

## Chapter 4

# Difficult Issues in Drafting and Implementing Merger and Acquisitions Scheme Documents

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### Introduction

This chapter focuses on the issues faced by solicitors in drafting documents in merger and acquisitions (M&A) schemes. 'M&A scheme' refers to a scheme of arrangement between a company and its members under which the members agree to a third party acquiring their shares. In other words, an M&A scheme (or 'acquisitions scheme') is a takeover utilising Part 5.1 of the *Corporations Act 2001* (Cth).

The issues faced by the drafter of M&A scheme documents are not of themselves particularly difficult. 'Difficulty' arises because of the process for a Part 5.1 scheme. The documents are subject to review by the Australian Securities and Investments Commission (ASIC) and the scheme process is overseen by a court which includes a second court hearing held after the documents have been prepared, after members have voted on the transaction, at which the court, ASIC or an objector shareholder can raise objections to the scheme. Critical review of the scheme documents can occur at the end of the process. This is a critical difference between a Chapter 6 takeover offer and a Part 5.1 scheme. In addition the primary forum for resolving issues in a bid is the Takeovers Panel, whereas for a scheme it is a court.

### Documents

The documents which will typically be required for an acquisition scheme are:

- (a) a merger implementation agreement between the target company and acquirer. This sets out the obligations of the

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