M&A 2025 Outlook

Public M&A trends and strategies

November 2024

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Deal predictions based on real data

We look beyond statistics to consider what strategies and drivers will really matter to bidders, targets and shareholders undertaking a public M&A deal in 2025.

This report is based on the most recent data taken from our proprietary database and in-depth research for the 12 month period ended 30 September 2024.

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Introduction

This year, the public M&A market experienced a resurgence in activity, with the highest number of deals we have seen in the last decade.

In the Australian public M&A market, we saw available capital, an appetite for strategic growth in sectors like technology, healthcare, and renewable energy and the need to secure a competitive advantage driving increased activity and a generally optimistic sentiment. As domestic and international players re-engage in the market and vendors embark on long-awaited sales processes, we anticipate that M&A in 2025 will see us well on the road to recovery.

The year was not without its challenges. Last year, we predicted that there would be an increase in activity but that market dynamics would be 'fragile', and this has proven to be the case. Inflationary pressures combined with a still-noticeable divide between buyers and sellers in terms of pricing continued to shape the strategies of firms engaged in M&A. This resulted in a significant increase in hostile deals, up to 22% from around 13% in our previous survey period.

We are seeing ever-declining numbers of ASX-listed companies and increasing private M&A opportunities, which may see the pendulum shift towards more private than public deals, particularly for private equity buyers.

> “
>
> **The road to recovery… “are you ready for it?”**
>
> Taylor Swift

They say that 'the road to recovery is always under construction', and for the M&A market, that rings true. Incoming merger clearance reforms, potential changes in governments both domestically and abroad and global geopolitical tensions may lob a few obstacles in our path. But for many market participants who view M&A as a crucial tool for driving growth and adapting to an evolving business environment, these minor potholes will not detract from the opportunities that present themselves.

In our annual M&A Outlook, we explore the activity, strategies, trends and our predictions for the Australian M&A scene in 2025 – which is shaping up to be vibrant and dynamic.

Sandy Mak
Head of Corporate

01

Predictions for 2025

1. Resurgence in private equity – but not necessarily in public M&A
2. Consolidation and growth in gold and copper producers
3. Distressed M&A transactions will present opportunities
4. Liability management will be the new focus area for leveraged finance
5. M&A deals to spike in H1 ahead of merger clearance reforms
6. More tech M&A

1. Resurgence in private equity – but not necessarily in public M&A

Growth and buy-out private equity sponsors, particularly in the tech sector, are expected to ramp up activity in 2025. The tide is shifting in favour of more robust private equity dealmaking in Australia, and the economy has shown itself to be relatively resilient. This is despite macro-economic headwinds, including persistently elevated inflation globally, an uncertain geopolitical outlook in the Middle East and Ukraine, and domestic issues such as sluggish growth expectations, housing affordability and cost-of-living pressures.

We expect Australian private equity transactions in 2025 to increase from 2023 and 2024 levels, particularly if the Reserve Bank of Australia follows the lead of the United States Federal Reserve and European Central Bank in cutting interest rates. However, we predict this increase in deal activity will be skewed in favour of private M&A transactions as more sale processes emerge.

More favourable borrowing conditions, coupled with increasing distance from COVID-19's impacts (both positive and negative), should see sponsors becoming increasingly comfortable with valuations and cash flow forecasting. This will result in increased deployment levels.

In what is shaping up to be a compelling year for private equity, we predict:

- a rise in activity levels on the buy-side from sponsors flush with cash from recent fundraisings. On the sell-side, sponsors will realise portfolio exits, including via secondary private equity transactions or non-traditional routes such as continuation funds, as they look to return money to investors in advance of future fundraisings;
- sponsors to continue to take advantage of opportunities created by structural shifts and consumer trends. This will hopefully be backed by more positive consumer sentiment if interest rates have indeed peaked, with asset quality remaining the critical determinant in whether execution levels continue their steady rise from FY24 levels or spike more aggressively; and
- the bulk of this increase in activity will be in the private M&A space. There might be a decrease in public M&A activity by sponsor bidders, simply because the availability of private opportunities will reduce the need for sponsors to seek opportunities in public M&A.

2. Consolidation and growth in gold and copper producers

Initially fuelled by Newcrest's A$26 billion takeover by US peer Newmont in late 2023, 2024 saw continued consolidation and growth amongst Australian ASX-listed gold producers through M&A. Amid a challenging capital markets environment, driven in part by international conflicts and global political uncertainty, high gold prices and increasing market commentary on relevance driven by a focus on annual production, scale and profitability, we anticipate further activity into 2025. We also expect to see a greater variety of M&A activity, with additional consolidation amongst Australian mid-tier producers, and an increasing preparedness for Australian gold companies to look overseas for opportunities as competition for quality assets increases.

Often a forgotten commodity, copper is continuing to receive global attention as the mining industry focuses on its importance to:

- the global drive to reduce carbon dioxide production;
- tightening supply-demand balance; and
- improving demand.

BHP's A$3.2 billion play to grow its South American copper business through deals with Filo Corp and Lundin Mining is expected to trigger a further round of M&A activity, as it becomes increasingly clear that there are not enough copper mines under development to meet growing demand.

While the market often highlights the challenges facing the lithium and nickel industries, these commodities remain crucial to the drive toward zero emissions. Further counter-cyclical M&A is also possible in this sector, as projects become significantly more affordable and the potential for exploration and production diversifies. This is particularly true in lower-cost mining jurisdictions, where existing producers may see realistic new opportunities. Some recent examples of this include Pilbara Minerals' proposed acquisition of Latin Resources and Rio Tinto's acquisition of Arcadium Lithium.

> "We anticipate further activity into 2025 with a greater variety of M&A activity

3. Distressed M&A transactions will present opportunities

As economic pressure rises, we are seeing an increase in restructuring transactions, both in external administration and informally. We expect this increase in distressed M&A transactions to continue in 2025.

While enforcement by lenders is becoming more common, both commercial banks and private credit providers are often still hesitant to commence enforcement action. Therefore, a borrower-led distressed M&A process offers an attractive alternative to external administration for both borrowers and lenders. These processes present opportunities for bidders. Depending on the target's capital structure, there may be options for creative structuring and liability management exercises in connection with these transactions.

Participation in a distressed M&A transaction process can also place a bidder in a strong position to execute a transaction if the target ultimately enters external administration. If bidders are willing to act swiftly and decisively, they can transact at attractive prices in distressed transaction processes conducted in and out of external administration.

Despite a preference for solvent transactions, we expect to see an increase in major businesses entering into external administration in 2025.

4. Liability management will be the new focus area for leveraged finance

In 2024, liability management transactions, increasingly common in the US and European leveraged finance markets, became topical in the Australian market. Australian lenders are increasingly focused on potential 'loopholes' in their documents, which could be used by borrowers to facilitate 'lender on lender violence'.

There are differing views between lenders and borrowers on what the right balance is for the relevant provisions. Lenders do not want to be unfavourably treated in a restructure. From a borrower's perspective, such lender concerns must be balanced against allowing the borrower to restructure in a way that is in the interests of the business and does not involve coercion or abuse of minority creditors. We predict that as more liquidity returns to the market, including if the Term Loan B market opens, lenders will narrow their focus and the market will settle on the appropriate level of protections. As one market participant said of a liquid market and lenders bidding for deals, *"you only have so many shots to fire, so you quickly need to work out what your 'must-haves' are."*

5. M&A deals to spike in H1 ahead of merger clearance reforms

A new bill to reform Australia's merger laws has recently been introduced. From 1 January 2026, with a transitional regime available from mid-2025, a mandatory and suspensory merger control regime will apply. This is a radical transformation from the previous voluntary notification regime for Australian dealmakers (see further details in our merger clearance article on page 33).

In essence, the new regime will capture a significant number of transactions and may result in significant delays to transactions. An extended transitional period has been proposed, which is helpful for merger parties, practitioners and the Australian Consumer and Competition Commission (**ACCC**). The transition to the new regime will occur in two stages:

- from 1 July 2025, merger parties will be able to voluntarily notify the ACCC of acquisitions under the new regime and can no longer seek merger authorisation; and
- from 1 January 2026, the new regime will become mandatory.

In 2025, buyers and sellers may aim to fast-track their transactions with a tight timetable to completion, in order to close their deals before the mandatory notification regime commences. Many merger parties seeking voluntary clearance in the second half of 2025 will seek to notify under the new regime to avoid being required to re-notify if clearance is not granted before 1 January 2026.

6. More tech M&A

In the past 12 months, the tech sector has been one of the most active for M&A activity in Australia, with private capital playing a significant role. In particular, business-to-business (**B2B**) software-as-a-service (**SaaS**) businesses have attracted considerable interest from bidders. While M&A transactions in other sectors have been characterised by stop-start deals, wide bid/ask spreads and long timelines to completion, tech M&A has seen highly competitive processes with vendors obtaining strong outcomes. A hallmark of these processes has been relatively tight timeframes. Successful private equity buyers have been winning competitive processes at the expense of strategic buyers based on how quickly they can complete due diligence and confirm funding. With more Australian private equity investors getting comfortable with valuations based on annual recurring revenue (**ARR**) multiples rather than EBITDA, we expect to see them transact more B2B SaaS deals, particularly in the mid-market. The one constraint on this development will be whether there are enough good quality listed tech companies available to acquire as the target market in the listed tech sector grows thinner each year.

How did we go?
Considering our predictions from last year

Predictions made for 2024	Results
M&A will remain robust but it is precarious	Market confidence returned over 2024, with the last 12 months delivering 59 deals within our deal criteria. This is the highest number of deals in a 12 month window in the last decade.
Energy and resources, the energy transition and REITs will be sectors of interest	As predicted, 2024 saw continued interest in the energy and resources sector, as well as the return of interest in interest in real estate investment trusts (**REITs**). The metals and mining sector was responsible for over 37% of deals in the last 12 months, up from 30% in the previous year. Following a year with no deals in the REIT space, we have now seen two REIT transactions in the past 12 months, signalling our anticipated renewed interest.
Continued focus on ESG due diligence	We expected environmental, social and governance (**ESG**) considerations to be front of mind for bidders and key stakeholders, and anecdotally we have seen this continue. In a number of transactions we have been involved in, bidders have walked away over an adverse ESG diligence finding. We are also seeing an increase in the number of bidders undertaking significant 'outside-in' due diligence at the outset of a deal, particularly in the ESG space.
Foreign bidders to rise, especially from Five Eyes nations	Our findings confirmed that foreign bidder representation increased in M&A transactions. For the first time in over five years, foreign bidders represented more than half of our bidder pool, with 54% of bidders being from a foreign jurisdiction, up from 43% the previous year. Of the foreign 54% of bidders, 38% were from Five Eyes nations (excluding Australia).
More requests for pre-deal hard exclusivity arrangements	As anticipated, this statistic is hard to measure since it is not publicly disclosed. Anecdotally, we have seen bidders looking for exclusivity periods of up to the maximum period allowed by the Takeovers Panel. This is a hard exclusivity period of four weeks and a further period of soft exclusivity. However, targets are considering these requests in the context of the specific circumstances of their transaction, and are often pushing back on these requests.
Reverse break fees are here to stay	Not only have reverse break fees become a mainstay of implementation agreements, their frequency has increased. In 2023 reverse break fees were a feature of 66% of deals. In the last 12 months they appeared in 82% of deals, but notably, none were paid out.

Real Estate sector in 2024

In 2023, we anticipated that significant opportunities would exist for patient and creative capital and REITs willing to take a longer term view. We predicted that we would see, amongst other things:

a) strategic scrip mergers between listed REITs to bridge the valuation gap; and

b) listed REITs buying asset portfolios from under-performing REITs.

The acquisition of Newmark Property REIT (**NPR**) by BWP Management Limited, in its capacity as responsible entity of the BWP Trust (**BWP**) via a scrip for scrip off-market takeover, is a good example of the type of transaction that we predicted.

The transaction, which was BWP's first foray into public M&A in over nine years, was particularly influential for the Australian REIT market, demonstrating the ability of REITs to acquire assets at a discount to net tangible asset (**NTA**) utilising scrip consideration. Under the transaction, NPR securityholders received 0.4 BWP securities for every NPR security held, representing a 43.1% premium to NPR's undisturbed closing price. BWP was also uniquely positioned to leverage its relative position of strength, offering NPR securityholders the opportunity to benefit from lower gearing. NPR's gearing was above its target at 47.2% at 31 December 2023; comparably, BWP had a materially lower gearing of 17.1% at 31 December 2023. It also benefited from a significantly improved capital management position. NPR had constrained financial flexibility and limited growth opportunities, with little capacity to raise further debt; comparably, BWP had headroom of A$165 million under its facilities, with total liquidity of more than A$184 million.

In connection with the transaction, BWP Management Limited (in its personal capacity) (**BWPM**), also acquired 100% of the shares in the external responsible entity of NPR, Newmark REIT Management Limited (**NRML**), together with various management rights relating to fee streams held by related entities of NRML. The timing of completion of the acquisition was carefully linked to BWP's acquisition of at least 50.1% of the securities in NPR under the off-market takeover.

The all-paper transaction ultimately boosted BWP's scale and diversity, providing BWP with a high-quality, complementary portfolio of assets, resulting in a combined portfolio of A$3.5 billion.

Corrs advised BWP on its acquisition of NPR and BWPM on its acquisition of NRML.

The takeover bid launched by ASX-listed Aspen Group (**Aspen**) for Eureka Group Holdings Limited (**Eureka**), an Australian provider of affordable rental accommodation for independent seniors and disability pensioners, is yet another example of the strong activity in the real estate sector that we predicted for 2024. The intent of the transaction was to establish a third large, listed player in the lifestyle and affordable housing sector alongside Ingenia Communities Group and Lifestyle Communities Limited and may signal further consolidation in the sector for 2025 and beyond.

The bid was the culmination of an approach by Aspen which began over a year ago, and was structured as a scrip-for-scrip bid at 0.28 Aspen securities for one share in Eureka.

The transaction demonstrated, notwithstanding strong headwinds in 2024, how perception of value remained the core sticking point of many public M&A transactions. In Aspen's case, it held the view that net asset value (**NAV**) and earnings per share (**EPS**) accretion were the more reflective and accurate measures of value than Eureka's trading price. Aspen's bid ultimately closed with Aspen holding 35.87% of the shares in Eureka.

Corrs advised Aspen on the off-market takeover bid for Eureka.

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Key trends and insights from 2024

What happened in the 12 months leading up to 30 September 2024 and how did our predictions play out?

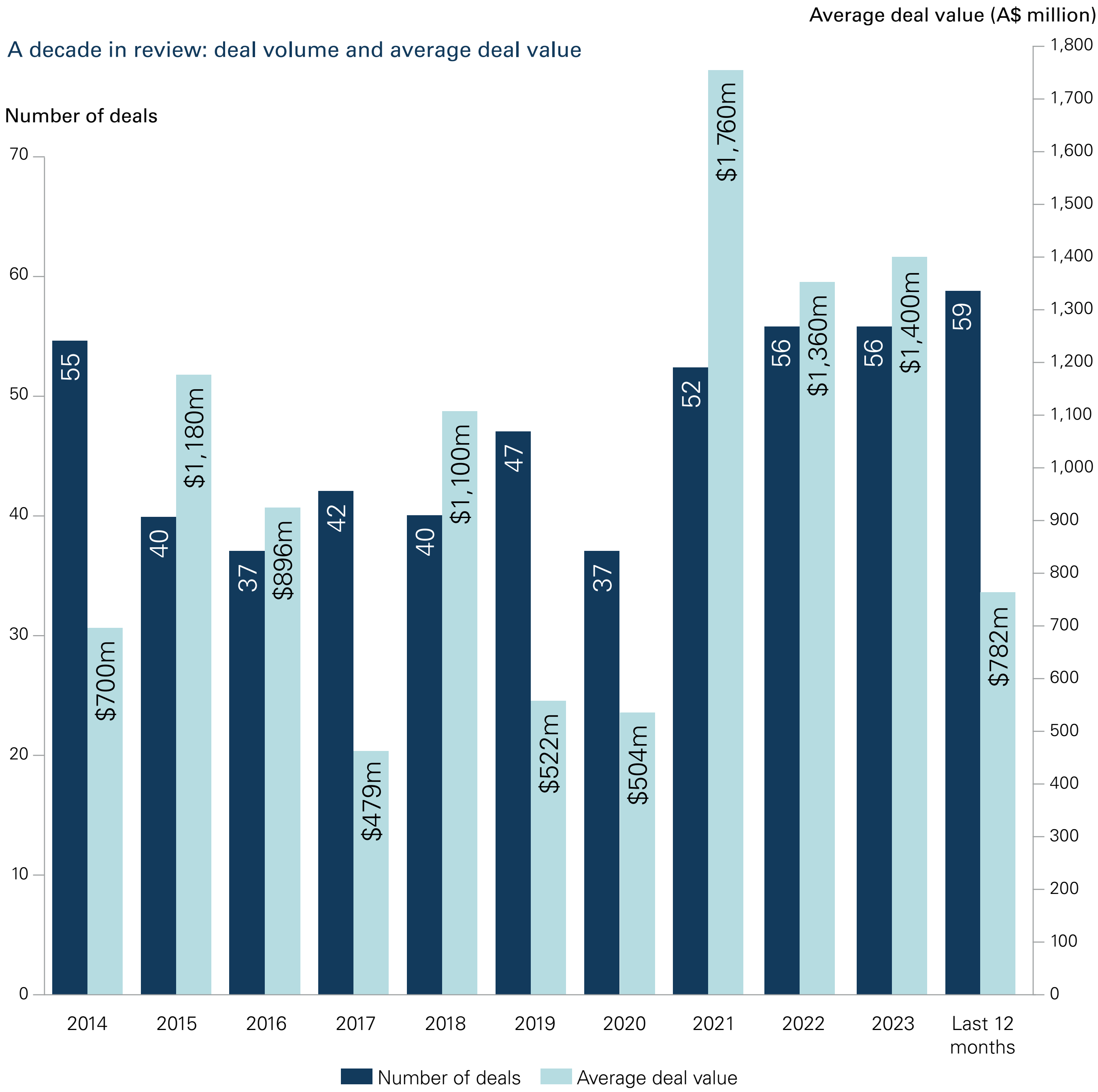
Deal volume high

This year's survey period had the highest volume of deals for the past decade, with 59 transactions falling within our review criteria for the survey period.

Despite the record deal volume, the overall deal value dropped from approximately A$78.2 billion to around A$46.1 billion, with a change in the average deal value from A$1.4 billion to A$782 million. The past 12 months have not seen any of the very large, over A$10 billion deals that have resulted in higher average deal values in the prior three years.

Our prediction that M&A will remain robust has proven to be correct

A decade in review: deal volume and average deal value



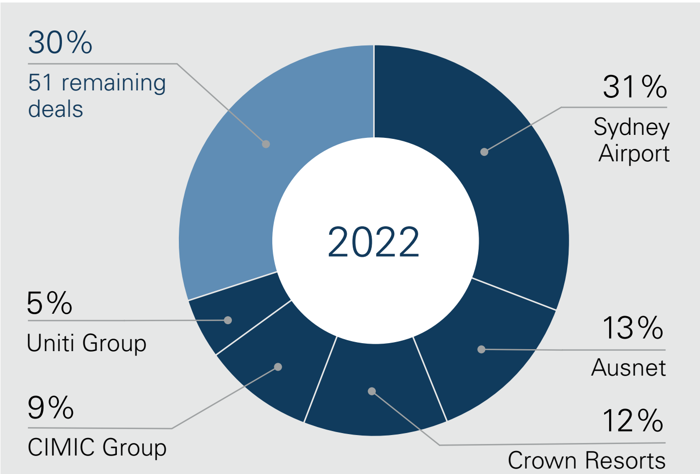
Mega deals absent from survey period

In the previous three survey periods, we have seen the five highest deal values represent between 70% - 78% of the overall deal value for the survey period. This year, the five highest deal values only represent 55% of the overall deal value.

