M&A 2024 Outlook

Public M&A trends and strategies

November 2023

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CORRS CHAMBERS WESTGARTH

Deal predictions based on real data

We look beyond statistics to consider what strategies and drivers will really matter to bidders, targets and shareholders undertaking a public M&A deal in 2024.

This report is based on the most recent data taken from our proprietary database and in-depth research for the 12 month period ended 30 September 2023.

Contents

01	Predictions for 2024	4
02	Key trends and insights from 2023	8
03	Strategies for bidders and targets in 2024	24
04	Regulatory updates	32
05	In focus: REITs	38
06	Methodology	42
	Contacts	46

Introduction

After a strong start to the year, and a much quieter middle of the year in terms of deal activity, M&A has made a surprising comeback with a burst towards the finish line in 2023.

This deal period has mirrored the prior 12 month period, with an equal total of 56 deals announced in the review window. Anecdotal evidence suggests that it will remain that way until at least the end of the year.

Competition is hot for good targets, with approximately 20% of deals being contested, and resources continue to dominate the Australian M&A landscape with gold, oil and gas, and critical minerals featuring heavily.

Debt has expectedly been a less popular source of funding in the last 12 months. However, interest rates do now appear to be stabilising, although the November RBA rate rise demonstrates that rate increases are not over. Recent events have shown that geopolitical stability is precarious and can also flare up at any moment and skew the results and predictions. The continued unrest in the Middle East and Ukraine could also impact oil prices, inflation and interest rates, all of which could affect the appetite for M&A.

In an environment of big highs and big lows, and with deal execution still challenging for many players, 'fragile' is the best description of our M&A outlook for the coming 12 months.

> "The bravest are surely those who have the clearest vision of what is before them, glory and danger alike, and yet notwithstanding, go out to meet it.
>
> Thucydides, History of the Peloponnesian War

> "That will make money.
>
> Barbie Movie

01

Predictions for 2024

1. M&A will remain robust but it is precarious
2. Energy and resources, the energy transition and REITs will be sectors of interest
3. Continued focus on ESG due diligence
4. Foreign bidders to rise, especially from Five Eyes nations
5. More requests for pre-deal hard exclusivity arrangements
6. Reverse break fees are here to stay

1. M&A will remain robust but it is precarious

We are predicting a busy period for M&A in the next 12 months, but with periods of volatility in between and continued challenges in execution. Market confidence is returning now that interest rates are settling down, though that may be about to change, and a 'soft landing' is appearing even more likely.

The last quarter of our review period (July – September) saw 17 transactions announced – the most deals announced comparatively in that quarter for the past five years.

This is not to suggest that we are out of the woods yet, with inflationary pressures in Australia, plus a looming mortgage cliff, to still play out in the economy. Any rebound that is underway should still be treated as precarious if confidence shifts or inflation increases – and incidents like the recent geopolitical instability in the Middle East can easily change dynamics overnight. We expect continued challenges in executing transactions with bidders looking to protect themselves against overpaying for assets in an uncertain environment, and targets looking to ensure the greatest degree of certainty before agreeing to recommend a transaction.

2. Energy and resources, the energy transition and REITs will be sectors of interest

We expect continued interest in these sectors and in lithium in particular (at the time of printing, the battle for Azure Minerals also remains ongoing). The battle for Liontown and its subsequent equity raising, following Albemarle's withdrawal of its bid, also indicates that the sector is not without its challenges, particularly in the development phase and in circumstances where the commodity price is challenged.[1]

Not a single public M&A transaction was announced in the last 12 months for a target in the real estate sector, but we predict that this will change in 2024. Strategic mergers between publicly listed real estate investment trusts (**REITs**) will increasingly begin to make sense as scrip-for-scrip mergers present an opportunity for larger players to bridge valuation gaps, consolidate in a sector or enable diversification of asset classes, build scale or accumulate assets for when the economy turns.

As noted in our FIRB article, not every bidder interested in critical minerals or real estate will be able to have its pick of targets – foreign investment scrutiny over bidders and their country of origin will play a role in determining how active the sector is and who is likely to have the best chance of buying.

3. Continued focus on ESG due diligence

As Benjamin Franklin wisely noted: "diligence is the mother of good luck". Ever-increasing stakeholder expectations and regulatory pressures continue to make ESG a threshold diligence item for many bidders. A cursory management statement of compliance is no longer an acceptable approach. ESG considerations are increasingly front of mind for bidders and a stage 1 diligence item for private equity and strategic bidders alike. Australia has been slower on the uptake of ESG diligence compared to other foreign jurisdictions, but it is now becoming more commonplace in both public and private M&A.

The Australian Securities and Investments Commission (**ASIC**) is also very alive to greenwashing and the misrepresentation of financial products and investments as environmentally friendly, sustainable or ethical. Targets and bidders alike need to be cautious around statements being made about underlying businesses and ESG due diligence will help with addressing that.

4. Foreign bidders to rise, especially from Five Eyes nations

In the last 12 months, Australian domiciled bidders have dipped by almost 10%. However, bidders from the remaining Five Eyes nations[2] are up 9% against the previous 12 months, so while there is more offshore bidding underway, it is still fairly concentrated on the Five Eyes nations and we expect this to continue.

The increasing requirement from targets for bidders to have already obtained, or at least sought, Foreign Investment Review Board (**FIRB**) approval prior to signing binding documentation combined with hefty filing fees will deter bidders from jurisdictions that are not as favoured by FIRB as the Five Eyes nations.

The weakening of the Australian dollar against the US dollar in the last two years, by as much as 20%, has made Australian targets much more attractive for foreign buyers, and the deals at the big end of town are almost exclusively completed by foreign buyers. While deals like Newcrest and Origin do skew the results, the average deal value for foreign bidders is A$2.4 billion / A$533 million from domestic bidders.

We expect that this trend will continue as Australia remains a source of attractive assets at a good value, particularly given foreign exchange rates.

1 Corrs advised Albemarle and is acting for Azure Minerals.

2 The Five Eyes nations comprise the United States, the United Kingdom, Canada, New Zealand and Australia.

5. More requests for pre-deal hard exclusivity arrangements

Following new Takeovers Panel guidance on lock-up devices, we expect that bidders are going to be more likely to ask for exclusivity given the available guidance on hard exclusivity agreements. We expect targets will also be more comfortable to provide it, simply because there are now parameters which are acceptable to the Takeovers Panel.

This statistic will be difficult to measure, as the pre-deal exclusivity arrangements are not always disclosed to the market, and bidders will be even more likely to ensure that they structure target discussions in a way that can avoid disclosure of exclusivity in line with the Takeovers Panel guidance. We also expect that the market will default to a four week exclusivity period in line with the Takeovers Panel determination of this number as the acceptable standard. See more details set out in the pre-bid exclusivity article.

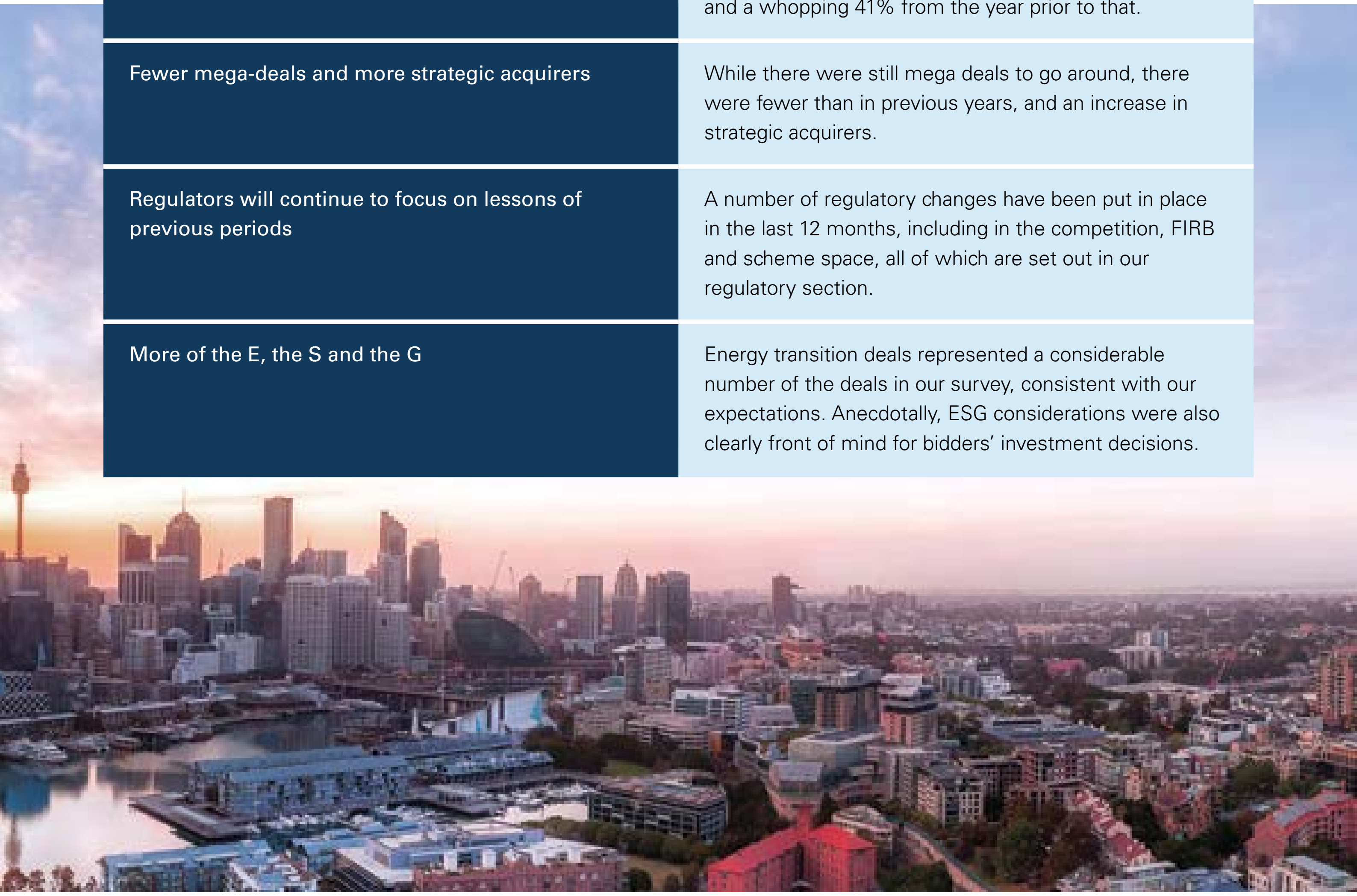
6. Reverse break fees are here to stay

The past few years have seen the steady increase of reverse break fees, a fee payable by the bidder to the target upon termination of the transaction in certain scenarios. We predict this is not an anomaly, but rather a constant that we can expect to stay as a feature in M&A.

Four years ago, approximately 35% of all deals included a reverse break fee and we are now seeing that approximately half of all deals within the survey period included an agreed reverse break fee. We expect the rise of the reverse break fee is partially attributable to the volatile environment of the previous few years, and with further uncertainty ahead, we expect these numbers to remain at this level (or higher) for at least the short to medium-term future.

How did we go?

Predictions made for 2023	Results
Slower activity levels but public M&A will rebound	We predicted that public M&A activity will rebound following the COVID dip of 2020. This has proven correct with the last 12 months equalising the highest number of deals in a 12 month window in the last decade.
Domestic energy and resources sector to remain buoyant	Energy and the metals/mining sector were together responsible for more than 41% of deals in the past 12 months and have indeed remained buoyant.
Out of favour sectors will be back in vogue	The industry sector that saw the largest jump in number of deals was the software/services industry representing almost 20% of deals in the past 12 months as compared to 10% in the prior survey period.
Bespoke structures crucial to deals	A number of bidders approached deals through both a scheme and takeover structure or engaged in joint bids to ensure deal success.
Greater use of pre-bid stakes	Pre-bid stakes were up 14% for takeovers since last year, and a whopping 41% from the year prior to that.
Fewer mega-deals and more strategic acquirers	While there were still mega deals to go around, there were fewer than in previous years, and an increase in strategic acquirers.
Regulators will continue to focus on lessons of previous periods	A number of regulatory changes have been put in place in the last 12 months, including in the competition, FIRB and scheme space, all of which are set out in our regulatory section.
More of the E, the S and the G	Energy transition deals represented a considerable number of the deals in our survey, consistent with our expectations. Anecdotally, ESG considerations were also clearly front of mind for bidders' investment decisions.



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Key trends and insights from 2023

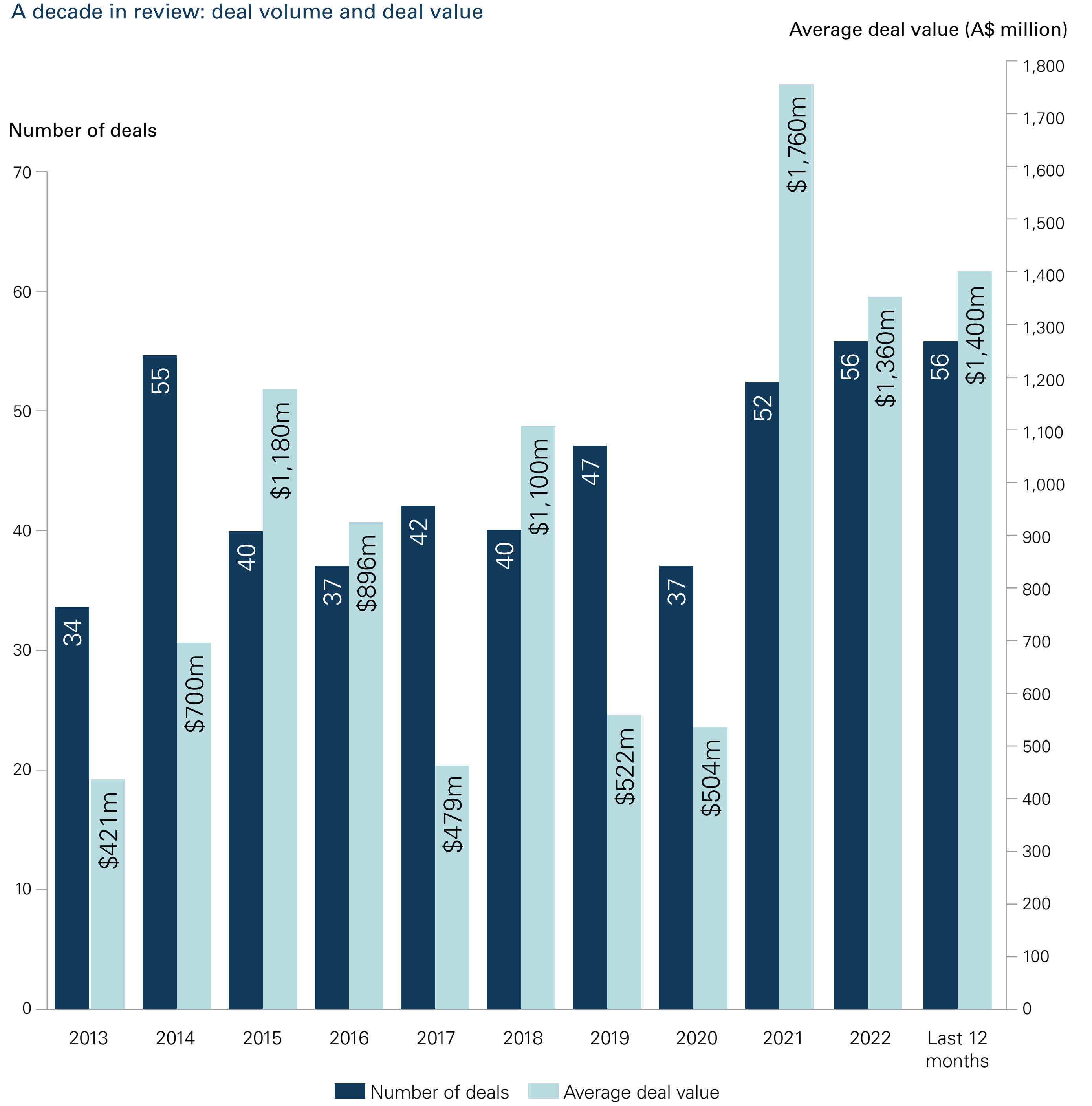
What happened in the 12 months leading up to 30 September 2023 and which of our predictions were correct?

Deal volume and values remained high

In the past 12 months, Australian public M&A witnessed a continuation of the higher levels of activity we saw in 2022, despite a more subdued macro environment. A total of 56 deals were announced with an average deal value of A$1.4 billion. This milestone represents the equal highest number of deals for any year in the last decade, matching the 2022 tally.

