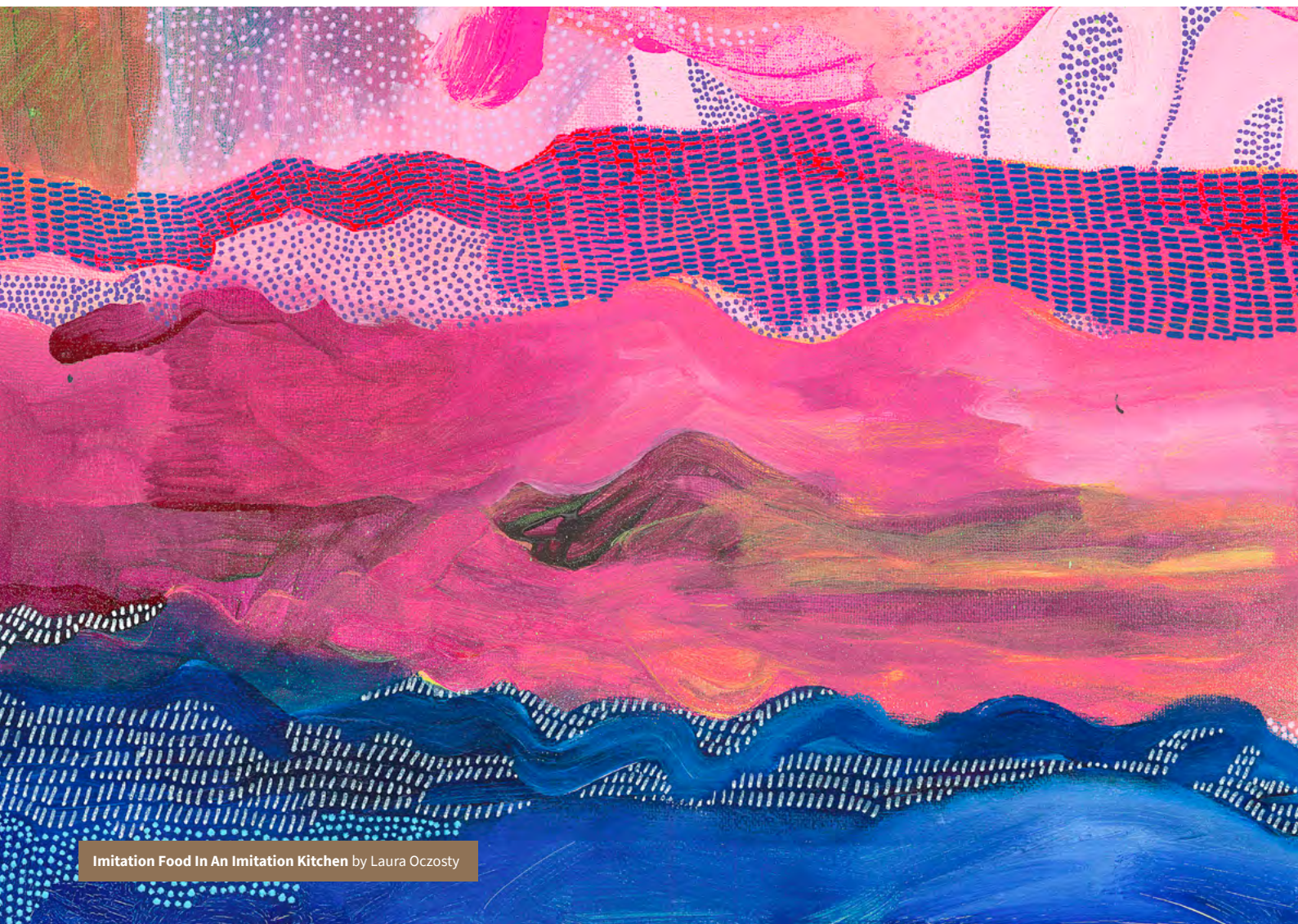


IT'S PUBLIC

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THE MAYNE POINT IS, YOU CAN'T WALK AWAY THAT EASILY (OR CAN YOU?)

If you needed a reminder that material adverse change (MAC) clauses are often more bark than bite, the Supreme Court of New South Wales just prescribed one.

In the Mayne Pharma Group Limited (**Mayne Pharma**)/Cosette Pharmaceuticals, Inc. (**Cosette**) scheme stoush,¹ Black J found that Cosette hasn't proved that a MAC had occurred - meaning Cosette's attempt to walk away from the deal flatlined. The message to dealmakers is equal parts familiar and pointed: if you want a MAC clause that works when you need it, you must draft it like you mean it. Vague hopes will not cure a bad case of buyer's remorse.