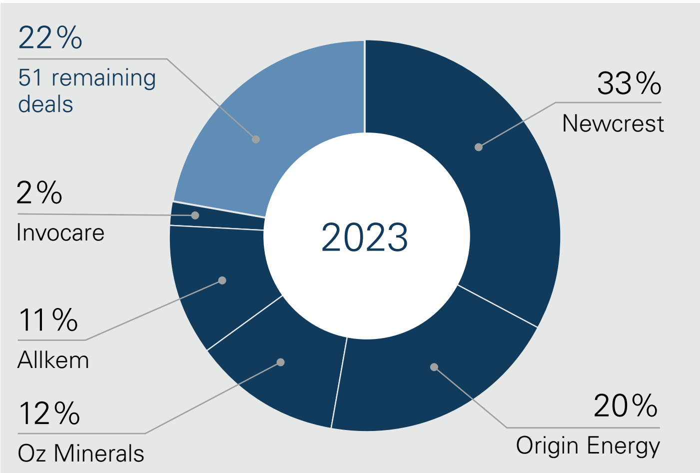
Last year, we coined the term 'the Newcrest effect'. This term refers to the over-representation in the deal values from a few very large deals – which was notably absent this year.

In addition, one of the top five deals was the mop-up takeover of Boral. If you looked at actual consideration paid (rather than the implied value of the company), its deal value would be significantly lower than the implied value of A$6.7 billion, as the consideration paid by Seven (including scrip) was less than A$2 billion, given Seven's existing interest of 71.6%.

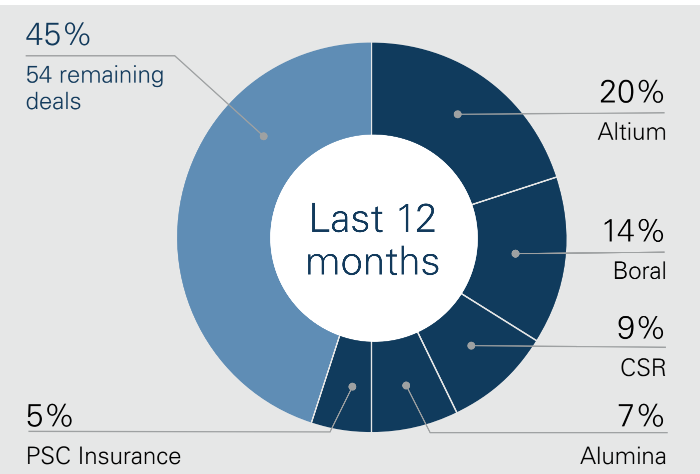
Top five deal by value



2022	
Sydney Airport	A$23.6 billion
Ausnet	A$10.1 billion
Crown Resorts	A$8.9 billion
CIMIC Group	A$6.8 billion
Uniti Group	A$3.6 billion



2023	
Newcrest	A$26.2 billion
Origin Energy	A$15.4 billion
Oz Minerals	A$9.5 billion
Allkem	A$8.2 billion
Invocare	A$1.8 billion

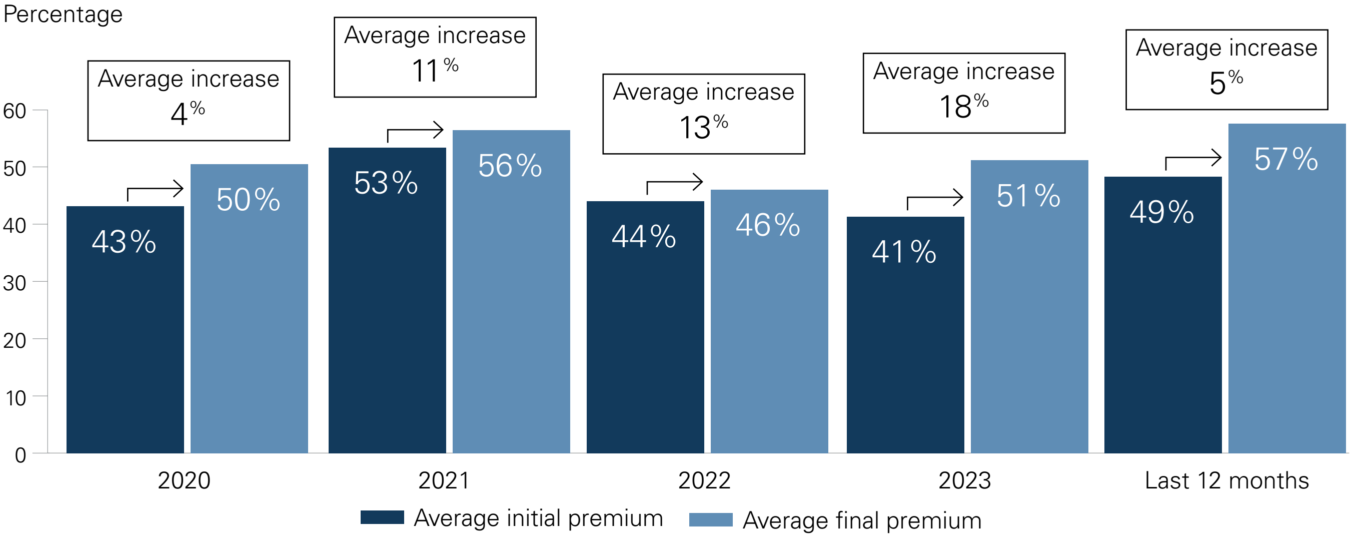


Last 12 months	
Altium	A$9.0 billion
Boral	A$6.7 billion
CSR	A$4.3 billion
Alumina	A$3.3 billion
PSC Insurance	A$2.3 billion

Overall average control premia up for the first time in three years

Gone are the days where a premium of 30% - 40% represented a healthy premium. This year, the average final control premia was the highest in the past five years at 57% (up 6% from the final average premia of 51% the prior year). The average starting premia this year was 49%, 8% higher than the 41% average initial premium last year. This reflects the pressure on target boards to deliver significant premia to target shareholders and the relative strength of boards' position in negotiating due diligence and a recommended deal. However, the average premia increase between the initial and final announcements was only 5%. This is the first time since 2021 that the average premia increase has been in the single digits, ultimately reflecting the higher starting average premia. It also reflects the more creative ways which bidders are increasing offer consideration, such as scrip alternatives (Genesis Capital's bid for Pacific Smiles) and a special dividend (Seven's takeover of Boral).

Average premia and price increases

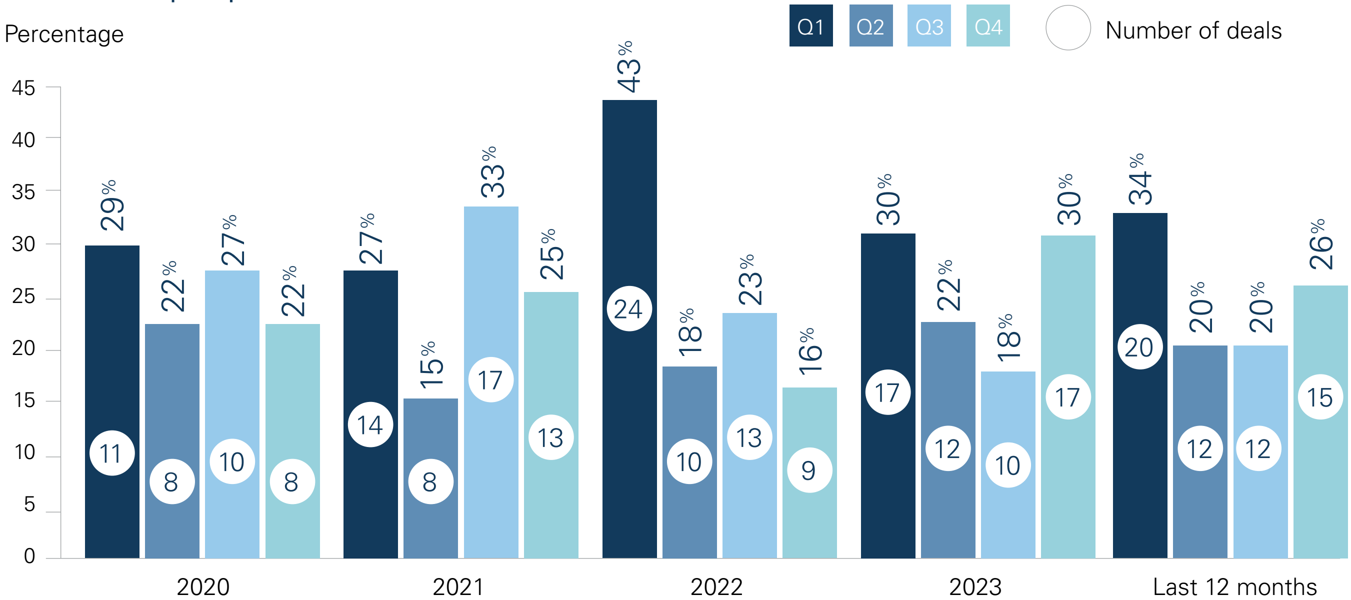


Note: These averages reflect the increase between the transaction announcement and the final premium and do not include the premiums that decreased.

Deal spread less volatile

Deal activity was more consistent across the past 12 months, albeit with stronger performance in Q1 and Q4. Outside of that, the level of deal activity was spread more consistently over the last 12 months compared to the prior year, where volatility of activity was significantly more marked. The more even spread over the last three quarters is a hopeful sign that we are returning to a 'business as usual' environment. We anticipate that in 2025, we will see a greater number of deals announced in the first half of the calendar year (due to the incoming merger reforms).

Deal volume per quarter

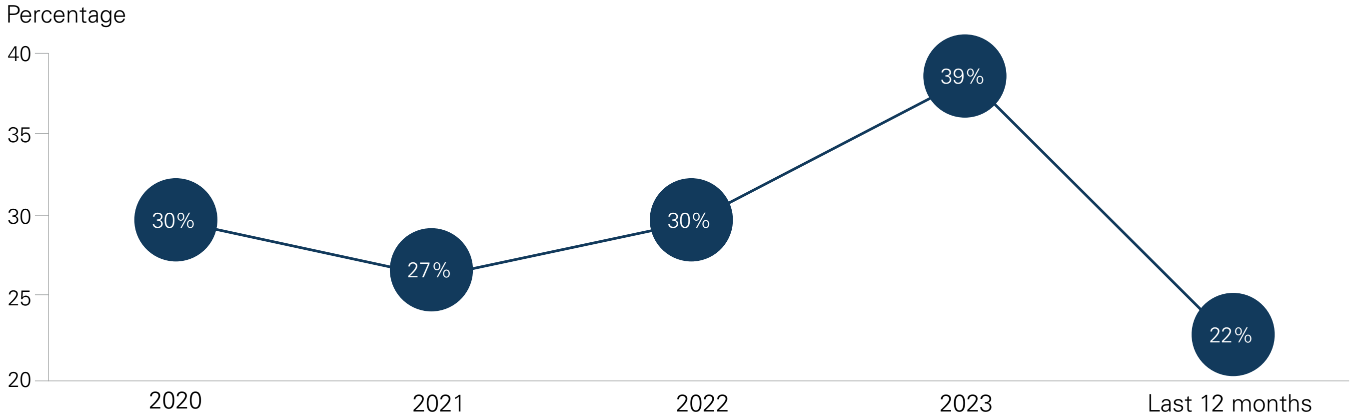


Deals completing faster and on time

As at the end of the survey period, 66% of the deals were completed, 22% were ongoing and 12% had been withdrawn or terminated. This compares with 43% of the deals completed, 39% were ongoing and 18% had been withdrawn or terminated in 2023. Even though there was an uptick in the volume of deals in Q1, this is still an indication that deals are being done in faster time periods than in 2023, as the number of deals that were ongoing at the end of the survey period has almost halved. This suggests that bidders were much more willing to come to the table to get things done during the last 12 months.

We anticipate that in 2025, there will be tight timetables to completion and pressure to finalise deals before the merger reforms activate in July 2025.

Percentage of deals ongoing at the end of survey period



CSR Limited and Saint-Gobain

The A$4.5 billion acquisition of CSR Limited (**CSR**) by French building materials leader, Saint-Gobain, was a significant transaction completed within a short timetable. A 'ticking fee' was included in this deal, which would increase the consideration payable to CSR shareholders if the scheme did not become effective within four months of signing. Ticking fees are rare in Australian public M&A, but can incentivise parties to complete a transaction swiftly and minimise disruption.

As a foreign investor, Saint-Gobain required Foreign Investment Review Board (**FIRB**) approval for the transaction. Approval can often take several months to be received, particularly for high profile deals. The statistics for this year's survey period show foreign bidders were in the majority for the first time in five years, putting additional pressure on FIRB approval timelines.

In this case, the bidder was well-prepared and confident in its ability to meet the timetable. The ticking fee was ultimately not triggered as the scheme became effective on 19 June 2024 – with a week to spare, and in less time than both the average Australian bidder or foreign bidder.

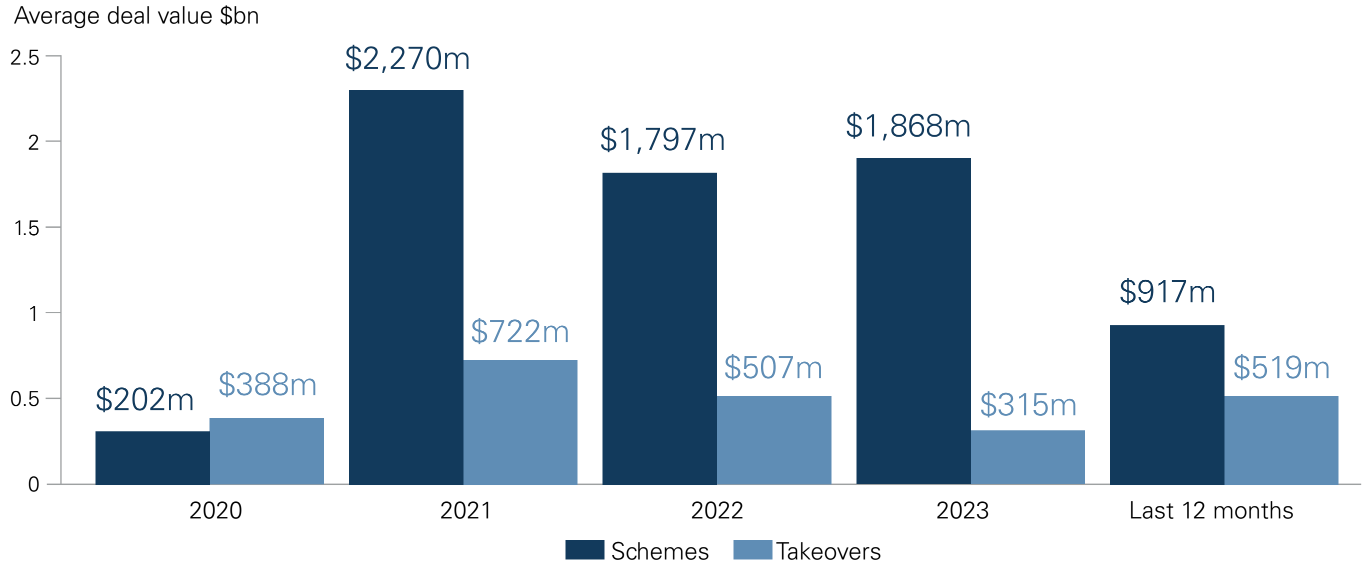
Corrs advised Saint-Gobain on all aspects of the transaction.

Average amount of time from transaction announcement to effective date of a scheme

Increasingly even split in deal value of schemes vs takeovers

This year we saw a more even split between the deal value for takeovers and schemes than in previous years. This was largely driven by the impact of Seven's mop-up takeover bid for Boral.

Average deal value of schemes vs takeovers



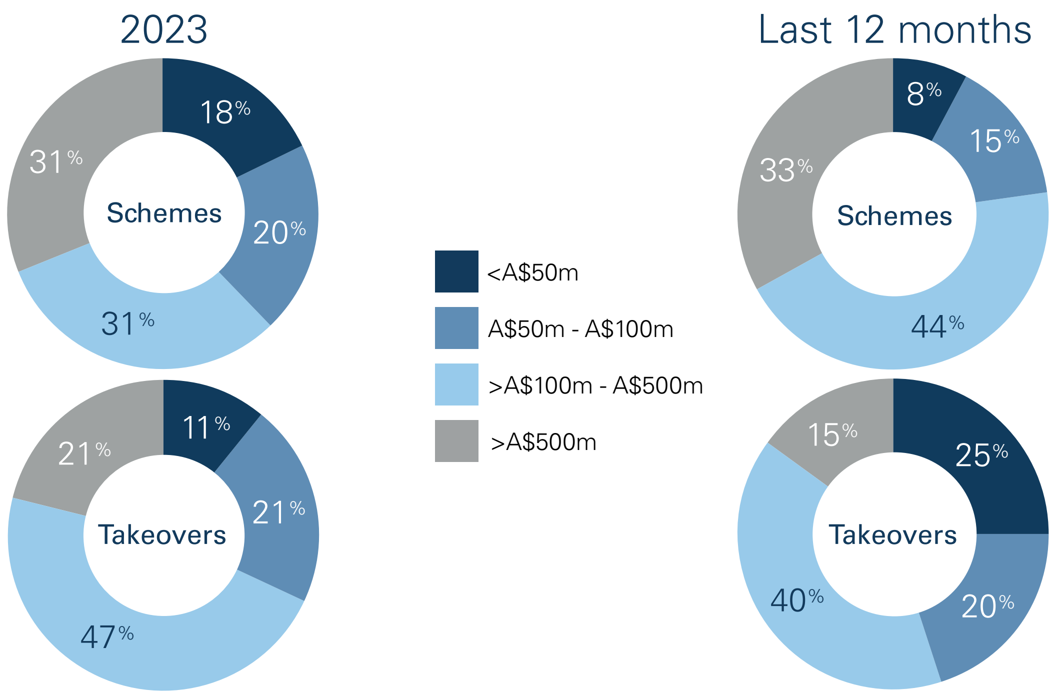
Schemes and takeovers balanced in mid-market value deals

Over the last 12 months, there was a more balanced distribution between takeovers and schemes in the mid-market deal range of A$100 million to A$500 million deal value range, with 44% of schemes falling in this range (compared to 31% in 2023) and 40% of takeovers within this range (compared to 47% in 2023).

This rise in mid-market schemes and the increase in lower-value takeovers is consistent with the fact the last 12 months had the highest number of deals announced but lowest average deal value in the past three years. This is not surprising given in this section of the market, cost and complexity are often key factors which favours takeovers.

The value of scheme consideration continued to demonstrate that big money prefers schemes, with the percentage of schemes with a value of over A$500 million sitting consistent with last year (33%), compared to takeovers (15%).

