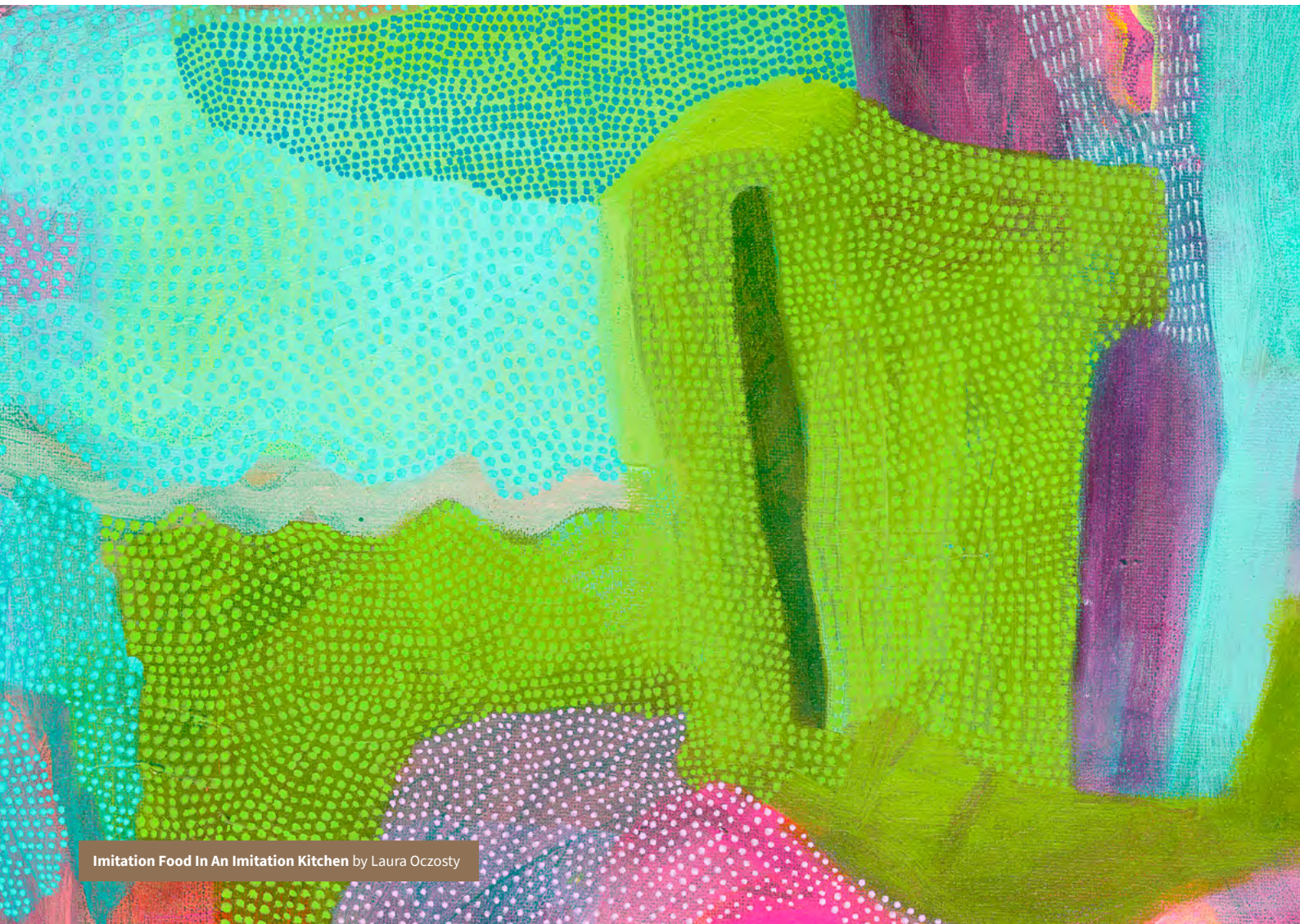


IN PRIVATE

KWM M&A INSIGHTS | OCTOBER 2025



WELCOME TO THE SECOND EDITION OF IN PRIVATE

Your essential legal guide to the world of Asia Pacific private capital dealmaking and portfolio management

Private capital dealmaking is in a period of recalibration. Fundraising, financing, governance and regulation are all shifting, requiring sponsors and portfolio companies to understand and adapt quickly. Our second edition of *In Private* brings together six perspectives on how to stay resilient and ready.

We start with “**IPO Ready? A Sponsor’s Checklist for the Comeback**”. With private equity trade sales facing headwinds, sponsors are revisiting IPOs as a potentially credible exit strategy. From pre-IPO raisings and escrow mechanics to ASIC’s trial of a streamlined listing process, we explore the key considerations for sponsors considering undertaking an IPO.

“**Who’s the boss? The tug-of-war over real estate fund management rights**” examines how institutional investors are seeking greater influence over fund managers. Longer-term structural trends – including the shift toward ‘asset-light’ business models and the rising influence of superannuation – are compounded by challenging market conditions.

In “**Div recaps: have your cake and eat your portco too**”, we explore the resurgence of dividend recapitalisations, including the key considerations and regulatory implications associated with undertaking such returns.

From a wider regional perspective, “**Looking beyond the dollar: Asia’s investment and leverage strategies**” explores how Asia’s markets are adapting to geopolitical resets and currency volatility. As US exports decline, investors are leaning into emerging Asia and local-currency financing, including RMB-denominated lending.

Closer to home, “**From oversight to offence: navigating wage theft risks in portfolio companies**” considers how the new criminal wage theft regime is reshaping diligence and governance expectations. With penalties including prison and multimillion-dollar fines, wage compliance is now a core governance issue for all Australian companies.

Finally, “**FIRB/ACCC: approval pathways converge**” highlights how a recent FIRB policy change has seen some additional competition information being sought as part of the FIRB application process.

