75% of the number of shares voted. In contrast to an off-market takeover offer, a scheme delivers a certain outcome one way or the other, as a scheme will deliver either 100% control of the target or nothing.

---

[3] Section 606 of the Act.
[4] Section 631(1) of the Act.

Schemes of arrangement require Court approval at two stages of the process. At the outset the Court will only allow the scheme to be put to shareholders to vote on if it considers it is not demonstrably unfair or unreasonable to shareholders. If the Court allows the scheme meeting to be convened then a detailed explanatory statement explaining the purpose and effect of the scheme must be sent to shareholders. While not strictly required as a legal matter, in practice nearly all schemes have independent expert reports. In the context of a scheme an independent expert must opine as to whether the scheme is in the best interests of shareholders. If shareholders approve the scheme, it must then be formally approved by the Court at a second hearing. This provides dissentient shareholders the opportunity to petition the Court if they have any concerns about the transaction.

If the members' scheme is approved by the requisite majority of shareholders and by the Court (and if all other conditions to the scheme are satisfied or waived), the scheme will bind all target shareholders, including those who vote against the scheme and those who, because of apathy or otherwise, do not vote at all.

Takeover tactics

Of course the world of mergers and acquisitions is all about gaining control of companies because of the perceived economic benefits that will flow from the takeover. At a minimum this requires a 50% interest, however, the main prize is to obtain a 100% interest which will deliver certain benefits including providing access to 100% of the target company's cashflow, straightforward replacement of the target board of directors, greater ability to extract synergies and economies of scale, the ability to tax consolidate the merged group which itself will deliver benefits and facilitating financing arrangements, particularly if secured financing is involved and a financial assistance 'whitewash' procedure is required under the Act. To achieve 100% ownership under an off-market offer a bidder must obtain a 90% shareholding interest before it can compulsorily acquire the remaining shares. To achieve a 100% interest under a scheme a bidder need only obtain the support of 50% of the shareholders who vote (whether in person or by proxy) and 75% of the number of shares voted. It follows that, where the circumstances permit, a bidder will opt for the scheme route over the off-market offer route. Importantly, in a scheme transaction the bidder will require the support of the target board so the scheme option is not always available. From a funding perspective, lenders are often asked to commit to funding irrespective of whether the transaction proceeds by way of off-market offer or scheme of arrangement.

Statutory framework – takeovers by way of off-market offer

What does the law say about the financing of takeovers by way of off-market offer? Section 631(2)(b) of the Act requires that a person not announce a bid if:

> "the person is reckless as to whether they will be able to perform their obligations relating to the takeover bid if a substantial proportion of the offers under the bid are accepted"[5]

There are two key policy considerations that the section aims to address. The first is to avoid the creation of what would be a false market if bids could be announced without there being adequate resources to pay accepting shareholders. The second goes to market credibility – if bidders were unable to pay accepting shareholders market participants would soon lose confidence in the integrity of the market and look to take their investment funds elsewhere.

The test of whether someone is reckless in these circumstances is an objective one. Section 5.4(2) of the Criminal Code (Cth) provides that a person is reckless as to a result if 'he or she is aware of a substantial risk that the result will occur and having regard to the circumstances known to him or her, it is unjustifiable to take the risk'.

---

[5] It is of course against the law to propose a bid knowing it will not be made or to be reckless as to whether it will be made (section 631(2)(a) of the Act).