Deal type across value range



Foreign bidders dominate for the first time in over five years

It has been over five years since foreign bidders outnumbered Australian bidders. However, this year 54% of all bidders were foreign.

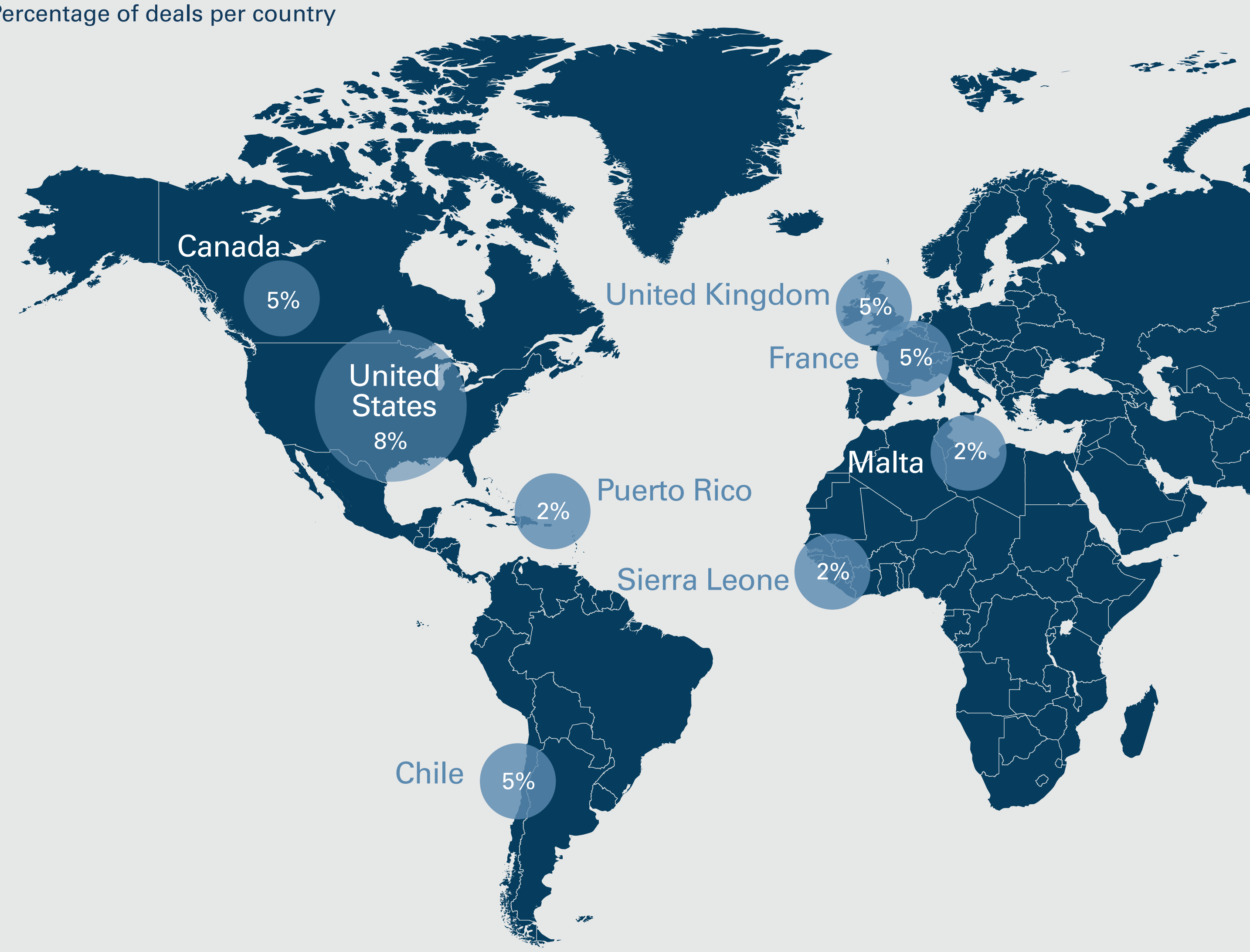
The last 12 months saw a mix of foreign bidders with Five Eyes nations dominating, but the geographical origin of bidders was diverse. Japan contributed the most to deal value this year, with Japanese bidders engaging with targets in the software and services, utilities and professional services industries, contributing to 23% of total deal value. This was driven by transactions across the value range spectrum from multi-billion to just over A$50 million, including Renesas Electronics Corporation's successful scheme of arrangement for Altium Limited (with a deal value of approximately A$9 billion) and Mitsubishi's acquisition of Link Administration Holdings (with a deal value of approximately A$1.2 billion). Overall, Asia as a continent contributed the largest number of foreign deals with 18% of all foreign transactions, followed closely by North America with 15%.

Australian bidders vs foreign bidders

The last 12 months have seen foreign bidders overtake Australian bidders as the dominant bidder for the first time in over five years.

	% of Australian bidders	% of foreign bidders
2020	62%	38%
2021	58%	42%
2022	67%	33%
2023	57%	43%
Last 12 months	46%	54%

Percentage of deals per country

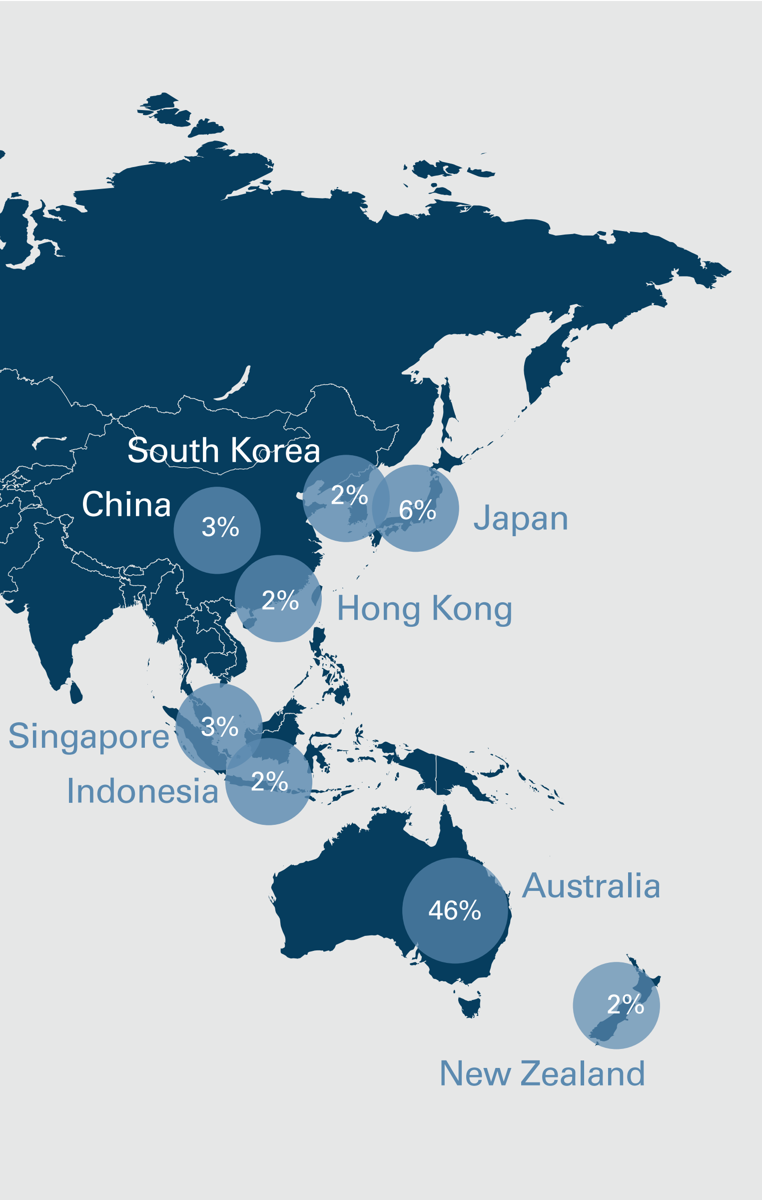


Note: Where a bidder was a consortium from multiple jurisdictions, each jurisdiction has been counted individually.

Bidders by continent

Following a year of limited bidders in 2023, Asia represented the largest shift in bidder geography. South American bidders also emerging after being absent in 2023, largely because of the interest from Chilean bidders in critical mineral assets.

Continent	2023	Last 12 months
ANZ	59%	48%
Asia	4%	18%
North America	21%	15%
Europe	14%	12%
South America	0%	5%
Africa	2%	2%



Percentage of total deal value of Australian bidders vs United States bidders vs all other foreign bidders

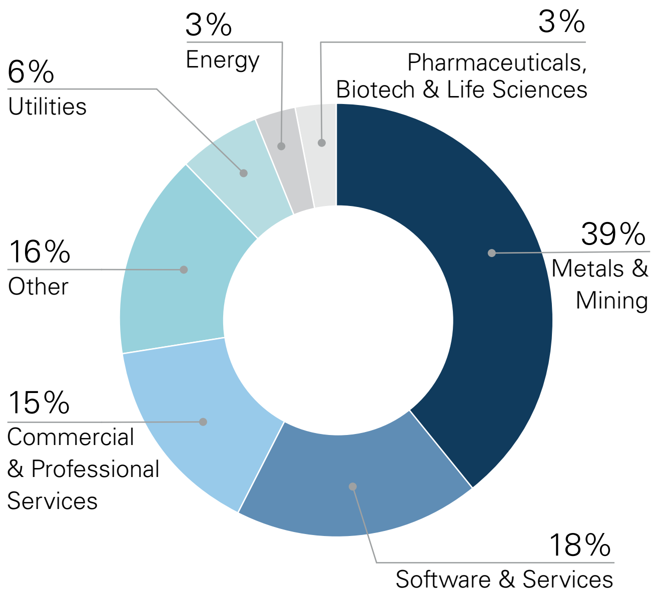
In the last 12 months, 'other foreign bidders' have, for the first time in the last five years, contributed more to overall deal value than the US. This reflects the impact of the increased investment from Japan and the absence of US inbound mega-deals.

	Australian bidders	US bidders	Other foreign bidders
2021	36%	49%	15%
2022	40%	35%	25%
2023	22%	40%	38%
Last 12 months	36%	11%	53%

Sectors of interest for foreign bidders

Metals and mining emerged as the top sector of interest for foreign bidders, accounting for 39% of all foreign bids. Close second and third were software and services (six deals with foreign bidders) and commercial and professional services (five deals with foreign bidders).

Sectors of foreign bidders

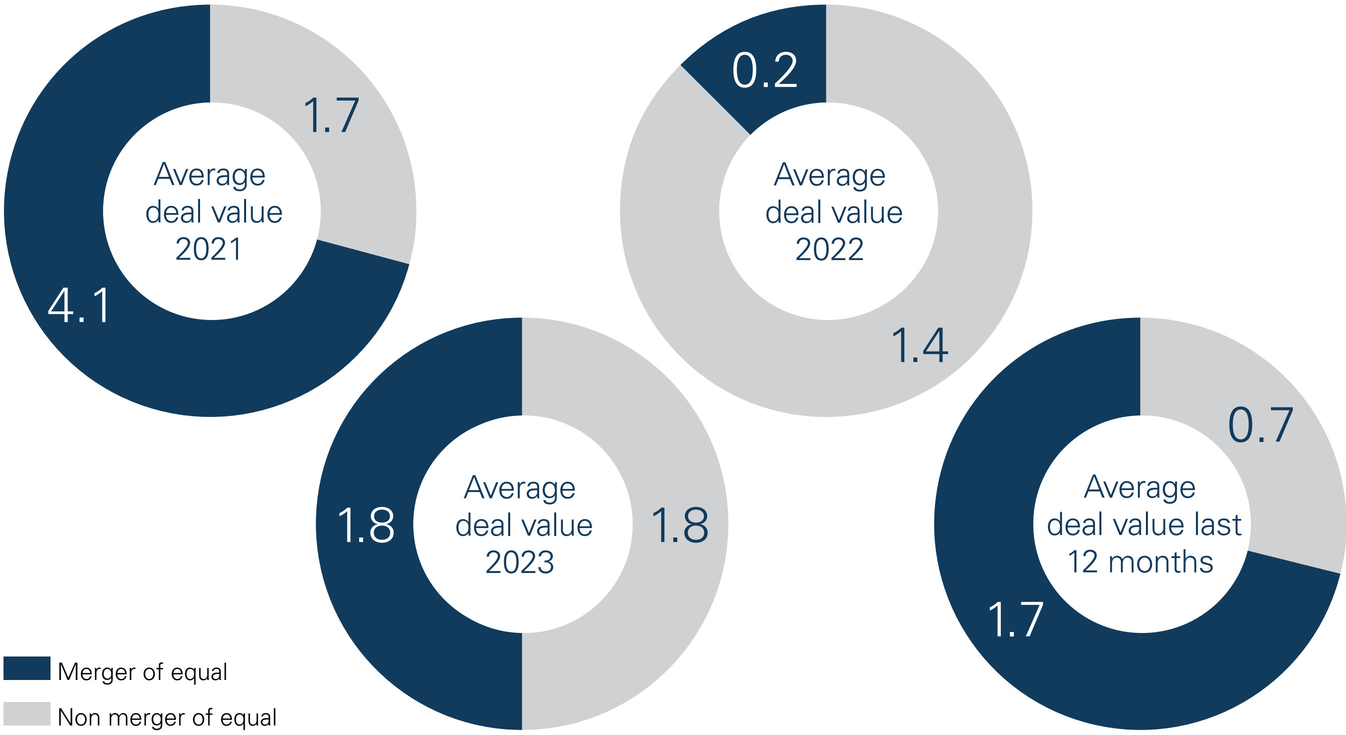


Our prediction that foreign bidders would rise has proven to be correct

Mergers of equals remain steady

The number of mergers of equals over the past few years has remained steady, at roughly 5% of deals per year. Mining and metals transactions have consistently dominated the mergers of equals space across all periods. However, this is the first year since 2021 where the average deal value of mergers of equals was significantly greater than the overall average deal value. Given the small number of mergers of equals each year, the average deal value of a merger of equals can vary significantly and is not favoured by either the high value range or the low value range. This year, the average deal value for a merger of equals was significantly higher than the overall average deal value, largely driven by the approximately A$3.2 billion Alumina Limited and Alcoa Corporation scheme and the approximately A$1.5 billion Silver Lake Resources and Red 5 Limited merger of equals.

Merger of equal average deal size



Silver Lake Resources and Red 5 Limited

After missing out on acquiring St Barbara's Gwalia gold mine in Western Australia (which was sold to Genesis Minerals Limited (**Genesis Minerals**) in mid-2023), Silver Lake Resources Limited (**Silver Lake**) turned its attention to fellow WA gold miner, Red 5 Limited (**Red 5**).

As a precursor to opening up discussions regarding a potential control transaction, Silver Lake took advantage of a market opportunity to acquire on-market an 11.7% pre-bid stake in Red 5.

As there was widespread media speculation that Genesis Minerals could also be interested in Red 5, there was perceived to be a greater risk of any agreed transaction being disrupted if Red 5 was the target company, or if the transaction otherwise amounted to a 'reverse takeover' of Red 5, as this would result in Red 5 shareholders (as opposed to the Red 5 board) having the final say in whether the proposed transaction would proceed.

In structuring the proposed transaction with Silver Lake being the target company, Silver Lake's existing pre-bid stake in Red 5 was used as an effective takeover premium to set a share exchange ratio that avoided the transaction amounting to a reverse takeover of Red 5. Whilst Red 5 shareholder approval was not required, the Red 5 Board had a 'fiduciary out' should a superior proposal emerge for Red 5. The transaction provides a good example of how innovative deal structuring can be used to provide greater protection against interlopers and increase deal certainty.

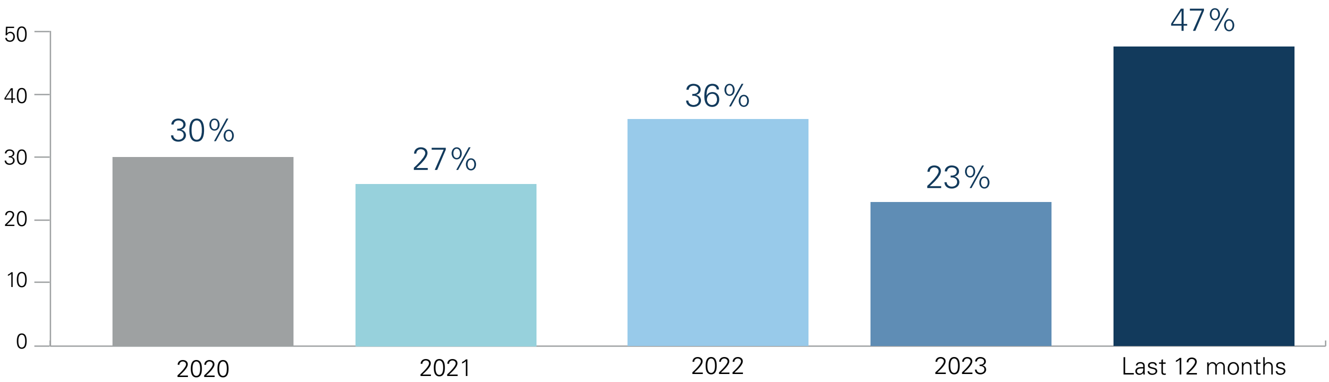
Corrs advised for Silver Lake on all aspects of this transaction.

The state of play of direct pre-bid stakes

In the last 12 months, the number of bidders with a direct pre-bid stake reached a five-year high, with 47% of all bidders having a direct interest in the target on announcement of the transaction. This is a significant increase from last year, where only 23% of all bidders had a direct pre-bid stake.

There were also a number of pre-bid stakes which were over 20%, including Madison Dearborn's (**MDP**) take-private of APM Human Services, in which it held a 30% stake after failing to exit following its brief three-year listing on the ASX. The Hancock and SQM joint bid vehicle holding 39% of Azure on announcement of the dual bid was another example of a large pre-bid stake. Also, as mentioned previously, Seven held an overall relevant interest of 71% in Boral on announcement of the takeover, 62% of which was held directly by Seven.

Percentage of buyers with a direct pre-bid stake in the target



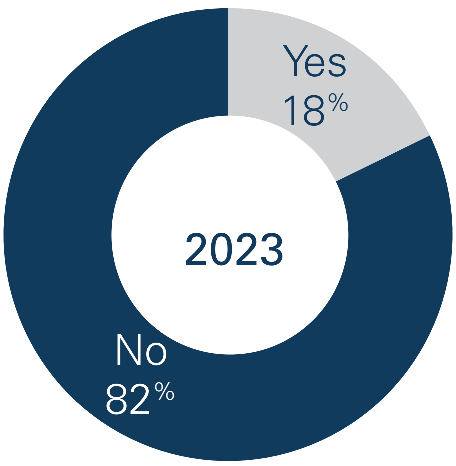
Independent board committees on the increase

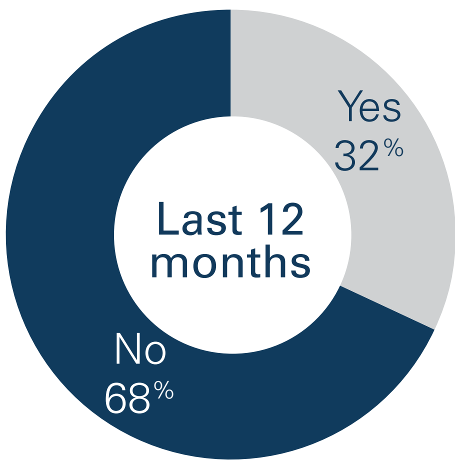
Last year we observed the prevalence of independent board committees (**IBC**). Our 2023 survey showed that 18% of all targets established an IBC. This year, this percentage has increased to 32% of all deals. This indicates that there were even more transactions that needed to avoid a conflict of interest in the last 12 months. This could be due to board representation by a bidder, involvement of management directors in bids or that the bidder held a significant stake in the transaction. A number of IBCs were established because target boards chose to adopt a more cautious view on conflicts of interest for directors and major shareholders.