Enjoy the read!

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IPO READY? A SPONSOR'S CHECKLIST FOR THE COMEBACK

With private equity trade sale exits facing headwinds and Virgin Australia's IPO trading above its offer price, conditions may finally be tilting in favour of sponsor-backed IPOs.

For sponsors who haven't had cause to think about IPO exits for a while, here's a practical checklist of some of the key areas to consider and manage.

PRE-IPO RAISINGS - DE-RISKING EXECUTION

Pre-IPO capital raises are becoming increasingly common and typically take the form of priced rounds (often preference shares) or convertible notes that convert at a discount to the IPO price. These raisings allow institutional investors to join the shareholder register well before the IPO bookbuild, giving them deeper insight into the business and greater confidence to participate in the IPO. They can also provide the company with liquidity to pay down debt or offer early returns to existing investors.

ESCROW AND SELL-DOWN - BALANCING LIQUIDITY AND INVESTOR CONFIDENCE

In Australian IPOs, sponsors are typically escrowed or 'locked-up' until the end of the prospectus forecast period, which is often a full financial year plus a 'stub' period.

In the last wave of IPO exits by sponsors, it was common to have an 'early release' of 25% of the sponsor's shares midway through the escrow period, provided the trading price exceeded the IPO offer price by at least 20% for 10 consecutive trading days immediately prior to the release.

VIRGIN AUSTRALIA'S IPO: EARLY EXITS IN ACTION

The IPO of Virgin Australia showed how escrow can work in practice. Sponsors were locked up until the end of the forecast period but allowed an early release of 25% of shares once the price exceeded the IPO offer by 20% for 10 consecutive days.

The result? Liquidity for the sponsor without shaking investor confidence - a model we expect to continue seeing in future sponsor-backed IPOs.

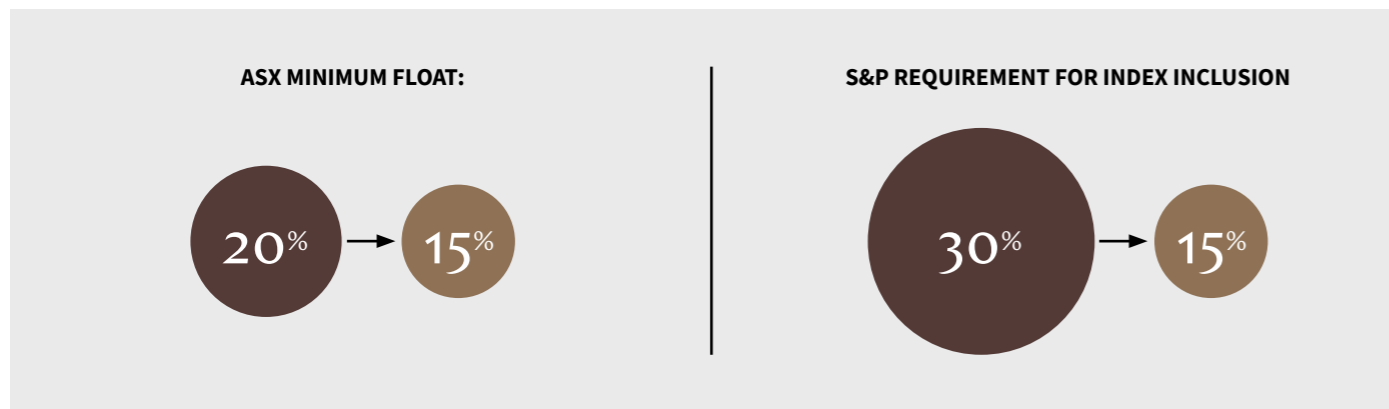
Escrow deeds restrict the shareholder from disposing of shares, creating a 'relevant interest' under Chapter 6 of the Corporations Act. ASIC provides class relief for escrow deeds that meet the following conditions:

- Escrowed securities are the same class as those offered under the IPO
- Voting rights on escrowed shares are not restricted
- The shareholder may accept a takeover offer if at least half of the non-escrowed bid class accepts
- Escrowed securities can be transferred under a scheme of arrangement
- If the deed is with the company, it terminates no later than two years after execution.

The ASX currently requires listed companies to have a minimum 'free float' of 20% - meaning at least 20% of shares must be freely tradable and not held by affiliated shareholders, such as sponsors.

On 21 August 2025, S&P announced it will reduce the minimum free float for index inclusion from 30% to 15%. This could lead the ASX to reduce the minimum free float requirement to 15%. While this would give helpful support for sponsors who may wish to sell-down less at IPO, it should also be weighed against the potential drawbacks of a larger overhang and reduced liquidity.





RELATIONSHIP DEEDS – PROTECTING SPONSOR INTERESTS

On an IPO, boards typically include an independent chair and a majority of independent directors. Sponsors, however, often put in place a ‘Relationship Deed’ with the portfolio company shortly before listing to provide additional contractual comfort for sponsors on a range of post-IPO matters.

A Relationship Deed typically contains:

- **Director appointment rights:** These rights typically reduce as the sponsor sells down. For example, one director can usually be appointed while holding up to 10% of shares, and two directors while holding more than 20%.
- **Information rights:** Allow sponsors’ board nominees to pass information back to the sponsor for investment monitoring and compliance.
- **Rights that facilitate sell-down:** Rights that enable sponsors to pick a favourable sell-down window while still complying with insider trading laws, including requiring the listed company to issue a ‘cleansing notice’ where inside information would otherwise block a sale by a sponsor.

MANAGEMENT EQUITY – ALIGNING INTERESTS

As part of an IPO, companies typically implement a new long-term incentive (LTI) scheme. These schemes often include time and performance-based vesting conditions designed to align management’s interests with those of public shareholders, compared to pre-IPO incentive schemes for management, which are generally linked to the cash returns of the sponsor.

