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IT'S PUBLIC

KWM M&A INSIGHTS | 2025

Imitation Food In An Imitation Kitchen by Laura Oczosty

WELCOME TO THE INAUGURAL EDITION OF IT'S PUBLIC

your go-to publication and podcast for Australian public M&A. It's Public supersedes M&A in the City, but continues to deliver the same mix of clear, high-quality deal insight and market analysis.

KWM PODCASTS

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Spotify

SO WHY CHANGE?

Because It's Public is now part of something bigger and more exciting: This edition launches a refreshed suite of KWM M&A and corporate focussed publications, with clear, concise titles designed to help our readers easily identify the subjects which are interesting and important to them - and so you know it comes from KWM.

- Alongside this publication, you'll soon be able to access ***In Private*** for all things Private Capital.
- ***On Board*** - KWM's longstanding corporate governance quarterly – will continue in its popular newsletter format.
- And separately, look out for ***At Work*** - insights from our expanded Employment law team.

WHAT'S INSIDE?

In this launch edition, we explore the complexities and dynamics of the current M&A landscape.

In *The Threads of Louis Dreyfus Co's Successful Namoi Acquisition*, **Rhys Casey, Jason Watts, Matt McKeown & Simon Cooke** go inside-the-deal to recount the intense bidding war between Louis Dreyfus and Olam Agri for Namoi Cotton. In a piece with many lessons for dealmakers, discover how conditionalities and regulatory timing influenced the final outcome. The takeaway? Price isn't everything when it comes to determining the superior offer in competitive M&A.

Continuing the regulatory risk theme, **Lizzie Knight, Claudia Hollings** and **Peter Stirling** highlight the challenges of navigating Australia's foreign investment review process in *Conditionally Yours: Tackling FIRB Uncertainty in Foreign Bids*. Using a detailed KWM analysis of FIRB conditions and deal data, this article provides practical strategies for dealmakers to assess FIRB risks, outlining how to assess and manage conditions imposed on foreign bids.

Amanda Isouard and **Apoorva Suryaprakash** offer critical lessons from recent Takeovers Panel decisions in *Rights and Wrongs of Rights Issue Structuring*, providing insights into how to structure rights issues to maintain shareholder trust and avoid a dreaded 'unacceptable circumstances' determination.

Keeping a close watch on prospective legislative developments, **Genovieve Lajeunesse**, **Tim Bednall** and **Mark Vanderneut** examine proposed reforms impacting equity derivatives and takeovers in *Equity Derivatives: Collateral Damage*. They unpack the implications of a plan for a register of beneficial ownership - revealing how it could reshape ownership disclosures and takeover tactics.

In *The Great Australian Banking Shake-Up*, **Rhys Casey** and **Mark Vanderneut** analyse the ongoing consolidation of mutual banks in Australia, discussing the drivers behind this trend and the unique cultural considerations that make mutual mergers particularly compelling.

And the sector lens switches to resources in our *Podcast: Digging for Deals*. **Antonella Pacitti**, **Heath Lewis** and **Paul Schroder** join **Will Heath** to discuss why 2025 is shaping promisingly for resources sector public M&A. Their conversation lays out the energy transition and uncertainty themes driving consolidation, then looks deeper at how those themes are influencing the regulatory and dealmaking environment, geopolitical and trade uncertainty, and the financing and investment trends in resources dealmaking.

Listen to that here: Apple Podcasts | Spotify

Welcome aboard! We trust you enjoy this edition and find it valuable.

MEET THE EDITORS

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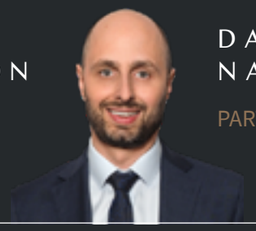

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DIGGING FOR DEALS: WHY WILL RESOURCES M&A BE BIG IN 2025?

Dig deeper into why the transition and uncertainty will drive dealmaking.

KWM PODCASTS

In the first edition of KWM's new It's Public podcast, M&A partners Will Heath, Antonella Pacitti, Heath Lewis and Paul Schroder discuss why 2025 is shaping promisingly for resources M&A. Their discussion covers the energy transition and uncertainty themes driving consolidation, the regulatory and dealmaking environment, geopolitical and trade uncertainty and the financing and investment trends all fuelling resources dealmaking.

Below is an edited transcript. You can listen to the full conversation via KWM Podcasts.

Download the podcast here

Spotify

Will Heath: Today, we are hugely excited to discuss why we think resources M&A the key sector to watch in 2025. To talk about it, we welcome our mining M&A Maestro, Mr. Paul Schroeder, and from Western Australia, Antonella Pacitti and Heath Lewis.

Heath Lewis: Hello, Will.

Antonella Pacitti: Hello, Will.

Paul Schroder: Thanks, Will.

Will Heath: We believe it's going to be a big year for resources M&A, with a couple of big themes dominating the mining M&A landscape. The first and long arc is the energy transition, and the second and shorter arc is uncertainty. Both drivers favour markets like Australia, with abundant transition resources like copper and other crucial critical minerals, as well as in the uncertainty scope hedge commodities like gold. Antonella, with that in mind, what's on our agenda?

Antonella Pacitti: The first is the current landscape and consolidation trend coming out of the mega deals, and certainly Heath and I are seeing that trend across commodities here in the West, along with some opportunism that's sparked by both distressed and some divestment of non-core and non-strategic assets by the big players. We're going to talk about a lawyer's favourite, the regulatory and deal making environment, financing and investment trends, shifting dynamics between the public and private markets. Paul is going to share an interesting counterpoint to the shrinking ASX narrative that we've certainly been hearing for a while.

Will Heath: On the shrinking ASX, a counterpoint to that has been some of the mega deals that we've seen on ASX and new listings. Antonella, you and I've talked about some of those mega deals, including Newmont and Newcrest, Allkem Livent, Alumina and Alcoa. And now you and the team over in the West have got Northern Star. What's the common theme in these mega scrip mergers, and how are they playing out?

Antonella Pacitti: Consolidation is the theme. Investor interest in gold continues unabated. It's always been the traditional hedge in an environment of uncertainty. Gold is outperforming every other asset class so far this year.

The trick when we're talking about consolidation and these scrip deals, which is what we're seeing, particularly in gold and commodities M&A, is how do you balance the strength of your own stock and your war chest with potential disconnect with fundamentals that a sustained high gold price can create, especially when it comes to development projects.

We're seeing a bit of that, but also the flipside, which segues nicely lithium. Heath Lewis, you've recently done an important transaction with Pilbara and Latin?

Heath Lewis: It is super interesting. Gold and lithium, we are seeing a lot of deal flow, and yet those two commodities couldn't be further apart. Lithium is completely in the doldrums - albeit every now and again there's some suggestion of green shoots - whereas the AUD gold price is absolutely flying.

M&A in both commodities are exhibiting some quite similar themes, even though they are in vastly different places. The all-scrip takeover of Latin resources by Pilbara minerals speaks to two things:

One is a very long-term market or commodity view adopted by Pilbara looking through current pricing scenarios to a world where demand for batteries returns to trend.

The other is the effectiveness of scrip as a currency to allow target shareholders to remain invested, while at the same time not being a drain on the bidder's balance sheet or liquidity in a tough market. Pilbara minerals wanted to be closer to the North American markets, where theoretically the energy transition and the domestic EV market was going to provide opportunity - watch this space in this post-Trump world.

It's also important in the resources space not to forget how important M&A is as another way of obtaining funding for a project, as against a prepaid offtake or debt or project finance or equity capital raising. So you see two commodities performing drastically differently, and yet producing significant transaction volumes and values.