Examples in the survey period include:

- Ansarada established an IBC excluding the founder and chief executive officer and chief financial officer, who held 4% and 5.6% (respectively);
- APM Human Services set up an IBC where both the bidder MDP's nominee directors and directors with significant holdings (who elected to receive scrip consideration) were excluded from the IBC;
- Genex Power Limited formed an IBC that excluded the bidder J-Power's nominee director; and
- Adbri Limited set up an IBC, which excluded the nominees of major shareholder, Barro Group, that held 43% and was the joint-bidder.

Percentage of deals with an IBC

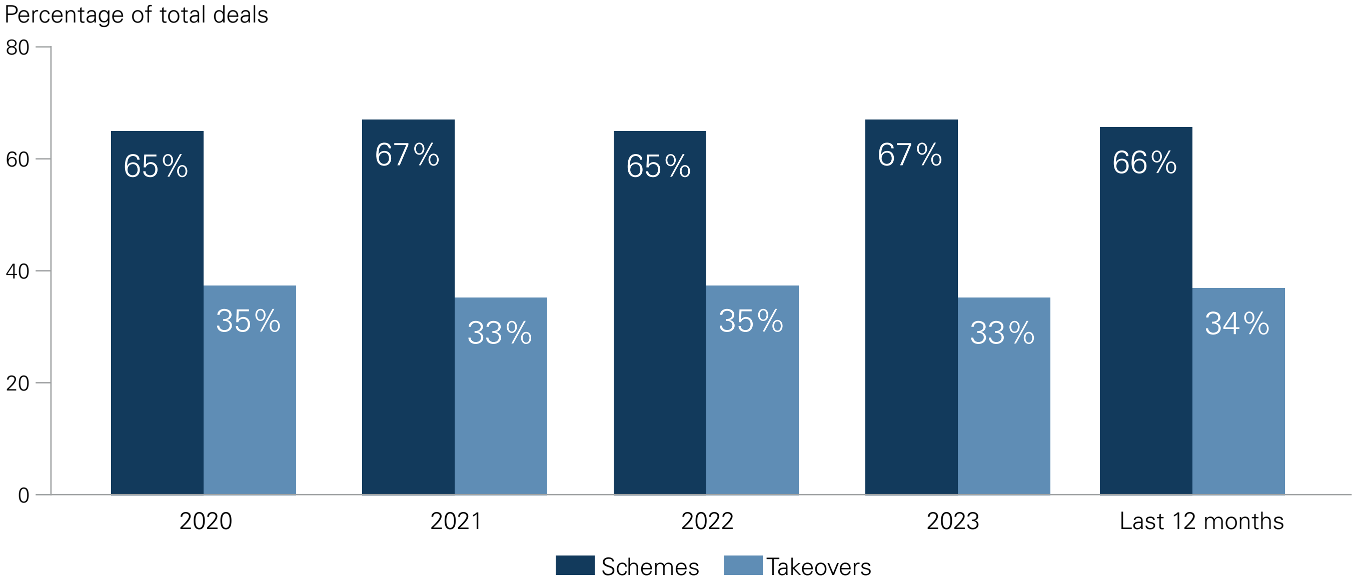




Schemes continue to dominate as preferred deal structure

The scheme versus takeover landscape remained consistent with prior years, with roughly 34% of deals being takeover bids and 66% being schemes of arrangement. Schemes continue to be the preferred structure because of the preference for friendly deals and the higher deal certainty afforded by the 'all or nothing' outcome available in schemes.

Schemes vs takeovers



Note: The concurrent scheme and takeover bids of Azure and Genex have been counted in only the scheme statistic.

Successful dual bid structures rising

In this survey period, we observed an increase in the number of concurrent scheme and takeovers structures, two of which were successful. While there have been questions as to the acceptability of the concurrent scheme/bid structure (e.g. Potentia's takeover panel application against KKR's concurrent scheme/bid for Nitro), SQM and Hancock's successful acquisition of Azure using a dual structure and the court's judgment as part of approving the scheme has strengthened the acceptability of such structures.

Structuring for success - Azure Minerals

The A$1.7 billion acquisition of lithium hopeful Azure Minerals is a good example of the imaginative and complex change of control structures being employed to get transactions over the line. Shortly after Chilean miner and chemical company SQM announced its offer for Azure Minerals, the Azure Minerals register contained four distinct material shareholding blocks including: Hancock (18%), Mineral Resources (14%), Creasy Group (13%) and Delphi (10%). While Delphi openly supported the transaction on announcement, the position of the other shareholders remained unknown, though Hancock and Mineral Resources had shown interest in transactions involving quality lithium assets.

The transaction was structured as a recommended scheme of arrangement proposal, offering a cash consideration of A$3.52 per Azure Minerals share alongside a simultaneous conditional off-market takeover offer at A$3.50 per share. The takeover offer was contingent on the scheme of arrangement not proceeding. Shareholders were advised to accept the takeover offer only once the outcome of the scheme was known. Importantly, the takeover offer had no minimum acceptance condition, providing liquidity for shareholders if one or more of the major shareholding groups sought to block the scheme. This also allowed SQM to increase its interest in Azure Minerals if the scheme failed, which meant the shareholding blocks opposing the scheme faced the potential of being a minority shareholder in a structure where SQM had a larger shareholding. Ultimately, SQM and Hanock joined forces and made a joint offer for Azure Minerals, retaining the same transaction structure and benefits for shareholders, including offering A$3.70 for the scheme and A$3.65 for the takeover offer. Delphi and Creasy Group publicly supported the revised transaction and Mineral Resources ultimately elected to dispose of its 14% interest prior to the successful completion of the scheme component of the transaction in May 2024.

Corrs advised Azure Minerals on both transactions.

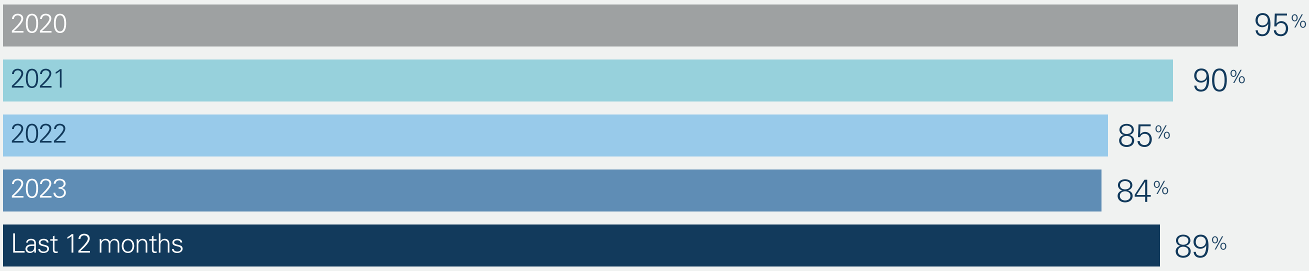
Limited variations in conditions

The past five years have seen limited movement in deal conditions. At least 84% of deals each year in the last five years consistently had conditions to completion.

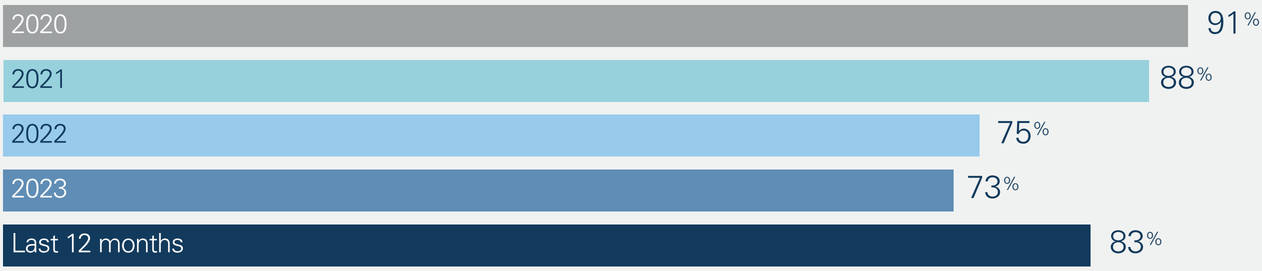
This year we have observed the number of deals with a material adverse change (**MAC**) clause bounce back to 83% of deals (an increase of 10% from last year). Last year, we suspected the drop in MAC conditions was driven by targets concerned about deal certainty and pushing back on its inclusion as a consequence of increased uncertainty during the post-COVID period. The uptick in MAC conditions demonstrates that targets feel less concerned that it will be triggered thereby giving the bidder a right to walk away.

This year, we also saw an all-time high in FIRB conditions, which is to be expected given that foreign bidders dominated this year. Although the level of ACCC conditions remained steady, given the impending merger reforms, we anticipate that in 2025 the number of deals with an ACCC condition will rise steeply.

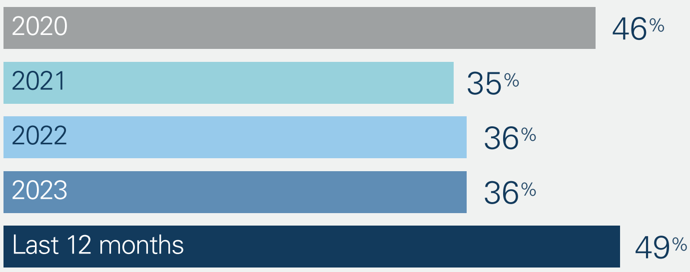
Deals with conditions (beyond prescribed occurrences)



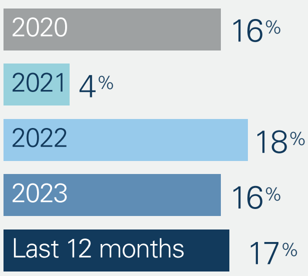
Deals with a MAC condition



Deals with a FIRB condition



Deals with an ACCC condition



Reverse break fees increased

Our prediction that reverse break fees are here to stay has proven to be correct

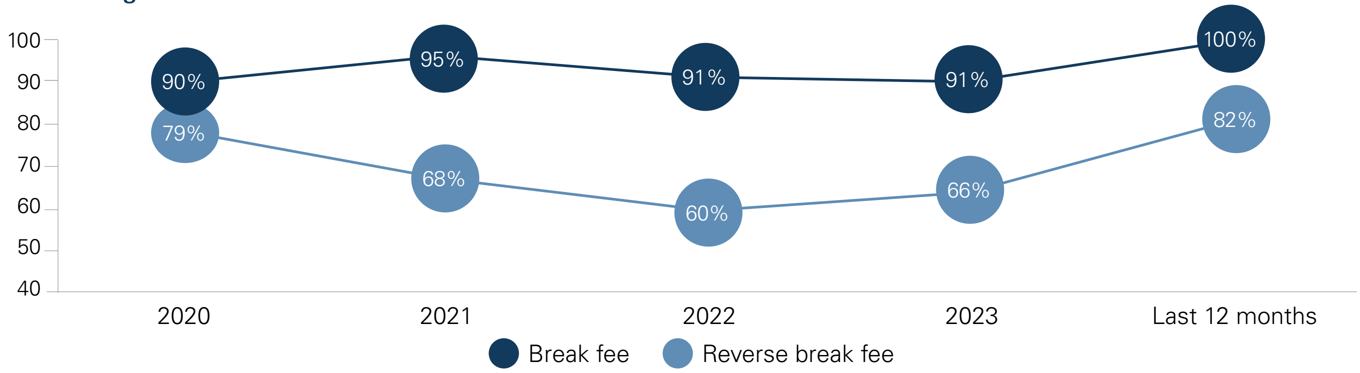
Reverse break fees were at an all-time high in the last 12 months, as compared to the last five years, with over 82% of deals with an implementation agreement having a reverse break fee.

This supports our prediction that reverse break fees are here to stay.

The vast majority of fees (approximately 90%) were payable only in the event of termination for a material breach by the bidder which explains why they are becoming increasingly common. For the target, they provide certainty as to a minimum amount of liquidated damages they will be able to recover in the event of a bidder default, and for the bidder, the payment is entirely within their control and subject to materiality and remedy qualifications, making them difficult to trigger in practice. These types of fees are usually limited to 1% of deal value. Since the Perpetual/Pendal litigation, where there was some uncertainty about whether such a fee released a bidder from claims for specific performance, targets have generally been careful to preserve that ability, meaning the fee does not operate as an option to walk away.

The more interesting examples were the two deals in which the fee was payable in the event of a failure to satisfy a regulatory condition (Base Resources/Energy Fuels and Altium/Renesas). The regulatory conditions in both cases were offshore approvals which the bidder was responsible for obtaining, being US/Canadian securities laws requirements in the case of Base Resources and CFIUS (Committee on Foreign Investment in the United States) and HSR (Hart-Scott-Rodino) anti-trust and other global anti-trust in the case of Altium. While the fee on Base Resources was the usual 1%, the fee on Altium was close to 5%, which is more in line with the types of break fees negotiated on US deals. Clients often ask about the circumstances in which these fees are agreed and while they are relatively rare, we continue to see limited examples particularly where offshore regulatory approvals are involved.

Percentage of deals with break fees and reverse break fees

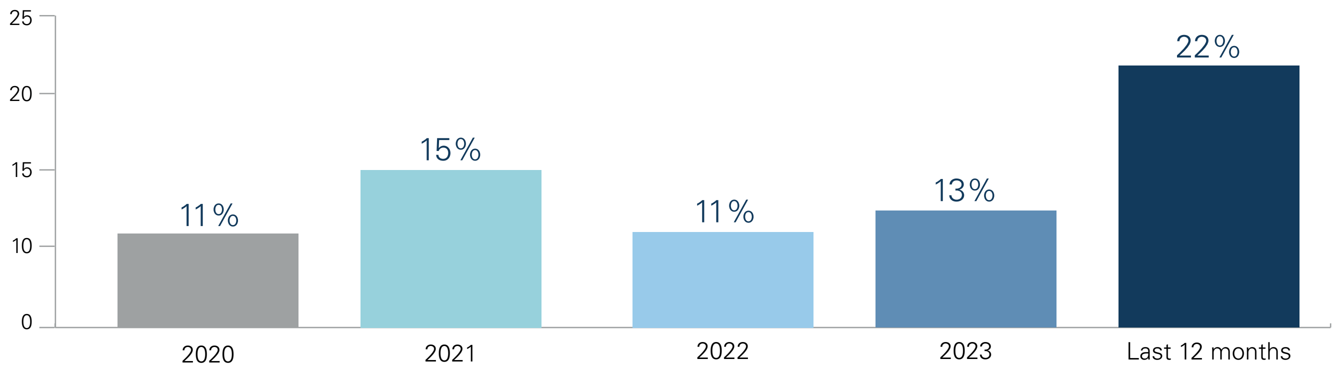


Increased number of hostile deals

In this survey period, we saw an increase in hostile transactions with approximately 22% of the transactions being hostile at some point. This is up from just 13% in 2023. This included two significant hostile bids during the period, being Charter Hall's hostile takeover bid for Hotel Property Investments and Zhaojin Capital's hostile takeover of Tietto Minerals Limited. Both Charter Hall and Tietto Minerals increased the offer consideration during the period to get the takeover bid across the line.

The mining and minerals sector was the dominant sector for deal hostility, with the clear majority of hostile deals taking place in this industry.

Percentage of hostile transactions



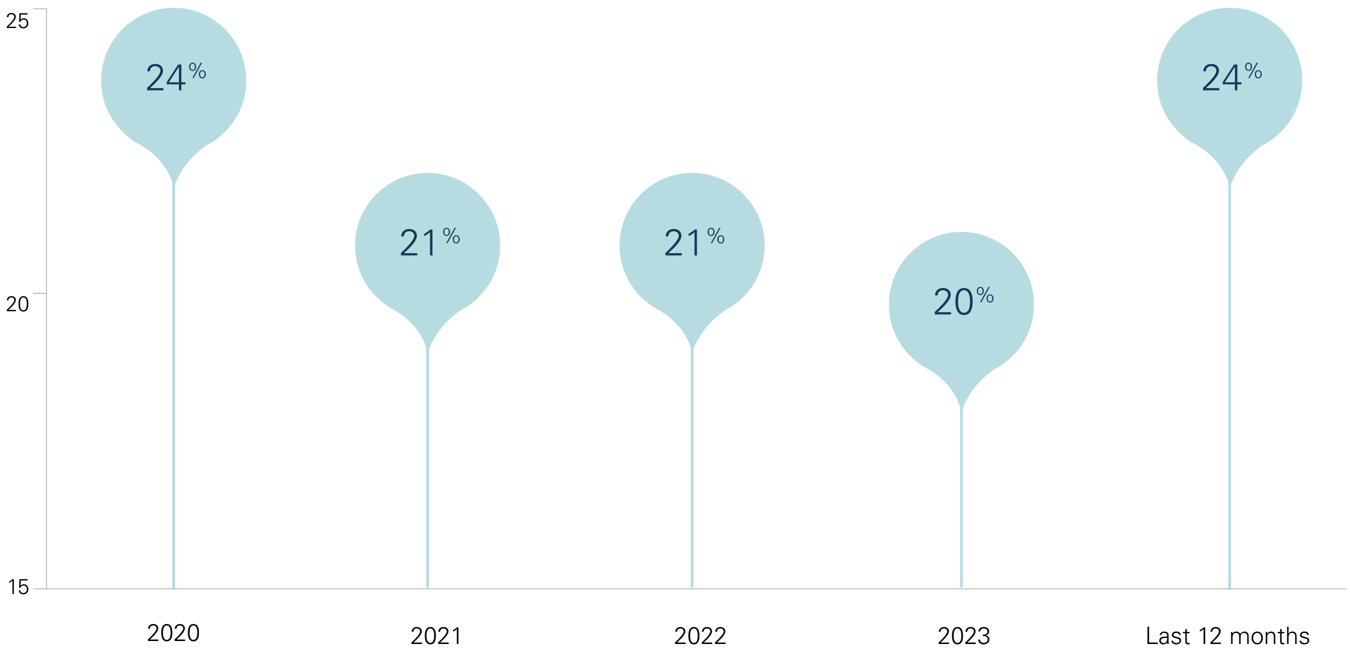
Competition for good assets still high

Competition is still high for good assets, with approximately 24% of deals being contested – including a three-way battle for Sierra Rutile, and Namoi Cotton being the subject of three separate bids (two of which were from the Louis Dreyfus Company).

Another notable battle was between Genesis Capital and Crescent Capital for Pacific Smiles. This is still ongoing, with Genesis Capital ultimately making a hostile bid for Pacific Smiles in September.

Anecdotally, there were also a number of other contested deals that are not included in our survey statistics because they did not reach a binding bid stage. For example, ARN Media and Anchorage Capital Partners faced competition from Australian Community Media for Southern Cross Media, with both competing bidders acquiring a 15% stake in the target.

