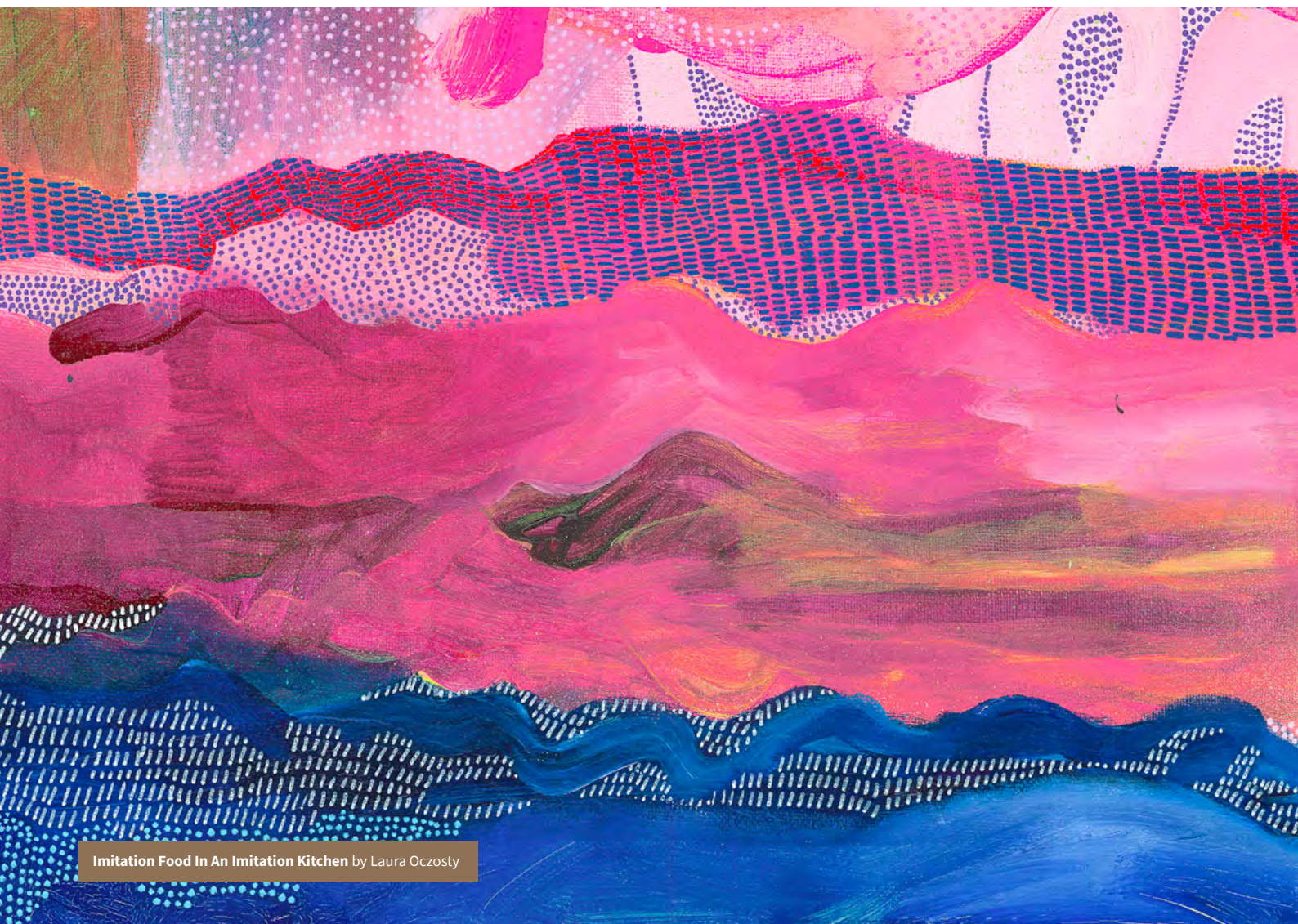


# IT'S PUBLIC

KWM M&A INSIGHTS | NOVEMBER 2025



# DOING DEALS IN WOBBLY MARKETS: WHO BEARS THE RISK OF TIME?

**When markets are moving beneath your feet, deal certainty becomes the currency that matters most (well that, and the price!).**

When markets are moving beneath your feet, deal certainty becomes the currency that matters most (well that, and the price!).

In public M&A, certainty runs both ways. Targets want bidders who will close, and bidders need targets to pave a clear path to completion through well-defined implementation obligations and tight exclusivity provisions. In wobbly markets, execution risk compounds.