Will Heath: Over to Paul in Sydney, these themes of consolidation and cross-border deals - are you seeing that in other things, like coal and other deals you've been working on?

Paul Schroder: The reality is there's demand for coal at the moment, mainly met coal, and we saw the very competitive Anglo coal sale process happen last year, and a number of spin-off processes are now underway.

We've seen private capital fill a funding hole for coal projects, and we've seen some capital markets open to funding coal mines too. For example, Denham's Olive Downs coking coal project in Queensland raised $875 million last month from the Nordic bond market. And Saul Patts and New Hope, both active in the coal industry, tapped the convertible bond markets.

With all that and after the very competitive Anglo sale process, it's no wonder that we're seeing a number of coal sale price processes underway on the east coast at the moment. I don't think it's only about met coal. With the data centres' insatiable demand for energy, we're going to see M&A around other forms of coal.

Antonella Pacitti: Flipping back to the energy transition, Will, I'm keen to hear more about aluminium. But maybe let's put a bit of context around it. It wouldn't be a podcast in 2025 without reference to the two T's - Trump and tariffs. Unfortunately for our Australian steel maker friends, an exemption that was looming from heavy tariffs has been pulled out from under us.

But there is still very much an existential imperative in transition-driven commodities. Let's talk a little bit about the geopolitical and trade uncertainty. Will, putting your regulator hat on, what's your assessment of the regulatory environment for getting these sorts of deals done?

Will Heath: In a market where we need to attract capital, and many of the deals we've mentioned are cross-border, we need to be receptive, and we need to have an efficient and fair system around foreign investment and also anti-trust and other regulatory approvals.

It puts a sharp focus on the Foreign Investment Review Board and on the ACCC. On FIRB, the Federal Government promised last year FIRB processes would be streamlined, and I think it's important that we see that delivered this year and maintained beyond the election.

It was pleasing that the Alumina-Alcoa transaction went through in a reasonable time. And we'd want to see transactions, not only of that size, but of the developer size, go through as well, without long delays.

It's also critical that the new Australian merger laws, coming in on January 1 next year, are properly supported by the government. We need to see efficient and fair processes from those two regulators and from others.

Antonella, is this regulatory dynamic playing out across other jurisdictions, and what else about geopolitics do you think will come up in resources deals this year?

Antonella Pacitti: Biased though we are, the big M&A in 2025 is positioned to be in resources. Geopolitical uncertainty creates opportunity, even though markets have exercised their uncertainty muscle over recent years, so they're more nimble, more likely to recover.

We've seen a lot of government policy from across the globe aimed at ensuring critical mineral supply. That's created competition for reliable and accessible resources. As President Trump will probably find out, critical minerals are plentiful in many geographies, but the timing for extracting them, delivering them to market, and properly exploiting them doesn't always align with market fundamentals.

The flip side of Australia's stability is that projects do cost more and there can be a time lag. That creates a potential counterincentive to Australian companies to look offshore, into riskier markets, which brings them into direct competition with some other major superpowers, particularly the Chinese producers.

This still favours incumbents who've got established and diversified portfolios to wear the potential increased exploration and development costs and spread their risk. I think we'll continue to see those big bids and maybe a resurgence of some of those that didn't get away last year. But I think we'll also see more programmatic M&A - small, steadier M&A on a regular basis, building profile and expertise incrementally.

Will Heath: Heath, who the kind of investors are that are coming in and doing these deals? And Paul, on deal structuring to get some of these deals done, how is that going to work?

Heath Lewis: I do worry that we've set ourselves up to be very facilitative of Western capital and Western economies over the last five or more years, and not so encouraging of particularly Chinese supply chains and Chinese capital. And now we're in a world where the rug's being pulled out from under us a little bit. So we've set ourselves up for one regime, and now we're looking at a very different environment.

We do a heap of work for the super funds. They're very prepared to play in the resources sandpit, but I am circumspect about the preparedness of super funds to operate in the space as a general proposition. I don't think they'll do it unless they've got the expertise, and it's a pretty specialized investment area with potentially significant risks.

Will Heath: What about sponsors?

Heath Lewis: Super funds have a very significant need to invest and deploy capital, but one of the challenges they have is that they often don't get out of bed for an investment that's $10 or $20 million. There would be many juniors in our part of the world, particularly in critical minerals and battery minerals, that have really exciting projects that tick the energy transition box, but the super funds - if they did - it would either swamp their equity structure or it's just not a big enough investment.

Paul Schroder: Could they follow a model like RCF? - who I know you've done a lot of work for - where they put in a little bit of debt, a little bit of equity, maybe some royalties, and they help these projects get off the ground, but leave that Australian entrepreneur in control of the project and driving it forward?

Heath Lewis: 100%. It also encourages the super funds coming in beside a sponsor or a PE fund. It's been proven to work effectively historically. Rather than being a direct investor, they can rely on the technical expertise of these resources-focused PE funds and come in as a co-investor.

Will Heath: Paul, where else are miners going to get capital? Where do you think deals might come from?

Paul Schroder: There's a broader narrative at play, the shift from public to private capital, and that's global - private capital looking for a home. That has and will continue to drive some of the activity in the Australian resource sector. EMR Capital's got sale processes underway. There's a new entrant to the Australian market - Oryx Global Partners appointed Elizabeth Gaines, the former Fortescue CEO last week. So PE going to continue to be an important player.

There's a need for patient capital in some of these projects. And we are seeing publicly, some sovereigns participating. Australia's NRFC committed $200 million to Arafura rare earths last year. There are Middle East sovereign wealth funds, which we expect are going to be acceptable sources of capital for critical mineral projects. With the US retreat, other capital is going to fill in the gaps. We're hoping that private equity is that source of patient capital to anchor and give expertise to get these projects off the ground.

Will Heath: It brings us nicely to an interesting trend on cross-border funds flow that we've picked up on this year, Paul?

Paul Schroder: Yes, some silver lining for the ASX. We've seen this influx of Canadian companies coming to the ASX, successfully raising capital here, which is a great story for similar resources economies. I might ask Heath to kick off with the Capstone example.

Heath Lewis: Capstone is the poster child for this. Off the back of Oz Minerals being taken out by BHP, there was a well-recognized gap in ASX in terms of pure-play copper producers. There's a desire on part of fund managers and investors for exposure to copper, again as a critical mineral benefiting from the energy transition.

I don't think it's impossible to raise capital on TSX in the resources market, certainly at the top end and for quality opportunities. That's what Capstone did - raised capital from TSX around about the same time as coming to ASX. On any measure, the Capstone example has been highly successful. Liquidity has been good. The share price has been strong and very much facilitated by the foreign exempt listing regime that ASX makes available to the bigger end of town.

Paul Schroder: We've had a number of inquiries from high-quality juniors looking to raise capital on the ASX and take advantage of that. Just to explain, if you're a $2bn market cap or above company, you can qualify in the ASX for a foreign exempt listing, which means that the ASX will mostly defer to the TSX requirements, so you don't have to duplicate things. That is obviously very attractive, that you can access capital without a host of additional regulation. We think if the ASX wants to attract more of these high quality TSX juniors, if they were to reduce this foreign exempt listing threshold from 2 billion to a lower number, that might help get more on the boards. And so that's something to think about as we try and counter this narrative of the shrinking ASX. If anybody listening wants to be a part of a submission, write in!

Will Heath: Thank you, everyone, for your insights. This podcast is part of our "It's Public" publication, where we'll continue exploring M&A themes in-depth. We also have an upcoming sister publication dedicated to private capital, which we're excited about – stay tuned for that! Thank you all for joining today, goodbye for now.