Percentage of deals that were contested

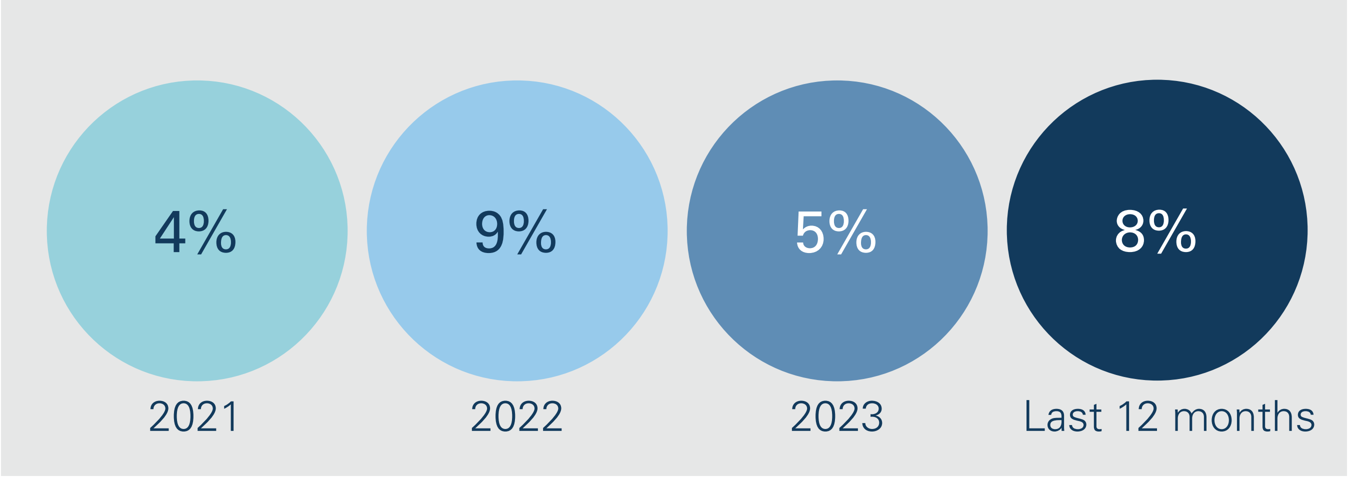


Increase in takeover panel proceedings

The number of takeovers panel proceedings initiated on announced deals was also slightly up at 8%, compared to 5% in 2023.

The deal volatility in this period is part of the road to recovery. We anticipate that the deal volatility will likely decrease next year as bidders and targets work towards finding reasonable valuations which will broaden the number of potential targets on the ASX.

Percentage of deals where takeover panel proceedings were initiated



Sponsor deals holding steady

While we did not see deal activity in the last 12 months approach the highs of 2020 and 2023, there was still a substantial increase in private equity deal volumes compared to 2022 and 2021. This was particularly the case in the mid-market, with business-to-business (B2B) software-as-a-service (SaaS) companies proving attractive.

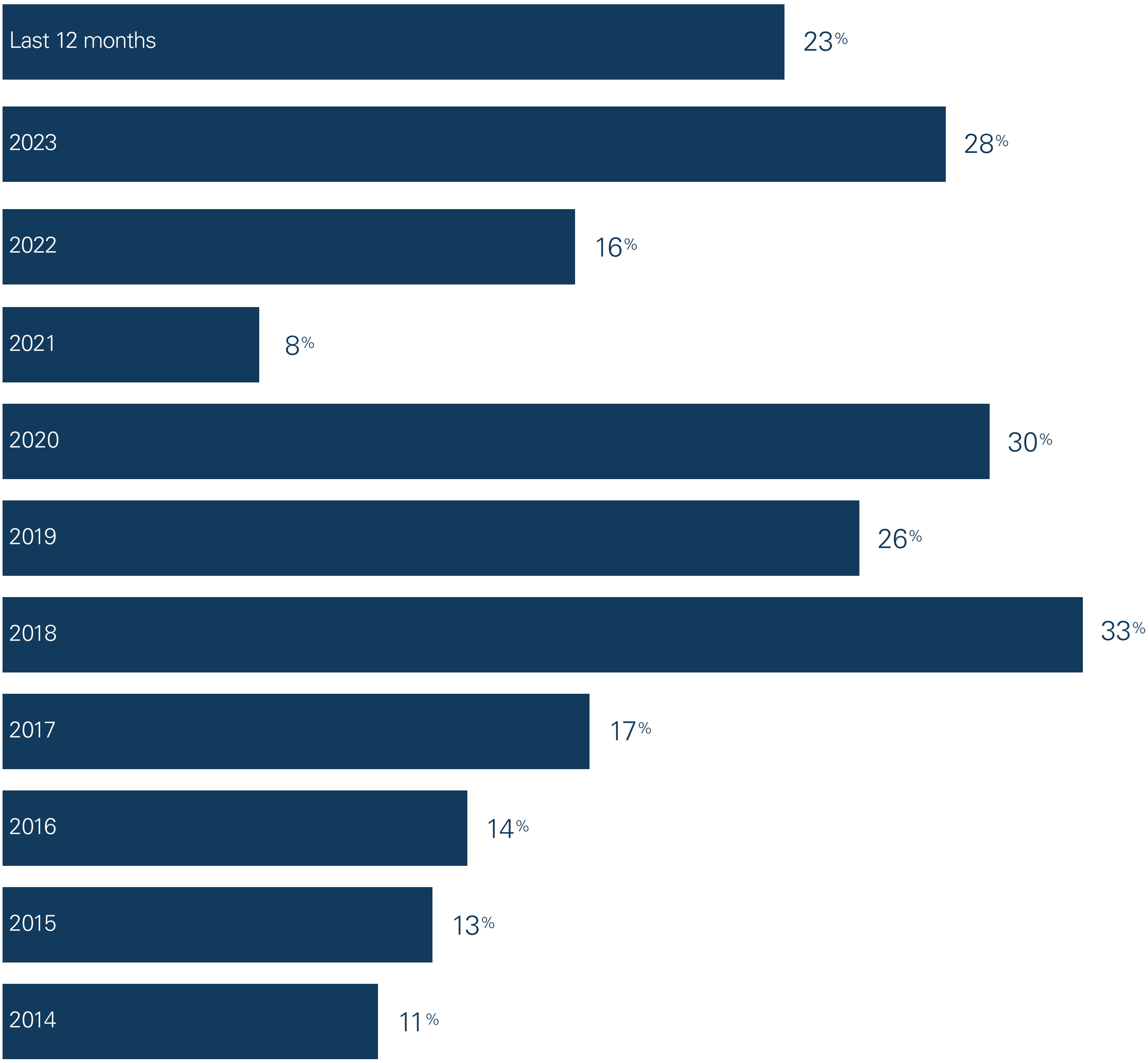
The lower activity in the public M&A space was a result of private equity firms having access to more private assets, and they spent more time investigating these opportunities. Anecdotally, our private equity clients told us their pipeline of potential acquisition opportunities increased in the last 12 months, with a number of processes being lined up for early 2025. Interestingly, we did not observe a marked contraction in bid/ask spreads in the last 12 months, with some private equity sale processes deferred to 2025 as vendors chose to wait for more favourable financial results and buyer sentiment.

With a more stable valuation and forecasting outlook, we see bidders moving up to meet sellers of quality assets. While we expect the trend of sponsors actively pursuing structured solutions to protect downside exposure to continue, we also expect a rise in processes that are fully bid, with unstructured, all cash consideration featuring prominently.

Although there are some early signs that the IPO window may be reopening in Australia, we expect that private equity sponsors will continue to be the most accessible form of funding for growth and liquidity for private companies, buoyed by the entry of several new sponsors into the Australian market and continued interest from North American sponsors in Australian assets.

After a cautious 2023 and more positive last 12 months, private equity sponsors are poised to continue to capitalise on new opportunities, with 2025 shaping up to be a great vintage for private equity dealmakers.

Private equity deals by percentage of total deals

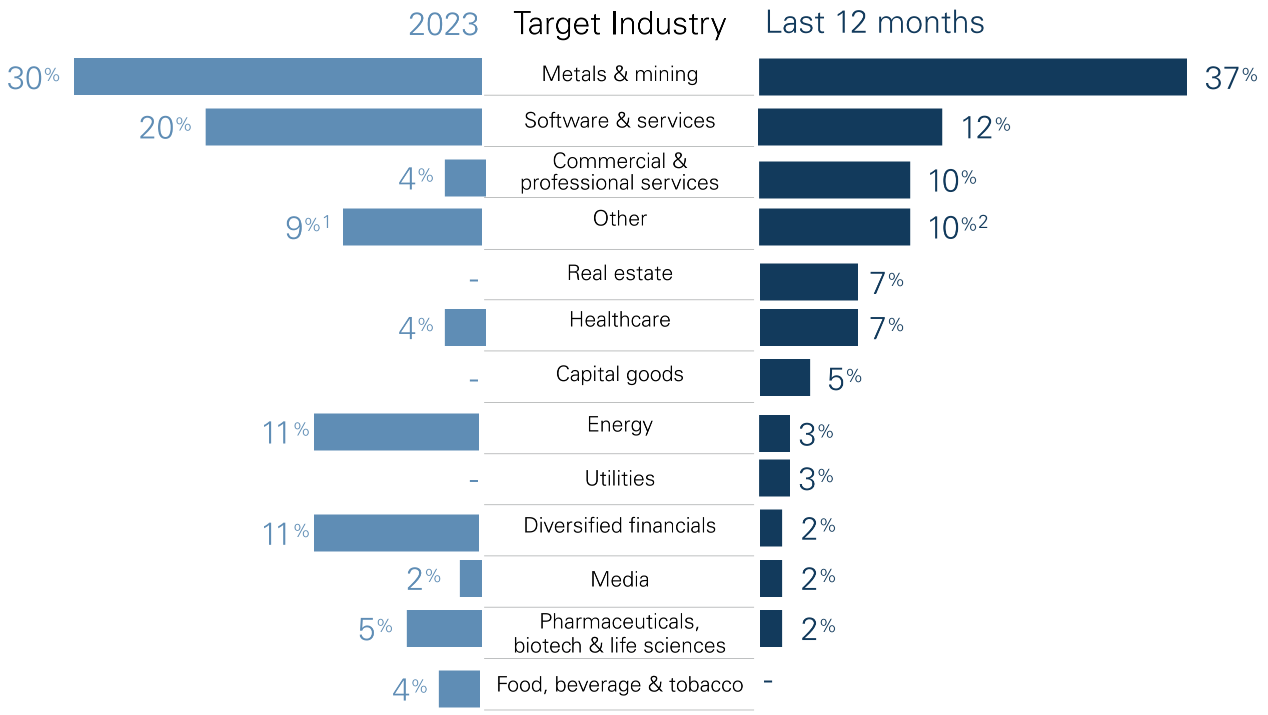


Resources still top of the table for third consecutive year

The metals and mining sector continues to dominate as the most popular target industry (climbing to 37%) with software and services following in second place. This highlights the continued interest from both strategics and sponsors in that sector, but a lack of available targets. It is worth noting that on a per-deal average basis, software and services is the most popular target industry, largely to reflect the Altium acquisition. Real estate has made a return to the board, a sector that we predicted would have a renewed interest this year.

> Our prediction that real estate would have renewed interest has proven to be correct

Target industries by percentage of deals



[1] For 2023, 'Other' comprises consumer services, entertainment, construction, retail and telecommunications services.

[2] For the last 12 months, 'Other' comprises transportation, banks, financials, insurance and materials.

Technology deals set to rise

One of the most active sectors for M&A activity in Australia in the last 12 months has been technology, with private capital being particularly active.

In recent years, Australia has been a happy hunting ground for cashed-up US growth funds who have benefitted from a lack of competition from domestic funds to invest in some great, scalable B2B SaaS businesses and then helped them expand into the US and other overseas markets.

Key transactions during the survey period included Renesas Electronics Corporation's A$9.1 billion acquisition of Altium, one of the largest software transactions in Australia, and the acquisition of Link Administration by Mitsubishi's Trust Bank for A$1.19 billion. We expect ASX-listed tech companies to remain in play in the coming 12 months, particularly from US buyers should the USD/AUD exchange rate remain favourable.

Opportunistic M&A in the tech sector is also expected to continue. Areas such as generative AI and digital infrastructure are in increasingly high demand. Blackstone's A$24 billion acquisition of AirTrunk is a prime example of this, having set new pricing benchmarks for data centre businesses.

03

Strategies for bidders and targets in 2025

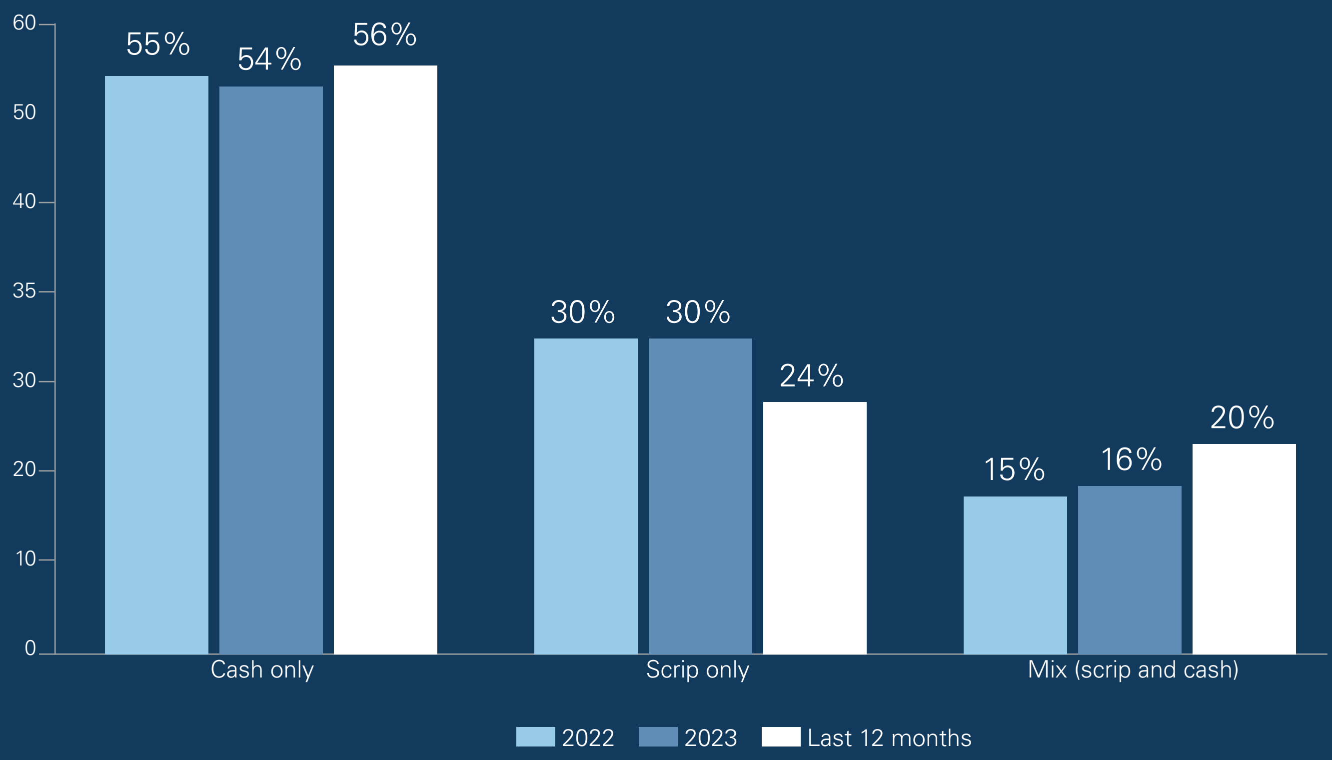
Our key insights

Bidders	• Using scrip as a silver bullet • Navigating truth in takeovers as a 'fundamental tenet'?
Targets	• Standstills are still enforceable • Swap disclosure is expected
Bidders + Targets	• When bidders become targets

Key statistic - using scrip as a silver bullet

Increases to mixed consideration (scrip and cash) was a key strategy used by bidders this year - see further bidder strategies in the following article.

Type of consideration and total value of consideration



Bidders

Using scrip as a silver bullet

Despite M&A activity levels being strong last year, completion rates were patchy with many announced deals ultimately failing to get across the line. One of the key trends was the strategic use of scrip or mixed consideration to win board engagement and shareholder approval.

The clearest example of this dynamic was the competing proposals from Genesis Capital and Crescent Capital for Pacific Smiles Limited. The Pacific Smiles board ultimately determined that Genesis Capital's cash and scrip proposal at A$1.90 was 'superior' to Crescent Capital's 100% cash proposal at A$1.91 because of the potential upside associated with the scrip. The deal highlights the wide discretion boards have in determining the value of scrip consideration.

Shareholders also favoured the option of both scrip and cash over an all-cash offer in various deals in the last year, including:

- Aussie Broadband's acquisition of Symobio Holdings Limited – where 74% of Symbio shareholders opted for the default consideration of 75% cash and 25% scrip. This is in contrast to 23% who opted for all cash and 2% opted for all scrip; and
- WAM Leaders Limited's merger with QV Equities Limited – where 67% of QV shareholders opted for scrip in WAM and 33% of QVE shareholders opted for cash.

In past years, scrip deals have generally been limited to 'stub equity' transactions to facilitate management rollover in private equity transactions. However, this year we have seen:

- more retail investors opting to elect the 'stub equity' alternative in those transactions; and
- more listed entities offering their scrip as consideration, which has then been taken up by retail investors.

> Key trend this year was the strategic use of scrip or mixed consideration to win board engagement and shareholder approval

Key lessons for bidders contemplating the use of scrip consideration

1. Scrip consideration can be a useful tool to bridge perceived valuation gaps by giving target shareholders the opportunity to retain exposure to the underlying business on the same economic terms as the bidder.
2. Bidders should also be aware of the wide discretion target boards have in valuing scrip, which could work for or against the bidder's interests.
3. Where considering extending 'stub equity' offers to all shareholders, bidders should take into account the increased take up by retail shareholders on recent deals, and whether or not the costs of managing a larger shareholder base are offset by the benefits of offering to all shareholders.
4. Careful consideration needs to be given to the level of disclosure of synergies in deals involving a merger of businesses, given the potential liability associated with the disclosure regarding synergies and the desire to sell the benefits of those synergies. Listed bidders must also navigate how to sell the synergy benefits to target shareholders and also sharing those synergies to bidder shareholders in any disclosure on synergies.

Navigating truth in takeovers as a 'fundamental tenet'?

ASIC's 'truth in takeovers' policy is generally considered a 'fundamental tenet' of Australian takeovers law. Put simply, market participants must 'do what they say they will' and this will be strictly enforced to ensure market integrity. Despite strong support from ASIC and the Panel in the importance of shareholders being able to rely on statements regarding 'best and final offers', there is tension in a bidder being prevented from increasing its bid price and maximising the value for target shareholders. This drives targets to find ways to allow a bidder to depart from its statement where possible. This year, this tension has been especially obvious.

All market participants (including bidders, targets and shareholders) need to focus carefully on the language used in best and final statements, and be aware of bidders' ability to depart from them.