Relevantly, the Act goes on to specify that where cash is being paid, the bidder must disclose the identity of persons providing the funds and the arrangements under which funds will be provided.[6] ASIC has stated that to comply with its obligations, a bidder should ensure that the bidder's statement:

(a) discloses the total amount necessary to pay for all the securities to which the bid relates;

(b) discloses whether the bidder holds, or has access to, sufficient funds to pay for all the securities;

(c) identifies how much of the cash will come from amounts held by the bidder;

(d) if some or all of the cash consideration is not sourced from the bidder's funds, identifies the person or persons providing the funds and provides details of the arrangements under which those funds are to be provided; and

(e) clearly discloses any restriction on the availability of funds under external funding arrangements.[7]

Statutory framework – takeovers by way of scheme of arrangement

What does the law say about the financing of takeovers by way of scheme of arrangement? The starting point is section 411(17)(b) of Act which says that the Court must not approve a scheme takeover unless there is produced to the Court a statement in writing by ASIC stating that ASIC has no objection to the scheme takeover. There is an alternative, in that the Court may approve a scheme takeover if it is satisfied that the transaction is not proceeding in a way that circumvents the rules on takeovers in Chapter 6 of the Act. [8] The practice is, however, for the company to seek a statement from ASIC that it does not object to the scheme takeover. This means that the role of ASIC is crucial. It should be noted, however, that the Court has the final say and can decide not to approve a scheme takeover even where a no objection statement is provided by ASIC. [9]

So in considering whether to not object to a scheme takeover it follows that ASIC would be mindful of relevant case law. In *Re Coles Group Limited (No 2)*[10], Robson J stated:

> "...the objectives of Ch 6 [being the takeover provisions in the Act] are relevant to the issue of the court exercising its discretion to approve a scheme of arrangement effecting a takeover. They indicate a legislative intent to protect members subject to a takeover."

Thus the case law is clear that members of a company subject to a takeover by way of scheme of arrangement should receive the same protection under the law that members of a public company receive under relevant sections of Chapter 6 of the Act.[11] ASIC has spelt out its position as follows:

(a) shareholders should not be adversely affected because the transaction is being conducted by way of scheme and not under the takeover provisions[12]

---

[6] Section 636(1)(f) of the Act.

[7] Australian Securities and Investments Commission, *ASIC Regulatory Guide 9*, June 2013. Although ASIC's Regulatory Guides are not legally binding, they provide essential guidance on how ASIC interprets the law and how ASIC exercises its discretions granted by specific legislation, see for example section 655A of the Act that grants ASIC powers to exempt and modify the application of Chapter 6 - Takeovers to a particular person.

[8] Section 411(17)(a) of the Act.

[9] See the final part of section 411(17) of the Act. This interpretation was affirmed by Robson J in *Re Coles Group Limited (No 2)* [2007] VSC 523, 9-10 [33(8)].

[10] *Re Coles Group Limited (No 2)* [2007] VSC 523, 20 [73].

[11] In dealing with schemes, courts apply the principles of Chapter 6 of the Act by analogy where appropriate (deal protection mechanisms are the most obvious example), but they are not directly applicable and don't necessarily apply in the same way. For example, section 631 of the Act relating to the consequences of publicly announcing a proposed bid has literally no application where the proposal is for a scheme of arrangement, and generally speaking bidders take advantage of that distinction.

(b) shareholders should receive equivalent protection whatever method is being used for the acquisition[13]

Takeovers Panel

Introduction

Whilst the Act and case law lay the foundations of what is required for takeover financing, the Takeovers Panel has filled in much of the detail. The authority of the Takeovers Panel is found in the Act. If there is a dispute about the conduct of a takeover a party can apply to the Panel for a declaration of 'unacceptable circumstances'[14] and the Panel can make orders to protect the parties in the event of unacceptable circumstances.[15] In considering whether circumstances of a takeover are unacceptable the Panel must take into account policy considerations[16] and these are set out in non-binding Guidance Notes that the Panel issues from time to time.

It should be noted that the Panel does not purport to have any direct role with respect to a takeover that proceeds by way of scheme of arrangement, rather such a transaction is supervised by the Court with assistance from ASIC. Still, as far as market practice is concerned, the guidance issued by the Panel on takeover financing (see below) has also guided financing arrangements for scheme takeover transactions.

