

Book Review: The Negotiation of Key Merger & Acquisition Clauses: Getting the Deal Done



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The wheeling and dealing of mergers & acquisitions has had a prominent place in our popular culture since the 1980s. “Wall Street” introduced audiences to a new kind of thriller, featuring corporate takeovers as a form of blood sport. “The Secret of My Success” and “Working Girl” featured M&A as a forum for the plucky all-American hero/heroine to rise from the mailroom to the coveted corner office by nefarious but romantic schemes. “Pretty Woman” and “The Thomas Crown Affair” advanced a new warrior protagonist; the cut-throat M&A billionaire with a heart ready to be melted and US Senators on speed dial. More recently M&A has provided fertile ground for legal dramas such as *Suits*.

Behind every successful merger lies a battlefield strewn with exhausted lawyers and shattered egos. Many an overly invested junior lawyer has resigned in horrified disbelief over the Hollywood level bitterness and hostility that can be displayed in the negotiations.

Despite its media popularity, there has been a lacuna in the legal literature. The viewer may be spoilt for choice in terms of popular representations of

cut-throat business dealings, but the purchase of a simple book setting out first principles of M&A law has been difficult if not impossible. *Mergers & Acquisitions for Dummies*, published in 2023 and promising “a thorough understanding of what the heck is going on” presented for the first time a beginner’s guide to the key legal concepts. *The Negotiation of Key Merger & Acquisition Clauses: Getting the Deal Done (Getting the Deal Done)* is an intellectually satisfying and practically more effective alternative addressing the Australian jurisdiction.

Getting the Deal Done addresses the content of the key clauses relevant to M&A transactions in a series of essays edited by notable M&A intellectuals Kanaga Dharmananda SC, Emma Scotney, and James Sippe. Authored by some of Australia’s foremost hands-on practitioners in this complex area of law, the essays cover each of the critical clauses common to all M&A transactions.

As one might expect of an expert text edited by this trilogy of intellectuals, *Getting the Deal Done* has a strong paedagogic flavour. What delights the reader, however, is the underlying commercial practicality

of the text. The connection between the complexities of the legal transaction and the underlying commercial considerations of the parties is effortlessly illustrated in each of the 11 chapters, making the book practical and accessible for industry professionals as well as lawyers.

The strong and competent hands of the editors are reflected in the consistency of tone across the chapters. Overall the text is accessible and easy to read. Each chapter is delightfully headed with popular references and concludes with a summary of the key points made. Checklists provide a simple reminder of the topics covered in each chapter.

Getting the Deal Done is worth reading for the introduction alone. The essays are introduced by Diane Smith-Gander AO, whose insight and experience are immediately apparent from her opening comments. Her pithy set of seven practical tips to a successful merger are a must read for anyone engaged in or advising on the M&A legal process.

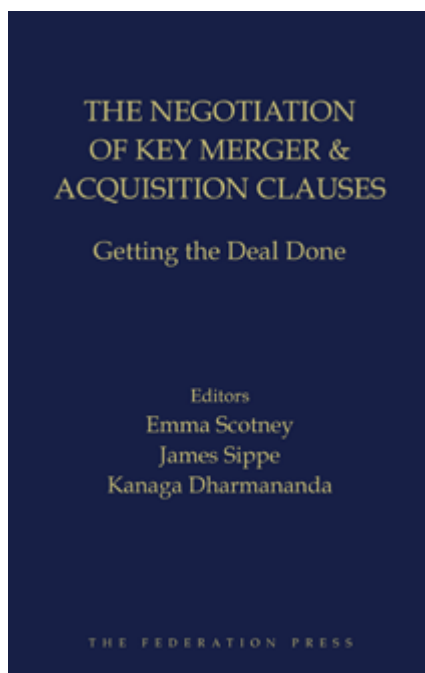
In “Keeping Secrets” Andrew Pascoe deals effectively with the traditional opening gambit of the M&A transaction,

the confidentiality clause. Jeremy Wickens tackles the strategic importance of stand-still provisions in "Holding Steady" and provides an important guide to the international authorities that often guide Australian practitioners. The chapter on deal protection by Scott Gibson, aptly titled "Going Exclusive", tackles the most hotly negotiated aspects of Australian M&A transactions in simple language, reducing complex deal protection devices to easily understood contractual concepts.

Nigel Hunt and Caitlin Morris co-author the chapter which will be of primary interest to commercial litigators; the conduct of business covenants. The clauses dealing with business covenants (or the absence of them) are very often the source of post-merger aggression, particularly in transactions involving family companies. In "Minding the Store" Hunt and Morris set out the fundamental principles of the business covenant and the mechanisms by which business as usual is intended to continue throughout the transaction in easy to follow language.

Chapters five through seven deal with very familiar contractual concepts for any experienced construction lawyer; warranties, indemnities and limitations of liability. The collective knowledge of Paul Branston, Panashi Devchand, Michael Lishman, Justin Harris and Paul Vinci is neatly contextualised for the M&A market, highlighting potential pit-falls in the negotiations process and provide a thorough refresher course in how to construct these essential clauses. Every junior construction lawyer would benefit from reading these chapters, as well as any professional (legal or otherwise) engaging in M&A transaction.

Chapter eight is perhaps the most challenging of chapters for the legal reader. Aptly titled 'Money Matters' it deals with finance and purchase price adjustments; traditionally areas in which lawyers rely heavily on expert financial advice. This



reader succumbed to the temptation to skip this chapter on first reading and come back to it later. It turns out that it was unnecessary - Mark Paganin and Chris Branson manage between them to explain in plain English such esoteric terms as 'locked box' and 'leakage' and describe the various forms of adjustment in an accessible way that doesn't leave the legal reader confused or dejected. The knowledge contained in this chapter has traditionally taken years of practical M&A experience for young solicitors to acquire.

Even lay readers with no vested interest in M&A transactions may enjoy the aptly named "Are we there yet?", a chapter by James Nicholls, Anthony Papamatheos and Kirsty Hall explaining the gap between media fanfare and the practical realities of meeting conditions precedent in the context of public M&A transactions. This chapter is essential reading for anyone wishing to propound knowledgeably in the ways of public mergers.

James Sippes' survey of material adverse change (MAC) clauses in the M&A context is disappointing only for its brevity. This chapter could, in this respectful reader's opinion, be expanded to be a stand-alone textbook on the importance and working of termination rights in the M&A context, concepts not given enough attention in a legal environment in which break-fees are rarely made public and jurisprudence is almost non-existent. It aptly but too briefly makes the critical point for the Australian legal community; that MAC clauses, though rarely enforceable, can directly affect stock prices during an acquisition period and have very significant commercial implications notwithstanding their limited legal effect. This is a concept that lawyers new to M&A struggle to appreciate quickly on their early transactions.

The book closes with Nick Heggert and Tritan Boyd's ambitious attempt to elucidate the intricacies of death and taxes in the M&A context. As they rightly note at the outset of the chapter, a comprehensive analysis of the tax issues and outcomes that can arise from a M&A transaction is beyond scope, as are the complex cross-border taxation issues that can arise. However, what they do provide very well is a simple overview of key Australian tax concepts and consequences that will guide the reader to obtaining and then understanding the best advice from dedicated experts. The key points and checklists provided in this chapter offer the reader a frame-work for understanding what is at issue and what must be resolved in the negotiations and drafting.

Getting the Deal Done is an outstanding addition to any commercial business library. Company directors, bankers and students will derive as much benefit from it as experienced M&A lawyers. It may well take a canny reader from the mailroom to their first corner office. ■

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