THE THREADS OF LDC'S SUCCESS IN THE BATTLE FOR NAMOI COTTON

Why price isn't everything in determining a superior offer.

Louis Dreyfus Company and Olam Agri's bidding war for control of Australia's largest cotton ginning company, Namoi Cotton, was an enthralling tale of contested M&A. The deal offers a fascinating insight into what does – and does not – amount to a superior offer, as well as the critical role shareholder sentiment can play. This article explores how the battle unfolded, the eventual outcome, and the lessons it offers for dealmakers navigating similar situations.

KEY TAKEAWAYS FOR DEALMAKERS

1. **Price Alone Doesn't Aways Win:** The final outcome was not solely based on the highest bid. The conditionality of the bids played a crucial role.
2. **Regulatory Timing Matters:** The sequence and timing of regulatory approvals can significantly impact the viability of competing bids.
3. **Limits to Independent Expert Opinions:** Expert reports on what constitutes 'fair' value are important factors for target boards' decision making. However, the board has ultimate responsibility for determining which proposal is 'superior' for shareholders.

The strategic review, and opening bids

29 June 2023
Namoi Cotton announces a strategic review.

28 November 2023
Louis Dreyfus Company (LDC) submits a non-binding indicative offer (NBIO) valued at $0.51 per share. LDC already held a 17% stake in Namoi. Namoi's shares are trading at approximately $0.35.

19 Jan 2024
LDC and Namoi sign a Scheme Implementation Agreement.

20 March 2024

Just two days before the first court hearing for LDC's scheme, Olam Agri (Olam) enters the fray.

Olam makes a dual proposal, offering $0.59 per share for a scheme and $0.57 per share for a takeover. This created a competitive environment, prompting Namoi's independent directors to assess both offers.

Both proposals required FIRB and ACCC approvals and were otherwise subject to minimal conditions, including a 50.1% minimum acceptance condition.

29 April 2024
Before an implementation agreement is due to be signed with Olam, LDC announces that it is making a takeover bid for Namoi at $0.60 per share.

May 2024

Olam abandons its dual scheme / takeover approach. Announces a takeover bid at $0.66 per share, increasing to $0.70 per share if it obtains voting power in 90% of Namoi's shares. Samual Terry Asset Management (STAM) states it would accept the Olam offer, subject to the usual qualifications around higher bids and the expert's report.

LDC announces that the $0.70 was illusory because it (as a 17% shareholder) would never accept Olam's offer. LDC subsequently increases its own offer to $0.67 per share.

Olam shortly afterwards drops its 90% minimum acceptance offer and increases its offer to $0.70 per share.

The independent expert values Namoi shares in the range of $0.42 to $0.78, concluding both offers represent 'fair' consideration. However, the expert concludes that the LDC offer could not be 'fair' as there was a superior offer.

The Namoi independent directors at this point recommended rejection of the LDC offer and acceptance of the Olam offer.

REGULATORY RISK – THE ACCC / FIRB PROCESS

- Both bids faced an extended ACCC review; with competition concerns raised that were common to both bidders (such as ownership of cotton classing entities) and others that were bidder specific (such as concentration of ginning services in various regions).
- LDC had an approximately 8-week advantage given it lodged its ACCC application earlier (and had the advantage of diligence in preparing its application). Olam had a slower path through the ACCC, and limitations on access to information, which would prove to be a key hindrance.
- LDC cleared the ACCC on 1 August 2024, having promptly agreed to divestment and other undertakings to address the ACCC's concerns. By early September, LDC also obtained FIRB approval and went unconditional but did not increase its bid.
- Olam's bid faced more challenges to progress through the ACCC, as it faced difficulty in preparing a remedy proposal package that was considered sufficient to address competition concerns. The ongoing delay put Olam at a significant disadvantage.

AUGUST

LDC OFFER $0.67 – UNCONDITIONAL

- Shareholders had an unconditional cash bid from LDC with certainty of payment at $0.67 per share.

OLAM OFFER - $0.70 – CONDITIONAL

- Shareholders had a conditional offer from Olam at $0.70 per share, albeit with no certainty that it would become unconditional.

TENSIONS RISE

As the battle heats up, the independent directors face a looming dilemma. LDC's offer, although several cents lower, was now unconditional, while Olam's higher offer remained conditional on ACCC (and FIRB) approval. The independent directors, having initially recommended Olam's higher $0.70 proposal began leaning towards the LDC offer, reasoning that Olam's $0.03 higher offer was not sufficient to compensate shareholders for the time value of money and the risk of the Olam offer not receiving ACCC approval.

FAIR VS SUPERIOR - THE EXPERT'S RECOMMENDATION IN QUESTION

The independent directors asked the expert to confirm its opinion. The expert concluded that the LDC offer was superior due to the lack of conditionality and the risks of the Olam offer not proceeding.

Surprisingly, the independent expert opined that the Olam offer was neither fair nor reasonable. According to the expert, the Olam offer was not fair as the LDC offer was superior, and it was not reasonable because of the uncertainty.

The independent directors issued supplementary target's statements recommending shareholders accept the LDC offer and reject the Olam offer.

ASIC WEIGHS IN

ASIC's view was that given both offer prices were within the expert's valuation range, then by definition (and in accordance with their regulatory guide) they were both fair. It was for the independent directors, not the expert, to determine which offer was superior. The expert was required to reissue its supplementary reports stating both offers to be fair and reasonable.

SEPTEMBER – SHAREHOLDER DYNAMIC SHIFTS

Olam increases its offer to $0.75 in September and enters into share sale agreements with major shareholders STAM and Harvest Lane to acquire 9.9% of Namoi's shares. Having advised shareholders to reject Olam's bid when it was at $0.70, the independent directors' recommendation shifted again to support it.

Olam also make progress with the ACCC who set a revised decision date. STAM confirms its intention to accept the Olam offer for the balance of its shares.

TAKEOVERS PANEL CRESCENDO

LDC takes Olam, STAM and Harvest Lane to the Takeovers Panel alleging that the sales were unacceptable. In the course of hearings, the Panel extracts an undertaking to unwind those arrangements.

LDC further increases its offer to $0.77 per share.

STAM ultimately accepted LDC's offer, giving LDC a commanding stake of 47.66% in Namoi. The independent directors pivot back to recommending LDC's offer at $0.77 per share, sealing Olam's fate.

KEY TAKEAWAYS

Price Isn't Everything:

While a higher bid can attract attention, the conditions attached to that bid can make an important difference for shareholders weighing risk and reward. Olam's conditional offer, despite being higher, ultimately proved less attractive to shareholders concerned about certainty and timing.

Timing is Crucial:

The sequence and timing of regulatory approvals can significantly impact the outcome of a bid. LDC's ability to offer a remedy package which was comprehensive enough to address the ACCC's concerns gave it a critical timing advantage over Olam, which faced delays while negotiating with the ACCC over an appropriate suite of remedies for its own bid.

Expert Opinions Matter:

Independent expert assessments inform board recommendations and shareholder sentiment. However, these opinions will attract regulatory scrutiny if they stray beyond the question of value, and into judgement.

CONDITIONALLY YOURS: TACKLING FIRB UNCERTAINTY IN FOREIGN BIDS

How dealmakers can assess or improve a foreign bids' approval prospects.

Tectonic shifts in the global order are seeing security and economic considerations collide. While nations like Australia will proclaim to be 'open for business' and welcoming of foreign investment, actions speak loudly. In pursuit of economic security, foreign direct investment regimes around the world are increasingly imposing higher fences and bigger yards on foreign investment.

For Targets, Bidders and their boards, this elevates a critical question: How to assess or improve a foreign bids' approval prospects? This article looks at recent FIRB deal approval data and analyses prominent deals to provide dealmakers a playbook.