> Our prediction that public M&A would rebound has proven to be correct

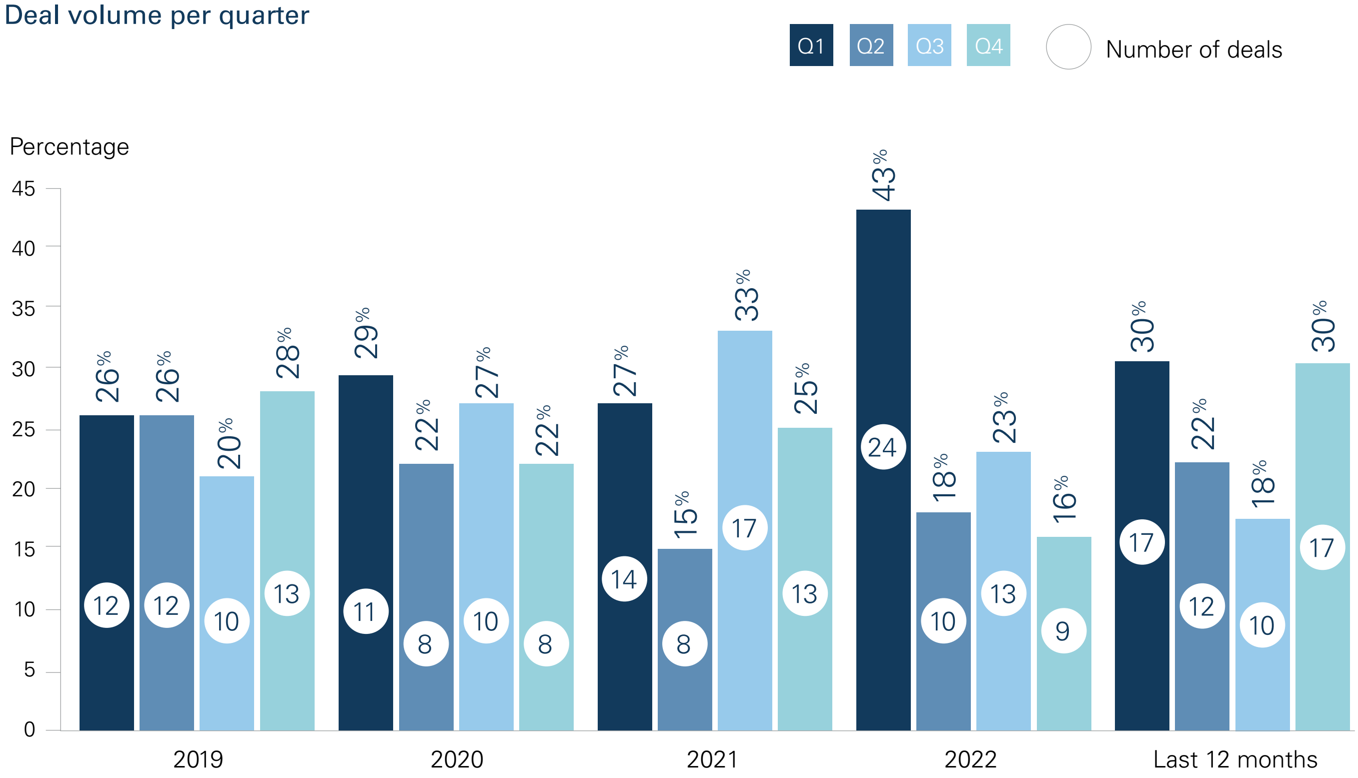
A decade in review: deal volume and deal value



Deal spread indicates a transition into consistency

Deal activity was relatively consistent across the last 12 months, with a small dip in both Q2 and Q3. Comparatively, last year's activity was heavily weighted to Q1 of the survey period, being the last quarter of calendar year 2021, which is consistent with the anecdotal experience that there was a drop off in activity in calendar year 2022. If Q1 is excluded from the 2022 statistics, on average there was a significantly greater level of activity in the last 12 months than in 2022.

Deal volume per quarter



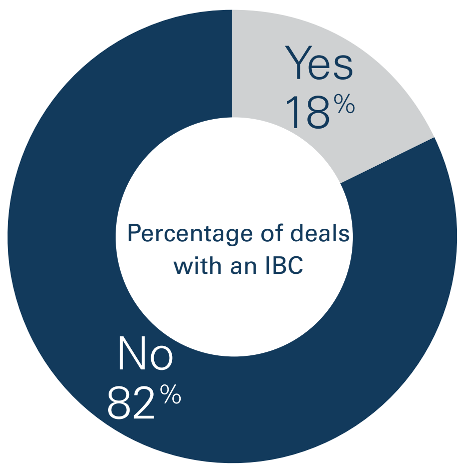
Prevalence of independent board committees

This year is the first year we have looked at the prevalence of independent board committees in public M&A transactions. Our survey showed that in the last 12 months, approximately 18% of the target companies established an independent board committee (**IBC**). This statistic highlights the material number of transactions which involve potential conflicts, related party transactions or differential treatment of management and is consistent with the general experience of deals being more complex and harder to execute.

It is also indicative of the number of transactions where a representative of the major shareholder sat on the board or a board member was incentivised to participate in some way.

Examples include:

- the bidder having a nominee director on the target's board prior to completion of the transaction (such as Best & Less Group, Thorn Group and Pact Group);
- target directors being otherwise related to the bidder (such as Pushpay); or
- target directors intending to rollover as shareholders following the transaction (such as Elmo Software and Alloggio Group).



Note: each target company was counted only once, even if they were the subject of multiple bids.

ESG in the M&A space

We predicted last year that we would see a lot more public M&A being led by ESG outcomes, which has proven to be true. The number of deals that are fuelled by ESG drivers has significantly increased over the past two years, with the percentage of resources targets with a critical minerals interest rising from 28% in 2021 to 47% in the last 12 months.

Investing in targets that are either ESG conscious or can improve the ESG status of a bidder have proven to be popular or even assist in the granting of certain regulatory approvals.

The scheme between Origin Energy and Brookfield is a clear example of the ESG influence in the regulatory space. In considering the scheme, the ACCC was not satisfied that the proposed acquisition would not be likely to substantially lessen competition, however the likely gains for Australia's renewable energy transition amounted to public benefits that sufficiently outweighed the likely public detriments.

We have predicted that in the coming years the stakeholder expectations and regulatory pressures will also continue to make ESG a threshold diligence item for many bidders. A number of public M&A transaction documents this year included disclosure of transition risk (where changing environmental legislation may make existing business practices difficult or impossible) and social risk (that is, a company may lose its social licence should they fail to meet social expectations).

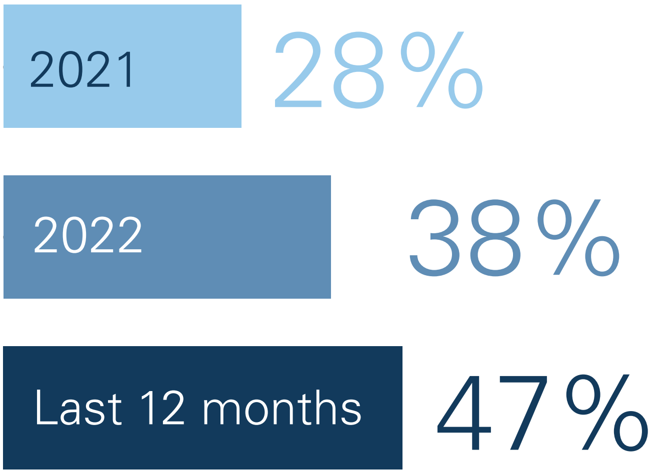
Essential Metals described the risk by noting that it "may be required in the future to transition its mining operations to decarbonised mining operations". Meanwhile, Musgrave Minerals was more specific – noting the risk that rules around the "disposal of mining and process waste and mine water discharge" would change – two facets of mining it described as being "under constant legislative scrutiny". Similarly, DDH1 noted "various environmental legislation and regulations could affect [its] operations".

Disclosure of transition risk and social risk in Australian M&A suggests that businesses are increasingly being valued by reference to their role in the energy transition and the support which the Australian public are likely to give them.

'Critical minerals' are the minerals which are required to build complex electrical infrastructure and will therefore be in high demand during the energy transition. Minerals like copper, lithium and zinc are required to construct transmission cables and batteries. This graph demonstrates how targets with critical minerals interests have become highly sought-after targets in Australian M&A.

> We predicted that 2023 would see more of the E, the S and the G, which has proven to be correct

Percentage of resources targets with critical minerals interests



Other ESG considerations: misconduct and disclosures

In early October 2023, the United States Department of Justice announced a new Safe Harbour Policy for voluntary self-disclosure of misconduct uncovered during the M&A process. The policy would provide acquiring companies an opportunity to avoid prosecution if they disclose potential criminal conduct by the acquired company within six months of closing if they also promptly remediate misconduct, fully cooperate with subsequent investigations, and pay restitution or disgorgement. In her announcement speech, the Deputy Attorney General Lisa Monaco warned the market to "invest in compliance now or your company may pay the price – a significant price – later."

While pre- and post-close due diligence has long been an integral part of any deal, the Safe Harbour Policy ups the stakes for prompt and comprehensive reviews of a target's approach to compliance and investigations to identify potential illegal conduct for acquiring companies with relevant jurisdictional nexus to the United States.

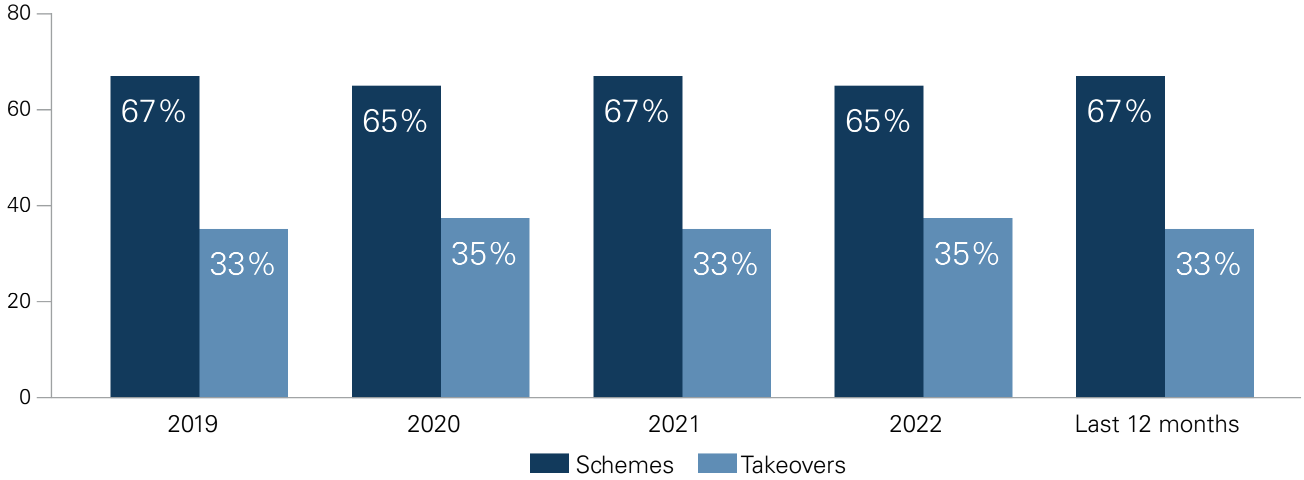
We anticipate post-acquisition investigations of target companies for misconduct will become more commonplace as acquirers seek to take advantage of the policy timeframes, and that a more rigorous compliance microscope will be applied to new transactions.

Schemes remain the preference

The general popularity of schemes vs takeovers remains the same as for prior years, with schemes used on more than two thirds of deals surveyed. While schemes remain popular for the usual reasons related to transaction certainty, there still clearly remains a place for takeovers which we saw used to great effect in the last 12 months on competing deals (e.g. Warrego) and as a concurrent structure with a scheme to encourage minority shareholders to support the scheme (e.g. Nitro and intelliHR).

Schemes vs takeovers

Percentage of total deals

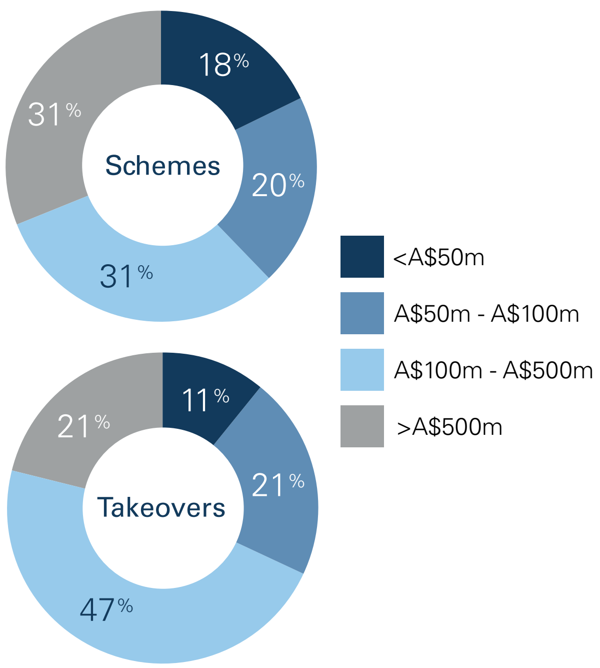


Note: the concurrent scheme and takeover bids of Nitro Software/Cascade and intelliHR/The Access Group have been counted in both the scheme and takeover statistics.

Takeovers popular in the mid-market, schemes dominate big money

A closer examination of this data reveals an interesting disparity in the distribution of takeovers across deal values. In the past 12 months almost half the takeovers were concentrated in the A$100 million to A$500 million deal value range, in contrast to schemes, which exhibit a much more even spread across the deal values.

Deal type across value range

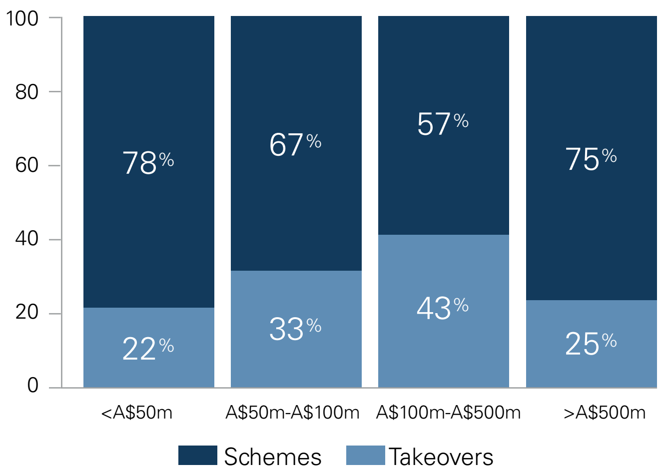


While there were overall fewer deals in the A$1 billion plus range, they were still present. Of the deals in the A$1 billion plus market range, all were schemes except for the off-market bid for Healius by Australian Clinical Labs, which at the time of printing was ongoing. A total of 75% of deals over the A$500 million deal value were schemes.

We predicted fewer 'mega-deals' in 2023, which has proven to be correct

Schemes vs takeovers per deal value

Percentage of deals



Takeover success rates soar

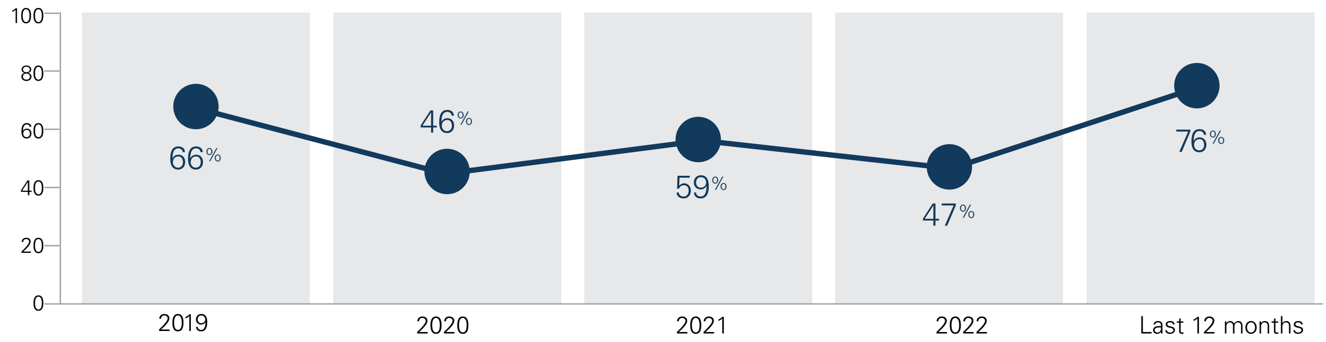
Takeovers had their time to shine this year, with the past 12 months marking an impressive 76% success rate, a substantial increase compared to the 47% success rate in 2022 and a five year high.

There was also a big jump in the use of pre-bid stakes for takeovers.

> We predicted that there would be a greater use of pre-bid stakes, this has proven to be correct for takeovers

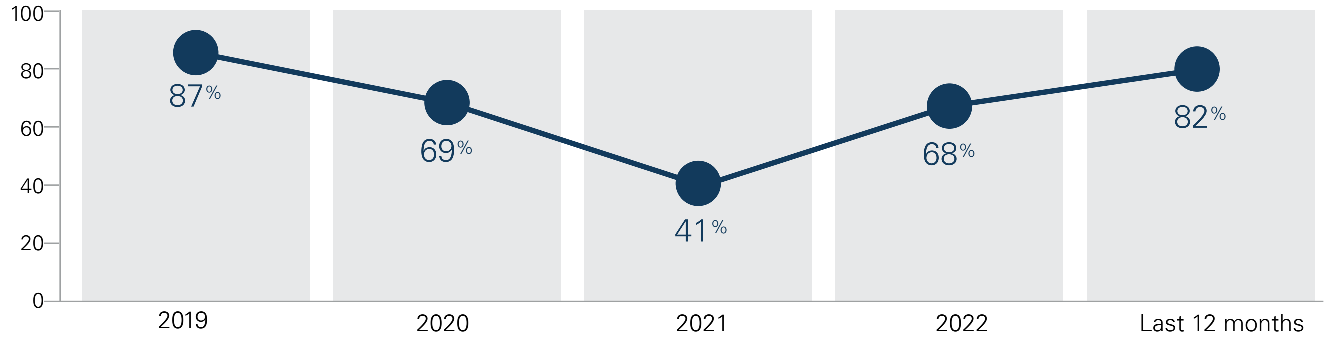
Takeover deal success

Percentage



Pre-bid stakes in takeovers

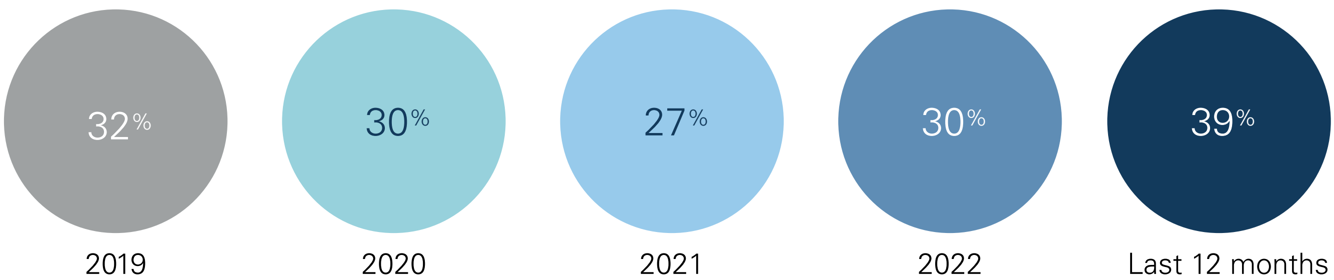
Percentage



More delays in deal completion

Almost 40% of all deals announced were marked as 'ongoing' at the end of the survey period (i.e. 30 September 2023). There will always be some deals which have either not completed or terminated at that time, but this statistic is materially higher than previous years. This reflects the fact that deals are on average taking much longer to complete, with a number of significant deals facing delays due to regulatory approvals or uncertainty regarding shareholder support (often brought about because a delay has resulted in market conditions moving and gaps in valuation opening up). Deals with longer than average timetables include the Carbon Revolution and Twin Ridge merger (announced in November 2022 and completed in October 2023), Newcrest (announced in May 2023 and completed in November 2023), Origin Energy (announced in March 2023 and still ongoing) and Allkem (announced in May 2023 and still ongoing).