Bidders

Two transactions this year involved best and final statements which allowed the bidder to offer more value to shareholders in circumstances that may not have been anticipated:

- Seven Group Holdings declared its takeover for Boral was its 'best and final price'. It subsequently varied it to permit a cash buyback and special dividend which would be deducted from the offer price. While the overall 'price' received by shareholders would remain the same, many would benefit from the value of franking credits received in connection with the dividend; and
- Crescent Capital declared its scheme proposal for Pacific Smiles to be the 'best and highest price', absent 'a higher or superior proposal or offer' or the 'target recommending a third party offer'. However, when the scheme seemed likely to fail, the target deemed a competing cash and scrip proposal from Genesis Capital as 'superior' despite it having a lower headline price, being non-binding, and lacking detail on the stub equity terms. This enabled Cresent Capital to increase its offer price, even though there was no higher competing offer.

Also in the last year, Brookfield and EIG declared their proposal for Origin Energy to be best and final in terms of price, and AustralianSuper publicly declared it would reject the proposal. When the bidders announced a revised structure (which was at the same or lower price) but allowed institutional shareholders to rollover and included a lower acceptance threshold, a key question was whether this would contravene the supplementary scheme booklet and ASX announcement issued by Origin. It is likely that it did not, given it related only to price and the shareholders' statement declared an intention to reject the previous proposals.

The Takeovers Panel was not asked to consider whether any of the above cases gave rise to unacceptable circumstances. However, without an application from an interested competing bidder, the target and bidder are clearly not motivated to seek such orders.

The key lessons for bidders on using 'best and final' are:

- to carefully consider the likelihood of a competing bid with the benefit of advice before making an unqualified best and final statement;
- to carefully consider the precise wording used in any qualification and whether it would be triggered by a 'competing proposal', or a 'superior proposal' or a 'higher price'. If it is a 'competing' or 'superior' proposal, consider who determines that; and
- participants should still assume that they will be held to best and final statements. However, they should be aware that targets and bidders might be motivated to look for ways to depart from them wherever possible.

Targets

Standstills are still enforceable

After a 13 year hiatus, the Takeovers Panel reinforced the enforceability of standstills in public transactions in two separate Panel applications.

Diatreme Resources Limited and Metallica Minerals Limited

Diatreme Resources Limited and Metallica Minerals Limited entered into a confidentiality deed with mutual standstills to discuss a merger. Subsequently, Diatreme announced a takeover bid for Metallica. The parties were in dispute about the timing of a proposed release from the standstill to allow the bid to proceed. Key takeaways include:

- the Panel confirmed that standstill agreements are not prima facie unacceptable, even where no confidential information has been exchanged, provided that it is commercially justifiable (which it was in this case). It noted there may be circumstances in which a standstill might 'frustrate' a bid and be unacceptable under the Panel's frustrating actions policy but did not specify what they might be;
- interestingly, ASIC argued that enforcing standstills in the face of a bid with benefits to shareholders was contrary to the Eggleston principles unless a specific 'public interest' could be identified. ASIC suggested that no such interest existed in this case, as no confidential information had been disclosed; and
- the target in this case proposed to release the bidder after allowing a set period of time for a competing proposal to emerge, which likely went some way to addressing the potential concerns of the Panel.

Ramelius Resources Limited and Westgold Resources Limited

Ramelius Resources Limited and Westgold Resources Limited entered into a confidentiality deed with mutual 12 month standstills, following which Westgold announced a merger with another party – Karora Resources Inc. In this case, material price sensitive information was disclosed and the Panel did not consider that the subsequent deal with Karora was sufficient cause to override the binding agreement of two sophisticated parties. ASIC agreed with this conclusion, focusing on the price sensitive nature of the information.

The key lessons for targets are that:

- a standstill restriction is not itself unacceptable. However, there might be other circumstances that would render reliance on the standstill restriction as being unacceptable;
- a standstill must be for an appropriate period, with 6-12 months being considered reasonable;
- confidential information does not need to be 'actually' shared under standstill arrangements for the standstill to be enforceable (although ASIC may have a different view);
- the Panel is reticent to override a binding agreement between two parties, viewing it as 'frustrating' an action voluntarily entered into by the parties; and
- the target should carefully consider the need to disclose the standstill. This can impact the ability to enforce a standstill that has not been disclosed (i.e. consider the guidance on lock-up devices).

Swap disclosure is expected

For a number of years, it has been established that the Takeovers Panel expects disclosure by a holder of long equity swap positions in a listed company of more than 5% (regardless of whether they are taken in the context of a control transaction).

Despite this, there were still examples of activist investors and bidders failing to comply with the disclosure requirements over the past 12 months. The Panel considered two such examples.

1. In the context of its contested bid for Pacific Smiles, Genesis Capital disclosed that it had a long equity derivative position in Pacific Smiles of 18.75%. It subsequently disclosed their interest had increased to 19.9%. However, the Panel determined that Genesis Capital had a position of 19.9% at the time it disclosed the 18.75% position. As this was not properly disclosed, it constituted unacceptable circumstances.
2. Similarly, the Panel found that Bell Rock had failed to disclose a long equity position in Whitehaven, despite being put on notice by Whitehaven of the requirements. This misrepresented its position as being below 5% at the same time Bell Rock sought to influence the control of Whitehaven through voting on proposed resolutions.

The Panel continues to find that it is unacceptable circumstances when bidders flout the Panel's guidance on equity derivatives. However, in these and similar cases, it can be challenging to find an appropriate remedy that deters investors from ignoring the rules. This is because the Panel is limited to making remedial (as opposed to punitive) orders and must avoid unfairly prejudicing relevant persons.

In both cases, the only orders issued were for corrective disclosure. The Panel noted that, in an appropriate case, it could order the cancellation of any agreement related to the equity derivatives and, where physical shares are held, impose a voting freeze or a divestment. However, these orders were not appropriate in the circumstances of the aforementioned cases.

Targets

It may be that it is worth again considering an amendment to the *Corporations Act 2001* (Cth), which incorporates the equity derivative guidance into the substantial holding provisions, ultimately allowing ASIC to enforce the rules.

The key lessons for a target in the context of a control transaction are:

- targets should carefully monitor their register and the positions of substantial holders, including potential counterparties to swaps like banks. They should consider how physical and derivative positions have been disclosed and whether there may be potential non-compliance; and
- if targets are aware of potential non-compliance, they should act promptly in seeking information from investors and, if necessary, make a Panel application rather than waiting for a control event to arise. The delay by Whitehaven in making its application until shortly before a shareholder vote caused the Panel to pause in making its decision. Targets will also be in a better position to seek divestment or voting freezing orders if they have acted promptly.

Bidders and Targets

When bidders become targets

To date, outside of a 'reverse takeover' scenario, there has been little guidance on if and when an ASX-listed bidder must preserve its ability to consider alternative proposals and, should one emerge, retain the ability to terminate an existing transaction to pursue a superior proposal.

Where the transaction is structured as a takeover, a bidder would in effect need to include a defeating condition that provides sufficient scope for the takeover offer to lapse if such a scenario emerged. However, *Corporations Act 2001* (Cth) prohibitions on including defeating conditions which are dependent on the bidder's opinion make it problematic to structure termination rights in a takeover bid based on whether the bidder sees any competing proposal to be a 'superior proposal'. For these reasons, transactions where bidders seek to retain a 'superior proposal' termination right generally proceed by way of a scheme of arrangement as opposed to a takeover.

Perpetual previously found itself in a position where it sought a judicial determination about whether its termination rights under the scheme implementation agreement extended so far as to enable it to terminate its proposed acquisition of Pendal when it became the target of another potential bidder. However, in that case, the court found that the wording of the scheme implementation agreement did not give Perpetual a right to terminate should a superior proposal (for Perpetual) emerge.

Similarly, when seeking to acquire Firefly by way of a scheme of arrangement, Gascoyne Resources agreed to certain exclusivity restrictions but did not preserve a unilateral right to terminate should a superior proposal emerge. When Westgold complained to the Panel about Gascoyne's inability to appropriately consider competing proposals, the Panel thought it odd that Gascoyne had the benefit of a 'fiduciary out' to the exclusivity arrangements without also having a termination right for superior proposals, but the Panel ultimately did not intervene.

This year, Westgold sought to acquire Karora by way of a Canadian plan of arrangement (the equivalent of an Australian scheme) in a scrip deal which had mutual exclusivity and mutual termination rights for superior proposals. The arrangements were tested by the Panel when Ramelius Resources complained of Westgold's inability to engage on an alternative transaction, with the 'fiduciary out' arrangements ultimately being refined in a manner consistent with the Panel guidance note on deal protection devices (Guidance Note 7). This was notwithstanding that Westgold was the bidder in that transaction.

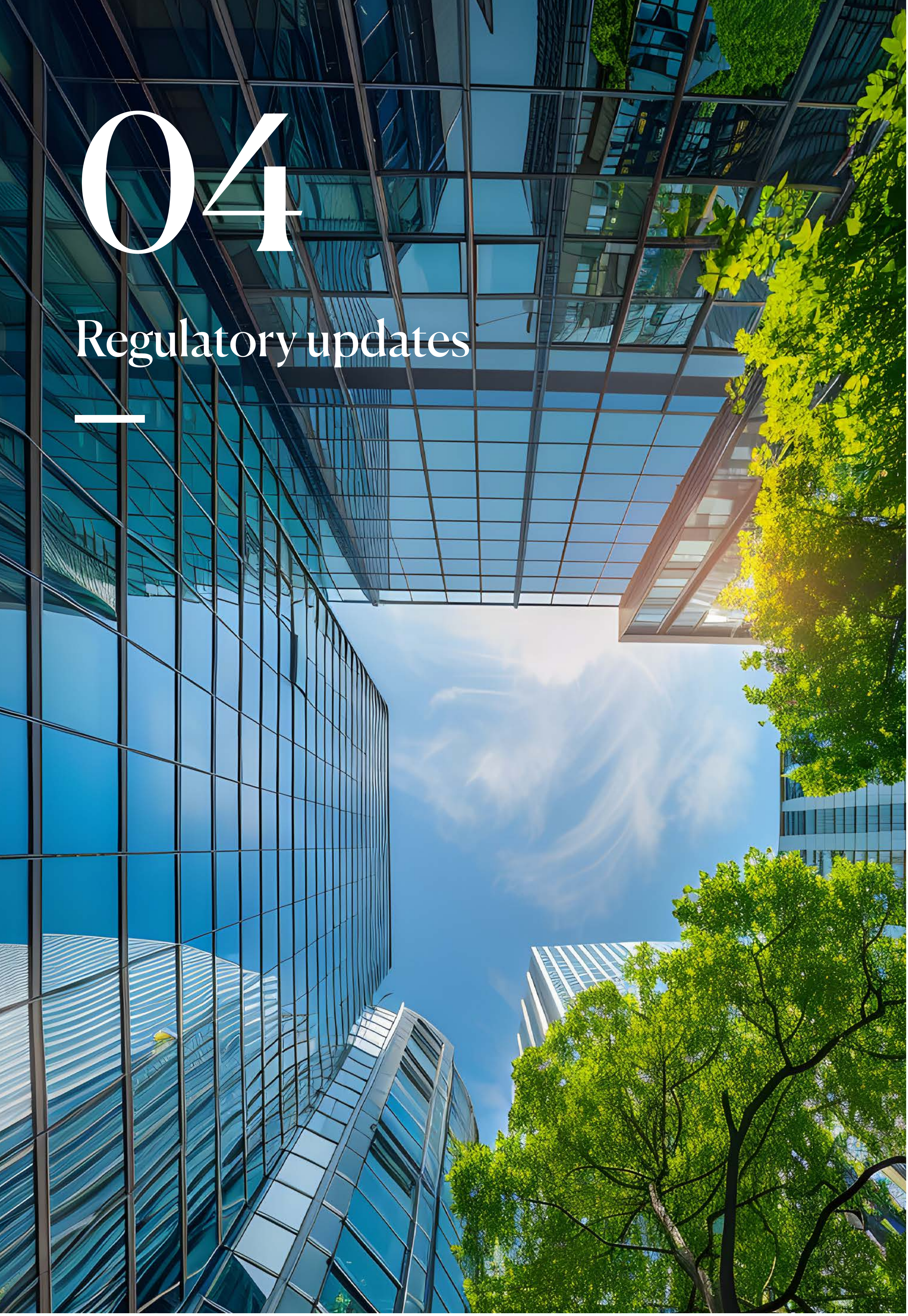
The key lessons for targets and bidders which may become targets are that:

- a target should clearly resist giving the bidder the ability to terminate in the case of a bid for it, as termination rights introduce an additional degree of uncertainty as to whether the proposed transaction will proceed;
- there is a risk that 'unacceptable circumstances' will arise if a bidder locks itself into a proposed transaction as a defensive tactic to opportunistic acquirers without an appropriate 'fiduciary out';
- any exclusivity imposed on the bidder will need to comply with the guidance on lock-up devices in Guidance Note 7 to ensure that there are not unacceptable fetters or constraints that make reliance on the 'fiduciary out' overly restrictive; and
- it is not entirely clear if and when the break fee limit of 1% of equity value applies to a payment by a bidder to a target in the case of a competing bid for the bidder (i.e. if this is properly characterised as a reverse break fee or a break fee), although it is possible that it will at least apply in the case where both parties are ASX-listed.

For more information, see "Should a bidder have a termination right to deal with superior proposals?" and "The 'fiduciary out' dilemma: risking what you have, for what might be".

04

Regulatory updates



Australian merger reform – a step change in our merger control regime

The Treasury Laws Amendment (Mergers and Acquisitions Reform) Bill 2024 (**Bill**), which reforms Australia's merger laws by introducing a mandatory and suspensory merger control regime from 1 January 2026, has now been tabled. This marks a significant shift in Australian merger control.

Dealmakers should be aware that the new regime is likely to capture many more deals (irrespective of competition concerns), involve longer reviews on average, and substantially increase the upfront process complexity of seeking Australian Competition and Consumer Commission (**ACCC**) clearance. Several aspects of the regime require further clarification and consultation including the upfront information requirements, forms, and fees, on which the ACCC will consult on in early 2025.

Overview of new regime

The following are the main features of the new regime.

1. On 1 January 2026, a mandatory and suspensory administrative merger control regime will commence. It will have a single clearance pathway with the ACCC as the first instance decision maker. Merits review by the Tribunal will be available to transaction parties and third parties.
2. Acquisitions of shares or assets that meet prescribed monetary and/or transaction value thresholds will require notification. Only acquisitions of shares that are capable of affecting competition by conferring 'control' are captured.
3. The changes are predominantly procedural. However, the legal test for clearance (i.e. whether a transaction would be likely to 'substantially lessen competition') will now be extended to include 'creating, strengthening or entrenching a substantial degree of power in a market'.
4. Significant penalties will apply for failure to comply with the requirements to notify and suspend completion, and for providing false or misleading information to the ACCC.
5. Indicative timeframes of 30 working days and 90 working days are set for 'Phase I' and 'Phase II' ACCC reviews respectively, and fast-track ACCC determinations after 15 working days will be introduced. If the ACCC does not make a determination in those time periods, a transaction is deemed cleared.
6. The ACCC may permit an acquisition that would be likely to substantially lessen competition if it would be likely to result in a net public benefit that would outweigh that lessening of competition after a 'Phase III' review (of 50 working days).

What transactions must be notified?

Only acquisitions of shares that are capable of affecting competition by conferring 'control' are required to be notified. The definition of 'control' is aligned with the *Corporations Act 2001* (Cth), being the capacity to determine the outcome of an entity's financial and operational policies.

Acquisitions of shares in publicly listed companies, or unlisted but widely held companies that do not result in the acquirer holding more than 20% of the voting power in those companies are not required to be notified. This is aligned with position in the *Corporations Act 2001* (Cth). A further exemption is available for acquisitions of shares by acquirers who already controlled a target immediately before those acquisitions.

Under the Bill, an acquisition must be notified if it meets any of the following monetary or transaction value thresholds.

'Economy-wide' monetary threshold

Where **all** of the following are satisfied:

- the target has a material connection to Australia (i.e. carrying on business in Australia or plans to carry on business in Australia);
- the combined Australian turnover of the merger parties (including the acquirer group) is at least A$200 million; **and**
- either:
  - the Australian turnover of each of at least two of the merger parties is at least A$50 million; **or**
  - the global transaction value is at least A$250 million.

'Targeted' thresholds for 'very large acquirers'

Where **both** of the following are satisfied:

- the acquirer group's Australian turnover is at least A$500 million; **and**
- the Australian turnover of each of at least two of the merger parties is at least A$10 million.

Three-year cumulative thresholds to address 'serial acquisitions'

An economy-wide threshold that applies where both of the following are satisfied:

- the combined Australian turnover of the merger parties (including acquirer group) is at least A$200 million; **and**
- the cumulative Australian turnover from acquisitions by the merger parties involving the same or substitutable goods or services over the previous three-year period is at least A$50 million.

A threshold for very large acquirers' transactions that applies where both of the following are satisfied:

- the acquirer group's Australian turnover is at least A$500 million; **and**
- the cumulative Australian turnover from acquisitions by the merger parties in the same or substitutable goods or services over a three-year period is at least A$10 million.

These cumulative thresholds are subject to a de minimis exception for acquisitions of entities or assets with less than A$2 million Australian turnover.

Dealmakers should be prepared for more notifiable transactions, irrespective of competition concerns. Treasury estimates that between 300-500 acquisitions would be caught each year. To put these figures into perspective, 500 reviewable mergers annually is approximately a 52% increase on the ten-year average. This extra administrative burden on the ACCC and transaction parties could result in substantial delays.

In addition to the above thresholds, the Treasurer appears likely to use the Bill's designation powers to:

- require notification of **all** acquisitions in the supermarket sector (and potentially certain acquisitions in the fuel, liquor and oncology radiology sectors);
- require notification of all acquisitions of an interest above 20% in private companies if the thresholds are otherwise met (i.e. relaxing the control test for those transaction types); and
- exempt land acquisitions relating to residential property development and certain commercial property acquisitions from notification.

The proposal for the designation of unlisted or private company acquisitions is targeted specifically toward acquisitions by private equity stakeholders, as is the 'serial acquisitions' threshold. The ACCC is focused on serial and 'roll up' acquisition strategies and expressly requested the Treasurer to consider a designation of this nature. This bespoke threshold would capture a significant number of transactions and could create a burden for a wide range of stakeholders involved in Australian and international M&A – most notably private equity acquirers. If implemented, it would create a mandatory obligation to notify for many types of private equity transactions regardless of competitive effects, and could strain the limited ACCC resources allocated to managing the new regime.

The proposal to exempt land acquisitions relating to residential property development and certain commercial property acquisitions from notification is sensible. However, the scope of the proposal is presently unclear and requires urgent clarification.

Many have welcomed a possible notification waiver system, but no detail has been provided. We anticipate that it could be unwieldy. For example, there is no information on timing, information requirements or how the ACCC will exercise its discretion.

Review timing

Despite some limitations on the ACCC's ability to 'stop the clock' on the statutory timelines, dealmakers must be aware that, subject to some exceptions, the ACCC's ability to control the statutory clock will be significant and will require careful management, especially in the initial period of the new regime.

Notably, the ACCC will be permitted to prevent the statutory clock from starting if a notification is materially incomplete or misleading. It can suspend the statutory clock until incomplete or misleading notifications are updated or its requests for information are complied with.

In practice, the ACCC will retain a degree of discretion over review timing. The actual duration of reviews will depend on the ACCC's approach in practice and its process guidance, which it will consult on in 2025. Despite the ACCC's expectation that 'about 80% of mergers will be cleared within 15-20 business days', we have some concerns about flexibility in the statutory timeframes and the ACCC's ability to cope with the substantially increased volume of reviews compared to the current regime.