KEY TAKEAWAYS FOR DEALMAKERS

Be strategic

Ensure the application of Australia's foreign investment regime is considered early as part of deal planning and execution.

Assess the risk

Establish frameworks for assessing FIRB risk, applying the "Who, What and How" framework from Australia's Foreign Investment Policy.

Prepare to accept broad conditions

KWM's analysis and FIRB's approach indicates Bidders will likely be required to accept an increasingly broad range of conditions with limited carveouts.

Put your money where your mouth is

With the heightened focus on FIRB risk, expect to see reverse break fees and ticking fees increasingly deployed to address delays in obtaining or a failure to obtain FIRB approvals.

THE FIRB DIMENSIONS OF RISK

Who

In a rapidly shifting geopolitical environment, assessing a foreign bid is not straightforward. Who is considered safe? FIRB is said by pundits to favourably consider investors from the Five Eyes intelligence-sharing arrangement (comprising the USA, UK, Canada and NZ alongside Australia). The Coalition Opposition has suggested a white-list of investors[1] from the Five Eyes with the addition of Japan and India. However, in reality bidders rarely neatly fit within these lists. In any event, as Lord Palmerston keenly observed in 1848, States "have no eternal allies, and … no perpetual enemies" and a white-list today may be a shade of grey tomorrow.

The good news for Target boards is that there is an effective way to assess this risk. Securing information about the capital stack of the Bidder, any proposed syndications and the Bidder's FIRB history enables ready comparison against FIRB's latest positions.

For Bidders, joining forces with Australian capital can potentially cleanse foreign investment delays or concerns around control, access and influence.

1. The Hon Angus Taylor MP Shadow Treasurer, Keynote address for the AFR Business Summit 2025, Wednesday 5 March 2025

What

Sectors and assets considered sensitive are also growing.

The "small yard, high fence" strategy of protecting economic assets is subject to immense pressure to expand the 'yard'[2] . When the Security of Critical Infrastructure Act was introduced in 2018 it covered four sectors, namely electricity, gas, water and ports.

By September 2023, the Federal Government had more than doubled the sectors of national significance, adding a further 11 sectors. The latest Quarterly Report on Foreign Investment (1 July 2024 to 30 September 2024) identified that 6% of all commercial foreign investment applications in the quarter related to national security actions.

Sensitive areas likely to remain subject to increased scrutiny by the Federal Government include health, technology and data (including software as a service), technologies and assets to deliver a net zero transition (including renewable energy and critical minerals) and housing.

Recent Government interventions in high-profile distressed businesses, such as Rex and the Whyalla Steelworks, suggest Targets with large Australian workforces are also likely to face heavy scrutiny.

How

Understanding Bidder ownership structure will be critical to any Target assessment. Ensuring that ownership is transparent will be critical to securing timely FIRB approval.

Targets are likely to require Bidders to provide a clear articulation of who will ultimately control the Bidder and therefore the Target once the proposed transaction is implemented.

EVOLVING FIRB CONDITIONS

FIRB commonly imposes conditions on transactions. Typically, these conditions are designed to manage control, influence and access of a Target where the Who, the What or the How raise sensitivity 'red flags'.

Under the more flexible legislative regime, the Federal Government agencies FIRB consults on matters of national interest are increasingly using the FIRB process to impose conditions. This is resulting in a panoply of conditions relating to governance, security clearances, operational involvement, access to data and property, cybersecurity and data protection and tax.

KWM conducted an analysis of 2024 public deals to provide you a data-driven picture of what this looks like.

We looked at takeover bids and schemes of arrangement which involved an Australian listed target, were announced between 1 January 2024 and 31 December 2024, and had a deal value over A$25 million.

The results reveal dealmakers are quickly adapting to the regulatory risk.

2024 DEALS

23
out of the 49 (47%)
deals required FIRB approval

5
of 23 (22%)
were 'broad formulation' – requiring the Bidder to accept any conditions imposed by FIRB relating to a particular area – eg cyber, governance, security or tax, with limited carve outs.

14
out of 23 (61%)
had a reverse break fee triggered by material breach.

3
of the 5
broad formulation had a reverse break fee triggered by material breach.

The findings surface two main issues for dealmakers:

1. The lack of standard conditions as FIRB (and consult agency) practice evolves; and
2. The growing unpredictability regarding conditions which may be imposed.

They raise an important question: how will market practice evolve in response? Expect transaction documents to increasingly rely on a broad brushstroke approach to what FIRB conditions must be accepted by a Bidder, with limited carve outs.

2. Address to the United States Studies Centre

REVERSE BREAK FEES AND TICKING FEES

Reverse break fees are increasingly a part of the Australian public M&A landscape.

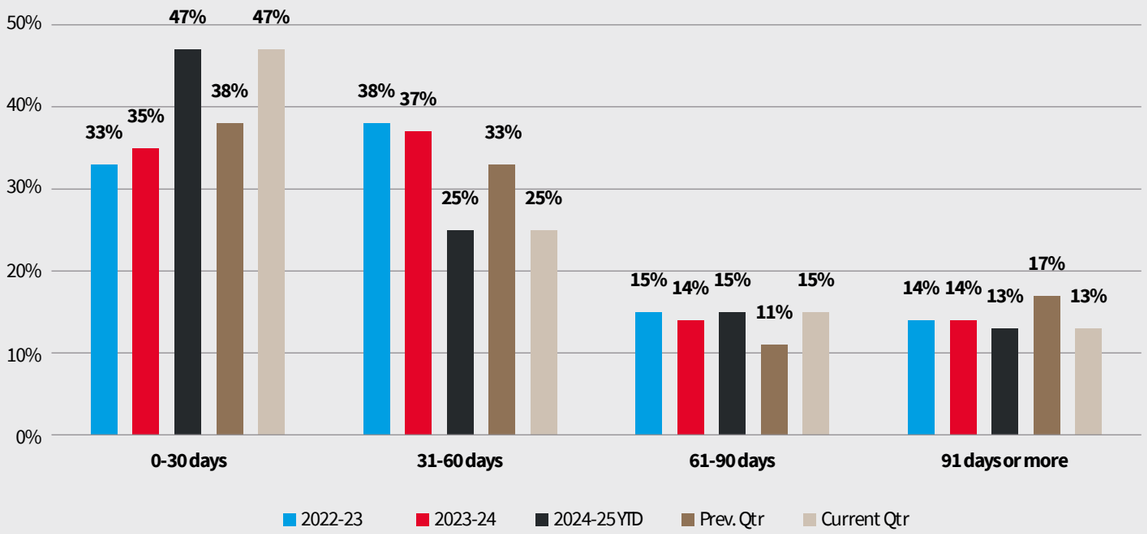
Following the US Executive Order prohibiting Nippon Steel's bid for U.S. Steel[3], recent press has suggested US Targets are more likely to demand deal protection, imposing reverse termination fees to protect against a deals' failure for regulatory or political reasons.

In an environment of transactional diplomacy and the associated uncertainty with regulatory intervention, expect reverse break fees to have a greater prominence in Australian transactions in 2025 for a failure by Bidders to accept FIRB approvals on the conditions broadly described.

KWM's analysis of Australian-connected deals announced in 2024 found that 3 of the 5 deals with broad FIRB conditions included a reverse break fee for material breach – effectively a backdoor to a reverse break fee for a failure to obtain FIRB. Interestingly, none included a reverse break fee for failing to obtain FIRB by the end date.

While the latest Quarterly Report on Foreign Investment noted the median processing time for approved commercial investment proposals, the median hides the reality of delay.