Golden rule for takeover financing

To assist market participants understand the Panel's approach to funding of cash consideration for a takeover, it issued *Takeovers Panel Guidance Note 14 – Funding arrangements* on 4 March 2004 and updated it on 11 February 2010. The 'golden rule' in the Note is that a bidder must believe it will be able to implement its offer and have (and must maintain) a reasonable basis for that belief. The use of the word 'reasonable' makes it clear that the test is objective so it is irrelevant what the bidder thinks. The Panel may find it is unacceptable if:

(a) the bidder does not have a reasonable basis to expect it will be able to pay shareholders; or

(b) the bid becomes unconditional when financing is conditional and there is a real risk of funding conditions not being satisfied.

Unacceptable financing

The Panel has set out when it would consider there to be no reasonable basis for a bidder to expect that it will be able to pay shareholders. This includes where the funding is subject to:

(a) documentation and there is no binding commitment. Thus a 'best endeavours' statement by lenders would not be acceptable

(b) lender internal approval

(c) unusual funding mechanics, such as the commitment period being too short to fit the transaction timeframe or conditions precedent to funding unless they are likely to be satisfied or waived when the bid becomes unconditional

Key document milestones

The Note sets out some key milestones for the documentation stages of takeover financing. These can be best be described in the below table:

---

[12] Australian Securities and Investments Commission, *ASIC Regulatory Guide 60*, September 2011, para 60.102.
[13] Ibid para 60.18.
[14] Section 657A of the Act.
[15] Section 657D of the Act.
[16] Section 657A(2) of the Act.

Off-market offer - stage	Scheme takeover - stage[17]	What financing documents are required?
Bid is announced to the market	Scheme Implementation Agreement is announced to the market	Binding: - Commitment Letter - detailed Term Sheet
Offer is sent to target shareholders	Notice of meeting to consider scheme is sent to shareholders	Signed Facility Agreement
Bid is declared unconditional	Second Court Hearing Date	Security documents must be signed (if secured)

In setting out these milestones for the documentation stage it can be seen that the Panel is trying to avoid the situation that arose in the bid by Burns Philip for Goodman Fielder Ltd.[18] In that matter the bidder had not settled the terms of its financing package at the time it proposed to issue its offer to the target's shareholders. The Panel found that whilst this created too much uncertainty the bid could proceed if target shareholders were given the right to withdraw their acceptance prior to being informed of the terms of the facilities. As shown in the middle row of the above table, today it is necessary to have the terms of the facilities fully documented and signed prior to the bidder sending its bid terms to target shareholders.

Conditionality of funding

For a borrower looking to acquire an asset with a loan, any conditions which must be satisfied before the loan is made available will be of particular interest. In a takeover transaction the conditionality of a financing proposal will be under forensic examination. This is particularly so where the target board is not in favour of the bid, that is, the bid is 'hostile'. In such a situation, if there is uncertainty around the funding of any cash consideration, the target will seek to use that fact to undermine the credibility of the bid and, on occasion, to seek to have the Takeovers Panel declare that the bid is characterised by unacceptable circumstances. Even where a bid has the support of the target board or is proceeding by way of scheme, only an ill-advised bidder would declare the bid unconditional or proceed past the Second Court Hearing Date without being very certain that all conditions precedent to funding have been or will be satisfied or waived. This is because in both scenarios, the target shareholders must be paid for their shares and there may be dire consequences for the parties involved and their directors if this did not happen.

The Note suggests that it is acceptable to start with material conditions precedent to funding but they should be satisfied or waived as the takeover transaction proceeds and funding should be, in effect, unconditional when the bid passes the 'point of no return', that is, the bid is declared unconditional (in an off-market offer) or, by analogy, at the Second Court Hearing Date (in a scheme takeover). The mergers and acquisition sector has responded to such a requirement by way of a concept known as 'certain funding'.