Percentage of deals ongoing at the end of survey period



Overrepresentation from a few large deals

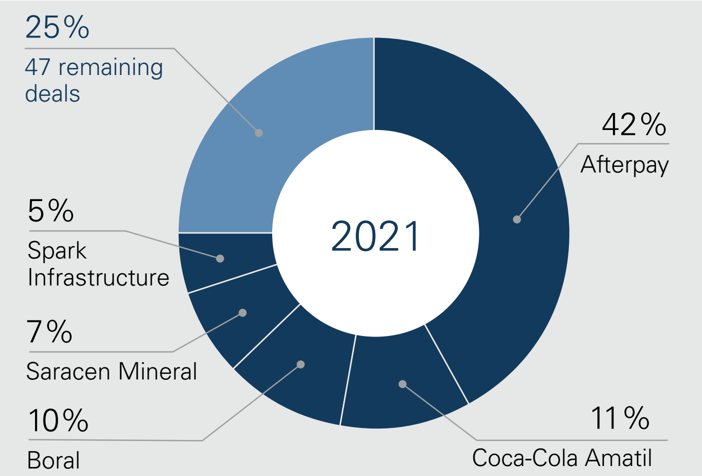
Overall transaction value was dominated this year by a small number of very large deals. As with previous years, we are seeing that the five highest value deals make up over 70% of the overall deal value (the majority of which were also international buyers).

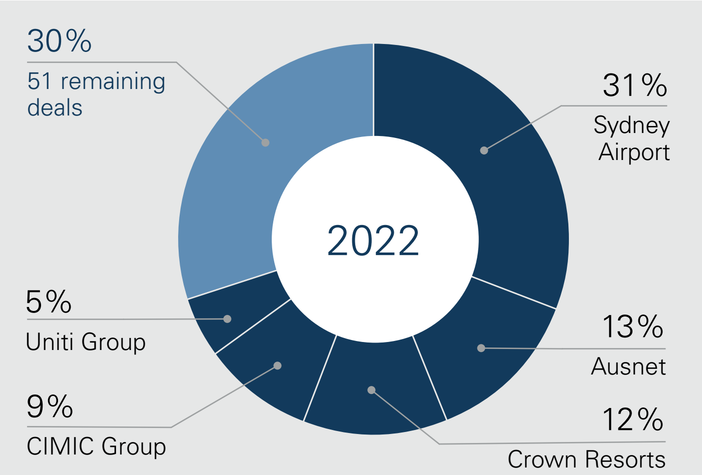
The 'Newcrest effect' was present in previous years (e.g. Sydney Airport in 2022 and Afterpay in 2021) but is more pronounced this year with the five largest deals representing almost 80% of deal value.

Average deal value for the survey period stands at A$1.4 billion, which is heavily influenced by the five largest deals, whereas the median deal value is considerably lower at A$165 million.

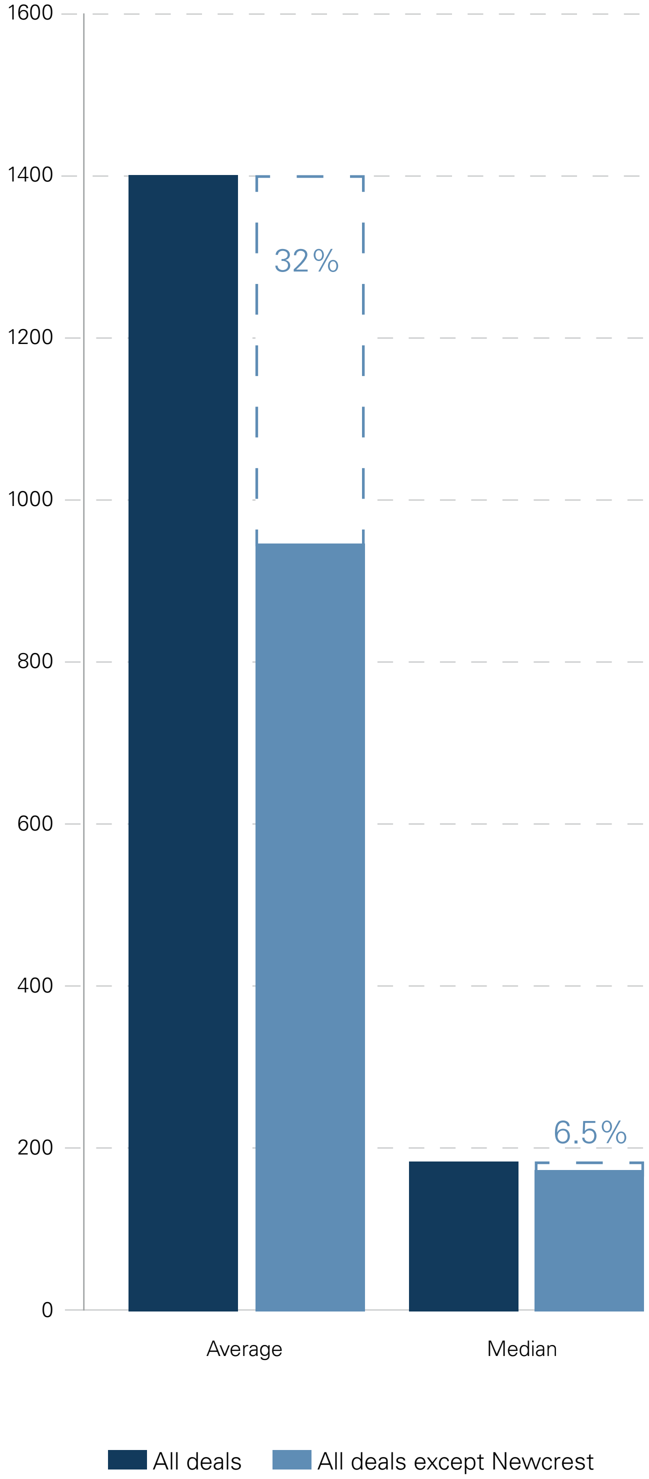
If Newcrest is removed, the average deal value is reduced by 32%, to A$948 million.

Top five deal value





Sensitivity of averages and medians with the 'Newcrest effect'

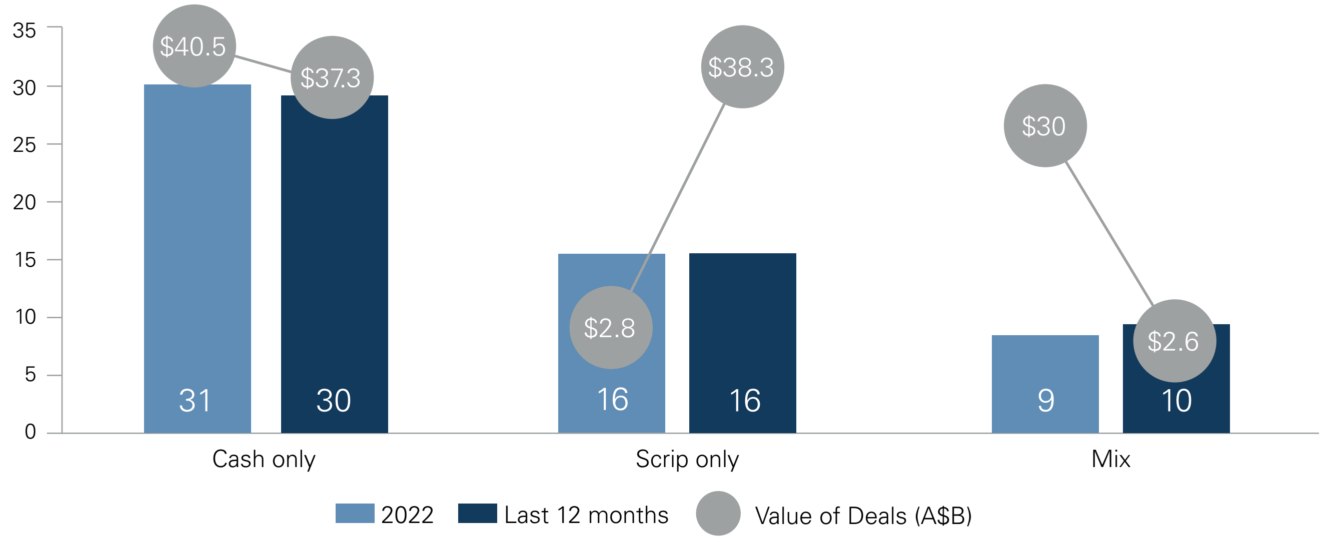


The value of scrip

The number of deals offering cash, scrip or a mix of cash and scrip is similar across 2022 and the last 12 months. However, although 2022 and the last 12 months had the same number of scrip deals, the value of scrip deals was 13.7 times higher in the last 12 months, and the value of deals using a mix of cash and scrip was 12 times lower.

Bidders appear to be much more likely to be using scrip on bigger deals in the last 12 months compared to 2022, which no doubt reflects the difficulty in securing debt on attractive terms in a rising interest rate environment and in the sectors in which we saw large deals this year.

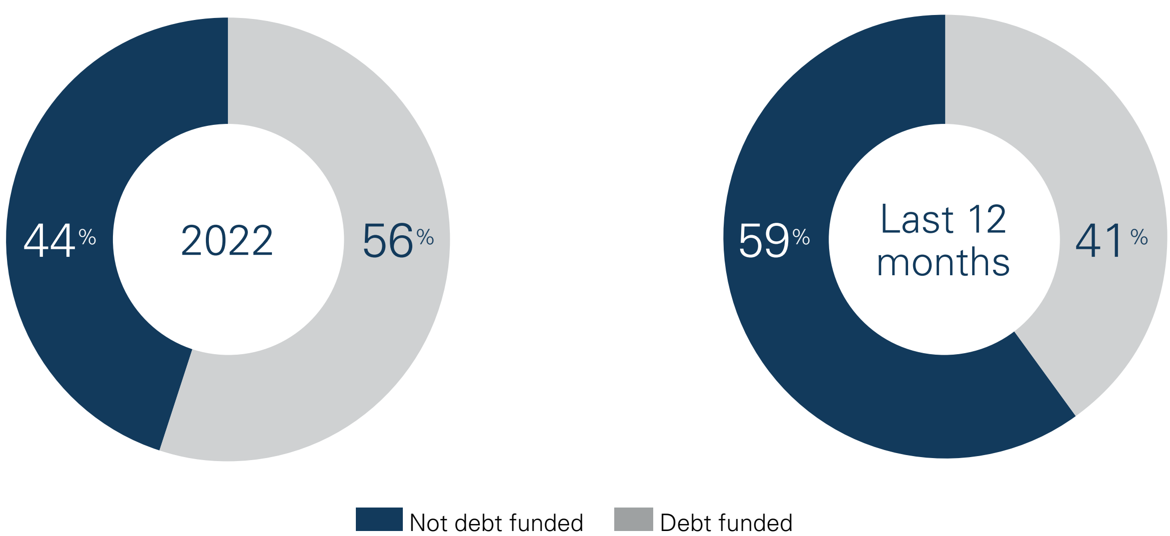
Type of consideration and total value of consideration



The rising cost of debt

Cost of debt seems to have had a significant impact on how M&A transactions were funded during the last 12 months. Between May 2022 and November 2023, the RBA raised the cash rate 13 times, from 0.10% to 4.35%. This had a knock-on effect on cost of funding and in addition margins increased as lenders more generally priced for higher risk. In turn, this flowed through to how M&A transactions were funded, with a 15% drop in debt funded M&A compared to 2022. Looking to 2024, there are lingering question marks as to whether inflationary pressures are easing, particularly with the recent conflict in the Middle East and any flow-on effect to the supply of oil. Conflicts aside, given moderate inflation seems to be here for a while, vendors are expected to adjust their price expectations to take into account the higher cost of debt. If that happens, it should arrest the decline in debt funded M&A and we might even see an uptick in debt funded M&A.

Percentage of cash or cash/scrip deals that were funded by debt



Sponsor deals on the rise and unique opportunities arose

It is well known that sponsor activity has sharply fallen away over the last couple of years due to a number of factors including persistent inflation, the fastest tightening of rates in a generation, a softening Chinese economy and on-going supply chain disruption from the war in Ukraine. However, we have seen some promising green shoots this year with more sponsor deals than last year, and while the numbers are not back to pre-COVID levels, there is some encouraging conviction both on very large take-privates (e.g. Origin) and more complex structured deals (e.g. Slater & Gordon).

Our view is that a combination of a difficult operating environment for many businesses with COVID-era debt packages and sponsors having greater certainty on valuation should help drive a contraction in valuation gaps. Vendors are likely to adopt a more realistic price expectation or will be forced to take on more structured capital solutions outside of traditional debt and equity offerings. This should play well for domestic and international sponsors operating in Australia (with international sponsors also benefiting from the weak Australian dollar).

Sponsors remain open to, and are actively pursuing, novel structuring arrangements to protect their downside exposure given recent volatility across the economy. Whilst sponsors are flush with cash after strong fundraising and lower deployment through FY23, they will not be immune from pain, with some of their own portfolio companies likely to be formally restructured as lenders lose patience with covenant breach waivers.

This should in general drive activity levels upwards, however, asset quality remains the obvious and critical determinant for whether we see execution levels move upwards more quickly or slowly. We expect sponsors to therefore target sectors with counter-cyclical protections (essential technologies and energy transition should remain in focus) and those with heavy exposure to business and consumer discretionary spend (consulting, non-essential retail and travel), where opportunities to 'buy well' should begin to emerge.

Our prediction that bespoke structures would be crucial to deals has proven to be correct

Debt and equity buy-out

Allegro's acquisition of Slater & Gordon is a good example of the creative structuring undertaken by some funds to unlock opportunities which might be missed by others.

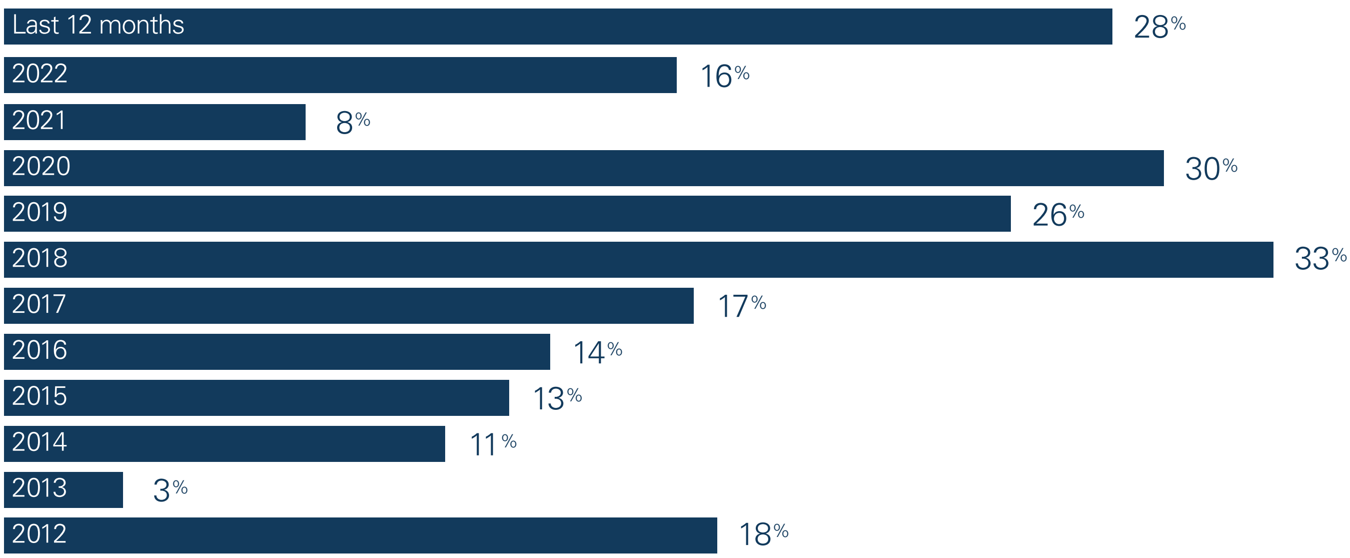
It had a unique capital structure with more than 95% of the listed shares owned by hedge funds which also owned 100% of a super senior secured facility with the remaining 5% held mostly by management and retail holders. Allegro negotiated debt purchase deeds with the hedge funds and proceeded with an off-market takeover which allowed the hedge funds to sell their debt and equity for an 'all-in' price of less than 100 cents in the dollar on the debt outstanding while other shareholders would have the ability to retain an offer price of 55 cents per share for their equity under the takeover which aligned with the trading price.

A conditional separation agreement also had to be negotiated between Allegro and the hedge funds to allow for resolution of various matters between Slater & Gordon and the UK business owned by the hedge funds upon obtaining control.

The terms and steps of the transaction needed to be carefully structured to comply with the applicable disclosure, takeovers and related party transaction rules.

Corrs advised Allegro on the acquisition of Slater & Gordon.