WHAT HAPPENED (AND WHY IT MATTERS FOR DEAL CERTAINTY)

Mayne Pharma and Cosette inked a scheme of arrangement at A\$7.40 per share, with a MAC condition and a FIRB condition (more on the FIRB condition below). The MAC trigger was essentially set as a decline of at least A\$10.76m of "Maintainable EBITDA (earnings before interest, tax, depreciation, and amortisation)" over 12 months. Soon after the scheme booklet was released, Cosette claimed the patient was declining - pointing to trading softness, an April earnings update, and a United States Food and Drug Administration "Untitled Letter" on the promotion of a key Mayne Pharma product - then purported to walk. Mayne Pharma pressed on, announced the purported termination, and secured overwhelming shareholder approval to proceed with the scheme. The Court was asked the hard question: had the sky really fallen by at least A\$10.76m of "Maintainable EBITDA" over 12 months?

The Court's answer was no. Its reasoning is relevant for every public M&A deal:

- Missing a forecast is not itself an adverse change; it's only evidence of one. Evidence still needs to isolate cause and effect.
- "Reasonably expected" captures real-world impacts that have occurred even if the full commercial pain hasn't yet been felt - but a risk that something might go wrong is not enough.

THE MAC THAT WASN'T: QUANTIFIED THRESHOLDS NEED REAL EVIDENCE

The parties agreed a quantitative threshold - A\$10.76m of "Maintainable EBITDA." Cosette's problem was not ambition; it was attribution. The Court was not persuaded that the specific events pleaded, alone or in combination, were doing the causal heavy lifting needed to cross the line.

When a MAC is pegged to a financial metric, you must show the difference is driven by the alleged changes - not background noise, general economic headwinds or self-inflicted wounds. If you cannot run the counterfactual cleanly, do not expect the Court to do it for you.

A MISSED ARGUMENT: WAS THE MAC VOID FOR UNCERTAINTY?

There is a drafting wrinkle here that did not get argued but should sharpen pens across the market. The MAC definition in the scheme implementation deed purported to pick up events occurring before signing, yet the operative condition required the MAC to "occur" after signing (up to the second Court date). Layer in a "Maintainable EBITDA" test without a fixed baseline or an explicit "but-for" counterfactual, and you have got ambiguity doing laps around precision.

If you want a condition that actually conditions, be clear on:

- the measurement period and the effective date window; and
- the metric and its baseline.

Otherwise, your MAC will wheeze when asked to run.

IS THE VOTE GETTING STALE AND THE CLOCK RUNNING DOWN?

Mayne Pharma has had shareholder approval in the bag for 4 months now, but notwithstanding the Court's favourable ruling at the time of writing this article, the FIRB condition remains unsatisfied. As the end date of 20 November approaches, Cosette has notified Mayne Pharma of its intention to appeal the MAC decision and FIRB has indicated it won't approve the deal. The deal has all of the ingredients for "stale vote" concerns. You can only keep the patient on life support for so long.

PRACTICAL TAKEAWAYS: MACS NEED SURGICAL PRECISION

Precision pays. If the goal is a credible termination right rather than a negotiating prop, draft for diagnosis, not vibes.

- Specify the quantitative metric, the measurement window, and the "but-for" world. If you cannot model it, you cannot litigate it.
- Resist "kitchen sink" approach to exclusions. If the mere "pendency of the scheme" (like in the Mayne Pharma scheme) is excluded without surgical limits, don't be surprised when your MAC clause collapses under its own weight.
- Tie process to remedy. If a party sues for specific performance or injunctive relief or has to delay the timetable while resolving a purported termination, consider including in the transaction documents an automatic extension to the end date to let the Court process do its job - do not force a race to expiry.
- Align timing. If you intend to capture pre-signing issues discovered post-signing, say so in the operative condition, not just the definition.
- Be realistic about evidentiary burden. A quantified MAC is a high jump with a tape-measure, not a limbo with a vibe-check.

WALK AWAY RIGHTS AND FIRB

At the time of writing this article, the Treasurer's preliminary view is that the deal "would be contrary to the national interest, on the grounds that it would negatively impact the Australian economy and community". This follows reports in the press that Cosette had apparently re-evaluated its plans and intends to close the manufacturing site in Adelaide, with the result that the South Australian government asked FIRB to block the deal.

Taking an axe to the deal isn't the Treasurer's only option. FIRB could use its scalpel and approve the deal on the condition that the Adelaide facility remain open. FIRB is no stranger to conditions - almost every deal in recent years includes conditions. Under the transaction documents, Cosette is bound to act reasonably in considering whether to accept that condition.

A bidder significantly changing its investment thesis part way through an announced deal (and in seeming silence in the scheme booklet) is almost unheard of. As our colleagues Daniel Natale and Jennifer Cheung explain in this edition in *'Doing deals in wobbly markets: who bears the risk of time?'*, we're seeing target companies give further thought to bidder obligations around satisfying FIRB and other regulatory conditions, end dates and reverse break fee triggers.

BOTTOM LINE

This decision will not spark a wave of successful MAC terminations. It will, however, embolden targets to keep calm and carry on when buyers wave the MAC flag without clean causation and quantification.

For bidders, if you want the parachute to open, pack it properly at signing. Otherwise, when you pull the cord, expect confetti. The FIRB condition conundrum remains a more pernicious pathosis - let's see what the next few weeks bring.

¹. In the matter of Mayne Pharma Group Limited [2025] NSWSC 1204.





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