Critically, because of substantial and mandatory upfront information requirements which do not currently exist, the ACCC has substantial discretion to engage in lengthy, 'pre-notification' discussions that are not a feature of the current process. That in itself is likely to result in longer ACCC engagements, except for the simplest of deals. When confronted with a complex review or a heavy workload from reviews, the temptation will be strong for the ACCC to drag out pre-notification discussions to delay the start of the statutory timeframes or find faults in information provided to it.

Enhanced transparency and greater access for third parties

Dealmakers will need to be aware that in contrast to the current regime, under which 93% of all reviews are completed confidentially and are not placed on a public register, the Bill will substantially restrict the ability to seek a confidential review. Secondary legislation will require all notified acquisitions to be published by the ACCC. Limited exceptions include for surprise hostile takeovers, which will be able to be confidentially reviewed and listed on the public register only after 17 business days.

For all other transactions, this enhanced visibility of transactions subject to ACCC review will be important for bidders in competitive processes in particular – as 'cleanskin' bidders or other complainants will have an enhanced ability to identify transactions subject to ACCC review and seek to 'game' the regulatory process.

Transitional arrangements

An extended transitional period is proposed which is helpful for transaction parties, practitioners and the ACCC.

The transition to the new regime will occur in two stages. From 1 July 2025, transaction parties will be able to voluntarily notify the ACCC of acquisitions under the new regime and can no longer seek merger authorisation. From 1 January 2026, the new regime will become mandatory.

In practice, it is likely that many transaction parties seeking voluntary clearance in the second half of 2025 will notify the ACCC under the new regime to avoid being required to re-notify if clearance is not granted before 1 January 2026. Helpfully, deals cleared under the current regime before 31 December 2025 and that are implemented within 12 months are exempt from notification. However, there is no specific provision for a range of foreseeable transition scenarios, such as where parties are before the ACCC and nearing the end of a review, but where a decision is unlikely before 31 December 2025.

What next?

The ACCC will consult on transitional arrangements in early 2025, but any transaction parties contemplating transactions with complex competition concerns should begin thinking immediately about whether and how to engage with the ACCC in the coming six to nine months. Dealmakers and their counsel must also begin to think about a range of practical matters as we enter the transitional period including:

- if conditions precedent need to be amended;
- whether longer 'sunset' dates may be warranted to account for the additional complexity inherent in the new regime;
- the extent to which the new upfront information requirements will warrant more and tighter rights to access vendor information for ACCC submissions, or enhanced and more open communication with targets in transaction processes; and
- how serial filers should put in place standard processes to facilitate early views to be taken as to notifiability, including through standard information requests and tools to capture revenue and other information required.

Unpacking the ATO's new focus on private capital

The taxation landscape for private capital, particularly foreign private equity, is currently a primary focus of the ATO. This is evident through:

1. proposed changes to Australia's foreign resident capital gains tax (**CGT**) regime; and
2. the ATO's newly formed 'Private Equity Unit', which will apply dedicated tax compliance resources to a wide range of fund managers and financial sponsors.

Proposed changes to the CGT regime

The ATO often starts any foreign private equity review with the view that a profit on disposal was made on revenue account, and may therefore be taxable in Australia. In some cases though, there are instances where a foreign private equity investment may be held on capital account.

Ongoing issues with the interpretation of Australia's existing CGT legislation and potential new changes to those laws, have created significant uncertainty for foreign investors who have invested, or are looking to invest, in emerging asset classes like renewable generation assets in Australia.

The current foreign resident CGT provisions contained in Division 855 of the *Income Tax Assessment Act 1997* (Cth) have been a feature of the tax landscape since 2006. The rules govern Australia's taxing rights over non-residents that dispose of assets which have a direct or indirect connection to Australia. Broadly, under the rules as they currently exist, a foreign resident is not taxable on gains made on capital account where at least half the value of the underlying assets is not attributable to real property situated in Australia.

The proposed changes are intended to align the tax treatment between domestic and foreign investors. In reality, the proposed changes are likely to significantly expand Australia's capital gains tax base by taxing foreign investors on exit from a project, which may drive foreign clean energy investors into other markets. Further, foreign investors may be placed at a disadvantage relative to some Australian investors, such as Australian superannuation funds and Australian tax consolidated groups, which can access further concessional tax rates and treatments.

Specifically, the proposed measures:

- clarify and broaden the types of assets on which foreign residents are subject to tax, with a focus on bringing renewable energy generation asset disposals clearly into Australia's tax net;
- amend the point-in-time principal asset test to a 365-day testing period; and
- require foreign residents disposing of shares and other membership interests exceeding A$20 million in value to notify the ATO prior to executing the transaction.

Real property is not currently defined in the tax legislation and significant differences in opinion between taxpayers and the ATO have arisen. The proposed changes mean that Taxable Australian Real Property (**TARP**) may be broadened to include, amongst other things, leases or licences to use land and associated infrastructure, such as wind turbines, solar panels, transmission towers or rail networks, and heavy machinery installed on land situated in Australia, as well as water entitlements relating to Australian land. This will also have a flow on effect to indirect Australian real property interests, including interests in Australian companies and trusts, and result in various intangible assets being subject to taxation.

There is also currently an absence of grandfathering or transitional rules contained in the current draft legislation. This means that the taxation profile for existing projects may be significantly greater than forecasted at the time of investment.

Private Equity Unit

The ATO has also launched its strategy for the newly formed 'Private Equity Unit'.

Stringent conditions on in-bound private equity relating to deal structure and exit notifications are standard when FIRB conditions are put in place.

However, we understand that the ATO Private Equity Unit is reviewing fund managers and financial sponsors to identify taxation risks throughout the entire investment lifecycle, including reviewing the managers themselves. In some cases, ongoing reviews of significant investors may be undertaken. The ATO has acknowledged that a tailored approach will be needed, and aims to take a holistic approach across each relevant fund's investments.

The ATO has also indicated that the Private Equity Unit will extend its focus beyond private equity to encompass a broad selection of fund managers and financial sponsors comprising:

- managed funds, including private equity;
- sovereign wealth and pension funds;
- collective investment vehicles, including managed investment trusts, attribution managed investment trusts and corporate collective investment vehicles; and
- infrastructure funds.

The primary areas of focus for the Private Equity Unit are:

- targeted reviews of fund managers and financial sponsors covering the full investment lifecycle, including pre-acquisition, acquisition, holding, pre-exit and exit;
- reviews extending to both investments made by fund managers and financial sponsors, as well as the Australian taxation affairs of fund managers and financial sponsors themselves, to ensure that the right amount of tax is being paid;
- specific consideration of large expenses and poor tax performance; and
- an understanding of the commercial rationale for investments, including an examination of the holding structure used for each investment.

ATO review activities can often be a significant burden on fund managers and financial sponsors. In our experience, proactive preparation in advance of any such review can assist in influencing the complexity, timing and the nature of the review. Care should be taken to provide the ATO with accurate and timely information, and to engage with the ATO regarding any perceived risks or concerns. Failing to do so can lead to the ATO further escalating issues, resulting in future audits or tax disputes.

> “We understand that the ATO Private Equity Unit is reviewing fund managers and financial sponsors to identify taxation risks throughout the entire investment lifecycle, including reviewing the managers themselves

Is silence golden: will Australia follow the UK and adopt a 'put up or shut up' rule?

Seasoned dealmakers will know that Australia has long had a reputation for being a 'leaky' market. Our regulator, ASIC, is now paying increasing attention to media leaks during fundraising and M&A activity that could compromise market integrity. Recent public statements suggest that ASIC may consider media leaks to be an emerging enforcement priority. Accordingly, ASIC may push for regulatory reform, such as implementing a similar model to the United Kingdom's (**UK**) 'put up or shut up' (**PUSU**) rule, which requires bidders to commit to a bid within 28 days of being named in the media, or face being barred from initiating a bid for six months. Under the current UK rules, bidders or targets have two months to make a formal offer after a public announcement has been made naming the bidder. A recent example of the PUSU rule in action was BHP's failed merger offer for Anglo American.

ASIC's key concern with leaked transaction information to the media is that it threatens the integrity of the information available to the market in the period between the leak, and the official release of material that is price-sensitive information to the market. During this period of degraded market integrity, there is a higher risk of insider trading. In recent years, leaks have preceded high-profile fundraises and control transactions, forcing targets to go into trading halts and issue responses to media speculation in advance of a transaction announcement.

In its quarterly Corporate Finance Update of December 2023, ASIC warned that it had observed an increase in media reporting ahead of public market transactions. ASIC stated that it expected market participants and corporate advisers to take appropriate precautions including using robust information barriers, confidentiality agreements, and insider lists. ASIC raised the issue again in July, following the BHP/Anglo American leak and several other notable leaks.

Overseas, there have been mixed responses to the UK's PUSU rule. The PUSU rule was introduced in the UK in September 2011 following widespread criticism and concerns over Kraft's protracted four month, initially hostile, takeover bid for Cadbury. The purpose of the rule was to address the imbalance of power created by bidders who used 'bear hug' or 'virtual' bids to put pressure on target boards (via their shareholders) to come to the table. Since its inception, the rule has been successful in protecting listed target companies from prolonged uncertainty in the period prior to a transaction being signed, and acting as a 'shield' to its shareholders, as well as customers and staff, during this time.

The introduction of a PUSU rule would be a major overhaul of the current Australian takeover regime. In its simplest form, it could be enacted through an amendment of the existing rule in section 631 of the *Corporations Act 2001* (Cth), which requires a bidder to make a takeover bid within two months after the bidder makes a public proposal. For the amendment to align with the UK rule, section 631 would have to be amended so that it:

- extends to schemes of arrangements, given the current rule only apples to takeover bids; and
- applies when the target announces an unsolicited approach.

If ASIC's primary concern is to protect targets from extended periods of uncertainty, it is easy to see a role for the PUSU rule in Australia. However, its impact as a deterrent to leaks is less clear, and there is little evidence that the PUSU rule is required in Australia from a market integrity perspective. While media leaks may be damaging to a potential bidder, they may also act as a deal accelerant and another tool in the arsenal of a defensive target. In our view, section 631 serves as sufficient protection for targets and in any event, a scheme is within a target's control.

Regulatory landscape for financial services M&A

Anti-Money Laundering and Counter-Terrorism Financing (AML/CTF) reform affecting advisers

Due diligence addressing AML/CTF issues remains as important as ever. The presence of an active regulator, the Australian Transaction Reports and Analysis Centre, and the complexity of Australia's AML/CTF laws, means it is a particular focus for businesses. While the government is seeking to reduce this complexity with its recently announced reforms, the potential for significant AML/CTF penalties to arise even in a short period of time will remain.

The reforms are likely to extend Australia's AML/CTF laws to a range of other business activities, including real estate transactions, M&A and debt/equity advisory services, escrow services and corporate restructuring advice. These will impact a raft of professional service providers such as real estate agents, business brokers, wealth advisers, financial planners, company secretarial service providers, trust and company service providers, lawyers, and accountants.

Professional service providers will need to comply with AML/CTF obligations when providing these services, including undertaking appropriate customer due diligence. This is a departure from the status quo for many advisers, particularly those who are not part of a global network.

Satisfying these due diligence requirements can raise complex issues, particularly where information is needed from overseas jurisdictions. This will need to be planned for and addressed as part of transactions – often in a compressed timeframe. Professional service providers and their clients will need to prepare for the implementation of these changes, and the increase in obligations which result, well before the planned 31 March 2026 commencement.

Payments regulation M&A: another layer of due diligence

Australia's payments regulatory framework is also set for modernisation to expand their regulatory coverage.

The *Payment Systems (Regulation) Act 1998* (Cth) (**PSRA**) will modify the definition of 'payment system' to capture a broader set of arrangements which facilitate the transfer of funds, and expand the definition of 'participant' to capture all entities involved in the payments value chain. Purchasers of businesses captured by these definitions will therefore need to conduct additional due diligence under the new regime to ensure that targets comply with the amended regulatory standards.

The definitions of 'financial products' and 'financial services' will be expanded under the *Corporations Act 2001* (Cth) to capture various 'payment functions' such as payment facilitation services and payment technology and enablement services. Like the PSRA reforms, this will broaden the scope of due diligence required on payment service providers to determine whether they require an Australian financial services licence and, if so, whether they hold appropriate authorisations and comply with their licensee obligations.

> “ Professional service providers will need to comply with AML/CTF obligations when providing these services, including undertaking appropriate customer due diligence

05

In focus – Shareholder activism in M&A

Shareholder activism in M&A

State of play of shareholder activism in Australia

- In recent years, there has been a rise in alternative asset managers that have funds dedicated to unlocking shareholder returns through activism in Australian companies.
- This form of activism differs from the 'non-financial' style of activism, which is primarily ESG focused, such as Grok Venture's vote against AGL's proposed demerger, and the raft of climate change activist campaigns against oil and gas companies.
- Value-focused activism is also in sharp contrast to the traditional passive investing by Australian institutional investors, who liaise with the board, but do not initiate value strategies or agitate for change.
- The recent pivot towards transactional activism or value-focused activism has been steered by a new generation of Australian fund managers. These fund managers have followed their US counterparts and established funds dedicated to 'private equity style' or 'high conviction' investments that aim to generate shareholder returns by activism.

For further insights on the landscape of new activist investors, see "The rise of value-driven shareholder activism in Australia: a new governance playbook".

Key governance takeaways for ASX-listed companies in responding to activists

- Monitor your register, be aware of activist funds' strategies and understand the views of your other major shareholders
- Engage advisors early, in particular financial, legal and communications/PR advisers
- Understand your strategy for long-term value and your potential areas of attack
- Focus first on engagement, not defence, but be prepared to defend your position or litigate if necessary
- Build your communication strategy and assign one person to engage, who has the expertise and bandwidth to do so
- Be conscious of and seek advice on your directors' duties. Be prepared to establish independent board committees to consider the activist's demands, if necessary
- Request confidentiality arrangements wherever possible
- Monitor your continuous disclosure obligations

The rise of the value-based shareholder activist: the new dealmakers?

Shareholder activism is back with a new focus – returning financial value to shareholders. Colloquially known as value-focused activists, this movement is being driven by alternative asset managers that have funds dedicated to unlocking shareholder returns through activism in Australian listed companies. These fund managers aim to generate shareholder returns by establishing activist investing as an asset class.

The rise of sophisticated, value-driven and media savvy activist investors has significantly transformed the M&A landscape. In last year's M&A Outlook, we discussed major shareholders as 'kingmakers'. However, with the rise of the activist investor, listed companies have a new strategic stakeholder to manage when doing deals, one that has strong opinions on potential acquisitions and disposals, and will make that opinion clear and potentially public.

In the past 12 months, several value-driven activist campaigns have urged ASX-listed targets to undertake, or refrain from, certain transactions, including:

- L1 Capital requesting Santos Limited to structurally separate its liquified natural gas (**LNG**) assets to unlock inherent value;
- the activist swarm of HMC Capital, Tanarra Capital, Allan Gray and Aware Super that were successful in leading Lendlease to divest overseas assets;
- Tanarra Capital rejecting the Australian Clinical Labs (**ACL**) hostile on-market takeover of Healius and publishing a public statement that the radiology business should not be sold for less than A$825 million;
- Osmium Partners pushing for board seats on Articore Group Limited with the intention of immediately seeking a sale of the company; and
- Allan Gray supporting the proposed merger of ARN and Southern Cross Media (see our full article on Southern Cross Media over the page).

Who are they and what do they want?

The key Australian players driving value through activism are:

- Tanarra Capital Long-Term Value Fund;
- HMC Capital Partners Fund 1; and
- L1 Capital Catalyst Fund.

There are also other experienced Australian activist funds, such as Sandon Capital and Samuel Terry Asset Management. Other fund managers, hedge funds and superannuation funds engage in activism, however, do not at present have dedicated activist funds.

Value driven activist funds charge higher fees for investment management, aiming to generate returns above benchmark by actively agitating for change to unlock value. Strategic acquisitions, and more recently disposals, are common strategies these funds use to unlock significant shareholder value.

How do they approach?

Unlike a traditional bidder or major institutional investor, activist funds typically build a stake of less than 5% to approximately 15%, and then usually (though not always) approach the board with their value-unlocking thesis. This is not a potential transaction, but a strategy often accompanied by a media campaign. Some examples include:

- L1 Capital specifically proposed to the Santos board that the company's Australian oil and gas assets and Alaskan oil assets should be separated by a demerger and distributed to Santos' shareholders, leaving Santos as a 'pure play' LNG company; and
- HMC Capital proposed to reverse the underperformance of Lendlease Group and return value to shareholders by divesting its non-core assets.

Are the activists really the new dealmakers?

The activist investment funds have the potential to influence the M&A transactions of their listed targets well above the size of their holdings. This makes them important stakeholders for the board to engage with once on the company's register.

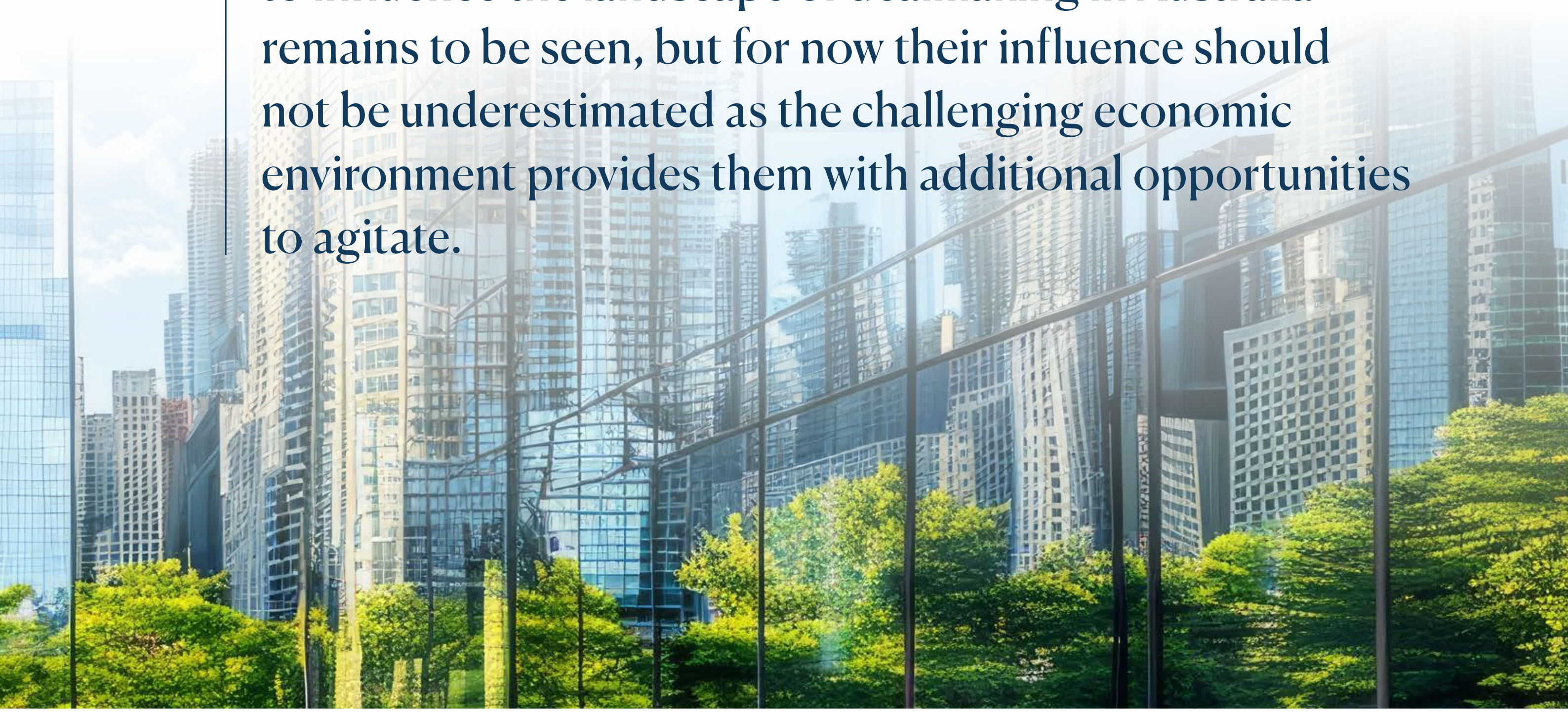
The most compelling example of an activist's potential to become a dealmaker is Tanarra Capital's investment in Healius Limited. With a stake of only approximately 12%, Tanarra:

- publicly stated its reasons for not accepting ACL's all scrip off-market takeover bid for Healius, which was ultimately withdrawn;
- appointed a nominee director to the Healius board (with the resolution passing by an overwhelming 99.73% of votes); and
- published a letter urging Healius to achieve a price of A$825 million or more for the sale of its radiology business, Lumus. Subsequently, Healius announced the sale of Lumus to Affinity Equity Partners for an enterprise value of A$965 million.