Certain funding

Business MAC and Market MAC

To understand how a 'certain funding' loan differs from an ordinary loan it is necessary to understand a key term of ordinary acquisition financing. In a typical acquisition loan agreement it is a condition

[17] The author's view of the analogous stage of a takeover by way of scheme of arrangement.
[18] *Goodman Fielder Limited 01* [2003] ATP 01 (being a Takeovers Panel decision published on 21 January 2003).

precedent to an advance of the loan that no event of default or potential event of default subsists when the advance is requested or made. It is also usually an event of default if there is, or with the passing of time or the happening of an event there is likely to be, a material adverse effect on the borrower's or target's assets, financial condition or trading position (often referred to as a 'Business material adverse change' or 'Business MAC'). In respect of a target company the circumstances which could constitute a Business MAC can be varied and broad. Examples include termination of a material contract, a change in law that might seriously compromise the business or a serious deterioration in the target's financial position. The main point here is that the happening of such an event will be outside of the bidder's control. In the context of a takeover transaction, it should be apparent that requiring there to be an absence of a Business MAC condition would be incompatible with having a high level of certainty for the funding. Such a condition would allow a lender to refuse to fund, even after the bidder has declared the bid unconditional, if in the lender's opinion a Business MAC had occurred.

Similarly, syndicated loan agreements usually contain a provision allowing the lenders to refuse to fund if, in their opinion, something has occurred in the market generally that would prevent an orderly syndication of the facilities. As with the Business MAC such a 'Market MAC' would be incompatible with having a high degree of certainty for the funding.

Permissible drawstops

The concept of certain funding has thus evolved to exclude all conditions to the funding other than mechanical conditions which are in the complete control of the bidder, save with the exception of a couple of conditions that, whilst outside the bidder's control, are considered to be remote. The circumstances under which a lender can refuse to advance the acquisition loan are generally as follows: [19]

(a) A failure to satisfy mechanical conditions precedent: delivery of a funding request, the signing of finance documents, provision of standard legal opinions and so on.

(b) For a scheme takeover, that the Court has not approved the scheme and the Court order has not been lodged with ASIC (without which there would be no transaction in any event).

(c) It being illegal for the lenders to fund. Whilst this is outside of the bidder's control it is considered to be of sufficiently low risk to be accepted by the Court.

(d) A 'major default' having occurred but only in respect of the bidder. These include:

    1) failure to pay an amount under the loan agreement;
    2) insolvency of the bidder;
    3) the loan being unlawful, void, repudiated or rescinded;
    4) the bidder entering into a merger, acquisition, disposal, borrowing money or making a loan, in each case outside agreed parameters; and
    5) the bidder giving a prohibited security interest to a third party.

    All of these actions are within the bidder's control, save for unlawfulness which, as with illegality above, is considered to be remote.

(e) A 'major misrepresentation' having occurred but only in respect of the bidder. These include misrepresentations as to:

    1) the status of the bidder (that is, that it is duly incorporated);
    2) the internal authority it has to enter into the finance and other transaction documents;
    3) whether it is bound by the loan agreement;
    4) whether the transactions contemplated are permitted under its constituent documents; and

---

[19] The Loan Market Association's standard document for leveraged finance transaction contains certain funding provisions as an option.

5) whether it has due power and all necessary authorisations to enter into the loan agreement and other transaction documents. Such authorisation might include approval of the Australian Competition and Consumer Commission or the Foreign Investment Review Board.

Again, all of these matters can be said to be within the bidder's control or can be satisfied prior to declaring the bid to be unconditional.

(f) A breach of certain offer or scheme loan undertakings. All of these matters are within the bidder's control.

(g) The bidder materially changes its core business.

(h) For an unlisted bidder, it becomes listed.

(i) The bidder itself becomes subject to a change of control. For a listed bidder the absence of such an event would be seem to be outside the control of the bidder.

Interestingly in Australian takeover financing, but not in the United Kingdom, insolvency on the part of the target is usually an event that allows the lenders to refuse to fund. This is clearly something that is outside the bidder's control. The bidder, and its lenders, will have conducted extensive financial due diligence on the target and will no doubt be satisfied that target insolvency is very remote or they would not have proceeded with the bid and funding. Having said that, it would seem the risk is more than theoretical so it is interesting that Australian practice differs from the UK in this respect. The consequences for a bidder and its directors for not paying target shareholders once the bid has been declared unconditional could be severe,[20] so it is not difficult to see that lenders would come under enormous commercial pressure to waive the insolvency condition and see out the funding. Lenders would also be concerned about reputational risk given that the fall out from a bid failing in these circumstances would likely be high profile and possibly result in Court action and questions from ASIC.