Regulatory friction is a principal culprit. In the current deal environment, M&A transactions are facing heightened regulatory scrutiny (both domestically and offshore) and timetables are lengthening in step. The ACCC's imminent move to a [mandatory merger clearance regime](#) is the most salient example of this. As timelines extend, so does the window for macro shocks, earnings volatility and plain old buyer's remorse to develop. In this context, bidders with post-signing changes of heart are increasingly probing how far legal levers can be pulled to reset, re-price or retreat.

In recent memory, there are two prominent examples in the Australian public M&A market of bidders getting cold feet and testing these levers in the courtroom – [Perpetual in its attempt to resile from its acquisition of Pandal](#) and Cosette on its pending acquisition of Mayne Pharma (covered earlier in this edition). In the Pandal case, the Court made clear that a bidder cannot treat a reverse break fee as an option fee to walk away from a binding scheme implementation agreement, absent a clear contractual right to do so. Likewise, in the Mayne Pharma decision (which is currently under appeal), the bidder's attempt to invoke a material adverse change (MAC) to escape the deal failed on the facts and the drafting. The message is straightforward: courts will not permit bidders to use generic legal 'outs' to avoid performance, without an express right to do so and clear facts to rely on.

That does not mean the search for exit ramps is over.

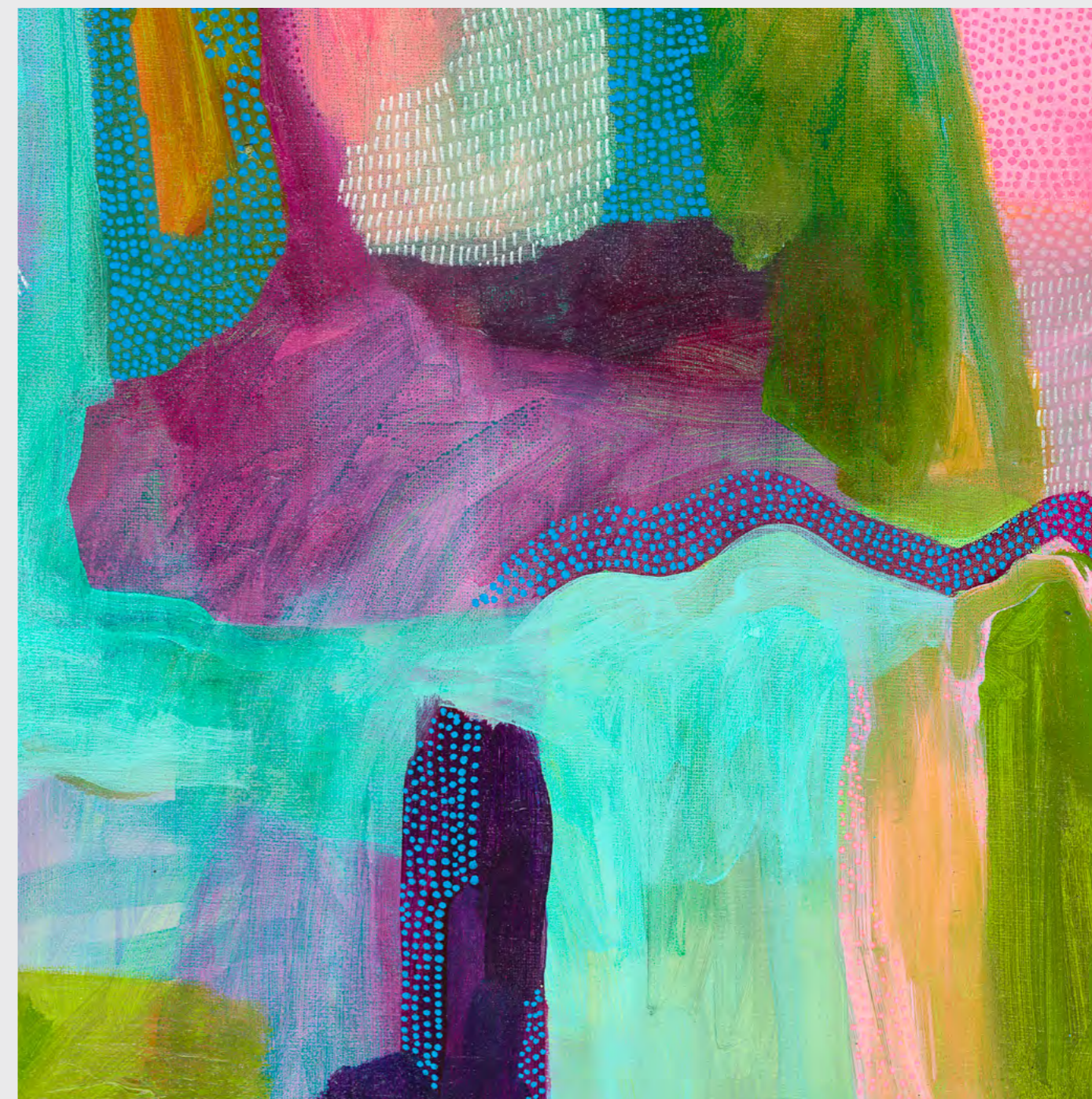
In the case of Mayne Pharma, at the time of writing, the takeover remains contingent on FIRB approval, and the end date of 20 November approaches. After that, all bets are off. What's more, FIRB have now indicated their preliminary views that approval may not be forthcoming (in large part due to Cosette's own shifting intentions concerning the target following its purported termination), and have unilaterally extended the statutory deadline to 14 November (after initially requesting a 1 December extension).