For an activist to successfully influence an investment or divestment, the conditions need to be just right. In the case of Healius, there was a failed takeover bid, operational concerns, failed acquisitions by Healius and share price underperformance before Tanarra's nominee was appointed to the board. Tanarra was able to run a compelling campaign for change, which gave it the backing of the majority of the shareholder base. The Healius board, to its credit, did execute well on the divestment of Lumus and was successful in finding a buyer at a healthy price, well above Tanarra's stated acceptable price.

The degree to which value-focused activists will continue to influence the landscape of dealmaking in Australia remains to be seen, but for now their influence should not be underestimated as the challenging economic environment provides them with additional opportunities to agitate.

"The degree to which value-focused activists will continue to influence the landscape of dealmaking in Australia remains to be seen, but for now their influence should not be underestimated as the challenging economic environment provides them with additional opportunities to agitate.



Southern Cross Media: lessons from an activist backed deal (that didn't happen)

A good example last year of shareholder activists using their position to push for listed companies to pursue M&A was the proposed take-private of Southern Cross Media.

That deal demonstrated the extent to which activist shareholders will push for M&A and the risks to both boards and shareholders in pursuing such transactions. It is also a useful case study in how the Takeovers Panel can be effectively used to seek a remedy where shareholders have acquired or voted stakes in breach of the *Corporations Act 2001* (Cth).

Shareholder activists in advancing the transaction

On 18 October 2023, ARN Media and Anchorage Capital Partners (**ACP**) submitted a non-binding indicative offer to acquire 100% of the shares in Southern Cross by way of scheme.

The proposal was highly complex given that the deal involved a merger of ARN Media and Southern Cross before separating out the combined assets into two new media groups. One would be owned by ARN, and the other owned by ACP. The Southern Cross shareholders would receive a combination of cash and shares in the newly reconstituted ARN (ARN NewCo). The Southern Cross board required additional information by way of reverse diligence to assess the value of the ARN NewCo shares and evaluate the proposal, before providing full access to due diligence or engaging further. The Southern Cross board determined that the initial proposal from the joint bidders was not in the best interests of Southern Cross shareholders.

Key shareholder, Allan Gray, was invested in both sides of the transaction (i.e. in Southern Cross and ARN) and was publicly supportive of the transaction proceeding. However, its position was different to most Southern Cross Shareholders, given its interest in ARN. Spheria Asset Management also acquired a substantial holding after the announcement of the proposal in a typical example of multiple activist funds pursuing the same opportunity.

Spheria publicly called for the removal of the chairman with the stated reason being the Southern Cross board's delay in engagement with the joint bidders on the takeover (which Spheria said shareholders supported). Spheria submitted a formal notice calling for an EGM to vote on the removal of the chair only a week after the board announced its determination that the proposal was not in the best interests of Southern Cross shareholders. Allan Gray and Ubique indicated publicly that they might be supportive of such a resolution if put to shareholders.

The Southern Cross board ultimately managed to solicit an increased offer from ARN and ACP which was announced two days after the meeting requisition. The board determined that this increased offer was sufficiently attractive to engage further to progress a binding proposal, including by undertaking mutual due diligence and negotiation of transaction documents.

Risks to boards and shareholders alike

Despite the board achieving a higher offer price for shareholders and agreeing to re-engage with the bidders on this basis, Spheria refused to withdraw the requisition notice. Southern Cross' chair voluntarily resigned given the position of the substantial shareholders to avoid this becoming a distraction to the transaction.

Ultimately, the transaction did not proceed as a result of ACP withdrawing after almost six months of engagement. As a consequence, Allan Gray sold down their position at a reduced share price.

The transaction is a reminder to both boards and shareholders of the risks associated with agitating for such transactions. Boards have an obligation to act in the best interests of all shareholders even in the face of significant shareholders, whose interests may differ from those of other shareholders. The decisions that boards make in the context of these activist campaigns on material M&A will always be judged with the benefit of hindsight, and it is the board that is ultimately responsible for such decisions. Even if a board is convinced of the merits of a transaction promulgated by activist shareholders, a transaction is not always guaranteed, which necessarily creates exposure to downside risk on any stake acquired.

Takeovers Panel application

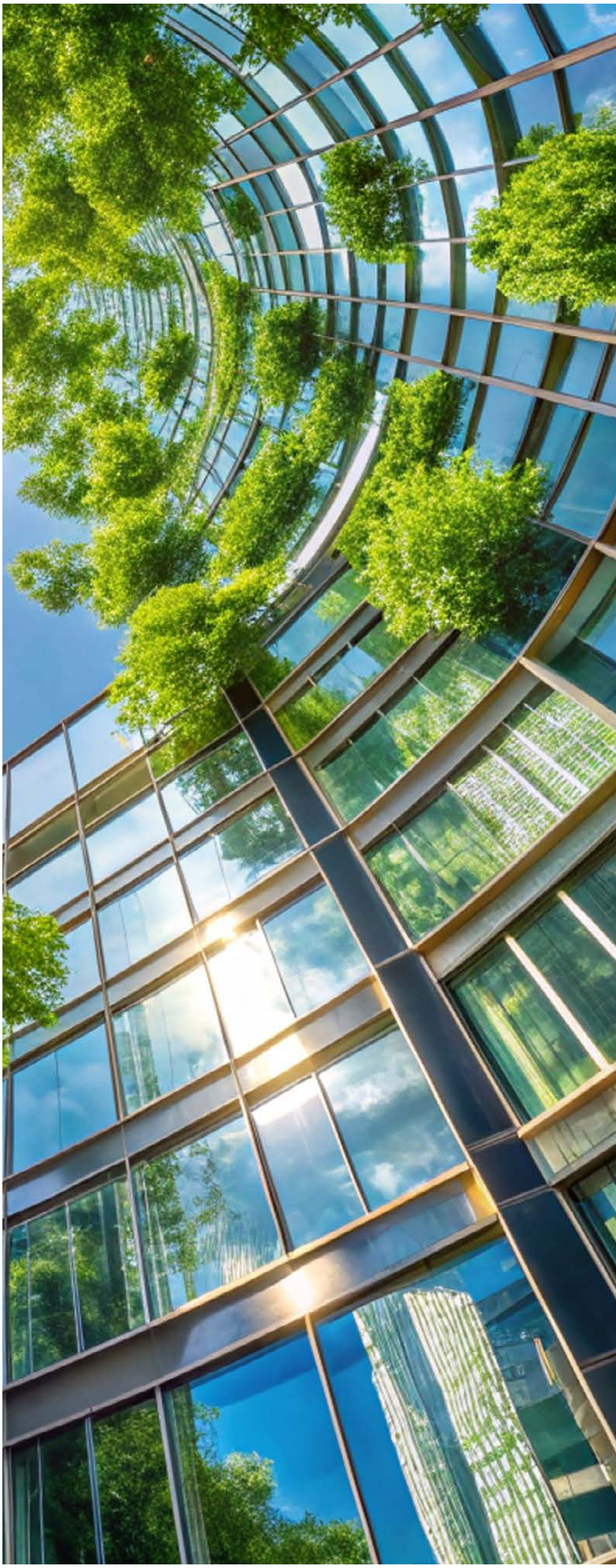
To further complicate matters, ARN and Allan Gray were found to have breached the takeovers prohibition under section 606 of the *Corporations Act 2001* (Cth) in aggregating their shareholdings. The breach arose because Allan Gray was deemed to have an interest not only in its direct stake in Southern Cross, but also in the Southern Cross shares acquired by ARN due to Allan Gray's 20% interest in ARN. This resulted in Allan Gray's aggregate holding in Southern Cross exceeding 20% by 6.83%.

In such circumstances, the Panel would typically make orders for the divestment of the shareholding to the extent that it exceeds 20%, and that was the Panel's decision in the first instance.

However, on review, the Panel set aside its divestment orders and made new orders which required ARN to:

- vote the excess 6.83% interest in Southern Cross in favour of any resolutions recommended by the majority of the non-conflicted directors, which are not related to transactions involving ARN or any of its associates;
- accept the excess shares into a competing takeover if the acceptance allowed a competing bidder to go unconditional and obtain over 50% of the shares in Southern Cross, unless ARN has made an unconditional takeover bid or entered into a binding scheme implementation agreement, in each case recommended by the non-conflicted directors;
- not accept the excess shares into a takeover bid by ARN or any of its associates; and
- not otherwise transfer or dispose of the excess shares.

These orders were more favourable to Southern Cross as they avoided an uncertain sell-down of a material stake, and gave Southern Cross greater certainty over the treatment of that stake in a change of control transaction. The orders present an interesting alternative to a divestment, which is worth considering in future transactions. They also demonstrate the flexibility of the Panel as a forum for resolving disputes in the context of a shareholder activist campaign, and the ability to consider novel arguments as to remedies.



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Methodology

Corrs public M&A database

Corrs has a detailed proprietary public M&A database from which it drew the statistics and trends referred to in this publication. The database covers all announced takeovers and schemes with a deal value over A$25 million from 2011 to 2024. The statistics referred to in this publication provide a limited snapshot of the more detailed information that is available in the database.

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

Methodology

In producing this publication, we reviewed data from a deal sample of 59 takeover bids and schemes of arrangement, which:

- involved an Australian-listed target;
- were announced between 1 October 2023 and 30 September 2024; and
- had a deal value over A$25 million.

We note that when referencing the 'the last 12 months' in this publication, this is a reference to data from deals annouced between 1 October 2023 and 30 September 2024. When referencing the year '2023' in this publication, we have reviewed data from deals announced between 1 October 2022 and 30 September 2023, and similarly for 2021 and 2020.

A full list of all deals in our database this year is set out in Appendix A. Information in relation to these deals is current to 30 September 2024 (unless otherwise specified in this publication).

As at that date, seven schemes and six takeovers from the deal sample were ongoing.

Schemes of arrangement which were genuine restructures or re-domiciliation have been disregarded. Foreign transactions which involved the acquisition of ASX-listed securities have been disregarded (e.g. CHESS depository interests in a US company or transactions governed by or conducted under foreign law).

Where a deal was not recommended by the target board in its initial public response to the transaction, the deal is referred to as 'hostile.' If there is more than one bidder or potential bidder at the same time for the same target in the survey period, we consider the transaction to be 'contested,' irrespective of whether a potential bidder enters into a binding agreement for the target.

We have considered bidders making consecutive bids for the same target as one deal. There were three instances in which a concurrent scheme / takeover transaction was used. In each case, the takeover was structured as being an alternative, which was conditional upon failure of the scheme. For the purposes of this report, we have counted each concurrent scheme / takeover bid as a scheme only. However, where a bidder made separate bids with different structures (i.e. takeover bid followed by a scheme) then we have counted those bids as separate deals.

The information used was largely obtained from our own in-depth research and market analysis, along with primary sources such as ASX announcements, bidder and target statements and scheme booklets.

Appendix A

	Target name	Bidding entity (Parent)	Date announced	Deal value (A$)	Bid/Scheme
1	92 Energy Limited	Atha Energy Corp.	08/12/2023	$72,212,000	Scheme
2	A2B Australia Limited#	ComfortDelGro Corporation Limited	22/12/2023	$181,954,000	Scheme
3	Adbri Limited	CRH ANZ Pty Ltd	27/02/2024	$2,093,579,000	Scheme
4	Advance ZincTek Limited	Ankla Pty Ltd	11/12/2023	$33,666,000	Off-market bid
5	Altium Limited	Renesas Electronics Corporation	15/02/2024	$9,036,988,000	Scheme
6	Alto Metals Limited	Brightstar Resources Limited	01/08/2024	$44,400,000	Scheme
7	Alumina Limited	Alcoa Corporation	12/03/2024	$3,254,292,000	Scheme
8	Ansarada Group Limited	Mermaid EquityCo L.P.	13/02/2024	$236,302,000	Scheme
9	APM Human Services International Limited	Madison Dearborn Partners LLC	03/06/2024	$1,329,914,000	Scheme
10	Auswide Bank Limited	MyState Limited	19/09/2024	$209,296,000	Scheme
11	Azure Minerals Limited*#	Sociedad Quimica y Minera de Chile S.A	26/10/2023	$1,627,347,000	Scheme and off-market bid
12	Azure Minerals Limited*#	Hancock Prospecting Pty Ltd and Sociedad Quimica y Minera de Chile S.A	19/12/2023	$1,697,114,000	Scheme and off-market bid
13	Base Resources Limited	Energy Fuels Inc.	22/04/2024	$352,366,000	Scheme
14	Boral Limited	Seven Group Holdings Limited	19/02/2024	$6,650,252,610	Off-market bid
15	Capitol Health Limited	Integral Diagnostics Limited	18/07/2024	$350,684,000	Scheme
16	CSR Limited#	Compagnie de Saint-Gobain S.A.	26/02/2024	$4,319,320,000	Scheme
17	Dacian Gold Limited	Genesis Minerals Limited	16/10/2023	$344,355,000	Off-market bid
18	Damstra Holdings Limited	Ideagen Limited	29/01/2024	$69,075,000	Scheme
19	Decmil Group Limited	Macmahon Holdings Limited	16/04/2024	$103,977,000	Scheme
20	Dynamic Group Holdings Limited	Australian Meat Industry Superannuation Pty Ltd	26/07/2024	$40,082,000	On-market bid
21	Eureka Group Holdings Limited#	Aspen Group Limited	08/03/2024	$145,853,000	Off-market bid
22	Genex Power Limited*	Electric Power Development Co., Ltd.	12/04/2024	$380,924,000	Scheme and off-market bid
23	GTN Limited	Viburnum Holding Pty Ltd	09/09/2024	$92,990,000	Off-market bid
24	Hotel Property Investments	Charter Hall Retail REIT and Host-Plus Pty Ltd	09/09/2024	$92,990,000	Off-market bid
25	K2fly Limited	Accel-KKR	21/06/2024	$38,020,927	Scheme
26	Latin Resources Limited#	Pilbara Minerals Limited	15/08/2024	$585,599,000	Scheme
27	Link Administration Holdings Limited	Mitsubishi UFJ Trust and Banking Corporation	18/12/2023	$1,192,282,000	Scheme
28	Lithium Power International Limited	Corporación Nacional del Cobre de Chile	18/10/2023	$385,090,000	Scheme
29	MC Mining Limited	Goldway Capital Investment Limited	02/02/2024	$76,178,000	Off-market bid
30	McGrath Limited	RPAA Holdings Pty Ltd	25/03/2024	$96,102,000	Scheme

	Target name	Bidding entity (Parent)	Date announced	Deal value (A$)	Bid/Scheme
31	Metallica Minerals Limited	Diatreme Resources Limited	28/03/2024	$33,242,000	Off-market bid
32	Millennium Services Group Limited	SoftBank Group Corp	22/12/2023	$54,238,000	Scheme
33	MMA Offshore Limited	Cyan MMA Holdings Pty Ltd	25/03/2024	$1,025,945,000	Scheme
34	Namoi Cotton Limited	Louis Dreyfus Holding B.V.	19/01/2024	$104,601,000	Scheme
35	Namoi Cotton Limited	Louis Dreyfus Holding B.V.	30/04/2024	$139,614,000	Off-market bid
36	Namoi Cotton Limited	Olam Agri Australia Pty Ltd	09/05/2024	$153,986,000	Off-market bid
37	Newmark Property REIT#	BWP Management Limited	24/01/2024	$246,855,000	Off-market bid
38	OreCorp Limited	Silvercorp Metals Inc.	27/12/2023	$276,482,000	Off-market bid
39	OreCorp Limited#	Perseus Mining Limited	29/01/2024	$269,910,000	Off-market bid
40	Pacific Smiles Group Limited#	NDC HoldCo Pty Ltd	29/04/2024	$333,864,000	Scheme
41	Pacific Smiles Group Limited	Genesis Capital Manager I Pty Ltd	17/09/2024	$303,206,000	Off-market bid
42	PNX Metals Limited	Patronus Resources Limited	15/04/2024	$35,722,000	Scheme
43	Probiotec Limited	PT Pyridam Farma TBK	22/12/2023	$251,320,000	Scheme
44	Prospa Group Limited	Salter Brothers Tech Fund	27/02/2024	$73,785,000	Scheme
45	PSC Insurance Limited	Ardonagh Group Holdings Limited	08/05/2024	$2,253,991,000	Scheme
46	QANTM Intellectual Property Limited	Adamantem Capital Management Pty Ltd	10/05/2024	$254,472,000	Scheme
47	QV Equities Limited	WAM Leaders Limited	12/03/2024	$217,770,000	Scheme
48	Rex Minerals Limited#	MACH Metals Australia Pty Ltd	08/07/2024	$393,217,000	Scheme
49	Sierra Rutile Holdings Limited	PRM Services LLC	20/03/2024	$40,302,000	Off-market bid
50	Sierra Rutile Holdings Limited	Gemcorp Commodities Assets Holdings Limited	01/07/2024	$67,913,000	Off-market bid
51	Sierra Rutile Holdings Limited	Leonoil Company Limited	22/07/2024	$67,610,000	Off-market bid
52	Sihayo Gold Limited	Provident Aurum Pte. Limited	21/05/2024	$27,460,000	Off-market bid
53	Silver Lake Resources Limited#	Red 5 Limited	04/02/2024	$1,496,969,000	Scheme
54	Southern Cross Gold	Mawson Gold Limited	31/07/2024	$635,029,000	Scheme
55	Symbio Holdings Limited	Aussie Broadband Limited	01/11/2023	$259,100,000	Scheme
56	TASK Group Holdings Limited	PAR Technology Corporation	11/03/2024	$310,008,000	Scheme
57	Tietto Minerals Limited#	Zhaojin Mining Industry Company Limited	30/10/2023	$768,190,000	Off-market bid
58	TPC Consolidated Limited	Beijing Energy Holding Co. Ltd	02/04/2024	$99,477,000	Scheme
59	Volpara Health Technologies Limited	Lunit Inc.	14/12/2023	$292,530,000	Scheme

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

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