In scheme transactions, the question of credit or performance risk was considered by Gyles J in the Federal Court.[21] His Honour took a pragmatic approach, being satisfied that the practical risk that the bidder would not meet its obligation to provide the scheme consideration was slight on the facts of those cases. However, he suggested a practical mechanism, taken up in later cases, whereby the cash consideration is placed in trust before the implementation date. The advantage of this mechanism is that shareholders do not relinquish their shares until the consideration for their shares in placed in trust. The mechanism does not, however, close the gap completely between the Second Court Hearing Date and the scheme implementation date, such that if a target insolvency event occurred during this period the lenders would be entitled to refuse to fund and the consequence for the parties involved could be severe.[22]

Commercial conditions precedent that must be addressed early

For an off-market offer, the period during which lenders only have limited circumstances in which they can refuse to fund (referred to as the 'certain funds' period) needs to extend from, at a minimum, the date the bid is declared unconditional to the date which is 21 days after the bid is closed for acceptances. In a scheme transaction it should run, at a minimum, from 8.00 am on the day on which the Court will approve the scheme (referred to as the 'Second Court Hearing Date') until the anticipated date for payment of shareholders. A bidder will usually require its lenders to start the certain funds period much earlier,

---

[20] Including criminal and civil liability for the bidder and its officers under Chapter 6B of the Act. It remains to be seen what precisely would happen in such a circumstance, one option might be that the Takeovers Panel declares unacceptable circumstances and effectively rescinds the bid.

[21] *Re Kaz Group Ltd* [2004] FCA 738; *Re Tempo Services Ltd* [2005] FCA 411 and *Re SFE Corporation Ltd* [2006] FCA 912.

[22] The target would seem to be in breach of the Court order to implement the scheme. The bidder would seem to be in breach of its obligation, under a deed poll, to fund the scheme consideration. Thus, both the target and the bidder (and their officers) could be subject to court action and potential civil liability. Successful target shareholder recourse against the bidder would depend on how deep the bidder's pockets are, noting that for many private equity transactions the bidder is a special purpose vehicle without substantial assets.

often when the deal is announced to the market which might precede the point at which the bid is declared unconditional by several months. The reason for this is that the bidder will want to demonstrate that its bid is highly credible and subject to only mechanical conditions.

It follows that the lenders will need to conduct and be satisfied with any 'commercial' due diligence prior to going into the certain funds period. Commercial due diligence refers to any diligence the results of which is outside the bidder's control. Depending on the business concerned and access the bidder will commission experts to investigate and report on matters including finance, tax, legal, environmental, market, insurance and any other specialist report required and will procure that such experts make their reports available to the lenders on a limited reliance basis. The lenders will also instruct their lawyers to review and report on the main transaction documents for the bid. If the lenders are satisfied with the diligence exercise they will confirm this to the bidder leaving only the mechanical conditions to be satisfied prior to funding.

In an off-market offer, there is one key commercial condition that lenders will usually be asked to waive. This is the condition that the bidder has obtained acceptances from 90% of shareholders. The bidder may not be able to obtain such a high level of acceptances without making its bid unconditional as there will be many market participants who won't accept the bid until they know it will be followed through. A bidder will know that it is much more likely to get to 90% if it can go unconditional when it has obtained sufficient acceptances to gain control, that is from 50% of shareholders. The bidder will thus ask the lenders to take a 'leap of faith' and drop their 90% condition in the knowledge that this will likely lead to a bidder gaining a 100% interest. It is of course possible that a bidder may not get from 50% to 90% of acceptances so both the bidder and its lenders should factor in how such a scenario will impact the future plans and operations of the combined group.