APPROVED INVESTMENT PROPOSAL PROCESSING TIMES (BY NUMBER OF DAYS)



Source: Quarterly Report on Foreign Investment – 1 July 2024 to 30 September 2024

During bids where timing for FIRB approvals remains uncertain, ticking fees can encourage shareholder support (particularly in a contested bid) and provide Target boards with comfort. Recent deals show the adoption of this practice: following on from the ticking fee in the Brookfield Origin Scheme, the Saint-Gobain CSR Scheme also included a ticking fee if the scheme did not become effective within four months of signing.

LOOKING AHEAD

This discussion underlines the importance of a transparent and timely approvals regime for both antitrust and foreign investment. The Federal Government promised last year that FIRB processes would be streamlined. We hope this commitment survives the forthcoming election, is delivered this year and maintained. Similarly, it's critical that the Government properly supports and takes accountability for the implementation of the new Australian merger laws. Delay in FIRB, ACCC or other regulatory processes will put deals in jeopardy

For dealmakers, appreciating the politics and having a clear strategy to proactively manage regulatory risk as part of any deal will be critical in 2025. It is essential that the application of Australia's foreign investment regime is taken into account early as part of deal planning and execution.

3. Order Regarding the Proposed Acquisition of United States Steel Corporation by Nippon Steel Corporation | The White House

RIGHTS AND WRONGS OF RIGHTS ISSUE STRUCTURING

Takeovers panel decisions shed new light on what's acceptable - and what's not.

ASX-listed entities considering rights issues or other secondary equity raising structures should assess potential control effects as part of their preparations. Depending on the size of the raising, the extent of participation of material shareholders and other factors, an ASX-listed entity can find a raising results in a person (or a number of persons) obtaining a significantly increased proportionate shareholding. The dilutive effects and circumstances can potentially enliven complaints from minority shareholders and ASIC.

Two recent Takeovers Panel decisions consider rights issues with material control effects. Both involved renounceable pro rata offers at a material discount. Both involved a shortfall facility. Yet only one gave rise to unacceptable circumstances. The other did not even warrant conducting proceedings. We look at the reasons why and reflect on lessons learned for rights issue structuring.

BACKGROUND

In February 2025, the Panel declared unacceptable circumstances in relation to the affairs of Alara Resources Limited (**Alara**). Alara had announced a $15.3 million renounceable rights issue, at a 31% discount to the last trading price.[4] The offer was sub-underwritten by Alara's largest shareholder, Al Tasnim Infrastructure LLC (**ATI**), enabling it to potentially increase its stake from 14% to 45%.[5]

In comparison, despite multiple applications, the Panel declined to conduct proceedings in relation to the affairs of Energy Resources of Australia Limited (ERA). ERA had announced an $880 million renounceable entitlement offer, at an 88% discount to 5-day VWAP. The offer was not underwritten, but Rio Tinto Limited (**Rio**), ERA's majority shareholder, provided a binding pre-commitment to take up approximately its pro rata share. This would have enabled Rio to increase its holding from 86% to 99%[6] and proceed to compulsory acquisition.

SO WHAT'S THE LAW? GUIDANCE NOTE 17 - RIGHTS ISSUES

In considering whether a rights issue gives rise to unacceptable circumstances, the Panel looks at the effect of the rights issue against the Eggleston principles in section 602.[7] A rights issue resulting in a control effect will generally not be unacceptable if:

- there is a clear need for funds,
- the rights issue is structured appropriately, and
- an appropriate dispersion strategy has been put in place.[8]

4. The Alara offer also involved one free option being granted for every two new shares subscribed, with an exercise price of $0.05 and a term of two years. This was found to increase the control potential of the rights issue because it would allow ATI to 'bank' creep by exercising its options in tranches, in reliance on the 3% creep exception. See *Alara Resources Limited* [2025] ATP 1, [7], [49].
5. Rounded to the nearest whole number – *Alara Resources Limited* [2025] ATP 1, [8](e). The control effect in the Alara raise was exacerbated by the fact that around 51% of Alara shares were held by ineligible foreign shareholders, which was an additional factor weighing in favour of unacceptability – see *Alara Resources Limited* [2025] ATP 1, [6], [51]-[53].
6. Rounded to the nearest whole number, assuming no other shareholders participate in the offer, and any shortfall is not taken up – *Energy Resources of Australia Limited* [2024] ATP 22, [21].
7. Guidance Note 17 - Rights Issues (**GN 17**), [6].
8. GN 17, [10].

WHAT WAS DIFFERENT IN THE ERA AND ALARA CASES?

The control effect of the ERA raise was arguably more severe than the control effect of the Alara transaction. So, what was different, and why did the Panel find unacceptable circumstances for Alara and not for ERA?

a. No clear need for funds

In the Alara decision, the Panel found that there was insufficient material to establish a clear need for all of the funds sought to be raised.[9]

Alara also did not demonstrate an urgent need for all of those funds that would justify the potential control effect of the rights issue.

In contrast, the Panel found that ERA had a genuine need for funds. This was despite the offer being sized at $880 million when only a minimum $210 million was sought originally. In coming to this decision, the Panel noted that ERA's Independent Board Committee (**IBC**) relied on external financial advice to conclude that a single larger raising would be more efficient by minimising costs which would be duplicative across multiple raisings, and reducing the overall amount raised due to interest accrual on the funds raised. The Panel accepted that separate raisings would have involved additional costs and risks, with doubtful success in the absence of investor support.

b. No proper exploration of fundraising alternatives

In the Alara decision, the Panel found that there was insufficient material to show proper exploration of fundraising alternatives. The supporting documents provided by Alara included term sheets received from two PE institutions which were on commercially unattractive terms. The Panel was not persuaded that the passive receipt of these term sheets constituted a genuine exploration of alternative funding options. The Panel was particularly concerned by the absence of supporting material showing that Alara actively sought out or engaged with a broader range of potential financiers beyond these term sheets.

In comparison, the Panel found that the ERA IBC had "genuinely explored all other sensible and reasonable fundraising alternatives". This included:

- considering control transactions, equity, debt and asset sales, as well as funding requests to the Commonwealth Government and Rio;
- conducting an extensive market sounding process using three brokers and the IBC's external financial adviser to contact over 90 investors to determine interest in an equity raise; and
- considering privileged legal advice about the likely consequences of placing ERA into voluntary administration and determining that this would not be in the best interests of ERA.

c. Ineffective dispersion strategy

The Alara offer involved a shortfall facility, however any shortfall would first be allocated to ATI so that it would obtain voting power of 19.9%. The Panel found this arrangement reduced the effectiveness of the shortfall facility as a dispersion strategy and was inconsistent with GN 17, contributing to unacceptable circumstances. The effectiveness of Alara's dispersion strategy was also undermined by the fact that it had not considered alternative sub-underwriters to ATI, independently tested the market, or consulted other potential underwriters to validate its views on the prospects of securing support from other investors.

In contrast, the ERA shortfall facility did not have a preferential allocation in favour of Rio (who was restricted from taking up any shortfall under the ASX Listing Rules in any event) Unlike the Alara decision, the Panel found that ERA had incorporated a dispersion strategy in accordance with GN 17.

9. *Alara Resources Limited* [2025] ATP 1, [28]. The Panel's decision on this point reflects a lack of clarity on the overall funding structure and delays by Alara in providing information despite multiple questions and follow-up inquiries from the Panel on the need for funds – see [37].

d. Inadequate management of conflicts of interest

The Panel's decision in Alara reflects its concerns around the disclosure and management of conflicts of interest. A Non-Executive Director of Alara was the Managing Director of ATI and held 34% of the shares in ATI. That Director's alternate was also the Chief Operating Officer of ATI. These conflicts and how they were being managed were not disclosed in the prospectus.