Under ordinary circumstances with two aligned, motivated parties (and shareholder approval in the bag), the next steps would be clear – agree to FIRB's extension requests, extend the end date by agreement, and pull out all stops to get the Treasurer across the line (and interestingly, the target late last week applied to the Panel requesting that it compel Cosette to do just that). But these aren't ordinary circumstances. It will be interesting to observe if Cosette loses the skirmish on the MAC clause, but ultimately wins the war.

There is some irony here. The long tail of regulatory approvals, which gives bidders time to change their minds, could very well be used as a tactic to end a deal. With MACs and conventional legal mechanisms proving unreliable as escape hatches, nervous bidders may pivot to process based strategies: leaning into extended approval cycles, resisting extensions, or insisting on hard long stop dates that become de facto options when conditions change.

For targets, these risks can be mitigated to some extent through deal protections like higher reverse break fees<sup>1</sup> (which we advocated for [here](#)) and ticking fees<sup>2</sup> linked to failed or delayed regulatory approvals. These can provide incentives for bidders to prosecute approvals promptly, and compensate targets if a deal stalls or fails for reasons within the bidder's control. Post Mayne Pharma, targets will no doubt also be scrutinising the obligations of bidders to use 'best endeavours' to prosecute conditions, and pressing for greater rights to participate in regulatory review processes.

The practical takeaway is a familiar one, but more urgent in volatile markets. Draft with specificity. If a bidder needs conditionality to address exogenous risks, say so clearly and calibrate the thresholds. If a target seeks true deal certainty, ensure that conditions (and obligations to satisfy them) are tightly defined, there are appropriate financial penalties for delay and realistic end dates for any approvals in play. In unsteady markets, the parties need to ensure that it is crystal clear in the four corners of the agreement who ultimately bears the risk of time.



1. Reverse break fees are becoming increasingly common in the Australian public M&A market and have typically hovered around 1% of equity value (consistent with target break fees). However, since Pandal we've started to see a trend - particularly in ultra-high value deals - in the Australian market for 'supersized' reverse break fees being accepted.  
2. Ticking fees see sellers and target shareholders being entitled to an extra payment if the deal goes beyond a particular timing milestone.



# ABOUT KING & WOOD MALLESONS

A firm born in Asia, underpinned by world class capability. With over 3000 lawyers in 29 global locations, we draw from our Western and Eastern perspectives to deliver incisive counsel.

We help our clients manage their risk and enable their growth. Our full-service offering combines un-matched top tier local capability complemented with an international platform. We work with our clients to cut through the cultural, regulatory and technical barriers and get deals done in new markets.

#### Disclaimer

This publication provides information on and material containing matters of interest produced by King & Wood Mallesons. The material in this publication is provided only for your information and does not constitute legal or other advice on any specific matter. Readers should seek specific legal advice from KWM legal professionals before acting on the information contained in this publication.

#### Asia Pacific | North America

King & Wood Mallesons refers to the network of firms which are members of the King & Wood Mallesons network. See [kwm.com](http://kwm.com) for more information.

[www.kwm.com](http://www.kwm.com)

© 2025 King & Wood Mallesons

#### JOIN THE CONVERSATION



SUBSCRIBE TO OUR WECHAT COMMUNITY.  
SEARCH: KWM\_CHINA