Preface

This book of essays addresses the content of key clauses relevant to merger and acquisition (***M&A***) transactions. The book is concerned with the negotiation of key clauses that are commonplace or standard within M&A contracts. In a sense, this is a book about the law of contract but rather than trying to set out in an orderly fashion the rules of contract law, it tries to set out in an orderly fashion propositions about the underlying commercial considerations behind particular clauses and what may be considered standard or appropriate approaches to such clauses. The focus of this book, in other words, is not contract theory but a practical application of contract law.

The book has two purposes: a conceptual purpose, to show how a complex legal transaction can be traced to and be determined by a small number of essential commercial considerations; and a pedagogic purpose, to display for practitioners, bankers, and students the underlying structure of an important transactional instrument: the M&A contract. There is perhaps more legal detail than the banker requires and possibly more pragmatic analysis than is necessary for the law student.

We have assembled an experienced team of hands-on practitioners to provide their knowledge for this book. The legal and financial advisors, investment and commercial bankers, students, and corporate principals for whom this book is intended will, we hope, see this book as a roadmap: a book that sets forth the general issues in most M&A transactions and allows for an insightful reflection on the particular issues arising in any given deal.

Questions as to the negotiation, and effect, of key clauses in M&A contracts will continue to assume central importance in circumstances where the Australian economy is witness to an increasing appetite among companies to participate in M&A activity, both friendly and hostile in nature. Despite the importance and prevalence of M&A agreements, particularly in the energy and resources sector, there is a surprising dearth of practical material on the subject.

This book attempts to fill that gap in the literature by providing perspectives on M&A contracts as revealed through the negotiation and formulation of key provisions. To the extent that matters are left for individual negotiation in each transaction, it cannot be said that there are rules or standards at play with respect to M&A contracts. Rules tend to be clear in advance but crude in application. A standard may make the result less clear in advance and uncertainty can create costs of its own. Still, it may well make sense to proceed case by case because the industry is not yet ready to settle on all the rules. There may even be disagreement about what the right rule should be with respect to particular topics such as, for example, exclusivity. Taking one case at a time, rather than insisting on a clear rule, can be a helpful way of getting through the business of transactions. With that in mind, each of the chapters seeks to explain the significance of a particular contractual provision from a commercial perspective, addressing matters that could be, in most instances, the subject of negotiation.

The book begins with a masterly introduction to the whole topic of corporate transactions and M&A activity by Diane Smith-Gander AO, whose deep experience in the area informs her essay.

Chapter 1 by Andrew Pascoe deals with confidentiality agreements, usually the first document that is executed in a negotiated M&A transaction. In many instances, there will be a need to address market disclosure obligations.

Chapter 2 is concerned with standstill agreements by which a potential bidder agrees not to acquire the target securities for a particular period. Jeremy Wickens examines the functions and benefits of standstill provisions in the context of the application of particular provisions of the *Corporations Act 2001* (Cth).

The related topic of exclusivity is dealt with by Scott Gibson, Hedley Roost and Cameron Bill with input from Adrian Arundell of Azure Capital in Chapter 3. Exclusivity or deal protection devices feature in almost all negotiated M&A transactions. They take a familiar form but one must be careful to not become overzealous lest there is an application to the Takeovers Panel (such as by rival bidders).

Turning from the beginning of a transaction to its middle, Chapter 4 considers the conduct of business covenants that are generally drafted once a definitive transaction document has been signed. From that time, the seller is in effect running the business for the buyer. But there is still the possibility that the deal may not conclude. Conduct of the business during the period of hiatus is of significant commercial importance. Nigel Hunt and Caitlin Morris examine the sorts of covenants about the conduct of the business that are typically agreed.

Chapter 5, by Paul Branston and Panashi Devchand, covers the type of warranties that are usually the subject of negotiation and how the negotiation may be informed by, and relates to, the due diligence process that has been undertaken.

Michael Lishman, in Chapter 6, addresses the complex topic of indemnities which are a common but not particularly well understood feature of M&A transactions. Indemnities involve the allocation of risk between the parties and raise for consideration the extent to which the protection they offer goes beyond remedies for breach of contract.

Chapter 7 by Justin Harris and Paul Vinci deals with limitations on liability, a matter of some importance given the amounts at stake in large corporate transactions. The seller will be concerned to limit its liability in the event of a breach of warranty or an indemnity event, while the buyer will be anxious to keep that limitation under check. The inevitable compromise that is achieved will involve some appreciation of the risk inherent in the transaction.

Mark Paganin and Chris Branston address raising finance and the common purchase price adjustment provision in Chapter 8, a matter that can involve some complexity. There is likely to be some need for clear communication between the parties, and their advisors, when it comes to the financial modelling and assumptions relevant to the operation of purchase price adjustment clauses.

Chapter 9 by James Nicholls, Anthony Papamatheos and Kirsty Hall considers the important matter of conditions precedent, being conditions which, if not satisfied or waived, can allow one or both parties to walk away from the deal. Much will turn on the language used as to who can walk and when.

Chapter 10 deals with termination rights for material adverse change or material breach. Recent dramatic events, including the COVID-19 pandemic, have renewed interest in the careful drafting of material adverse change or material breach of clauses. James Sippe leaves his editorial role to tackle this important topic.

Appropriately, the last chapter considers tax issues which, inevitably, will surface in one way or another in respect of any M&A transaction. Nick Heggart and Tristan Boyd address the key issues at play with respect to relevant considerations when it comes to tax in a M&A transaction.

Pascal remarked that we are consoled by trifles because we are distressed by trifles. This has particular pertinence when it comes to the dogged determination with which parties will sometimes negotiate a specific, individual clause. To the extent that this book seeks to provide a tool kit for professionals involved in doing the deal, it may be seen as a trifle but it is offered as a consolation and tribute. Doing the deal is hard but important work.

We are grateful to each of the contributors for their valuable insights and contributions.

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