Alara submitted that conflicted directors were excluded from relevant discussions and decisions, and a sub-committee of non-conflicted directors was formed to ensure independence. Alara also provided Board minutes approving the rights issue and a Conflicts of Interest and Duty Policy dated 2018. The Panel considered that these limited materials raised concerns about the robustness and transparency of the processes implemented In the circumstances, the Panel would have expected a more comprehensive suite of supporting materials such as detailed board minutes and papers demonstrating deliberation on the identification and management of conflicts, and records of specific steps taken to mitigate those conflicts.

On the other hand, the Panel found that ERA had taken appropriate measures to ensure the independence of its Independent Board Committee (**IBC**) and manage conflicts of interest through:[10]

- the appointment of independent financial and legal advisers for the IBC;
- the adoption of detailed conflicts protocols in relation to the independence of the IBC and managing conflicts of interest and related party transactions;
- ensuring that the IBC was delegated all the powers, authorities and discretion of the full ERA Board with respect to any transaction or proposal; and
- limiting the involvement of ERA management and employees seconded from Rio to the maximum extent possible.

10. *Energy Resources of Australia Limited 04* [2024] ATP 22, [32]. The Panel also noted that previous decisions (ie *Energy Resources of Australia Limited* [2019] ATP 25 and Energy Resources of Australia Limited 02R [2020] ATP 3) found that the independence of the IBC was potentially compromised due to insufficient measures being taken to ensure the independence of ERA's IBC and potential conflicts of interest were not sufficiently managed.

LESSONS LEARNED

The ERA decision shows that a properly structured capital raise with an effective dispersion strategy and (where applicable) overseen by an IBC can withstand Panel challenge even though there may be potential control impacts. The Panel will usually accept a Board's decision as to the need for funds if the decision appears to be reasonable and supported by rational reasons. Given the ERA IBC took appropriate professional advice and followed appropriate procedures to ensure its independence, the Panel was not minded to second guess the decisions of the IBC regarding the rights issue, including in relation to ERA's need for funds, the size or structure of the rights issue or alternative funding options.

EQUITY DERIVATIVES: COLLATERAL DAMAGE

How a beneficial ownership register proposal could impact the ability to acquire a listed company.

What do tax reforms and equity derivatives have in common? Nothing. And yet, in November 2024, *Treasury released the exposure draft of the Treasury Laws Amendment Bill 2024: Enhanced disclosure of ownership of listed entities* (**Bill**). The Bill was introduced off the back of an election commitment by the Albanese Government to implement a public registry of beneficial ownership – proposed as part of a global initiative to ensure multinationals pay their fair share of tax.[11]

Put simply, the proposed reforms involve extending the concept of "relevant interest" to include derivative-based interests, irrespective of the settlement method or whether the writer has a relevant interest in the underlying securities. This change will have a profound impact on takeovers laws as bidders will be prevented from acquiring a more than 20% interest in a listed company, even if the interest is purely cash settled.

We're left scratching our heads as to how a proposal to introduce an ultimate beneficial ownership register, announced in the context of tax reforms, has resulted in proposed laws which affect the ability of a person to acquire a listed company.[12]

HOW DID WE GET HERE?

The use of equity derivates, particularly in control transactions, has attracted increased attention over the last few years. One of the more high-profile recent examples was Galipea Partnership (**Galipea**), an entity associated with Mike Cannon Brookes, building a stake in AGL Energy Limited (**AGL**) to block the proposed demerger of AGL[13]. Galipea's holding position became the subject of forensic analysis by the media to determine whether Galipea actually had the ability to vote down the proposal.[14] Galipea was initially described as "holding" a 11.28% interest in AGL (being a relevant interest in 8.44% in AGL and an economic interest in an additional 2.84%), through a combination of a cash settled total return swap and a collar.[15] Galipea subsequently announced that it had "simplified" its arrangements and (at the time of that updated notice) held a relevant interest in 11.28% in AGL.[16]

Understandably, high-profile uses of equity derivatives and recent Takeovers Panel[17] decisions have sharpened the focus on the use and disclosure of equity derivatives.

Under the current law, the "taker" of an equity derivative may not have a "relevant interest" in the underlying securities for the purposes of the *Corporations Act 2001* (Cth) (**Corporations Act**) either at all, or not until the taker has a right to acquire the underlying securities. A purely cash settled derivative does not therefore result in the taker having a relevant interest in the underlying securities, and disclosure by the taker is not required under Chapter 6C of the Corporations Act. However, Guidance Note 20: Equity Derivatives issued by the Takeovers Panel (**GN 20**) requires a person to disclose its long position (including a long equity derivative position – even if only cash settled, a relevant interest in securities or a combination of both) of 5% or more (and subsequent movements of 1% or more).

11. https://ministers.treasury.gov.au/ministers/andrew-leigh-2022/media-releases/beneficial-ownership-register-consultation.
12. Or any company governed by Chapter 6 of the Corporations Act.
13. Disclosed the relevant interest acquired pursuant to a loan and equity collar transaction, additional shares acquired through a cash settled TRS. Also disclosed an additional cash settled option that didn't increase its relevant interest by still "noted".
14. https://www.smh.com.au/business/companies/expert-warns-cannon-brookes-share-tactics-could-derail-his-agl-play-20220510-p5ak3t.html.
15. https://www.aspecthuntley.com.au/asxdata/20220502/pdf/02517215.pdf#search=%22%22.
16. https://www.aspecthuntley.com.au/asxdata/20220518/pdf/02522798.pdf#search=%22%22.
17. Both in the context of control transactions (*Pacific Smiles Group Limited* [2024] ATP 12) and shareholder activist campaigns (*Whitehaven Coal Limited* [2023] ATP 12).

THE GIST OF THE CHANGES

Amongst other matters, the Bill proposes to amend the Corporations Act to deem the following derivative-based interests as "relevant interests":

- interests arising from physically settleable derivatives, regardless of whether the counterparty has a relevant interest in the underlying securities – referred to in the Bill as "*deemed physically settleable derivative-based interests*"; and
- interests arising from non-physically settleable derivatives – referred to in the Bill as "*deemed non-physically settleable derivative-based interests*".

For the purposes of "deemed non-physically settled derivative-based interests", the number of securities the person is deemed to have a relevant interest in will be specified, or calculated in accordance with a method specified, in a determination made by ASIC. As at the date of this article, ASIC is yet to publish or articulate it's intended approach. There's a very real question as to how ASIC will approach calculations in the context of holdings through index related products and other "bundled" financial instruments.

The Bill otherwise defines relevant interests in derivatives under the existing law as "*relatable derivative-based interests*" on the basis that those interests relate to a particular holding. There's a joke in there somewhere about these reforms not being relatable.

The Bill therefore articulates three categories of derivative interests:

1. relatable derivative-based interests;
2. 2deemed physically settleable derivative-based interests; and
3. 3deemed non-physically settleable derivative-based interests.

There are two key consequences of the changes proposed by the Bill in the context of control transactions.

THE 20% RULE

As the Bill extends the concept of "relevant interest" to include deemed derivative-based interests, those derivative-based interests will count toward the 20% threshold for the purposes of section 606 of the Corporations Act.[18] This is an incongruous result given the 20% threshold is centred on the concept of "voting power", and not mere economic interests.

GN 20 already states that the acquisition of a long position that would contravene section 606 of the Corporations Act if it were comprised entirely of a physical holding may give rise to unacceptable circumstances.[19] The Takeovers Panel has broad discretion in considering whether unacceptable circumstances exist – including accounting for the extent to which the taker has attempted to exercise control or influence over the relevant entity.