Given potentially larger post-IPO shareholdings for sponsors in the future, careful planning of the interaction (if any) between the pre-IPO incentive plans and the post-IPO LTI is essential. This includes considering disclosure, tax and regulatory implications and ensuring the new IPO LTI works seamlessly alongside any pre-IPO incentive arrangements that may continue to apply. The goal is to achieve the desired commercial outcomes for both management and shareholders while supporting a successful IPO and ongoing value creation for all shareholders.

NEW STREAMLINED IPO PROCESS – FASTER ACCESS TO THE MARKET

In June 2025, ASIC unveiled a two-year trial aimed at simplifying the pathway to listing, reducing the regulatory burden and accelerating IPO timelines. There are two key changes:

- 1 **Pathfinder prospectus:** Eligible entities can submit a confidential pathfinder prospectus to ASIC at least 14 days before formal lodgement. This can remove the need to extend the exposure period from 7 to 14 days, potentially reducing the IPO timetable by up to a week. Eligibility requires a market capitalisation of at least A\$100 million at listing and no ASX-imposed escrow.
- 2 **No-action position during exposure period:** Eligible companies can accept investor applications during the exposure period for new listings, potentially shortening IPO timeframes even further.

This streamlined approach is available only for ‘front-end bookbuilds’, where the IPO price is set before the prospectus is lodged - a structure commonly used in Australia. It is worth noting that historically some of the larger Australian IPOs, with significant US offering components, have used back-end bookbuilds (where pricing is set after the prospectus is lodged) to align with US IPO pricing practice. It will be interesting to see whether IPO candidates looking to raise larger sums (including by accessing investors in the US market) will favour accessing the ASIC’s streamlined listing path over any back-end bookbuild process, which may be favoured by IPO managers and/or US investors.

DUAL-TRACK OR SEQUENTIAL TRACK PROCESSES – MAXIMISING EXIT FLEXIBILITY

Even if a trade sale is the preferred option for exit, running a dual-track process – where an IPO and a sale process run concurrently – can be highly beneficial. A ‘sequential-track’ process is a variant where both options are explored, but not pushed simultaneously to completion.

Advantages:

- Maximises valuation: Exploring both avenues can create competitive pricing tension between buyers and public investors.
- Provides flexibility: Sponsors have more than one exit avenue available to them allowing them (in theory) to pivot based on market conditions and/or investor interest.

Challenges:

- Resource-intensive: Managing two exit processes (at the same time or sequentially) demands extra time, effort, advisory and financial resources relative to a single process. The demands are particularly acute for the relevant portfolio company and its management team where it may be necessary to recruit additional specialist internal resources to help manage the additional intensity and informational demands.
- Forecast asymmetry: Trade sale forecasts can (and often will) stretch out to cover up to five years of forecast performance albeit heavily caveated and entirely at the risk of the buyer. Contrast IPO forecasts where the forecast period in the prospectus will typically not stretch beyond a full financial year plus a stub period. Reconciling these differing approaches needs to be considered carefully by sponsors who embark down a dual-track or sequential-track process.
- Stakeholder pressure: Divergent opinions and interests between sponsors and their management teams as to which exit pathway is best to follow can create tensions. Balancing these interests and opinions while maintaining a clear strategic vision is crucial for a successful sale process.



WHO'S THE BOSS? THE TUG-OF-WAR OVER REAL ESTATE FUND MANAGEMENT RIGHTS

A CHECKLIST FOR SPONSORS

CONSIDERATION	KEY ACTIONS	BENEFITS	PITFALLS (TO AVOID)
Pre-IPO capital raise	Structure as priced round or convertible note; bring in credible public market investors early	Builds investor confidence; provides liquidity/debt paydown; de-risks IPO execution	Misaligned valuation expectations
Escrow and sell-down	Negotiate early release mechanics; balance sponsor liquidity with market stability	Provides orderly exit pathway; signals alignment with public investors	Overhang risk if too little free float
Relationship deed	Secure director appointment, information, and cleansing notice rights	Protects sponsors' exit flexibility; ensures access to information for monitoring	Risk of overreach (perception of sponsor control post-IPO)
Management equity / LTI schemes	Align pre-IPO incentives with new IPO-linked LTI; consider tax/regulatory impacts	Aligns management with shareholders; motivates long-term performance	Poorly structured schemes create misalignment or tax leakage; double-dipping with old incentives
ASIC's new streamlined process	Use pathfinder lodgement and no-action relief to compress IPO timetable	Faster, more efficient listing process; reduces regulatory friction	Only available to eligible issuers; not applicable to back-end bookbuilds
Dual-track / sequential track processes	Run IPO and trade sale in parallel (or staggered) to maintain competitive tension	Maximises valuation; preserves flexibility if markets shift	Resource drain on management; inconsistent forecasts can undermine credibility

SEIZING THE IPO WINDOW

Finally, an IPO window can open and shut abruptly, particularly in the current 'eventful' climate. Sponsors and their portfolio companies who can move quickly and efficiently when a window opens will be the ones most likely to succeed in such times.

To successfully exit through an IPO, it is important to have a well-developed forecast model, a well-populated and extensive data room, and a clear understanding of any key legal or commercial issues. Equally essential is the appointment of advisers who understand the underlying business and its drivers, along with well-defined strategies for investor engagement, IPO escrow, sell-down and management equity.

For even the most casual observer of the market, it is apparent that the real estate funds management industry is experiencing a period of intense scrutiny and tension. Institutional investors are demanding greater influence over how their capital is managed (and recycled), while fund managers are seeking to preserve levels of discretion, long-term relationships with key investors, and the scale of funds under management.

Behind the increasingly public exchanges between competing managers – and between managers and their own investors – sit complex dynamics between longer-term structural changes and shorter-term cyclical pressures.

So, what exactly is going on?