Private equity deals by percentage of total deals

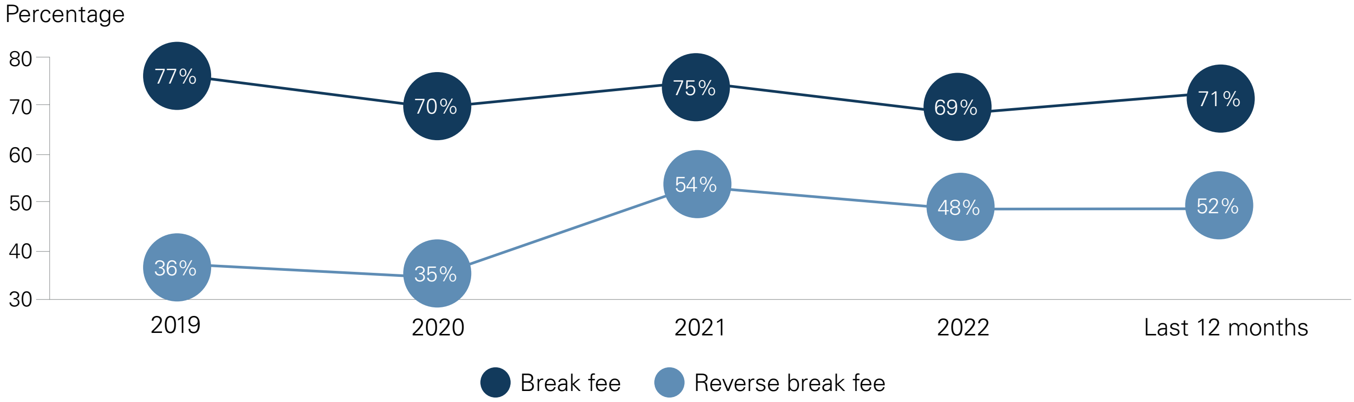


Break fees – both sides are paying in these break ups

Use of break fees in Australian public M&A has remained largely unchanged in the Australian market for the past five years, with limited variation in the data. Break fee values are also consistently being struck at the 1% mark, which is in line with Takeovers Panel guidance.

Reverse break fees, while not as common, have retained a consistent presence since their initial jump in 2021 and we do not expect that to change any time soon. Reverse break fees also sat at approximately the 1% value mark. The key outlier to this, and another example of the 'Newcrest effect', was the reverse break fee payable by Newmount, which was approximately A$581 million (or 2.22%).

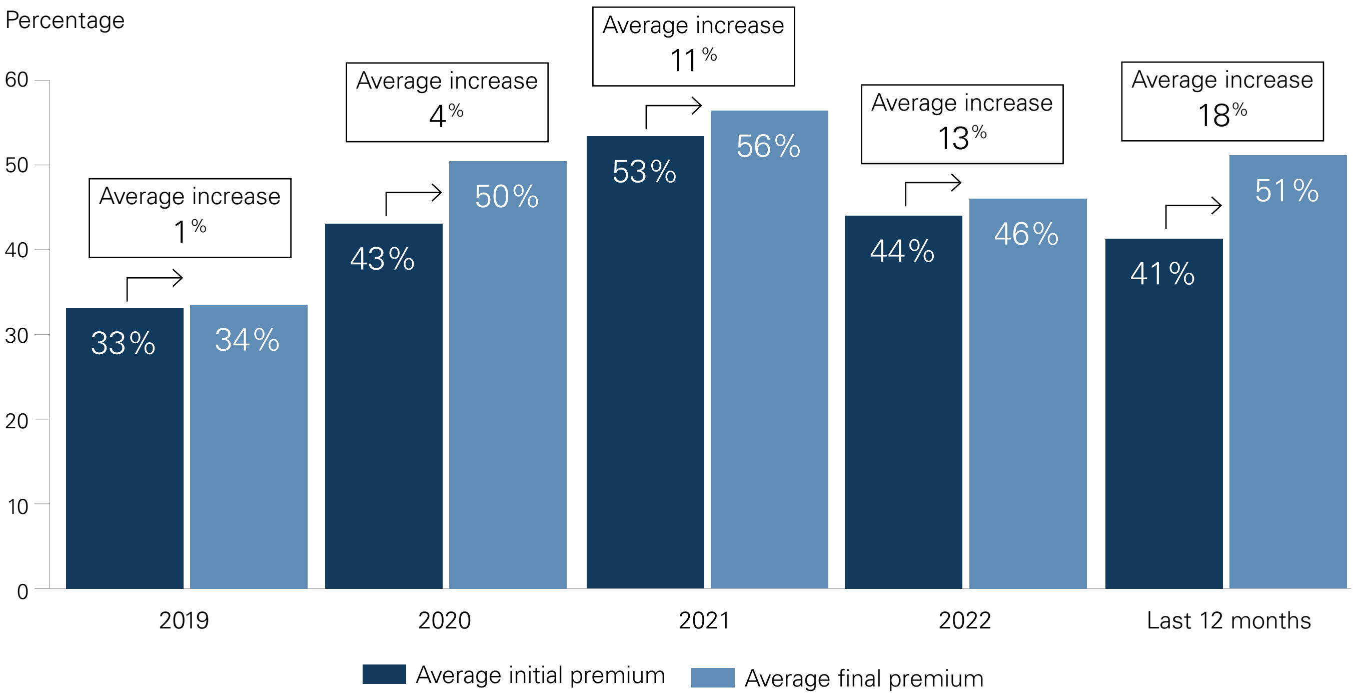
Percentage of deals with break fees and reverse break fees



Average increase in takeover premia at all time high

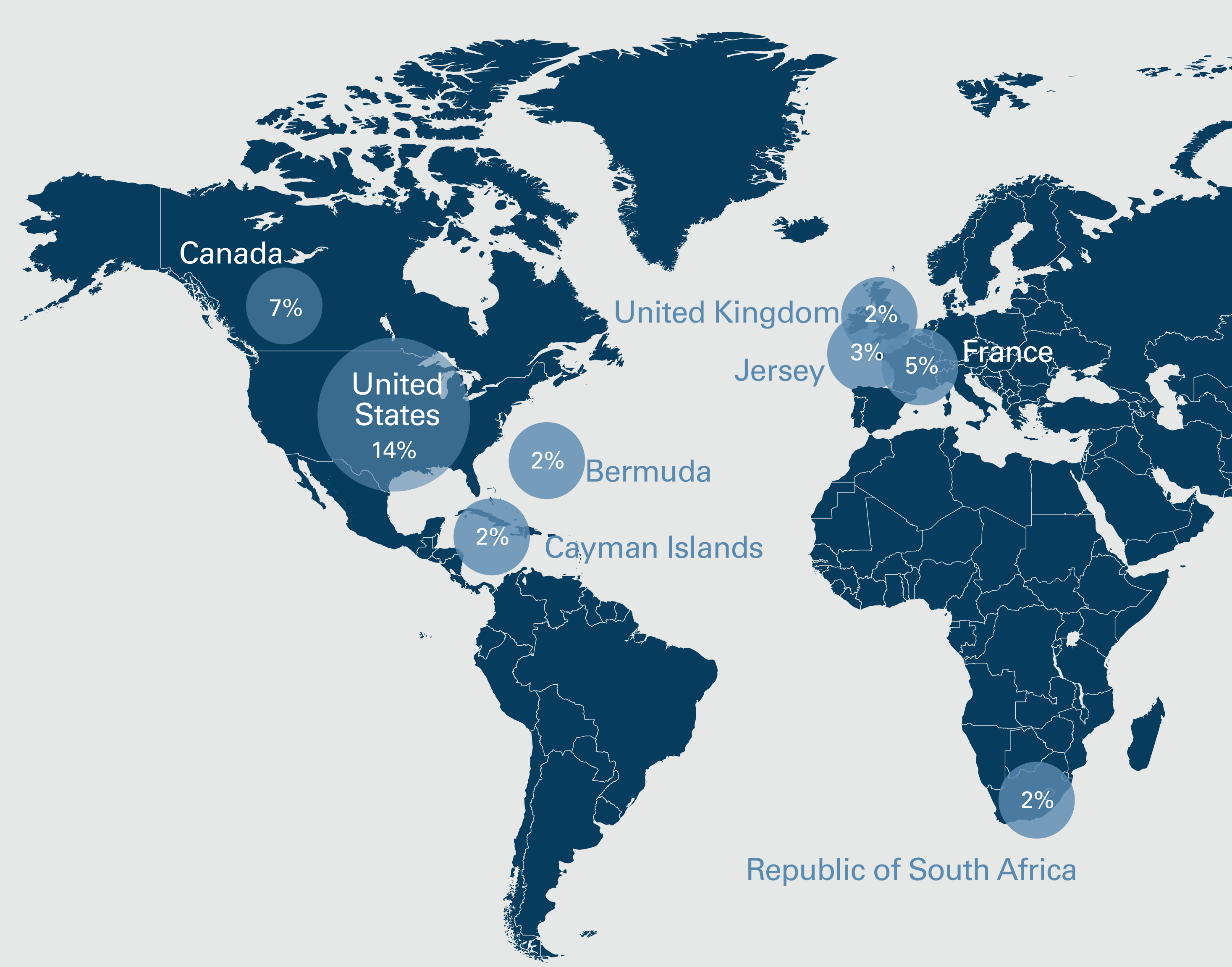
With trading prices under pressure and equity markets generally down, bidders who wanted to take advantage of these opportunities received push back from targets and shareholders. Target boards negotiated increases to offer prices, citing external pressures and costs of business trading. This resulted in share prices that were not reflective of the valuation of the company. Bidders who wanted to get a deal done were required to increase offer prices, with the last 12 months having the largest average increase in premiums over the past five years.

Average premiums and price increases



Note: These averages reflect the increase between the transaction announcement and the final premium and do not include the premiums that decreased.

Foreign bidders have increased but Australian bidders still dominate



Note: Where a bidder was a consortium from multiple jurisdictions, each jurisdiction has been counted individually.

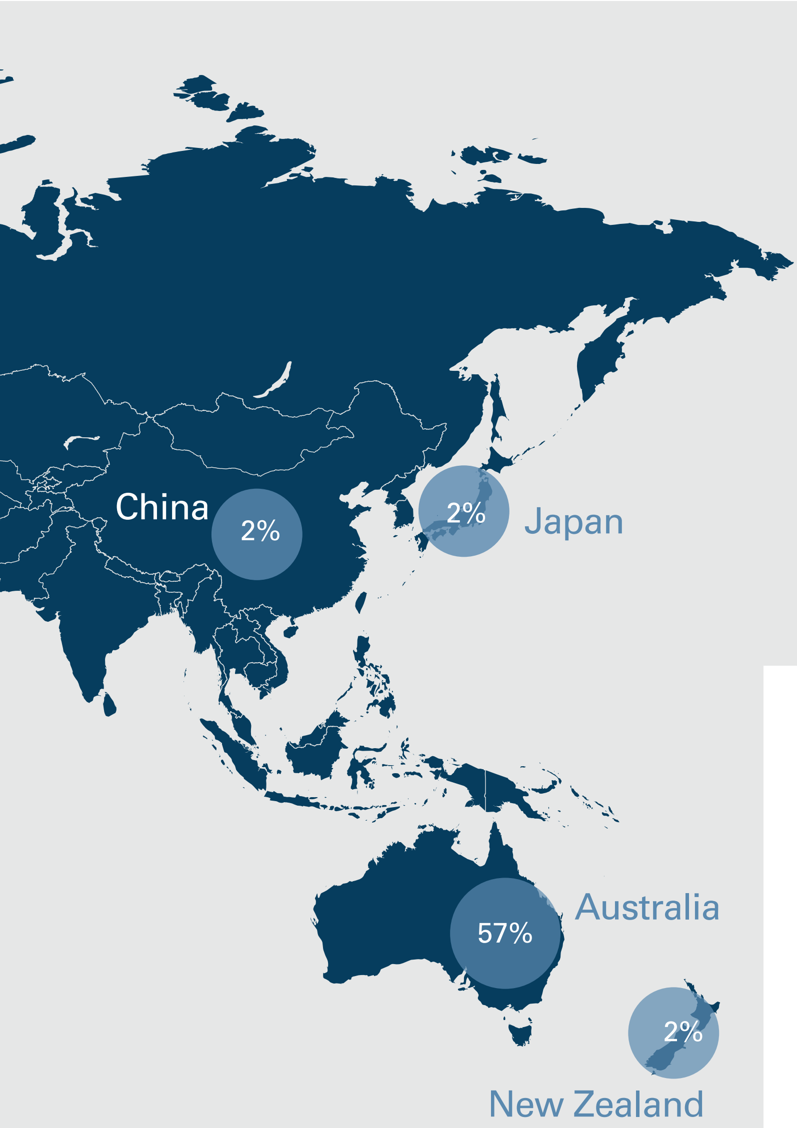
Australian bidders continue to dominate Australian public M&A, in line with figures from previous years – but foreign bidders made their presence known.

In the last 12 months, the jurisdictions with the most foreign bidders were the United States and Canada. This is consistent with the previous year, where they represented a cumulative 18% of all bidders.

Together, North American bidders represented 21% of bidders in the survey period, but 60% of all deal value, bolstered by large deals like Origin/Brookfield/EIG (Canadian/US bidder) and Newcrest/Newmont (US bidder).

Bidders by continent

Continent	% of deals	% of deal value
Oceania	59%	24%
North America	21%	60%
Europe	14%	14%
Asia	4%	2%
Africa	2%	<1%



Foreign bidder deal value and premiums

Foreign bidders came to spend big, with a higher deal value and higher premium paid on average compared to Australian bidders and bidders at large.

	Average deal value	Average final premium
Foreign bidders	A$2,548m	64%
Australian bidders	A$533m	43%
All bidders	**A$1,397m**	**51%**

European and Asian bidders

Participation remained low for Asian and European domiciled bidders, representing 4% and 12% of deal volume respectively. This is consistent with levels from the last two years, following spikes for Asian bidders in 2020 and European bidders in 2021.

	% of European bidders	% of Asian bidders
2020	8%	22%
2021	17%	4%
2022	8%	4%
Last 12 months	12%	4%

Australian bidders vs foreign bidders

Australian bidders have had a slight decline in the past 12 months compared to the previous year, but still account for more than half of the bidders.

	% of Australian bidders	% of foreign bidders
2020	62%	38%
2021	58%	42%
2022	67%	33%
Last 12 months	57%	43%

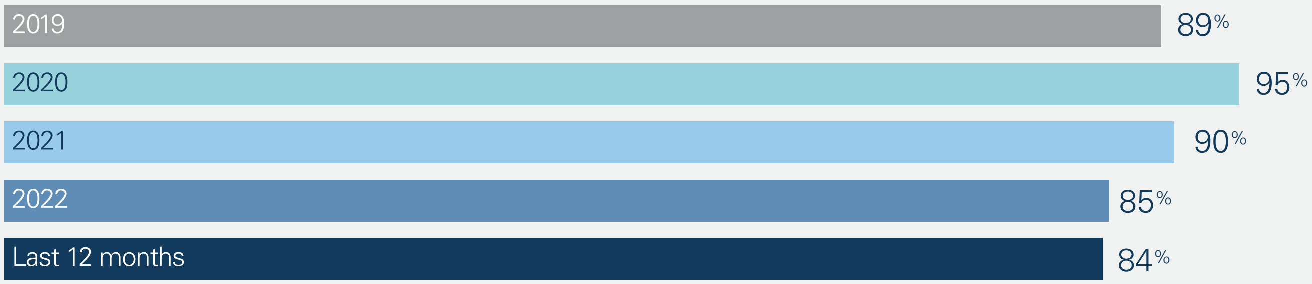
Limited variations in conditions

The past five years have seen limited movement in whether a deal is subject to conditions. Over 84% of deals each year in the last five years consistently had conditions to completion.

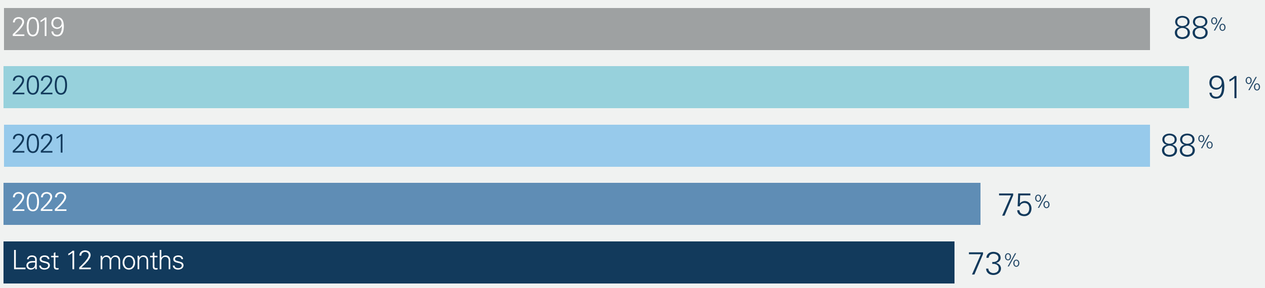
The largest variance in the last five years has been in the decrease in material adverse change (**MAC**) clauses being a condition to completion. We expect that this is driven by targets concerned about deal certainty and pushing back on its inclusion, as the existence of a MAC can give a bidder leverage to terminate in the event of a material event or change.

There has also been an increase in ACCC condition clauses, which is not unexpected given the increased interest by the competition regulator in M&A - see further details in our ACCC article.