This is where the rubber really hits the road. A person could breach the 20% threshold by holding only an economic interest in the relevant entity and have no actual ability to control the voting or disposal of securities in that entity.

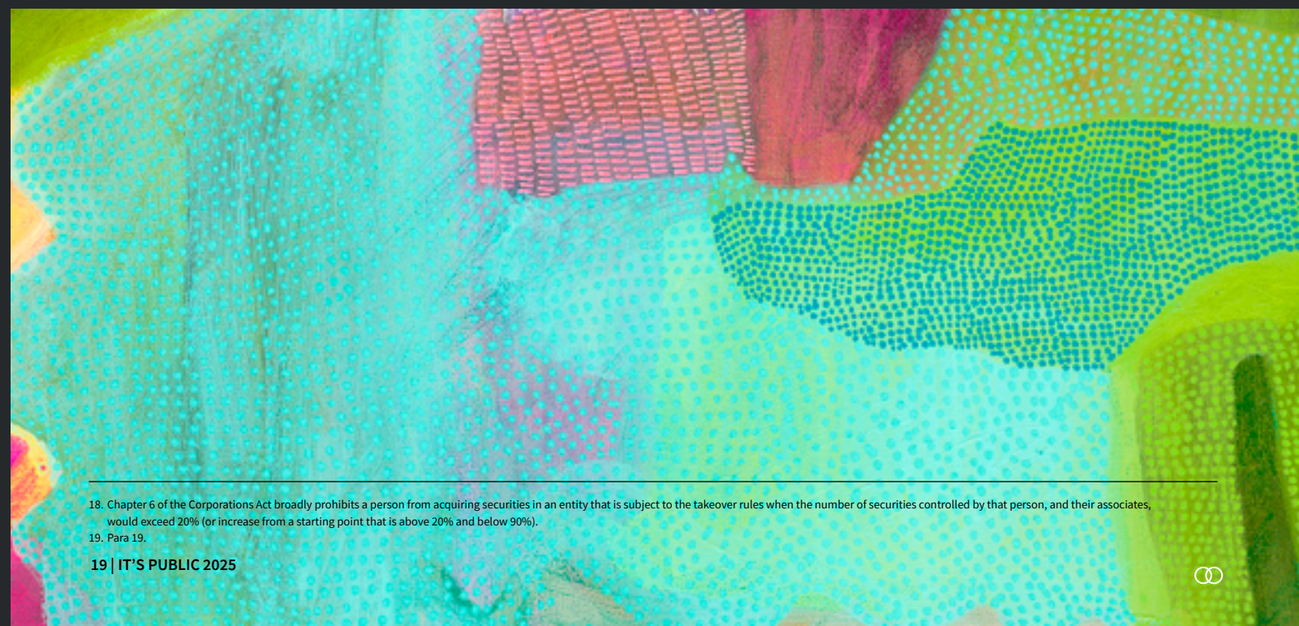
It's not clear why potential tax reforms have led to such a fundamental change to Australian takeovers laws.

Substantial holder notices

For the purposes of substantial holder notices, a person will need to aggregate their interests across all three derivative-based interest categories, and their non-derivative-based interests (i.e. actually holding shares) in calculating whether the 5% threshold is achieved.

The Explanatory Memorandum accompanying the Bill (EM) states that each type of interest will be separately identified in any substantial holding notice.

The EM notes that the proposed extension of disclosure requirements would be consistent with the approach taken in GN 20. However, the EM doesn't articulate why the Bill is required in light of the existing provisions of GN20.



18. Chapter 6 of the Corporations Act broadly prohibits a person from acquiring securities in an entity that is subject to the takeover rules when the number of securities controlled by that person, and their associates, would exceed 20% (or increase from a starting point that is above 20% and below 90%).
19. Para 19.

Notwithstanding the overlap with GN 20, revising the approach to substantial holder notices vis-a-vis derivative positions has merit.

Over disclosure of an economic interest in a listed company has the potential to mislead the market. In the AGL example, it may not have been readily apparent to a person not well versed in sophisticated financial instruments that Galipea did not initially have 11.28% voting power in AGL. Over disclosure of an interest in the context of a control transaction could mislead market participants to conclude that a potential bidder has the power to block a control transaction even when it doesn't actually control the votes to do so.

Under disclosure can be equally misleading – a key theme in most of the decisions by the Takeovers Panel concerning the disclosure of economic interests. Most recently, NDC (a Crescent Capital vehicle) effectively argued in Pacific Smiles Group Limited [2024] ATP 12 that had it been fully informed of the content of agreements underlying the economic derivative position held by the Genesis Capital managed bid vehicle, NDC may have decided (amongst other potential courses of action) not to proceed with its scheme to acquire Pacific Smiles.

Requiring substantial holder notices to clearly set out the economic interests by the holder is consistent with ensuring there is an efficient, competitive and informed market. The enhanced and clearer approach to disclosure could, however, be achieved through the substantial holder provisions and without amending the definition of "relevant interest" which has broader implications as discussed above.

WHERE TO NEXT?

The consultation period in respect of the Bill has closed. Submissions are yet to be made public but should make for a good read. Should the Bill remain on the legislative agenda of whoever forms the next Federal Government, our two cents: the enhanced disclosure proposals for substantial holder notices have merit but should ditch the fundamental change to the 20% prohibition.

THE GREAT AUSTRALIAN BANKING SHAKE-UP

WHY CONSOLIDATION OF MUTUAL BANKS IS THE NAME OF THE GAME.

As Australia's banking sector evolves amidst fierce competition, stringent regulations, and the need for (and high costs of) technological investment, a wave of consolidation is sweeping through the sector - and it shows no signs of slowing down. Recent high-profile mergers and acquisitions, such as Qudos Bank teaming up with Bank Australia, Australian Settlements Limited's sale to Banking Circle S.A., and the Auswide Bank-MyState Limited merger, are just the tip of the iceberg. The landscape has been further transformed by significant transactions like Suncorp Bank's acquisition by ANZ and a flurry of previous mergers among mutual banks, including Heritage Bank and People's Choice, as well as Greater Bank and Newcastle Permanent Building Society.

In a sector already known for its regulatory complexities, navigating these deals is no small feat. Yet, the mutual banking sector is particularly intriguing, as many discussions around potential mergers often fizzle out, stuck in the limbo in the non-binding 'MoU' stage. In part, this is driven by the fact that, by and large, mutuals live and breathe in a unique organisational culture which is acutely member-centric and steeped in localised history. In a dealmaking context, there is invariably a range of philosophical views around the boardroom table, generally more emotion in the negotiation, and often a reluctance (from the 'smaller' player) to be perceived as being 'taken over'.

In this article, we delve into the compelling dynamics of mutual bank mergers, exploring the threshold considerations that make dealmaking in this sector not just challenging, but utterly fascinating. Buckle up as we navigate the complexities of Australia's banking consolidation journey!

DRIVERS OF CONSOLIDATION

So, what's fuelling this trend? A mix of factors is driving mutual banks to merge, reshape, and redefine their futures:

- Scale matters: The need to achieve scale through a larger loan and deposit books and a broader capital base to maintain liquidity, fund growth and remain competitive.
- Diversification is key: Banks are on the hunt for greater customer and product diversification. By broadening their offerings, they aim to unlock new growth opportunities, mitigate risks, and enhance customer satisfaction.
- Digital transformation imperative: The imperative to significantly invest in digital infrastructure and technology to deliver modern banking services.
- Competing with giants: The ongoing challenge of competing with larger commercial banks in the context of Australia's prudential framework and more limited capital options (the hope of mutual capital instruments (MCIs) as an accessible form of Common Equity Tier 1 capital for mutuals following the Hammond Report has, unfortunately, not yet been realised).
- Robust risk management: As threats like fraud and cybercrime become increasingly sophisticated, banks must elevate their risk management practices. Protecting members and institutions from emerging risks is paramount.
- APRA's regulatory influence: APRA's focus on recovery and exit and resolution planning – which has forced a number of organisations to be 'merger-ready'.