STRUCTURAL EVOLUTION: ASSET-LIGHT(ER) MODELS AND SUPERANNUATION'S RISE

In what remains a capital-intensive sector, many real estate managers have evolved their business model toward "asset-light(er)". By owning fewer assets directly, and focusing on managing assets and capital for others, managers have unlocked scale (and related economies) and a more predictable recurring fee income. This allows them to position themselves as 'yield vehicles' that appeal to institutional investors seeking a stable return. In many cases, financial sponsors have taken similar steps, with many now incorporating diversified asset management verticals.

As the model has evolved, funds under management (FUM) has become an increasingly critical financial metric for – and the lifeblood of – management businesses. Management rights themselves have become a valuable strategic asset.

At the same time, Australia's superannuation funds – now overseeing more than A\$3.5 trillion – have evolved into powerful counterparties. As custodians of the retirement savings of millions of 'mum and dad' investors, superannuation funds carry on their sleeves the weighty fiduciary responsibility to act in the best interests of their members.

Given their scale and limited investable domestic opportunities, many superannuation funds have been forced to look offshore. This has given them greater exposure to foreign and global fund managers and has led to more benchmarking of Australian management capabilities and services against global best-in-class.

With larger tickets, more directive mandates and access to a global comparison set of managers, institutional investors are seeking "better deal[s] on fees, better governance standards and access to the best-quality assets" and are willing to move on if fund managers "fail to measure up".¹

The result? Investors (or groups of investors) that have significant capital to place, or that account for a significant proportion of a manager's FUM, are better positioned than ever to influence – or even re-set – management arrangements.

CYCLICAL PRESSURES: LIQUIDITY CONSTRAINTS AND PERFORMANCE DEMANDS

Overlaying these structural shifts are tough market conditions: commercial real estate valuations, particularly in the office sector, have been through an elongated soft period; liquidity has been challenged. As a result, transaction volumes have been muted, exit options have narrowed, and the cadence of recycling and return of capital to investors has slowed.

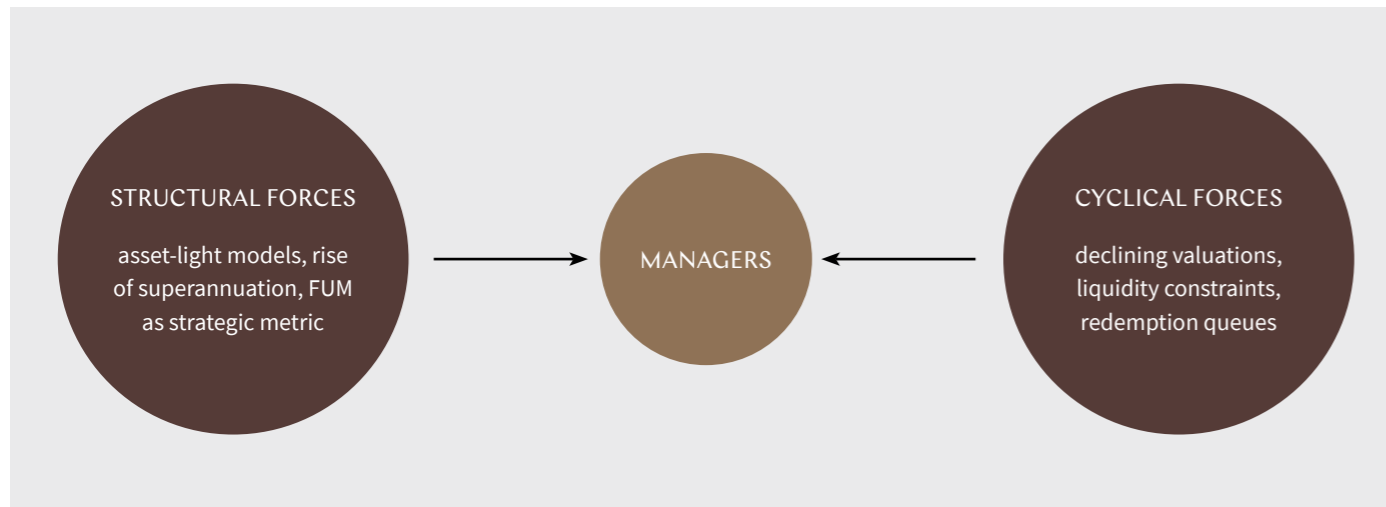
For managers, the consequences are clear:

- Redemption queues remain long for many open-ended vehicles, testing cash-flow reserves and investor patience alike.
- With interest rates softening despite there being few viable liquidity events, investors are scrutinising performance more closely and are re-evaluating whether existing management teams remain the best stewards of their capital when targets aren't met.

In this climate, management rights are far from an entitlement – they are a privilege that must be continually earned.

1. <https://www.afr.com/property/commercial/game-for-fund-managers-is-now-global-says-mirvac-ceo-20250901-p5mrwb>.

DIV RECAPS: HAVE YOUR CAKE AND EAT YOUR PORTCO TOO



KEY LESSONS FOR FUND MANAGERS

Fund management rights remain a cornerstone of value in real estate private equity. However, their preservation depends on alignment. Sponsors and investors who remain aligned through periods of cyclical pressure – by prioritising clear reporting, robust governance, and transparent fee structures and pathways to liquidity - will emerge with stronger partnerships and a more resilient model.



A div recap (or 'dividend recapitalisation' for those people who don't like shorthand) is where a company borrows to fund a distribution to its shareholders. This is a re-gearing event that leaves the company with more net debt on its balance sheet, allowing the sponsor to realise some of its equity value ahead of a full exit.

DRIVERS

In our [Leveraged Finance Year in Review](#) we typically have a word or phrase of the year. In 2025, there's a good case for 'DPI' being the winner two years in a row.

Distributed to paid-in capital ('DPI') measures how much money investors have put in vs what they've received back – but over the last couple of years, it has been used as fancy lingo for 'still not exiting yet'.