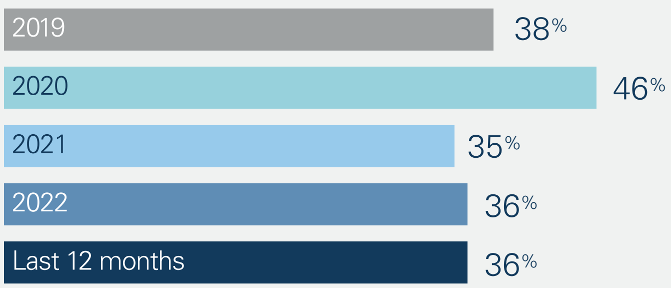
Deals with conditions (beyond prescribed occurrences)



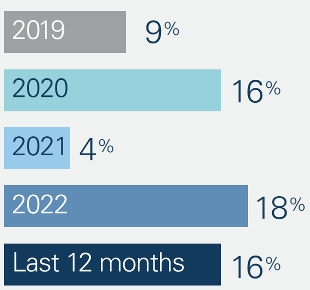
Deals with a MAC condition



Deals with a FIRB condition



Deals with an ACCC condition



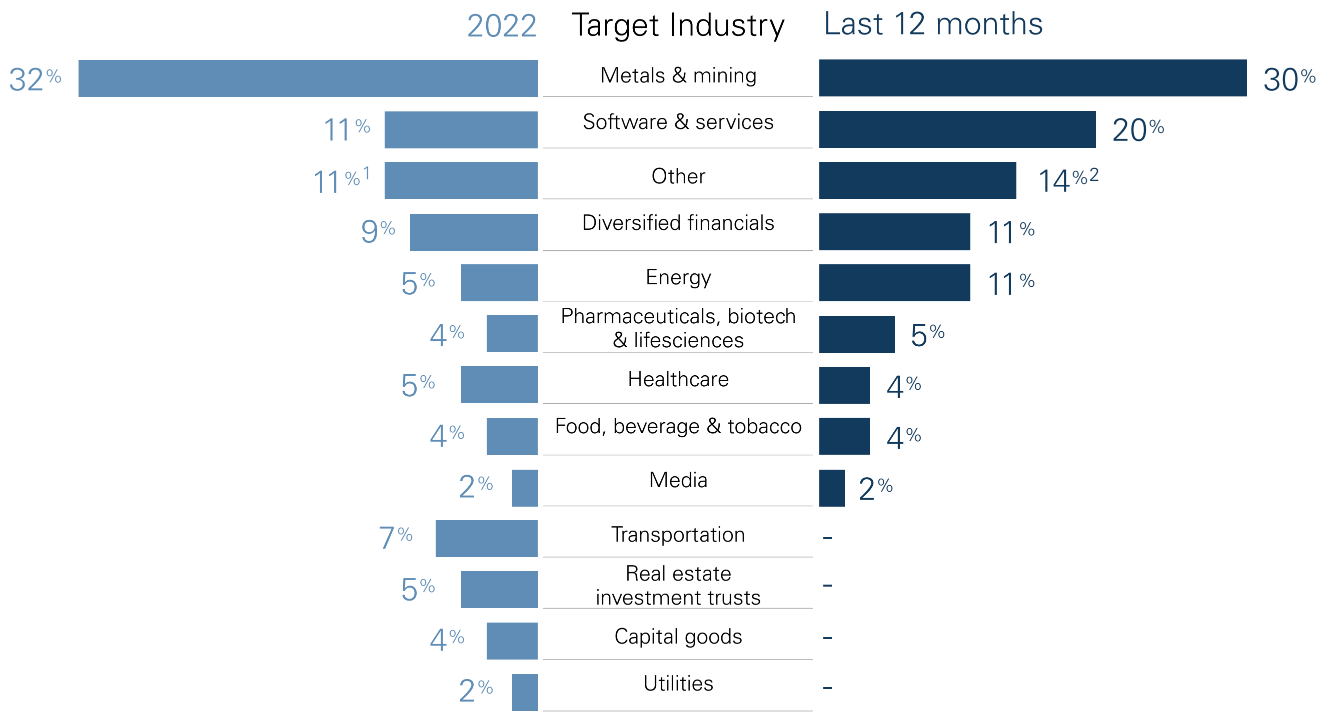
Energy and resources remain top of the table – 2022 vs last 12 months

The energy and resources sector has remained at the top of the table in terms of both volume and value, with a number of the large deals announced this year falling into that sector. The biggest increase from 2022 was in the software and service sector, which almost doubled between 2022 and the last 12 months. Sectors which saw little to no activity compared to last year were the real estate, healthcare and transportation industries.

We predicted that the domestic energy and resources sector would remain buoyant, this has proven to be correct

Corrs advised Norwest Energy, Australian Vanadium and Hancock Energy in this sector in the survey period.

Target industries by percentage of deals



[1] For 2022 'Other' comprises consumer services, commercial services, entertainment, construction, retail and telecommunications services.

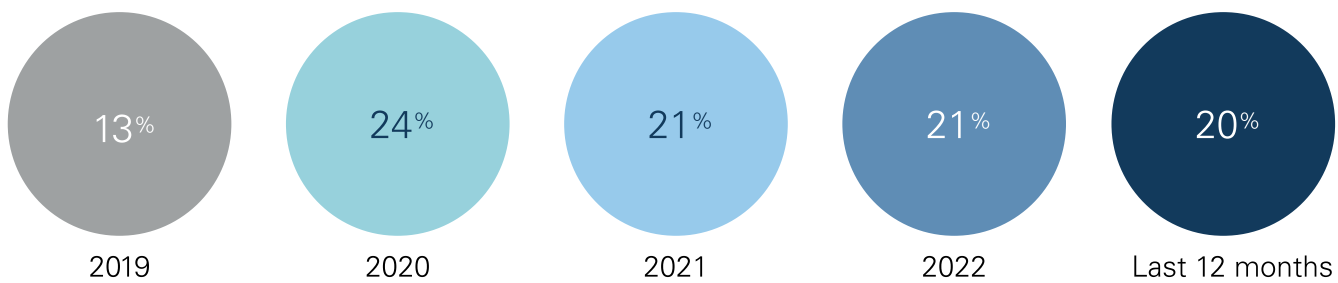
[2] For the last 12 months 'Other' comprises automobiles and components, professional services - legal, consumer services (hotels, restaurants and leisure), chemicals, consumer durables and apparel, funeral homes, financial services and containers and packaging services.

Competition for good targets and a number of bidding wars

The last 12 months had a number of contested deals, with numerous targets being the subject of multiple bids. Warrego Energy was faced with bids from three individual bidders, with the share price jumping from 17.5 cents to 40 cents within a nine week window – with Hancock, Strike and Beach bidding against each other and Hancock winning the race.

IntelliHR was also the subject of a number of offers, with its share price jumping from 6 cents to 25 cents within a nine week period. IntelliHR was subject to both scheme and takeover bids from each of the rival bidders, Humanforce and The Access Group, with Humanforce being the successful bidder.

Percentage of targets that received multiple bids



Energy and resources: driving M&A acceleration for Australia

The energy and resources sector remained the most active sector in Australia in the past 12 months with 41% of all deals falling into this sector. Deal activity by volume was up 3.5% from the previous 12 months and there was daylight between it and the next best sector, software and information technology services. This kept the Australian M&A market busier than other global jurisdictions given Australia's enviable natural resources endowments.

As per prior periods (and despite the critical minerals race capturing the media headlines), gold remained the most coveted commodity for growth with tie-ups benefiting from cost rationalisation due to a sustained cost-inflation environment. Gold focused M&A accounted for 58%, by deal number of metals and mining transactions, 43% of energy and resources transactions and 71% by value. Value was significantly underpinned by the A$26.2 billion between majors Newmont and Newcrest. Producers also remain on the search for copper and rare earths exposure with a now limited international pool of assets that are unencumbered but of requisite scale.

There was a 9% increase in deal activity for critical minerals from the previous 12 months, which included a doubling of lithium deals. The lithium industry was therefore a standout with an acceleration in M&A activity in the single commodity focus with the top four existing global lithium producers by capacity all seeking to grow inorganically during the period including Allkem/Livent, Albemarle/ Liontown and SQM/Azure.

The past 12 months saw a number of challenges for the sector including regulatory headwinds in federal labour reform, industry concerns from heritage law reform confusion at a state level in WA and federal government support for the downstream processing sector still maturing (particularly when compared to the US Inflation Reduction Act and the EU Green Deal). However, despite these challenges, Australia remains a Tier 1 jurisdiction for local and foreign miners to operate. A recent uptick in resource nationalism from other jurisdictions with strong mineral endowments helps the Australian miners sell the ever-higher development and operating costs.

The statistics of the past 12 months show 39% of deals in the energy and resources sector were focused on assets already in production as opposed to pre-development assets. This is a shift from prior years where sector M&A was driven more by acquirers seeking access to new deposits. This is a clear reaction from the market to sub-contract out of development and ramp up risks and a desire to achieve efficiency gains given the higher cost operating environment.

With sustained capex increases and labour access still very competitive, it will continue to be a challenging year for construction and delivery of projects within time and cost estimates. Therefore, the larger mining houses who have scale across commodities and workforce, and synergy for mine site access, may remain best placed to execute on development opportunities.

The competition for security of supply – Hancock/Warrego, Albemarle/Liontown and SQM/Azure

The competition for high quality assets was fierce this year. There were battles between shareholders and rival bidders for lithium companies and gas assets. One player in particular emerged as a strategic acquirer – Hancock Prospecting took a 19.9% stake in Albemarle's proposed takeover target, Liontown Resources, and was the rival (and ultimately successful) bidder in the tussle for Warrego Energy, fending off Beach Energy and Strike Resources (see details below).

The major diversified miners are yet to drive large-scale M&A in the critical minerals sector outside copper. This provides headroom for further M&A in this sector in the next 12 months. The lithium market is rapidly maturing. Price discovery of the most profitable areas across the lithium value chain for both extraction and processing techniques is close. This may assist the major diversified miners to get through the gate on internal approvals for large scale M&A. Until then, the existing lithium producers are expected to make hay and buy growth with the tailwinds of comparably high lithium prices.

Whilst we saw no activity in iron ore in the past 12 months, gas supply security for energy generation was a key feature of M&A deal flow during the period, principally in the Perth Basin in respect of pre-development domgas targets in Warrego and Norwest Energy.

The bidding war of strategically placed Warrego was particularly heated, involving a three way bidding contest between Hancock Energy (**Hancock**), Warrego's joint venture partner Strike Energy Limited (**Strike**) and the Kerry Stokes backed Beach Energy Limited (**Beach**).

Warrego Energy Limited (**Warrego**) is an energy company with a portfolio of gas exploration interests in Australia and Spain, with its key assets being a number of exploration tenements and projects in the Perth Basin.

The bidding war commenced in earnest on 10 November 2022 when Strike submitted a non-binding and indicative proposal at 0.775 Strike shares per Warrego share.

On 14 November 2022 Warrego then announced that it had entered into a scheme implementation deed with Beach at A$0.20 per share, with a contingent consideration component linked to the sale of Warrego's Spanish assets. On 30 November 2022, Hancock launched a takeover bid at A$0.23 per share which triggered the matching rights regime under Beach's scheme implementation deed with Warrego. Beach ultimately declined to match when Hancock increased its offer price from A$0.23 to A$0.28 per share. On 23 December 2022, Strike launched its own takeover bid at one Strike share for each Warrego share.

A period of stand-off ensued in the following month punctuated by:

- Hancock introducing an institutional acceptance facility whereby if it achieved acceptances from 40% or more shareholders the offer price would increase to A$0.36 per share; and
- Mineral Resources Limited acquiring a strategic stake in 19.17% of Warrego.

Ultimately, Mineral Resources struck out the possibility of launching its own competing proposal, citing the massively inflated prices of assets in the Perth Basin and rolled into Hancock's offer. The 40% acceptance condition was eventually met, and Hancock reached the 90% threshold to compulsorily acquire the remainder.

The transaction and stand-off between Strike and Hancock demonstrates how macroeconomic factors can have a significant influence on a competitive transaction. Prior to Strike's initial approach in November 2022, Warrego shares were trading at around 17 cents per share or below. The bidding war and associated M&A activity in the region (i.e. Mineral Resources' bid for Norwest Energy) caused the share prices of all major players in the Perth Basin to climb, with Warrego briefly touching 40 cents per share and Strike shares likewise trading above its historical prices. For Strike this provided an inherent upside to its proposal and for a greater part of the bidding process the implied value of the Strike proposal was higher than the Hancock offer. From the perspective of the Warrego board this also created an internal difference in recommendation approach. The majority of directors preferred the certainty of Hancock's cash bid; however, one director maintained a recommendation in favour of the Strike proposal citing the upside of the Strike proposal and the higher implied value.

In other competitive assets, Liontown Resources (**Liontown**) was the subject of a proposed acquisition by Albemarle, following which, Hancock acquired a 19.9% stake in Liontown and Albemarle withdrew its offer.

Less than two weeks after Albemarle advised that it would not proceed with its proposed acquisition of Liontown, lithium exploration company Azure Minerals (**Azure**) announced it had entered into a transaction implementation deed with a subsidiary of Sociedad Química y Minera de Chile S.A (**SQM**), under which SQM proposed to acquire Azure by way of a scheme of arrangement for a cash amount of A$3.52 per Azure share and a simultaneous conditional off-market takeover offer for a cash amount of A$3.50 per share should the scheme not be successful. The dual scheme / takeover transaction structure was designed to allow Azure shareholders to potentially participate in a liquidity event even if an interloper acquired a stake in Azure sufficient to defeat the scheme. Within two days of the deal being announced, Hancock Prospecting acquired an 18.3% stake in Azure, Mineral Resources subsequently acquired 12.3% of Azure. At the time of writing, the dual scheme / takeover remains on foot.

Given limited new IPO candidates and tight ECM market conditions generally, competition for quality development assets will continue to be high. We therefore anticipate continued M&A activity in the energy and resources sector in the next 12 months, with continued interest in 'new economy' commodity opportunities as well as those that offer efficiency gains in a high-inflationary environment.

Corrs advised Hancock on the acquisition of Warrego, as well as Norwest Energy on its takeover by Mineral Resources. Corrs also acted for Albemarle on its takeover bid for Liontown and is currently acting for Azure.

03

Strategies for bidders and targets in 2024

Bidders and targets under the spotlight

Bidders

Trust goes a long way

One of the biggest frustrations for our bidder clients is the difficulty in getting engagement with target boards at the outset of an approach. The M&A 'playbook' here in Australia tends towards an initial rejection of an approach unless the offer price is a 'knockout' price. This is in contrast to the approach in other jurisdictions, such as the US, where directors incline towards engaging unless there is a good reason not to do so.

However, we have observed a number of cases where bidders have managed to obtain diligence access following their first approach, and in some cases without even proffering an indicative offer price. The key to unlocking this early engagement is trust.

In all of these instances, the potential bidder had a relationship with the target or its key advisers and/or a reputation for acting with integrity. These factors influenced the perception of the targets as to whether the bid was opportunistic and whether the bidder in fact had 'more in the tank', which in turn assisted in gaining access to due diligence and facilitated the best pricing for all concerned.

The 'trust toolbox' of a well-prepared bidder will include:

- careful consideration as to the timing of, and participants in, the initial approach (e.g. whether the bid is at an opportunistic time in the earnings cycle of the target, and whether the approach has been led by individuals with a strong relationship with the target);
- well-formulated strategies for engaging with major shareholders / regulators;
- an understanding of the personal ambitions of, and dynamics within, the target's senior executive team (e.g. is there a desire to continue to work with the bidder post-completion, do the bidder's intentions for the business align with a founder shareholder's vision for the business); and
- a willingness to agree to a market standard standstill to give the target board comfort that the bidder is genuine in its pursuit of a friendly control transaction.

Timing is key for 'best and final' offers

If trust alone is not sufficient to get a recommendation, the prospect of a 'best and final' offer (in the absence of a superior proposal) at an early stage of the transaction may be a bidder's only choice. Deploying a best and final statement should never be taken lightly and is usually reserved for takeover bids as an 'end game' tactic to encourage acceptances before an offer closes.

In some circumstances, however, it can also be helpful in getting a recommendation at the outset from a recalcitrant target board for schemes of arrangement. The past 12 months have seen approximately 23% of transactions include a 'best and final' statement in relation to the price on offer, this is an increase when compared to the previous two years where only 16% of transactions included this feature. 'Best and final' statements can also be helpful to counter shareholder expectations that bidders have more to offer. This can occur when the target share price is trading above the bid price and the bidder has to bid against itself (a tactic which was deployed in Coca-Cola Europacific's bid for Coca-Cola Amatil (2020) and more recently Brookfield and EIG's bid for Origin Energy).

Not all shareholders are created equal

To ensure that a bid is successful, a deep understanding of the target's shareholder base is essential, including an understanding of the underlying motivation for major shareholders. For example, are they amenable to an exit at the offer price, would they prefer to team up with the bidder for the purposes of forming an association/launching a joint bid, or are they likely to obstruct the bid by launching a competing bid or defeating a scheme or takeover bid? As there is no 'one size fits all' solution for dealing with major shareholders, a bidder will need to have in its arsenal various options to secure this support – see our article on major shareholder engagement.

Defence vs offence

Bidders need to decide at the outset what is more critical to the success of the transaction – defending the bid or (in a scheme context) maximising the prospects of voter support. If a bidder is concerned about interlopers, it may be strategically preferable to acquire a stake in the target, recognising that the bidder will not be able to vote at the scheme meeting. There is always the possibility of selling down the pre-bid stake if there is major shareholder opposition to the scheme and the stake is required to be dispersed in order to maximise supportive voter turnout. This was a strategy employed by Vocus Communications in its bid for Amcom Telecommunications (2014), but this sell-down strategy has previously invoked the ire of regulators. An example of this is ASIC's application to the Takeovers Panel in relation to Charter Hall / Abacus' (CHAB) consortium scheme for Australian Unity Office Fund. In this example, CHAB disposed a 19.9% stake in the target after entering into a scheme implementation agreement and before the scheme meeting.

Choose your friends wisely

As regulatory approvals (and in particular FIRB approvals) continue to feature heavily in transactions (36% of deals in the past 12 months included a FIRB condition), partnering with the right joint bidders or consortium partners becomes an increasingly important execution consideration, especially if the target operates a business in a sensitive sector.

Targets

Be wary of bidders using reverse break fees as an option

In a fragile M&A environment (which we expect the next 12 months to be), bidders may seek to protect themselves against adverse changes in circumstances. Reverse break fees, which have historically been offered to provide protection to targets for bidder execution risk, may perversely become an option fee for bidders who decide not to proceed with a transaction if they are drafted as the sole remedy for a bidder's breach of an implementation agreement. Targets will need to negotiate a sufficiently high break fee to compensate for a bidder walking away and also ensure that they can compel an order for specific performance in their implementation agreements to address this risk.

Proactively assess bidder regulatory risk

In assessing which bidders to engage with, a well-advised target board, particularly of a target operating in a sensitive sector (such as critical minerals or critical infrastructure), will need to interrogate the regulatory risk of potential bidders which may impact on reverse break fee negotiations, including the triggers and quantum. Regulatory approvals, such as from the Australian Competition and Consumer Commission (**ACCC**) and the Foreign Investment Review Board (**FIRB**), have in recent years become increasingly complex, drawn-out and expensive, with regulators paying close attention to sensitive sectors.

Early disclosure of 'bad' news may be better in the long run

'Black box' diligence has long been part of the M&A playbook – withholding commercially sensitive and value-related information until the end of a diligence process to enable bidders and targets to reach agreement on other matters first. We query whether this is appropriate for all situations however find this is appropriate for situations where the bidder does not compete with the target. Targets should consider the merits of disclosing to a bidder commercially sensitive information that goes to the target's value sooner rather than later to ensure that it obtains the most transparent pricing from the bidder early in the process. Early disclosure allows for the bidder to factor this information into its bid price and avoid a last-minute price reduction (e.g. the Paine Schwarz Partners' recent bid for Costa, where it revised its bid downwards after Costa released a profit warning two months after the private equity firm had been granted due diligence access). Early disclosure may also save on significant management time and effort.