Piggy backing the terms of the bid

Where lenders agree to certain funds terms prior to the bid being declared unconditional, they will still have the opportunity to refuse to fund because of circumstances affecting the target provided the bid documents contain such protections for the bidder. The lenders then include a matching condition in their loan agreement that the bidder cannot waive these protective provisions without lender consent.

Thus a bidder will likely have a Business MAC as a defeating condition in its bid offer or, for a scheme, the Scheme Implementation Agreement. The bidder will also usually prescribe certain events, including the target entering into certain major transactions, as defeating conditions. By requiring the bidder to obtain their consent to waiving any such condition the lenders effectively 'piggy back' the bid transaction documents and extend the period in which they can refuse to fund because of significant commercial events. The bidder itself will waive any such conditions once it declare the bid unconditional so the protection for the lenders will fall away at that point too. This is usually a manageable risk because after the bid has been declared unconditional a target company will be in 'caretaker' mode and thus won't conduct any major transaction pending completion of the takeover and otherwise will not do anything to frustrate completion.

UK position

It is useful to consider some differences between Australia and the United Kingdom on certain funding. As mentioned above in the UK lenders do not have the ability to refuse to fund if the target becomes insolvent prior to the completion date. Another key difference is that in the UK the bidder's financial advisor or lender is required to issue a confirmatory letter that the bidder has the resources available to pay or fund any cash component of the bid.[23] Whilst such a letter is not an absolute guarantee of funds being available, there is precedent for a bidder's financial advisor being called upon to provide additional funds where it failed to take reasonable steps before reaching its conclusion that the bidder had sufficient funding and issuing its letter.[24] This takes 'standing behind your borrower' to a whole new level.

[23] City Code on Takeovers and Mergers, Rule 24.8.

[24] Richard Spedding and Simon Buckingham, *Financing an offer for a public company: the certain funds requirement* (2014) Practical Law <http://uk.practicallaw.com/5-370-3957>.

Certain funding plus

It was seen above that whilst it could be said that lenders don't need to be on certain funding conditions until the bid has been declared unconditional or, for scheme transactions, until the Second Court Hearing Date commercial realities usually require them to provide certain funding well prior in order that the bid build momentum in the market. On occasion borrowers also request certain funding for the acquisition of a private company. In this context the considerations are purely commercial in that it cannot be said that there is a legal justification for having certain funds. Commercial justification usually arises in a competitive bid context, where the bidder wants to put forward a bid with the best price and the least conditions. For transactions where many bidders are likely to compete for the target, vendors may impose a requirement that debt funded bids will only be considered if they have certain funding terms.

Conclusion

There is often much at stake in a takeover scenario. For both bidder and target alike the transaction will usually be transformative. Add to this that the bid will take place in the public arena and it is not surprising that special rules and practices have developed regarding the certainty that a bidder will be able to follow through and complete its bid should it achieve sufficient acceptances or, for a scheme, receive the approval of the Court and target shareholders. Irrespective of whether a takeover is proceeding by way of off-market offer or scheme transaction, the Act lays the framework for the cash component by requiring a bidder to ensure that it will have sufficient resources to pay shareholders and to be transparent in respect of how any debt component will be funded and the conditionality of the funding. The Panel, by issuing *Guidance Note 14*, has filled in much of the detail both as to the timing of key documents and the level of certainty required for funding. The market, largely following the UK, has developed an industry practice of 'certain funding' which reduces the conditions of funding to mechanical items which are within the bidder's control. There are a couple of exceptions, the most notable one being insolvency of the target. The fall out from a bid failing due to target insolvency and lenders refusing to fund may be severe so industry participants might consider following UK practice on this issue. Overall, law and practice in the area of takeover financing has resulted in somewhat of a 'machine' like approach to the debt funding side of takeovers indicating the accuracy of Max Weber's position on the key legal requirements for a capitalist system when he spoke nearly 100 years ago.