Sponsors remain under pressure to return funds to investors and, where exit conditions are challenging, are looking at other options to boost DPI.

Div recaps have been the most popular DPI tool this year, in particular as:

- Borrowing conditions in 2025 have been very favourable to borrowers. Falling base rates have been accompanied by a real compression in margins (particularly from private capital lenders). This has been partly driven by competition between an increasing number of lenders who have sought to deploy capital into a limited number of transactions. That lower cost of debt capital makes div recaps an attractive option.
- Many of the portfolio companies that are candidates for a div recap are currently at a natural refinancing point. Australian leveraged loans usually have a tenor of 5 years (or 6 years for private credit). The wave of deals done in 2021 (post-COVID with favourable borrowing conditions and healthy private equity activity) have looming maturities, meaning those portfolio companies will be back in the market to refinance anyway. And, more generally, a few recent years of more difficult borrowing conditions means there is a backlog of refinancings now coming to market.

Those factors, coupled with sponsor messaging that the real exit is coming soon, sees the 'refi + div recap' proposal often coupled with a request for portability – to allow the new debt package to survive a potential change of control transaction.

COMPLEXITIES

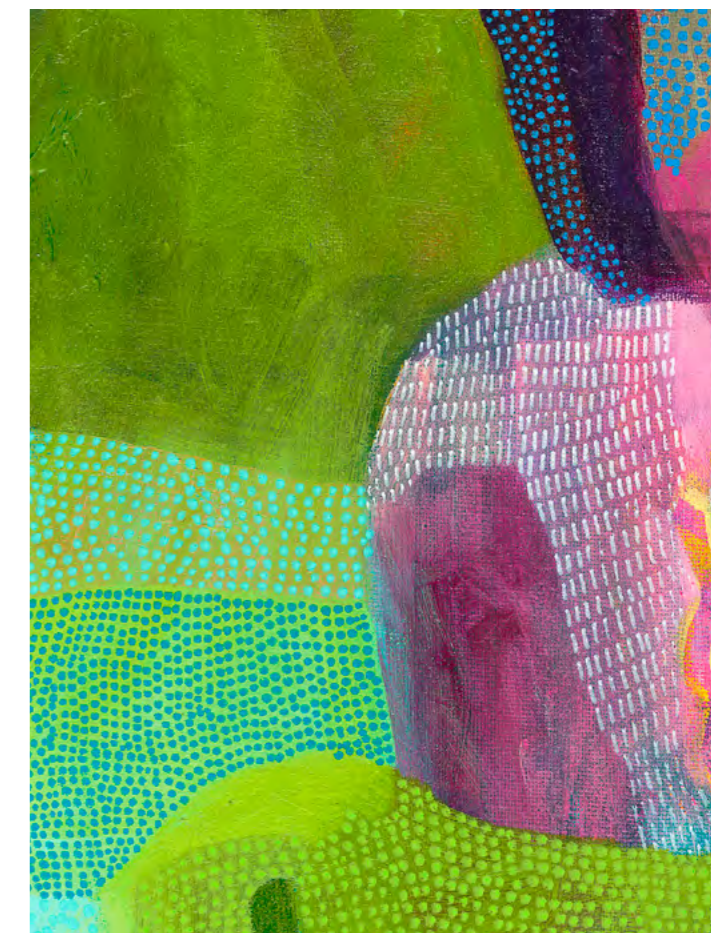
For a relatively simple proposition, div recaps involve some complexity in implementation which needs to be carefully considered for each deal.

METHOD OF UPSTREAMING

Notwithstanding the name 'div recap', not every deal involves a dividend. The key decision point is the appropriate method of upstreaming funds - dividend, buy-back or return of capital.

Relevant factors to the decision include:

- Whether the company has sufficient current year profits (or retained earnings) to pay a dividend and meets the other requirements of section 254T of the *Corporations Act 2001* (Cth).
- The company's share-capital account balance
- What approvals (if any) may be required from shareholders and the board under the relevant governing documents and/or the Corporations Act.



The chosen structure can have very different tax outcomes for shareholders. For example:

GENERALLY A DIVIDEND:

- is assessable as income
- is subject to dividend withholding tax for offshore holders if not franked
- may attach franking credits

VS

A capital return may reduce the cost base of shares – rather than giving rise to a taxable gain (provided the capital return does not exceed the cost base)

VS

An off-market share buy-back's proceeds may be a combination of capital and dividend; there is a degree of complexity in determining the components and care needs to be taken to ensure various integrity rules do not apply

DIVIDEND SUBSTITUTION RULES

Because it may be beneficial from a tax perspective for a shareholder to receive a capital return rather than a dividend, an integrity rule exists which can be applied by the ATO to declare all or part of a capital return to be an unfranked dividend. The ATO can do this if there is 'more than an incidental purpose' to confer a 'capital benefit' on shareholders.

To provide certainty, portfolio companies will generally obtain tax advice and may engage with the ATO for a tax ruling in relation to the proposed return of capital prior to undertaking it.

FRANKING CREDITS

If all or part of the div recap is implemented via a dividend, the next consideration is whether franking credits are available and can be allocated to the dividend.

THIN CAPITALISATION

For those lucky enough to have avoided thinking about thin capitalisation since the new laws generally came into effect from 1 July 2023, here is a quick primer:

- Under the new rules, deductions for interest expense are generally capped at 30% of 'tax EBITDA' (which is very different to adjusted pro forma financing EBITDA) for most taxpayers. For many leveraged borrowers, this can result in denied deductions.
- Certain taxpayers may be eligible to apply the 'third party debt test' (TPDT) as an alternative to the tax EBITDA test.
- One of the conditions for the TPDT (among others) is for the relevant debt to fund 'commercial activities in connection with Australia'.