Additionally, the more protracted the process, the more likely it is that the transaction will have leaked. The prospect of a price reduction or termination of discussions when negotiations have already been publicly announced can significantly reduce the leverage of a target board.

Critically assess the market's perception of your announcements

Target boards should not assume that the market will understand announcements relating to it. This dissonance has been evident in recent takeover battles with interesting outcomes. In the hotly three-way contested bid for Warrego Energy, Strike Energy announced that it had acquired a 19.9% relevant interest in the target. While on its face this appeared to lock up the target, the fine print revealed that the 19.9% stake was based on conditional sale agreements with carve outs for superior offers. In another example, in the TA Associates/Viburnum consortium bid for Infomedia, it was disclosed that TA Associates had acquired a relevant interest in Viburnum's 14.5% stake in the target, which appeared to suggest that Viburnum could vote against a competing proposal. However, a closer reading of the exclusivity agreement suggests that Virburnum was simply prevented from **supporting** a competing proposal, which may have meant that it simply would not be able to vote on a competing proposal. Perceptions such as this can dissuade rival bidders from participating in a competitive situation and target boards need to ensure clarity of information if they wish to engender outcomes that are in the best interests of all shareholders.

Do not burn your bridges

A target will need to be circumspect when it comes to its pre-closing conduct with bidders. An initially hostile bidder may end up as the successful acquirer, for example, in Potentia Capital's bid for Nitro Software and in Hancock Energy's bid for Warrego Energy. A successful bidder will acquire more than just the shares in a target company – it will also gain access to the board minutes, email systems and other correspondence relating to the target's pre-completion conduct. Target boards should therefore ensure that directors and officers adopt a level of discipline when it comes to engaging with bidders to ensure that there is no risk that an argument can be mounted that they did not act in the best interests of shareholders.

The battle for a headstart: pre-deal exclusivity and target board engagement

Getting effective engagement with a target board is one of the most critical initial considerations for a bidder. Obtaining a headstart on discussions and better still, pre-deal exclusivity, can give bidders a significant advantage in an M&A transaction, particularly where there is interloper risk. For target boards, the dilemma is whether to grant exclusivity before a binding offer is agreed which may shut down an effective auction process for other bidders. The former is often key to facilitating the proposed transaction for the benefit of shareholders but can halt any potential competitive tension.

The race to agree a binding deal ahead of rival bidders was demonstrated in the contested takeovers of AusNet Services Limited and Virtus Health Ltd. In both cases, exclusivity arrangements were granted at the non-binding offer stage to potential bidders. The exclusivity provisions involved a period of 'hard' exclusivity. 'Hard' exclusivity refers to a lack of fiduciary carve-out and other deal protection measures being included, such as notification, equal information and matching rights for the bidder. The exclusivity provisions agreed during the non-binding offer stage in both of those transactions were challenged before the Takeovers Panel. The decision of the Takeovers Panel in each case was that aspects of those arrangements, and the 'hard' exclusivity provisions in particular, were unacceptable.

Market practice has been very clear about the parameters that target boards can agree to after a binding scheme or bid implementation agreement has been signed. However, the position was less settled in relation to pre-binding deal arrangements. Following the AusNet and Virtus cases, the Takeovers Panel updated Guidance Note 7 on lock-up devices to provide guidance specifically in relation to pre-deal 'hard' exclusivity.

The Takeovers Panel's decision to revise Guidance Note 7 was largely driven by a desire to ensure that the arrangements between a target and potential bidder did not give the bidder an undue advantage. This could manifest in the bidder having a significant headstart on diligence and discussions to the exclusion of all other competitors before a binding agreement was signed. The 'first mover' advantage also means that a competing proposal may struggle to be considered a 'superior proposal' by a target board, given the greater certainty of execution of the first proposal.

Ironically, our recent anecdotal experience is that non-binding indicative offers (**NBIOs**) requesting 'hard' exclusivity from the outset of target engagement are becoming more common and are being deliberately structured to address the Takeovers Panel's parameters.

Notification obligations on targets, meaning to notify the emergence of any competing offer, are also limited for a competing proposal received during the pre-deal stage. This is due to the fact that Guidance Note 7 requires disclosure of certain notification provisions in those circumstances.

This is not to suggest that the guidance has not been effective in deterring anti-competitive behaviour. In our view, the Takeovers Panel's parameters enable target boards to assess the suitability of the requests from bidders, and to push back where they consider it appropriate. Where target boards are minded to facilitate exclusivity arrangements, they now have clear 'guardrails' to structure the arrangements so as to mitigate the risk of a challenge. As a result, we predict that the release of Guidance Note 7 will see an increase in pre-deal hard exclusivity arrangements.

The Takeovers Panel released a revised Guidance Note 7 (**GN 7**) on Deal Protection and a revised Guidance Note 19 (**GN 19**) on Insider Participation in Control Transactions.

The revised GN 7 provides more specific guidance on the Takeovers Panel's approach to exclusivity arrangements. This includes guidance in relation to 'hard' exclusivity arrangements. These are exclusivity arrangements without an effective 'fiduciary out' during the non-binding stage of a transaction. The Takeovers Panel's view is that 'hard' exclusivity is likely to give rise to unacceptable circumstances "unless there are circumstances that warrant it" (GN 7 provides a limited set of such examples) and that the period of 'hard' exclusivity should be short and limited to four weeks. The Takeovers Panel also clarified in the revised GN 7 that, while it would not expect targets to agree to break fees in respect of non-binding proposals, if one is agreed the quantum should be 'substantially lower' than 1% of equity value.

The revised GN 19 clarifies the Takeovers Panel's approach to scenarios involving participation by insiders alongside bidders. The changes, among other things, broaden the definition of 'participating insider', clarify disclosure obligations regarding insider relationships with bidders and provide a non-exhaustive list of factors the Takeovers Panel will consider when determining whether unacceptable circumstances exist in this regard.

Major shareholders as 'kingmakers'

One of the most common questions asked by bidders is how to engage with major shareholders at the outset of a transaction. In last year's M&A Outlook, we discussed tactics for dealing with major shareholders that might seek to block a transaction. However, even where the major shareholder is a willing seller, there are complexities. This is especially true where that shareholder is seen as the deal's 'kingmaker'– whichever proposal they favour is likely to be the successful transaction.

A threshold question for bidders is whether (and when) to form an association with the major shareholder. Some of the competing considerations include:

IBC vs influence

Often a large shareholder will have a representative director on the board, or they may personally sit on the target's board if they are an executive. Any director representing a shareholder that is associated with the bidder will be excluded from the target's independent board committee (**IBC**). Of the deals in this year's survey period, approximately 18% of targets established an IBC to consider the proposed transaction.

Generally, bidders should avoid putting the target board in the difficult position of having to establish an IBC too early in the transaction. It can be helpful for a supportive major shareholder's representative to be 'kept in the tent' during the initial stages of a transaction, as the major shareholder's views on value are often relevant to a target board's decision to engage or reject an approach from a bidder. However, this should be balanced against the bidder's need for conviction that the major shareholder will be in favour of their deal.

In addition, target boards may be more likely to establish an IBC (and to do so earlier in the process) on future deals following the Takeovers Panel's updated Guidance Note 19 on Insider Participation in Control Transactions.

Certainty vs confidentiality

Once the bidder forms an association with a substantial shareholder, the market must be informed within two business days. This disclosure can alert rival bidders or interlopers to the fact of a potential transaction before a binding agreement is ready to be signed if the association is formed early.

Some bidders choose to align the timing of the association with the announcement of the transaction. An example of this was K1 Investment's acquisition of Elmo Software, in which the target's CEO entered into a voting agreement for his 11% shareholding which was announced on the same day as the scheme implementation agreement. Others choose to announce the arrangements at the time of entry into process deeds with the target, as was the case in Coca-Cola Europacific's arrangement with Coca-Cola Amatil's major shareholder.

Even where an association has not yet been formed between a bidder and a substantial shareholder, media speculation can force the target to announce receipt of a proposal that contemplates major shareholder engagement (subject to joint bid relief). That was the case for Readytech, where Pacific Equity Partners' NBIO contemplated an application for ASIC relief to partner with a Readytech major shareholder before that shareholder engagement was finalised. Pacific Equity Partners' plan to seek relief and partner with the major shareholder was later withdrawn.

Joint bids vs conditions

Joint bid relief will be required from ASIC for the bidder and a major shareholder to team up, if the major shareholder and bidder together hold more than 20%. This imposes additional regulatory hurdles to the creation of the association. In particular, the 'match or accept' condition imposed by ASIC in certain circumstances is likely to be unattractive for major shareholders and bidders alike.

We have seen a decrease in joint bid relief in the last few years, with the most recent being granted for acquisition of Coca-Cola Amatil (2020) and iCar Asia Limited (2021). While joint bid relief was not granted for any transactions in the survey period, it is clear that bidders are keen to establish a pre-bid foothold where possible and particularly for takeovers. 82% of takeover bids this year involved some form of pre-bid stake (including direct stakes, call options and pre-bid acceptance agreements), up from 68% last year.

In its acquisition of Healthia, Pacific Equity Partners achieved the support of two major shareholders who together held more than 20%, without the need for joint bid relief. In addition to the shareholders' respective statements that they intended to vote in favour of the scheme, Pacific Equity Partners also had a call option over a combined 19.9% of their shares.

Support vs vote risk

The major shareholder is likely to have their own views – as a shareholder – on the value of the target's shares. These views will have to be balanced by the major shareholder (or their representative director) against the director's duties that they owe to the target as a whole.

Assuming that the 'kingmaker' is willing to sell at the right price to the right bidder, a particular deal is unlikely to be executable if the substantial shareholder is not convinced. That is the case even if the remainder of the board or the IBC is in favour of that deal.

While securing major shareholder support will be important, receiving that support in the form of a separate arrangement between the major shareholder and bidder may put the major shareholder in a separate class for the purposes of the scheme vote. This can increase the risk of greenmailing from small shareholders whose leverage increases with their increased ability to block the vote. The proposed acquisition of Readytech was a good example of a bidder who had proposed to agree separate arrangements with the major shareholder, and who had to change tack (as noted above) when another shareholder whose shareholding was much greater, announced an intention to vote against the scheme.

Alternatives to association

If a bidder ultimately decides not to associate or jointly bid with the major shareholder, a number of alternative transaction structures remain available.

A structure favoured among private equity bidders is the stub equity structure. Under this structure, all target shareholders are offered the same consideration, with the ability for each target shareholder to elect some element of scrip consideration to rollover its investment. The bid vehicle's governance arrangements may also include minimum shareholding thresholds for the rights that will be enjoyed by target shareholders who choose to rollover their investment.

Whether a stub equity scheme will be suitable depends on the objectives of the bidder, and the issues with association that they are seeking to avoid. For example, a stub equity scheme will usually allow all target shareholders to vote in the same class (reducing vote risk). A major shareholder announcing that it intends to vote in favour and elect scrip consideration also shows its support for that particular bidder.

However, revised Guidance Note 19 states that a director who may receive a material stake or special rights from a holding of stub equity should ordinarily be excluded from an IBC. This is the case even if there is no association formed between that shareholder-director and the bidder, unless the director commits to taking no more than 'a small portion' of their consideration as stub equity.

04

Regulatory updates

Scheme slipstream: judiciary-led reform assists deal execution

There have been significant developments for schemes in the Federal Court of Australia and State Supreme Courts arising from various decisions and practice notes from the courts. As the preferred acquisition structure for certainty of implementation on mega deals, these judiciary-led reforms are streamlining the court approval process and are a welcome development for both domestic and, in particular, foreign acquirers.

The survey shows that schemes continue to be the most popular transaction structure – a data point that is consistent with prior years. Despite a general decline in transaction volumes due to macro-economic challenges, challenging debt markets, the rise in strategic M&A and increased competition for prized assets, there was a closing of the gap between the use of schemes and takeovers when compared to past survey years.

As the volume of evidence put before the courts steadily increased over recent years, so too did the calls for reform of the court approval process. In the Vita Group scheme, Justice Jackman responded to these calls by winding back certain procedural and evidential requirements with a view to ensuring that schemes are conducted as quickly, inexpensively and efficiently as possible.

Changes include:

- reducing the volume of evidence included in director affidavits (including where it relates to the negotiation of vanilla break fee and exclusivity lock-ups);
- removing the need for the chairperson and alternate chairperson to provide affidavits confirming their absence of conflict, if that evidence is given by another person on 'information and belief';
- removing the need for Court approval of shareholder communications, such as in-bound and out-bound call scripts;
- accepting ASX announcements instead of newspaper advertisements regarding the approval hearing;
- eliminating the need to file communications with ASIC where ASIC has provided a no objection letter;
- reducing the volume of evidence of proof of dispatch of the scheme booklet; and
- removing the need for proof of execution of the deed poll by foreign acquirers, unless a real uncertainty or issue exists in that respect.

Note that the efficiencies on break fee disclosure to the court would not ordinarily extend to reverse break fees, and in particular the quantum of these, where there remains market divergence – for example, on Newcrest and Newmont's recent tie-up, the reverse break fee was over 2% of the acquirer, Newcrest's, equity value.

Following Justice Jackman's decision in May 2023, other judges in the Federal Court and State Supreme Courts have adopted Justice Jackman's guidance, to varying degrees. As a result, there was an inconsistency of approach between jurisdictions in relation to some of the procedural and evidential reforms proposed by Justice Jackman. The uncertainty was recently addressed through the issue of harmonised court practice notes in the Federal Court and State Supreme Courts on 13 October 2023. It is hoped that the issue of the harmonised practice notes will mean that the position across jurisdictions will become uniform. Notwithstanding the practice notes, scheme proponents will need to continue to be mindful of their obligations in ex parte court applications, namely that there may need to be further evidence adduced to fully discharge their responsibility to bring to the court's attention all matters that are material to the exercise of the court's discretion.

These reforms have also arrived while we await the outcome of the Federal Government's consultation process concerning whether the Takeovers Panel should have jurisdiction over schemes. The efficiencies arising from the recent reforms could be seen as contributing to the argument for schemes to remain under the purview of the courts.

Proposed changes to the merger clearance process

Recent changes indicating more forceful merger control

In March 2022, the Australian Competition and Consumer Commission (**ACCC**) appointed a new chair. There has not been a revolution in Australian merger control since this changing of the guard, instead, there has been a steady evolution in several trends that have developed over recent years. In particular:

- The ACCC is 'pre-assessing' more transactions than ever before via short, confidential review processes (over 90% of the transactions it reviewed). That is freeing up more resources for the ACCC to devote to more complex matters and review processes, i.e. the number of public reviews is decreasing but the length of those public reviews is increasing.
- More complex reviews that generate more substantial competition concerns are taking longer (the ACCC has generally signalled a lengthening of public review timeframes from 8 to 12 weeks) and the ACCC's documentary and information gathering requirements are becoming more burdensome (the ACCC has indicated that it will use its compulsory information gathering powers increasingly in merger investigations where concerns warrant increased evidence gathering). While some public reviews in the last calendar year had shorter durations than the previous year, over the last ten years public informal merger review timelines have extended by, on average, around 20%. ACCC merger authorisation reviews are regularly extended beyond the 90-day statutory timeframe and the average merger authorisation review duration since 2017 has increased to 174 days post-filing. This indicates that requests for extensions are common if not inevitable.
- There has been a clear trend in recent years towards the ACCC becoming generally less trusting and more sceptical in its interactions with merger parties. The ACCC is making greater use of its compulsory information gathering powers (including compulsory examinations of executives), and is now routinely seeking production of all documents produced to other agencies in global merger review processes.
- The ACCC has taken a more forceful posture in merger control matters and has recently intervened in several high-profile transactions.

Since December 2022, the ACCC has opposed the following transactions involving listed Australian companies:

- the proposed regional network sharing arrangement between the largest and third largest telecom providers in Australia, Telstra and TPG (a negative merger authorisation determination which was upheld by the Australian Competition Tribunal on appeal);
- the proposed acquisition by ANZ, one of Australia's 'Big 4' retail banks, of the banking arm of Suncorp Bank, one of Australia's largest financial services providers (a negative merger authorisation determination which is currently on appeal before the Australian Competition Tribunal); and
- the proposed acquisition by Transurban, Australia's largest toll-road operator, of Horizon Roads, the only other private toll road operator in Australia (which was reviewed under the informal merger review process).

Reform proposals

More substantial changes, which will signal a step change in Australian merger control, are forthcoming. In April 2023, the Chair confirmed her broad support for reform to Australia's merger clearance regime, originally proposed by her predecessor. Underpinning those changes is the ACCC's belief that the present 'enforcement-based model' (in which the ACCC must approach the Court to block a transaction) has shifted the balance "too much toward avoiding the risk of opposing a benign merger, at the expense of increasing the risk of enabling anti-competitive mergers."

Claiming that the Australian regime is "out of place" when compared to the regimes in "most jurisdictions" due to its voluntary and non-suspensory nature, the ACCC has voiced repeated frustration at parties "pushing the boundaries of the informal regime" by:

- providing late, incomplete, or incorrect information to the ACCC;
- threatening to complete transactions before the ACCC has finalised its review; and
- notifying the ACCC of transactions after its international counterparts.

The most notable features of the proposed reforms are set out below.

- **Introduction of a mandatory and suspensory merger filing regime:** this would require merger parties to report transactions exceeding certain thresholds to the ACCC before completion (aligning more closely with practices in Europe and the United States) and preclude parties from completing a transaction unless the ACCC is 'positively satisfied' that the deal will not substantially lessen competition.
- **"Call in" power:** the ACCC would have a power to "call in" transactions which it believes may raise competition concerns, even if they do not meet the notification thresholds.
- **A new "notification waiver" system:** such a system would be used for non-contentious matters (along with a short-form notification option for simpler matters).
- **Retaining the merger authorisation process:** the ACCC would retain a merger authorisation process, whereby a transaction can be cleared if the ACCC is satisfied that the public benefits of an acquisition outweigh its detriments, including any lessening of competition (which was the case in the recent clearances of Brookfield/Origin and Armaguard/Prosegur), but only if the merger parties have failed to secure clearance on competition grounds.
- **Changes to the appeal regime:** while changes to the appeal regime are proposed, it is yet to be revealed whether the ACCC will propose a comprehensive merits review or limited merits review (based on the information before the ACCC). Nevertheless, parties will still retain the ability to approach the Federal Court of Australia to seek a declaration that a transaction is unlikely to substantially lessen competition.
- **Amendments to legislation:** substantively, the ACCC proposes that the amending legislation clarify that "entrenching, materially increasing or materially extending a position of substantial market power" can constitute a substantial lessening of competition and introduce new mandatory factors for any competition assessment including:
  - access to, or control of, data, technology, or other significant assets;
  - the loss of actual or potential competitive rivalry; and
  - whether the acquisition is part of a series of similar acquisitions.