Each deal is different, and so the relevant drivers ultimately dictate the universe of potential merger parties.

THRESHOLD CONSIDERATIONS IN CONTEMPLATING A MERGER

Mutual mergers can be structured in a number of ways, having regard to:

The relative size of each entity and its assets and liabilities.

Company type, capital structure and historical constitutional idiosyncrasies.

Integration considerations (principally the relative maturity of technology infrastructure and banking platforms).

Size and geographical spread of asset portfolio and members.

Other legal, tax and accounting considerations.

In thinking about any merger, some of the key threshold considerations are as follows:

KEY CONSIDERATIONS INCLUDE

Transaction structuring

- Whether the deal will need to be positioned as a 'merger-of-equals' - thereby preserving each party's mutual foundations. The 'social' issues (such as head office, board and senior management appointments, branding, community initiatives and member benefits) will be key, in additional to business-critical issues, including the ongoing use of each party's brands, processes and business and operating infrastructure.
- Company type, capital structure and historical constitutional idiosyncrasies (and the associated tax implications) typically drive transaction structuring. Novel issues can arise where the merger parties have member shares (or other forms of capital) on issue.
- A threshold issue can arise as to whether the Corporations Act takeovers regime needs to be navigated (most often by undertaking a transaction as a scheme of arrangement) or 'sidestepped' via the magic of the Financial Sector (Transfer and Restructure) Act 1999 (Cth) (FSTRA) regime.
- Novel structures involving the effective 'redemption' of member interests in exchange for scrip in a newly created NOHC or other BidCo which preserves member value can also be explored.

Member approvals and engagement

- Where mergers proceed as a voluntary transfer in accordance with the FSTRA, the expectation will be that the merger will need to be approved by 75% of the votes cast by members (whether in person or by proxy) of both merger parties. Board only approval may be sufficient if APRA can be satisfied that this method of adoption adequately takes into account the interests of members because 'special circumstances' are present.
- In either case, the member proposition will need to be well articulated to secure the vote (and support the recommendation of the respective boards).
- Often there are challenging quorum, 'demutualisation' or 'turnout' requirements which need to be met, necessitating a thoughtful and proactive member engagement and solicitation campaign.
- Given the typically long lead times in doing these deals, aligning timeframes and any required approvals with the AGM can be practically important, particularly from a board succession planning perspective or if any constitutional changes need to be 'front-run' (noting the risks of having a de facto referendum on a deal).

Regulatory approvals and engagement

- Early and proactive engagement with APRA, ACCC, ASIC, ATO and relevant State and Territory revenue offices (as applicable) is key.
- Relief from certain provisions of the Corporations Act as a result of the transfer of assets and liabilities between the merger parties may be required.
- Business transfers can be dutiable transactions and so any stamp duty leakage costs need to be assessed. Class rulings from the ATO may be required depending on the structure.
- Given the upcoming merger reforms, mandatory notification to the ACCC will most likely be required for most deals going forward – see our analysis here. This also means appropriate 'deal hygiene' measures need to be put in place upfront to appropriately manage gun-jumping and other competition law risks.

Disclosure and due diligence / verification processes

- For a FSTRA transfer, the merger parties will be required to prepare an 'Information Document' (or equivalent) for members. Similar documents are generally required if the transaction proceeds by way of scheme or if a member vote is in any event required.
- The 'Information Document' will be provided to APRA for review and, together with the relevant notice of meeting, must contain certain information prescribed by (amongst others) FSTRA, the Corporations Act, the parties' constitutions and related regulatory materials, including prescribed information relating to each entity and certain pro-forma financial disclosures.
- While not always required, boards sometimes want the comfort of an independent expert's report which opines on whether the transaction is in the best interests of members. The basis and methodology of any such expert evaluation (eg whether on a 'merger-of-equals' or 'controlling interest' basis) can be nuanced in the context of these transactions where often no consideration is flowing.
- A due diligence and verification process should be undertaken to ensure that the 'Information Document' and any other materials provided to members are not misleading or deceptive (including by omission), and to allow those involved in its preparation to avail themselves of any relevant defences to liability.

Employee considerations

- Early consideration will need to be given to the treatment and restructuring of each entities' employees, including any retention and bonus arrangements for KMP, and any relevant BEAR/FAR implications.
- Employee communications are paramount in transactions such as these, when anxieties tend to be heightened.

TAKEAWAY

An early focus on these key areas goes a long way to surfacing threshold key issues at the outset of any merger discussion. Given the drivers of consolidation are only amplifying, we expect the number of those discussions will continue to increase throughout 2025.

PUBLIC M&A MARKET ON A PAGE[20] A RECAP OF 2024

20. The statistics on this page are for deals announced between 1 January 2024 and 31 December 2024 where the target is or was listed on ASX and the deal value is $50 million or more.

NUMBER OF DEALS

51

AGGREGATE DEAL VALUE

A$53.3B

This figure includes the value of the Alcoa/Alumina deal, which is based on the announced closing value of the transaction of approximately US$2.8 billion.

STATUS

SUCCESSFUL	UNSUCCESSFUL	WITHDRAWN	CURRENT
33	6	4	8

FEATURES

AVERAGE NUMBER OF DAYS FROM ANNOUNCEMENT TO COMPLETION[21]

130

Scheme average: 135
Takeover average: 107

SCHEMES VS. TAKEOVERS

Schemes continue to dominate with **73%** of deals being undertaken by way of a scheme, although for the top 20 deals by value, this jumps to

85%

TOP SECTORS BY NUMBER OF DEALS

Metals & mining: 11

Software & services: 6

Commercial & professional services: 13

21. For a takeover, completion is considered achieved once the bidder has a relevant interest of at least 90%. For a scheme, completion is considered to occur on the implementation date.

10 LARGEST PUBLIC DEALS IN 2024

Target	Bidder	Deal value	Sector
Boral Limited	Seven Group Holdings Limited	A$12.45 billion	Materials
Altium Limited	Renesas Electronics Corporation	A$9.09 billion	Software & Services
De Grey Mining Ltd	Northern Star Resources Ltd	A$5 billion	Metals & Mining
CSR Limited	Compagnie de Saint-Gobain	A$4.32 billion	Materials
Alumina Limited	Alcoa Corporation	A$4.2 billion[22]	Materials
PSC Insurance Group Limited	The Ardonagh Group	A$2.26 billion	Insurance
Adbri Limited	Barro Group Pty Ltd	A$2.10 billion	Materials
Silver Lake Resources Limited	Red 5 Limited	A$1.38 billion	Metals & Mining
APM Human Services International Limited	Madison Dearborn Partners, LLC	A$1.33 billion	Commercial & Professional Services
SG Fleet Group Limited	Westmann Bidco Pty Ltd	A$1.20 billion	Commercial & Professional Services

22. The statistics on this page are for deals announced between 1 January 2024 and 31 December 2024 where the target is or was listed on ASX and the deal value is $50 million or more. The value of the Alcoa/Alumina deal is based on the announced closing value of the transaction of approximately US$2.8 billion.

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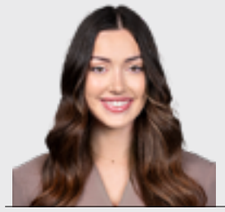

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