Taxation Ruling 2025/2, published by the ATO in early October 2025, indicates that 'commercial activities in connection with Australia' does not include the payment or distribution of dividends or capital returns.

If the ATO's view is correct, borrowers relying on the TPDT will need to consider the impact on deductibility of interest for any div recap transaction.

Where the lender under a div recap is connected to the borrower, additional limitations on interest deductibility may apply.

THE CASE FOR DIV RECAPS

None of this is to suggest that div recaps should be relegated to the 'too hard basket'. Div recaps are clearly an effective tool for sponsors to manage DPI pressure and generally for capital management – and there are many successful transactions in the market. However, each transaction requires careful and quality advice.

LOOKING BEYOND THE DOLLAR: ASIA'S INVESTMENT AND LEVERAGE STRATEGIES

Across Asia, the deal landscape is responding to the United States' geopolitical reset, tariffs and currency volatility. Exports from Asia to the US have materially reduced. China, Vietnam and Thailand have been most affected, particularly businesses with a large US customer base.

Yet emerging Asia has shown great resilience in the face of all the uncertainty.

Emerging market bond markets have outperformed developed markets, with investors recognising healthy balance sheets and relatively low government debt. The reduction in trade flows between US and Asia is having an unexpected result – it is requiring investors to actively diversify their portfolios into the region.

Emerging markets are expected to re-emerge.

CURRENCY IN LOCAL CURRENCY

Borrowing in local or proxy currencies has become more attractive among investors in Asian markets. There are calls to broaden debt markets across the region to reduce reliance on US dollar denominated debt and reduce currency risk and volatility. Businesses prefer to achieve a natural hedge if local debt is available.

Asian Development Bank's aggregate local currency portfolio reached more than \$3.75 billion equivalent as of 31 October 2024 across more than 15 local currencies, with local currency loans expected to reach 50% of private sector lending over the course of 2025. It remains relatively illiquid, but it is growing.

In its strategic plan for the next five years, ASEAN intends to promote the use of local currencies for investment leverage. The APEC Business Advisory Council have even recommended a bond linked to a basket of currencies in a bid to create more liquidity in regional debt markets and reduce reliance on the US dollar.

RMB CALLING

In July, some of Australia's leading CEO's and partners from King & Wood Mallesons met in China to talk trade and investment alongside Prime Minister Anthony Albanese. Part of the discussion noted the Chinese government's yuan internationalisation project.

Shortly after the Beijing meetings, Fortescue, the world's fourth-largest iron ore producer, inked the first offshore yuan-syndicated loan to an Australian company, which worth a record RMB 14.2 billion, with syndicate lenders consisting of Chinese, Australian and international lenders led by Bank of China.

We have seen similar initiatives carried out by China Development Bank in the past, through signing yuan-denominated loan contracts with Malaysia's Maybank, Egypt's central bank and BBVA Peru. The Export-Import Bank of China, being another Chinese policy bank, also signed a yuan-based loan agreement with Saudi National Bank too.



China's new regulatory framework for cross-border lending is enabling growth in Renminbi-denominated syndicated loans. The Notice on Offshore Lending Business of Banking Financial Institutions (**PBOC Notice 27**) was issued by the People's Bank of China and the Chinese State Administration of Foreign Exchange jointly in 2022. Under Notice 27, all Chinese domestic banks can participate in a broader scope of offshore lending activities and are in fact encouraged to lend in Renminbi instead of foreign currencies.

WHAT IT MEANS FOR AUSTRALIA

Two years have passed since Nicholas Moore AO's Special Envoy for Southeast Asia [delivered its strategic report](#), citing the stagnation in direct investment by Australia into the region despite the 'potential to be a substantial investor'.

The data from the first half of 2025 indicates green shoots in outbound M&A from Australia into Asia, but investment remains muted. Over time we expect a range of corporates and bidders heading to Asia to acquire real estate, infrastructure and energy assets, most likely coinvesting with other more experienced Asia investors.

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PODCASTS



For more on Asia's evolving M&A and investment landscape, listen to this [View from Asia podcast episode](#) featuring Partners Nicola Yeomans and Will Heath.

Download the podcast here



We will also likely see more AUD denominated 'kangaroo' bonds issued in emerging Asia like the one launched last month by the Indonesian government. It was a strategic step to diversify state budget financing and broaden the global investor base, including hopefully more Australian investors.

Watch this space.

FROM OVERSIGHT TO OFFENCE: NAVIGATING WAGE THEFT RISKS IN PORTFOLIO COMPANIES

Recent cases involving underpayment and significant penalties for breaches of workplace laws have made front-page news. For the private capital sector, these issues have the potential to affect all stages of the investment life cycle.

Below we look at some of those recent developments and reflect on where we see best practice in the wage governance space is heading, and what this means for sponsors.

NEW WAGE THEFT LAWS IN AUSTRALIA

On 1 January 2025, new wage theft laws commenced under the *Fair Work Act 2009 (Cth)* (**Fair Work Act**). The laws make it a criminal offence for employers to intentionally engage in conduct that results in the underpayment of wages or entitlements to - or for the benefit of - their employees under the Fair Work Act or an industrial instrument.

If a person is convicted of wage theft, they can face imprisonment for up to 10 years. In addition:

- companies and other bodies corporate can face fines of up to A\$8.25 million or the greater of 3 times the underpayment amount; and
- individuals may face fines of up to A\$1.65 million or the greater of 3 times the underpayment amount.