What's next?

On 23 August 2023, a 'Competition Review' was announced by the Australian Treasurer. The proposed merger control reforms are at the top of the review panel's agenda. The success and feasibility of any reforms will depend on their specifics, including the notification thresholds and review timeframes that are selected. We anticipate that any reforms will garner broad political support.

Finally, we anticipate that the current shift towards more restrictive merger control in Australia will continue.

The impact of the proposed reforms are likely to be felt most keenly by larger or serial acquirers (who are more likely to trigger notification thresholds) such as private equity, technology, retail, industrial property and health, aged care, and education players.

Dealmakers should be prepared for:

- additional merger control costs;
- longer review timelines;
- prescriptive upfront information requirements; and
- an overlay of greater risk and complexity in particular as the new reforms are implemented.

Key trends in foreign investment regulation and strategies for foreign bidders

> States have no eternal allies and… no perpetual enemies.
>
> Lord Palmerston

Our survey results show 43% of bids this year were from foreign bidders, of which 29% were from the Five Eyes nations (excluding Australia).[1] The re-mooring of the national interest test means businesses will be forced to make choices about with whom they do deals with, particularly in strategic sectors. Patriotic capitalism is problematic – but a growing inevitability.

National security prevails over economics

Consistent with global trends, we expect to see a continued primacy of national security over economics, the ongoing imposition of conditions on most transactions and a more bespoke application of the framing of those conditions.

The statistics in the latest FIRB Quarterly Report support this position with FIRB conditions imposed on 122 of the 297 applications for the 2023 April to June quarter and 72% of applications in the calendar year to date including the imposition of FIRB conditions.

Transactions involving sensitive technology, including semiconductor development and production, and energy, will continue to pose a higher risk.

We also expect to see an ongoing focus on compliance and an increased risk of enforcement action.

The key areas of focus for FIRB

While for the majority of acquisitions, obtaining foreign investment approval under various regimes will be a relatively straightforward process, investments in critical supply chains, digitalisation, infrastructure and decarbonisation will be the subject of heightened interest from security services and accordingly applications are expected to be subject to longer review periods.

We expect FIRB's focus in the coming year to be on the following areas:

Supply chains

Reflecting the rise of friend-shoring and sentiment in the US, UK and Canada, the security and resilience of supply chains relating to manufacturing, artificial intelligence, critical mineral and material resources, advanced clean energy and climate adaptation technologies, microelectronics and other key sectors relevant to key supply chains will be a focus.

> In July of this year the Treasurer issued a prohibition order to block the takeover of lithium miner Alita Resources by a China-linked company.

1 The Five Eyes nations comprise the United States, the United Kingdom, Canada, New Zealand and Australia.

The Five Eyes convergence shows foreign investment regulators are increasingly concerned to ensure that critical minerals and their processing remains onshore or within friendly shores and owned by like-minded investors. We would not be surprised to see the next focus of these agencies to be on off-take arrangements especially where facilities have long term arrangements for supply to non-Five Eyes destinations.

Cumulative effects of multiple transactions on anti-trust and national security

Anti-trust and national security are increasingly tied together.

Australia's foreign investment policy which sets out the national interest test was recently updated to note that the Government may also consider the impact that a proposed investment has on the make-up of the relevant global industry, particularly where concentration could lead to distortions to competitive market outcomes. A particular concern is the extent to which an investment may allow an investor to control the global supply of a product or service.

We expect the ongoing use of foreign investment laws by consult agencies to gain greater access to information and an opportunity to impose conditions under a more flexible legislative regime.

Bidders will need to have information to hand as part of the foreign investment process to address, at least, competition and tax requests for additional information.

Acquisitions by the same bidder, or related parties within the same sector or involving similar technologies, particularly in certain sensitive sectors or technologies, can expect greater scrutiny even where the particular transaction under review may not give rise to national security concerns when considered by itself.

Tech, cybersecurity and sensitive data

A strengthening of Australia's high-tech ecosystem in support of advanced capabilities will be fundamental to the success of AUKUS and investment in that ecosystem and its adjacencies is likely to attract more attention.

In light of ongoing Government and regulator concerns about cybersecurity following high profile attacks, along with fears of coercion, we expect to see the ongoing imposition of conditions on bidders relating to data including:

- requirements to implement enhanced security controls to protect sensitive information and technology from unauthorised access;
- requirements that certain key personnel or board members hold particular security clearances; and
- restrictions on the sharing of certain information.

What it means for M&A – choose your friends wisely

Joint bids

Joint bids might present bidders with flexibility to manage the optics of a bidder who may be considered 'non-like minded'. A consortium can be used to manage potential foreign investment approval issues through using the consortium structure to manage the economics and governance arrangements.

Bidders (including private equity) should be mindful of the increasing requests for information from FIRB about the truly passive nature of investors. Consistent with the announcement by the Committee on Foreign Investment in the United States (**CFIUS**) in May of this year that it has the authority to make inquiries "with respect to all foreign investors that are involved, directly or indirectly, in a transaction, including limited partners in an investment fund" and "with respect to any governance rights and other contractual rights that investors collectively or individually may have in an indirect or direct acquirer", FIRB is increasingly requesting information about governance and contractual rights of investors in funds.

To allay concerns about regulatory risk, foreign bidders may be more likely to have to offer ticking fees to manage delays to implementation as a result of any drawn-out regulatory approvals processes. For example, the Brookfield/Origin scheme includes a 4.5 cents per month ticking fee, accruing on a daily basis, which would be payable if implementation of the scheme is delayed beyond 30 November 2023.

Know your bidder

One of the issues a target board will need to consider when assessing a bid by a foreigner is FIRB completion risk – this will be particularly important in contested takeovers. This task is all the more complex in world of geoeconomic fragmentation, and where choosing your 'friends' wisely is particularly important but identifying who constitutes a 'friend' is not necessarily straightforward.

With Five Eyes' focus on ultimate beneficial owners, it is increasingly important for target boards to interrogate a bidder's upstream investors and any other sources of equity that will fund the bid. A failure by a bidder to provide sufficient information to enable a target board to effectively assess FIRB risk could result in challenges to the adequacy of disclosure, as a tactic to challenge the merits of a bidder's offer or in challenging a competitor's offer.

Target boards may look to additional contractual protections in the implementation deed to:

- require specificity in the formulation of the FIRB CP (see discussion below); or
- address the later introduction of investors in a bid structure (increasingly common for private equity bids with further syndication) that may impact the FIRB risk of the transaction or require specificity in the FIRB approval conditions.

Reverse break fees

With reverse break fees becoming an increasing feature of the Australian market, could a trigger for payment extend to 'regulatory failure'?

This year BHP agreed to pay a A$95 million (or 1% of the equity value) reverse break fee to Oz Minerals if it failed to obtain certain regulatory approvals required for the transaction (albeit subject to Brazilian and Vietnamese competition approvals).

With the growing focus on foreign investment approvals and the heightened scrutiny, we expect to see reverse break fees relating to regulatory conditions having a greater prominence in negotiations, particularly where the bidder or its investors are from a politically sensitive region or where the target operates in a sensitive sector.

While the reverse break fee for Newcrest and Newmont was extraordinary, the general market trend has to been to mirror bidder break fees, i.e. 1%, although we expect that this may change over time.

FIRB CPs

We expect to see the ongoing evolution as to what is market for a FIRB CP from the standard formulation of the bidder acting reasonably in the acceptance of FIRB conditions (which may include a reference to standard tax conditions and in more sensitive deals a side letter of agreed conditions) to a FIRB CP which:

- specifies the types of FIRB conditions which a bidder must accept, e.g. PE tax conditions, conditions relating to governance including Australian directors, residency, headquarters and security clearances and data and access conditions;
- requires acceptance of FIRB conditions previously accepted by a bidder (particularly relevant for repeat FIRB customers); and
- has a material adverse impact carve-out.

The broad construction of FIRB conditions reflects the lack of standardised conditions as FIRB's practice evolves, and the growing unpredictability as to FIRB conditions which may be imposed on transactions as the geopolitical paradigm moves at pace. While signalling to FIRB the FIRB conditions a bidder is essentially willing to accept may be of concern to the bidder, from a target board's perspective, a rapidly evolving foreign investment environment means certainty about what FIRB conditions a bidder will accept will be important.

The simultaneous scheme of arrangement and takeover of lithium exploration company Azure Minerals Limited by Chilean firm SQM is a case in point. In that transaction, the FIRB CPs would be satisfied if the bidder obtained FIRB approval either unconditionally or:

- subject only to standard tax conditions (which are in the form or substantially in the form of those set out in items 1 to 6 of the form of tax conditions last updated on 10 August 2023);
- conditions that SQM or its affiliates has had imposed in prior notifications; and/or
- conditions which would not reasonably be expected to result in an adverse material financial impact on the value SQM could reasonably expect to derive from the Scheme.

Looking ahead

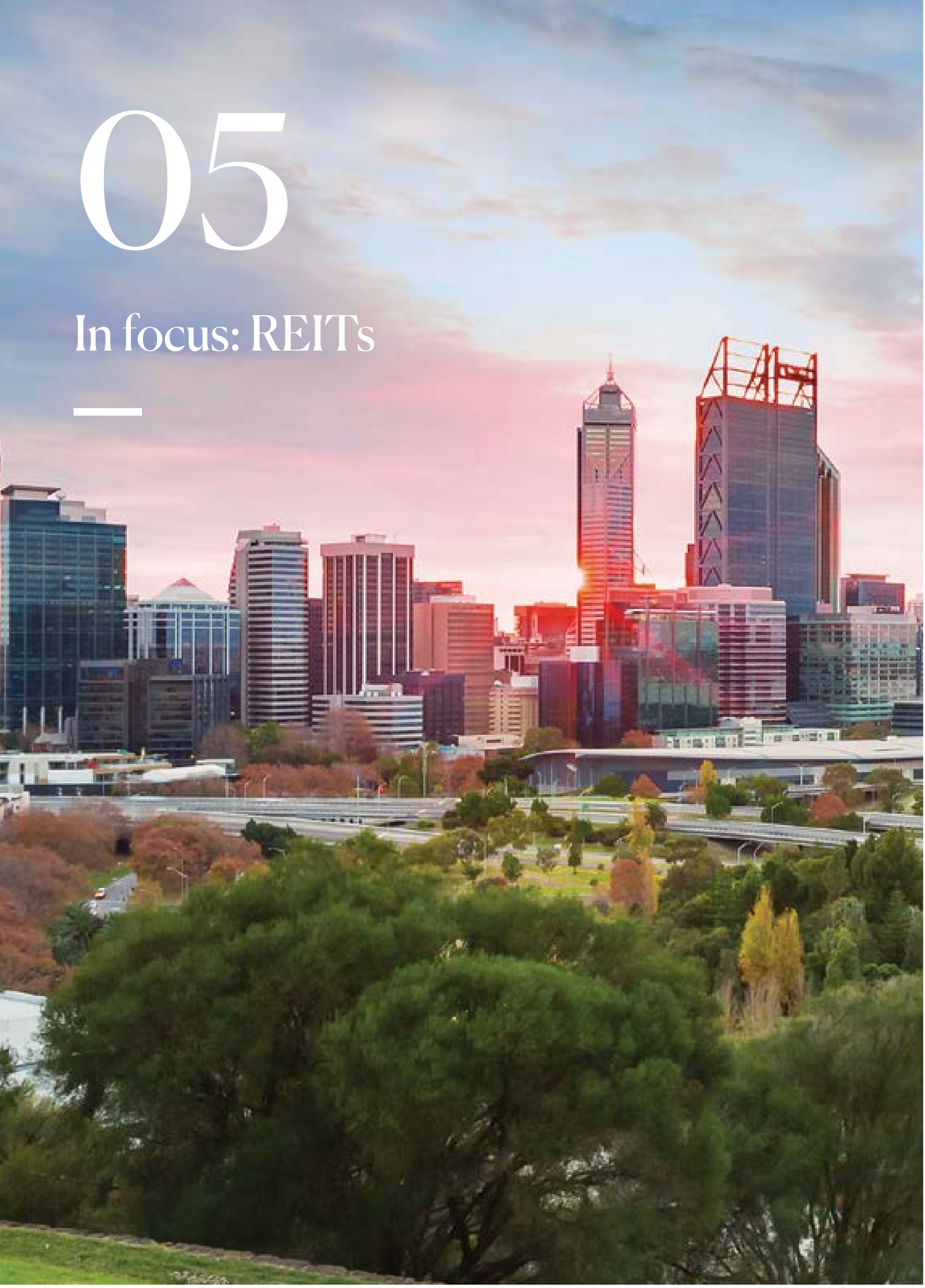
It remains essential that the application of the foreign investment regime is taken into account in deal planning and execution.

Appreciating the politics, respecting the process and having a clear strategy to proactively manage concerns will be critical to M&A in 2024.

Click here for a link to the detailed version of this article.

05

In focus: REITs



REITs: the art of the long view

The real estate deal environment has been significantly impacted by the challenges of tightening monetary policy and the revolution of how people live, work and play in a post-pandemic world. Significant opportunities exist for patient and creative capital and real estate investment trusts (**REITs**) that are willing to take a longer term view.

The current macroeconomic uncertainties mean solutions that create future sustainable value are likely to be a focus over the coming year. After an extended period of compressed cap rates driven by an unusually lower cost of capital, REITs will need to embrace innovation, digital solutions and sustainability to support net operating income (**NOI**).

In 2024, we expect to see:

- strategic scrip mergers between listed REITs to bridge the valuation gap and enable diversification of asset class;
- ongoing asset light, fund management models;
- continuation of the trend towards capital partnering to fund growth opportunities; and
- transformative acquisitions to support re-invention in innovation precincts, data centres and proptech.

Boosting cash flows and investing in undersupplied sectors will enable REITs to ride the storm of the predicted ongoing valuation pain.

Bridging the gap

We are unlikely to see take-private activity in REITs while debt markets remain constrained. While there is considerable private equity dry powder, take-privates need stability in interest rates and a better sense of where the economy (and asset values) are heading before making a play. A listed REIT trading at a significant discount to net asset value (**NAV**) is unlikely to transact at these levels and is not yet in the position of being a forced seller.

While we expect subdued M&A in REITs for 2024, strategic mergers between listed REITs for scrip are more likely.

Scrip deals will enable bridging of the valuation gap with consideration based on relative trade values. This presents an opportunity for larger players to consolidate in a sector, diversify asset classes and build scale for when the economy turns.

This trend has played out in the US listed REIT market. After two slow quarters, public REIT M&A in the US picked up in the second quarter with four REIT deals totalling US$24.27 billion in transaction value. While elevated interest rates reduced the number of take-private deals, all stock transactions remained prominent. Extra Storage Space Inc's all stock-acquisition of Life Storage Inc marked the largest REIT M&A announcement and creates the largest storage operator in the US. Life Storage stockholders are set to receive 0.8950 of an Extra Space share for each share they own, equivalent to US$145.82 per share.

Public Storage, which was the largest storage operator in the US, had bid US$129 per share for Life Storage. This unsolicited offer was quickly dismissed as 'significantly' undervaluing the business.

Public Storage had also made an offer for National Storage REIT (**NSR**) in 2020, bidding US$2.40 per security in cash. NSR is now trading at US$2.18 per security and could represent a play for what is seen as one of the more resilient asset classes. In a twist, we don't think it's improbable that NSR could put Abacus Storage King on its radar for a scrip bid as it now trades above Abacus Storage King, with its shares down from its demerger listing.

Diversification of revenue

Of the 24 listed REITs in the ASX Top 200, 15% now have third party capital mandates in place earning funds and asset management income. The extent of that funds management is a unique feature of the Australian market, differentiating it from US and European REITs, which are more focused on investing through their balance sheets.

We expect that in 2024, REITs will increase their focus on establishing funds management platforms and seek third party capital mandates as a means to generate incremental income streams. More REITs are likely to act as development, property and investment managers, gaining access to a more competitive cost of capital source and reducing reliance on their own balance sheet.

Capital partnering directly between REITs and pension funds is likely to grow, with the trend moving towards co-investment positions by local and off-shore pension funds. We also expect the trend of capital partnering with Japanese property developers to continue. Learning from the 1980s Japanese real estate investment boom in Australia, Japanese developers will continue to partner with Australian REITs with local expertise and experience to support residential and mixed-used developments in a relatively stable and higher growth market.

Transformative acquisitions to re-invent

With the gap between the NAV of listed REITs and unlisted REITs likely to reduce, listed REITs that are already trading on fully priced-in discounts will be in a relative position of strength. We expect to see listed REITs buying assets from unlisted REITs and portfolios from under-performing REITs in need of capital recycling.

These acquisitions can focus on alternative asset classes enabling REITs to diversify into growing sectors.

Health and life sciences

Much has been written about the growth in health and life sciences as an alternative asset class in Australia. Off-the-shelf acquisitions of portfolios or developments in this nascent area will be difficult. However, we think the model of precincts located close to universities presents a real opportunity for REITs that are keen to diversify from the office sector.

As a result of the challenging environment, many Australian universities are looking to reduce their property footprint and monetise assets. Adding value to Australian university offerings with the development of a rich research and innovation precinct is a significant opportunity for Australian universities and investors.

Australian REITs with both the expertise and history of development will be able to leverage their experience to make unsolicited proposals for precinct developments for Australian universities.

The deal struck between local private equity property player Wentworth Capital and the University of Sydney (on which Corrs acted) to develop a A$500 million hub for life sciences is a case in point and one of the biggest single moves yet for this emerging real estate sector. Under their agreement, Wentworth takes a 99-year lease on the university's Medical Foundation Building, just next to the main campus in Camperdown, that will be transformed into a Biomed, Science and Innovation Campus of up to 30,000 square metres and home to a range of industry and public users in the life sciences sector.