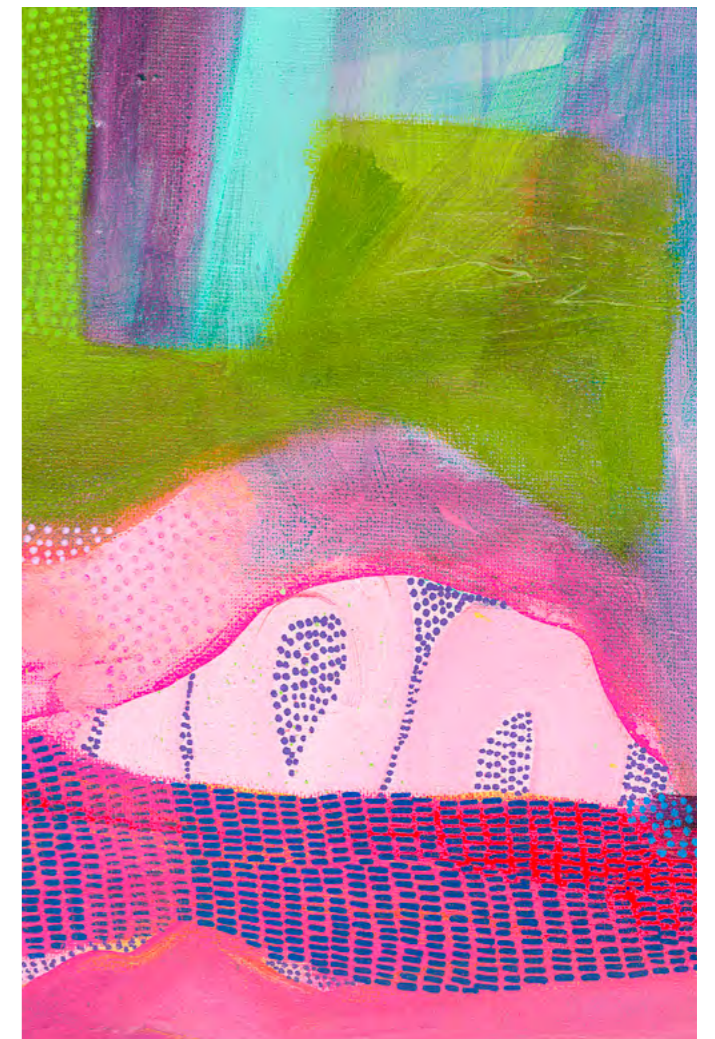
While the focus of the wage theft laws is on 'intentional' underpayments, there is scope for the requisite intention to be established in circumstances other than obvious wrongdoing. In particular, the Fair Work Ombudsman (FWO) has indicated that the regulation could apply in circumstances where non-compliance is detected (for example, during due diligence) but not remediated with appropriate urgency. Additionally, in establishing the fault element, evidence that the organisation lacks a 'culture of compliance' can be relevant.

Other individuals and entities can also be prosecuted under the 'related offence' provisions in the Fair Work Act, including if they incited, aided, abetted, counselled or procured the commission of the offence.

Importantly, the criminal wage theft laws continue to operate alongside the existing civil penalty regime for underpayments under the Fair Work Act. Given the absence of the need for intentional or deliberate conduct and the lower standard of proof that applies in civil proceedings, we expect the civil regime will remain an active forum for the FWO.

REVISED EXPECTATIONS FROM THE OMBUDSMAN

Following the introduction of the new wage theft laws, the FWO has published detailed guidance to assist organisations in ensuring they are meeting their wage compliance obligations and to minimise the risk of criminal liability and other enforcement proceedings for underpayments.



This includes:

FWO's Compliance and Enforcement Policy	The Policy outlines how the FWO will exercise its compliance and enforcement functions. It highlights its 3 main responses to allegations or instances of non-compliance – encouraging voluntary compliance, guiding compliance where required and enforcing the law when it is in the public interest.
FWO Payroll Remediation Program Guide	The Guide sets out the FWO's expectations for employers when conducting a payroll remediation. The Guide makes it clear that employers should take an 'employee-centred' approach while acknowledging there is no 'one size fits all' approach to a remediation.
Voluntary Small Business Compliance Code	Although published for small business employers, the Code and Guide provide detailed insights into the regulator's expectations as to how employers can demonstrate they are complying with minimum pay obligations.
Guide to Paying Employees Correctly and the Voluntary Small Business Wage Compliance Code	This includes making reasonable efforts to ascertain correct pay rates and entitlements, considering and relying on information that the employer reasonably believes is accurate and seeking information or advice in relation to the payment of wages and entitlements.

WAGE COMPLIANCE - A RISK GOVERNANCE ISSUE

There is no doubt the FWO expects wage compliance to be a priority for employers and their boards and shareholders.

Treating wage compliance as a risk governance issue (in accordance with conventional risk management practices) ensures that boards and their sponsors can receive information about the wage compliance systems and processes (including key risk factors), whether further resources and capabilities are required, and the results of monitoring, audit and assurance activities.

At a practical level this looks like:

- ensuring sound processes are in place for classifying employees under modern awards / industrial instruments and there is ongoing review of these classifications (including when there is a job change or a new employee commences);
- mapping legal obligations against compliance systems and processes and ensuring relevant controls are in place to achieve compliance;
- undertaking regular reviews and audits (both internally and externally) to assess compliance with applicable industrial instruments and laws;
- maintaining robust time keeping, payroll and data entry processes and testing those processes on a regular basis; and
- investing in governance and compliance protocols and resources.

HOW IS THIS PLAYING OUT FOR SPONSORS?

Wage underpayments are often discovered years after the initial error(s), with the damage compounding over time. The underpayment alone is unlikely to be the sole issue encountered. The knock-on consequences can include: superannuation and interest costs, a lengthy and costly external investigation, actual FWO prosecution or having to provide the FWO with enforceable undertakings, incurring penalties, threats of class action claims from former and current employees, and reputational fallout. On top of all this is the potential for holding companies to be liable for breaches of the Fair Work Act by their subsidiaries and the potential personal exposure of appointee directors under the new wage theft laws where they are knowingly involved in a contravention.

PROCEEDINGS AGAINST SUPER RETAIL GROUP

The commencement of prosecution proceedings against the Super Retail Group in 2023 demonstrated this focus. In that matter, the regulator alleged that SRG Limited was liable as a holding company for certain wage contraventions of its subsidiary employing entities because it knew or could reasonably be expected to have known that those entities would or were likely to underpay set-up workers and retail managers their entitlements to overtime under the relevant Award. Under the relevant Fair Work Act provisions, no offence is committed where the holding company took reasonable steps to prevent the contravention by the subsidiary.



FIRB / ACCC: APPROVAL PATHWAYS CONVERGE

THE WOOLIES/COLES DECISION

The recent Federal Court decision in high-profile proceedings by the FWO against Woolworths and Coles highlights the complexity in this area and will have immediate impacts in the private capital space.

Following this decision, we anticipate more detailed due diligence beyond simple wage compliance – diligence covering record-keeping and other matters will also be required, as well as recognising the potential inability to rely on so called “set-off” rights between pay periods in payroll sampling exercises (increasing the potential for actual legal underpayments to occur).

For our detailed thoughts on this decision and its implications, read our insight [Federal Court Rules Out Contractual Set-Off Award Entitlements Between Pay Periods](#).

In light of this, buyers and W&I underwriters have heightened expectations for targets to be able to demonstrate a strong and comprehensive compliance framework during due diligence. Without this comfort, we are seeing the buy side (particularly W&I underwriters) displaying increasing nervousness (and reluctance) to provide coverage in respect of wage compliance and employment legal compliance warranties.

WHERE TO FROM HERE?

There will continue to be growing scrutiny and regulatory focus on wage compliance, particularly given recent legal developments and as the criminal wage theft regime starts to be tested. In the meantime, smart sponsors will be prioritising a review of payroll practices in their portfolio companies to ensure that their systems and record keeping are robust and their wage compliance culture is fit for any FWO focus or buyer focus that may be coming.

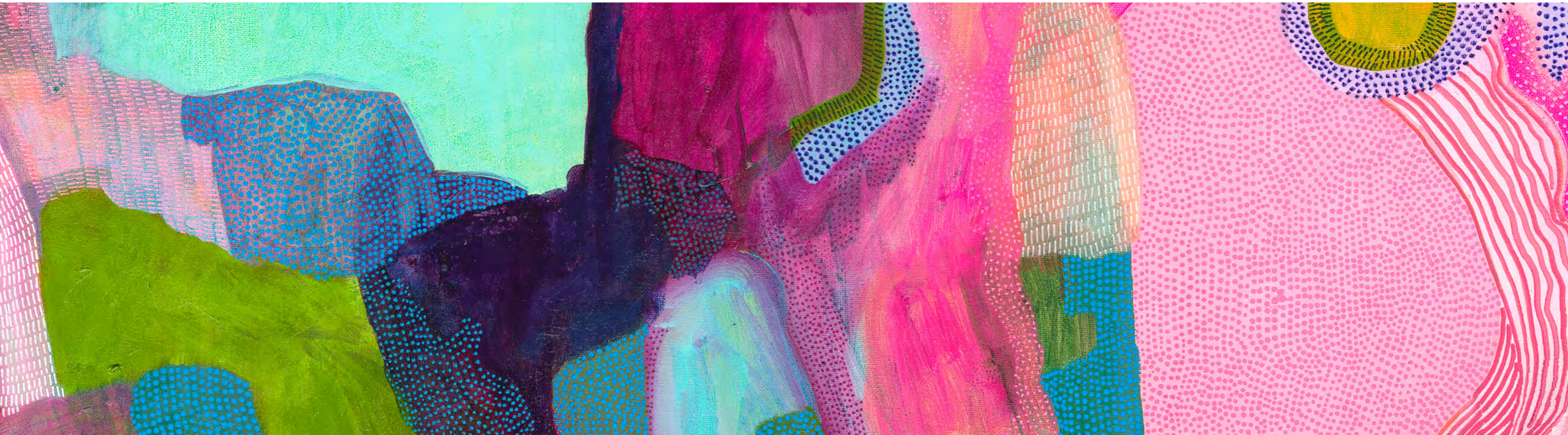
FIRB recently announced policy changes to streamline its application process and reduce regulatory duplication, requiring applicants to disclose information about competitive overlaps between merger parties. Regardless of any ACCC merger notification, Treasury may refer transactions to the ACCC if competition concerns arise, allowing the ACCC to assess whether FIRB-notified deals should also be notified under the new merger regime.

FIRB applicants must now state within their online application whether their transaction will be notified to the ACCC under the new merger regime. If ACCC notification is required or a waiver has been granted, applicants must provide Treasury with the ACCC reference or waiver number and keep Treasury updated on the application’s progress. If notification is not required and has not been made voluntarily, applicants must complete mandatory competition-related fields, including details on competitive overlaps, relevant markets, key suppliers, likely competitive effects, and Australian revenue figures for each party and related entities for the past three financial years.

The revised policy now makes clear (consistent with what has been practice to date) that FIRB will not make a decision until the ACCC has made a determination.

For sponsors, the changes emphasise the importance of early thinking and preparation around merger-related considerations. Deal teams should be ready to provide revenue data, market overlap details, and competitor information by the time their FIRB filing is to be lodged. Engagement with advisers and counterparties to quantify market share data and anticipate ACCC queries will be an important part of that process.

Finally, just before release of this edition of In Private, the Assistant Minister for Productivity and Competition announced that the Government will be moving ahead of 1 January 2026 to refine certain aspects of the new merger notification regime ‘to ensure the reforms are appropriately targeted and risk-based’. The proposed refinements include new and wider exemptions from mandatory notification for low-risk business activities in areas such as residential property development, retail trade and financial markets. The Government also plans to make practical adjustments to the automatic voiding provisions. For those that have been preparing for the new regime and its implications, these refinements look like a positive step forward.



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