AUKUS Pillar 2

Real estate precincts that support defence (particularly in the light of AUKUS Pillar 2) and regional development are likely to be a focus. The Australian Maritime College Proposal to establish an A$30 million Defence and Maritime Innovation and Design Precinct, which will bring together industry, research, education and training, is likely to represent a template for similar developments (for example the University of Wollongong and Port Kembla).

We expect to see opportunities to house specialist research into artificial intelligence, quantum technologies and hypersonic capability development, both on and off campus.

In a similar vein, locations situated near assets like Osborne Naval Shipyard (Australia's largest naval shipbuilding precinct, home to the Hunter Class Frigate program and where the AUKUS submarines will be built), HMAS Stirling (the current base of operations of Australia's submarines), and the proposed new east coast base (to support the operations of nuclear-powered submarines as well as surface vessels) should be well positioned for increased levels of activity.

Data centres

The demand for data centres in Asia-Pacific continues unabated as businesses ramp up their digital transformation journey and Artificial Intelligence, Virtual/Augmented Reality and the Internet of Things see increased investment. While hyperscale cloud platforms will be harnessed to support growth in data, more data centres will be needed to reduce latency, especially in areas where populations are more dispersed.

The Australian data centre market has an impressive forecast compound annual growth rate of 7.05% through to 2028. A significant amount of supply will be added to the major Australian markets in the near term, with close to three quarters of the total capacity currently under construction in Victoria and the remainder in NSW. Despite this, more will be required.

Although we think of AI as blue tunnels of suspended numbers and illuminated circuit boards, the reality is that generative AI is one of the most extractive industries in the world. It is estimated that generative AI is responsible for 2% of global greenhouse gas emissions and 2% of electricity consumption.

Australian REITs that benefit from the 'accidental foreign exception' under Australia's foreign investment regime together with Australian superannuation funds, hold a competitive advantage in this asset class. They have the ability to combat national security concerns and can partner with experienced developers and operators.

Within Europe, Iceland has attracted significant investment in data centres, as 100% of Iceland's electricity being a sustainable mix of geothermal and hydroelectric power generation. The sustainable electricity sources even benefit from free cooling, thanks to the naturally cool climate, reducing both the carbon footprint and long-term operating costs.

We suggest that, by leveraging the benefits of Australian REITs, Tasmania can become the Iceland of the Asia-Pacific for data centres. Tasmania provides an exceptionally strong proposition for data centres. It offers a stable and secure operating environment, with a low risk of natural disasters and lower ambient temperatures than the Australian mainland. In addition, Tasmania has similarly reached the enviable position of generating 100% renewable energy.

Office space

Turning empty office spaces into hybrid places (for example Brookfield's residential, retail and office offering in the evolving Hudson Yards neighbourhood) and transforming retail spaces to reflect the evolving demands of consumers and brands for experiential spaces are two examples of ways to support cap rates with a future increase in market value.

A focus on cashflows to support cap rates means new and innovative offerings to offset declines in traditional revenue streams will be required.

Institutional investment in build-to-rent (**BTR**) to manage the housing affordability crisis has been a topic of considerable focus in 2023. To make affordable housing offerings stack up, market rent BTR needs to work and one way to do this is to go back in time and offer renters something beyond physical spaces to the most precious perk of all: more free time.

Reflecting developments in the more established multifamily markets in the US and the UK, we expect to see a greater focus on the acquisition of the 'concierge piece' of BTR projects which reflect the post-Covid evolution of the tangible to experiential with onsite lifestyle managers, chefs, sommeliers and wellness coaches the norm.

Proptech

REITs acquiring proptech (particularly those at Series B or Series C stage) as a bolt-on will provide the most upside.

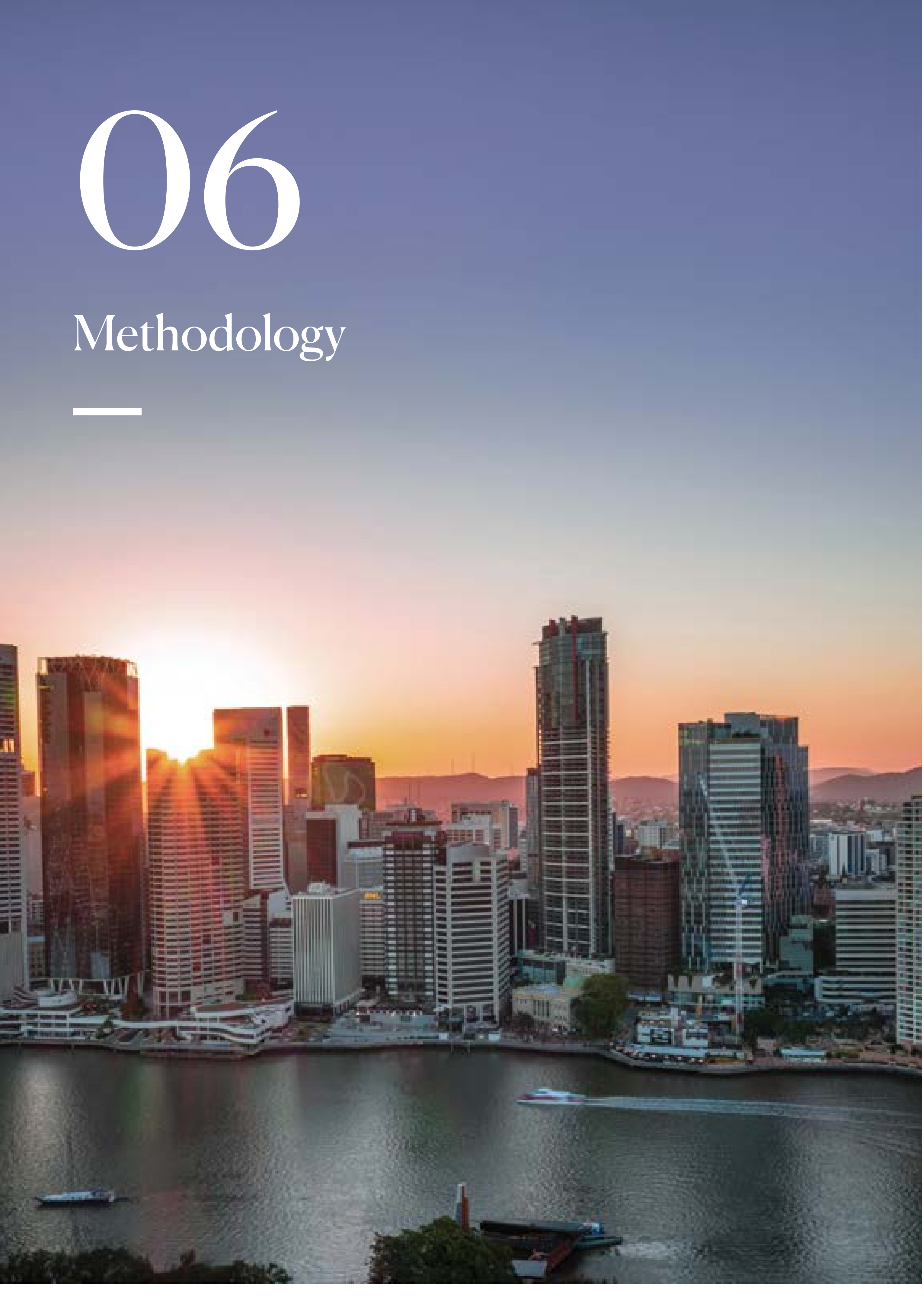
There are now over 380 proptech companies operating in Australia with the majority of these having entered the market in the last five years. In the US, Passive Logic is building a full ecosystem of tools, where it can plug into the existing mechanical and electrical system. It has an application programming interface that can speak to whatever is already there, and start to use AI and deep tech to understand what is happening in the building. The building can respond dynamically by turning off lights, reducing aircon etc.

In undertaking any acquisitions of proptech, REITs will need to take care not to get carried away with the digital at the expense of the mechanical. While the potential is great, the current market for digital proptech is fragmented and highly competitive, and solutions may lack interoperability - owning the solution will support interoperability.

We believe that better performing REITs will benefit from some of the challenges of others, particularly those that are more leveraged and private owners of real estate. Those benefits should enable REITs to consolidate as a proportion of the overall real estate market.

06

Methodology



Corrs public M&A database

Corrs has a detailed proprietary public M&A database from which it drew the statistics and trends referred to in this publication. The database covers all announced takeovers and schemes with a deal value over A$25 million from 2011 to 2023. The statistics referred to in this publication provide a limited snapshot of the more detailed information that is available in the database.

We would be pleased to assist with queries on deal statistics and market trends relating to public M&A activity, including deal structures and pre-bid stakes, rival bid strategies, target engagement, announcements, recommendations, pre-bid strategies, deal protection (such as lock-up devices and break fees), bid conditions, truth in takeover statements, tiered bid structures, getting to compulsory acquisition, sector activity, consideration, bidders and foreign investment

Please feel free to contact a member of the Corrs M&A team (see page 46).

Methodology

In producing this publication, we reviewed data from a deal sample of 56 takeover bids and schemes of arrangement, which:

- involved an Australian-listed target;
- were announced between 1 October 2022 and 30 September 2023; and
- had a deal value over A$25 million.

We note that when referencing the year '2022' in this publication, we have reviewed data from deals announced between 1 October 2021 and 30 September 2022, and similarly for 2020 and 2021.

A full list of all deals in our database this year is set out in Appendix A. Information in relation to these deals is current to 30 September 2023 (unless otherwise specified in this publication).

As at that date, twenty schemes and two takeovers from the deal sample were ongoing. The information used was largely obtained from our own in-depth research and market analysis, along with primary sources such as ASX announcements, bidder and target statements and scheme booklets.

Appendix A – Methodology

	Target name	Bidding entity (Parent)	Date announced	Deal value (A$)	Bid/Scheme
1	A-Cap Energy Limited	Lotus Resources Limited	13/07/2023	$64,587,000	Scheme
2	Advanced Share Registry Limited	Automic Enterprise Pty Ltd (Automic Group)	08/09/2023	$31,912,000	Scheme
3	Allkem Ltd	NewCo (Livent Corporation)	10/05/2023	$8,187,224,000	Scheme
4	Alloggio Group Limited	ALO BidCo Pty Ltd (Next Capital Pty Limited)	27/03/2023	$48,175,000	Scheme
5	Best & Less Group Holdings Ltd	BBRC Admin 1 (Brett Blundy, Ray Itaoui)	01/05/2023	$236,943,000	Off-market bid
6	Beyond International Ltd#	Screentime Pty Ltd (Banijay Group)	06/10/2022	$47,499,000	Scheme
7	Blackmores Limited	Kirin Holdings Company Ltd	27/04/2023	$1,783,818,000	Scheme
8	Breaker Resources NL	Ramelius Kalgoorlie Pty Ltd (Ramelius Resources Limited)	20/03/2023	$130,700,000	Off-market bid
9	Cannon Resources Ltd	Kedalion Nickel Pty Ltd (Kinterra Battery Metals Mining Fund, LP)	31/10/2022	$38,510,000	Off-market bid
10	Carbon Revolution Limited	Carbon Revolution plc (Twin Ridge Capital Acquisition Corp)	30/11/2022	$289,296,000	Scheme
11	CD Private Equity Fund I	CD Private Equity Fund III (Responsible Entity: E&P Investments Limited)	05/10/2022	$38,594,000	Scheme
12	CD Private Equity Fund II	CD Private Equity Fund III (Responsible Entity: E&P Investments Limited)	05/10/2022	$80,618,000	Scheme

	Target name	Bidding entity (Parent)	Date announced	Deal value (A$)	Bid/Scheme
13	Chesser Resources Limited	Fortuna Silver Mines Inc.	09/05/2023	$83,581,000	Scheme
14	Cirrus Networks Holdings Ltd#	Atturra Holdings Pty Ltd (Atturra Limited)	11/09/2023	$58,590,000	Scheme
15	Costa Group Holdings Limited	Chilli Buyer Pty Ltd (Paine Schwartz Partners, LLC)	04/07/2023	$1,487,071,000	Scheme
16	DDH1 Limited	Perenti Limited	26/06/2023	$405,104,000	Scheme
17	Diverger Limited	Count Limited	22/09/2023	$45,337,000	Scheme
18	Eildon Capital Group	Samuel Terry Absolute Return Active Fund (Trustee: Samuel Terry Asset Management Pty Ltd)	24/04/2023	$43,934,000	Off-market bid
19	Elmo Software Ltd	Cookie Monster AcquireCo Pty Ltd (K1 Investment Management, LLC)	26/10/2022	$483,113,000	Scheme
20	Ensurance Ltd	PSC Insurance Group Limited	08/08/2023	$25,200,000	Scheme
21	Essential Metals Limited	Tianqi Lithium Energy Australia Pty Ltd (Tianqi Lithium Corporation, IGO Limited)	09/01/2023	$133,783,000	Scheme
22	Essential Metals Limited	Develop Global Limited	03/07/2023	$152,600,000	Scheme
23	Estia Health Limited	Firebird BidCo Pty Ltd (Bain Capital Private Equity, LLC)	24/03/2023	$826,755,000	Scheme
24	Genesis Minerals Ltd	St Barbara Ltd	12/12/2022	$542,200,000	Scheme
25	Healius Limited	Australian Clinical Labs Limited	20/03/2023	$1,530,352,000	Off-market bid
26	Healthia Limited	Harold BidCo Pty Ltd (Pacific Equity Partners Pty Limited)	31/08/2023	$260,007,000	Scheme
27	intelliHR Limited	Humanforce Holdings Pty Ltd	17/03/2023	$87,302,000	On-market bid
28	intelliHR Limited	Humanforce Holdings Pty Ltd	31/01/2023	$56,098,000	Scheme
29	intelliHR Limited*	Access Workspace Pty Limited (The Access Group)	03/03/2023	$79,898,000	Scheme and off-market bid
30	InvoCare Limited	Eternal Aus BidCo Pty Ltd (TPG Global LLC)	07/03/2023	$1,829,571,000	Scheme
31	Mincor Resources NL	Wyloo Consolidated Investments Pty Ltd (Wyloo Metals Ltd)	21/03/2023	$759,351,000	On-market bid
32	MSL Solutions Ltd	Plutus BidCo Pty Ltd (Pemba Capital Partners)	15/11/2022	$119,359,000	Scheme
33	Musgrave Minerals Limited	Mt Magnet Gold Pty Ltd (Ramelius Resources Limited)	03/07/2023	$226,698,000	Off-market bid
34	Musgrave Minerals Limited	Westgold Resources Limited	06/06/2023	$177,362,000	Off-market bid
35	New Century Resources Ltd	Sibanye Resources Australia Pty Ltd (Sibanye-Stillwater Limited)	21/02/2023	$148,482,000	Off-market bid
36	Newcrest Mining Limited	Newmont Overseas Holdings Pty Ltd (Newmont Corporation)	06/02/2023	$26,200,000,000	Scheme

	Target name	Bidding entity (Parent)	Date announced	Deal value (A$)	Bid/Scheme
37	Nitro Software Ltd	Potentia Capital Management Pty Ltd (Technology Growth Capital LLC)	31/08/2022	$562,070,000	Off-market bid
38	Nitro Software Ltd*	Rocket BidCo Pty Ltd (Cascade Parent Ltd)	31/10/2022	$540,870,000	Scheme and off-market bid
39	Norwest Energy NL#	Mineral Resources Ltd	16/12/2022	$402,814,296	Off-market bid
40	OreCorp Limited	Silvercorp Metals Inc.	06/08/2023	$281,645,000	Scheme
41	Origin Energy Limited	Brookfield Asset Management Inc, MidOcean Energy LLC	10/11/2022	$15,353,127,000	Scheme
42	Oz Minerals Ltd	BHP Lonsdale Investments Pty Ltd (BHP Group Limited)	05/08/2022	$9,460,657,000	Scheme
43	Pact Group Holdings Limited	Bennamon Industries Pty Ltd (Kin Group Pty Ltd)	13/09/2023	$117,049,000	Off-market bid
44	PropTech Group Ltd	Rockend Technology Pty Ltd (MRI Software LLC)#	31/10/2022	$93,387,000	Scheme
45	Pushpay Holdings Ltd#	Pegasus Bidco Limited (Sixth Street and BGH Capital Consortium)	28/10/2022	$1,412,386,000	Scheme
46	SILK Laser Australia Limited (Target)	Australian Pharmaceuticals Industries Pty Ltd (Wesfarmers Limited)	19/04/2023	$177,956,000	Scheme
47	Slater & Gordon Ltd	Wright NomineeCo Pty Ltd (Allegro Funds Pty Ltd)#	24/02/2023	$77,590,000	Off-market bid
48	Talon Energy Limited	Strike Energy Limited	14/08/2023	$133,027,000	Scheme
49	Technology Metals Australia Limited	Australian Vanadium Limited#	25/09/2023	$84,000,000	Scheme
50	Tesserent Limited	Thales Australia Holdings Pty Ltd (Thales Group)	13/06/2023	$176,044,000	Scheme
51	Thorn Group Limited	Somers Limited	25/08/2023	$40,674,000	Scheme
52	United Malt Group Limited	Malteris Soufflet SAS	28/03/2023	$1,495,896,000	Scheme
53	Vango Mining Limited	Catalyst Metals Limited	10/01/2023	$66,010,000	Off-market bid
54	Warrego Energy Limited	Strike West Holdings Pty Ltd (Strike Energy Limited)	10/11/2022	$409,609,000	Off-market bid
55	Warrego Energy Limited	Beach Energy Limited	11/11/2022	$244,542,000	Scheme
56	Warrego Energy Limited	Hancock Energy (PB) Pty Ltd (Hancock Prospecting Pty Ltd)#	30/11/2022	$342,474,000	Off-market bid

* These transactions were a concurrent scheme and takeover. For the purposes of the statistics for the review period, the scheme and takeover were counted as one transaction, unless otherwise noted in the publication.

\# Corrs advised on these transactions.

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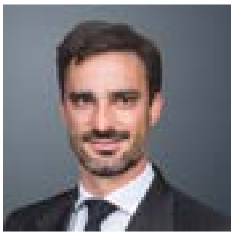

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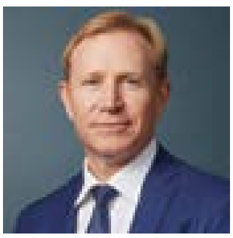

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