2017
M&A YEAR IN REVIEW

A deal survey
with a difference

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Corrs public M&A database at your service – happy to assist with any statistics you need

With our new and punchier format we have not covered all the topics that have been addressed with the same detail as in previous years. However, our underlying analysis has remained as detailed as ever and we have a comprehensive database relating to all takeovers and schemes from 2011 to 2017. Any of the Corrs M&A team would be delighted to assist and respond to specific 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, recommendation, 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 for any queries you may have.

This is a deal survey with a difference

Our review looks beyond statistics to consider what really matters to bidders and targets in doing an M&A deal.

2017 Corrs M&A year in review

Sandy Mak and Adam Foreman, Editors

While 2017 saw only a very modest increase in the number of public M&A deals over the previous year, there were a number of promising signs or "green shoots", which suggest to us that, on the back of a steadily improving global economy, corporates and their boards are starting to regain the confidence to move past the global uncertainties and market volatility that have kept volumes down in recent years, and pull the trigger on strategic and other M&A transactions that have been until now sitting biding time and gathering dust in the bottom drawer.

Firstly, there were a number of what you might call bold or ambitious transactions, whether because of their size, structure or execution, including the eye-watering $33bn bid for Westfield, Downer EDI's $1.2bn off-market takeover for Spotless, announced at the same time as an accelerated entitlement offer to fund the bid along with the acquisition of a 15% stake after-market, and CBS's surprise entry into the Australian media market with its acquisition of the Ten Network out of insolvency from underneath the noses of established media players Lachlan Murdoch and Bruce Gordon.

Second, Downer EDI wasn't the only one to execute a market raid last year, with raids on Westfield, Propertylink, Santos, WorleyParsons, Myer, and Tatts Group, suggesting companies are more prepared to take risks to further their strategic goals.

Thirdly, we saw an increasing number of targets the subject of competing proposals, including AWE Ltd, Asia Pacific Data Centre Group and SMS Management & Technology, with a willingness to participate in a public bidding war a good sign of confidence.

And finally, we saw a marked and continued uptick in activity throughout the year, as confidence appeared to build momentum, with December alone accounting for 17% of deals by number - a trend that looks like it will continue through the remainder of 2018, with 10 public deals already announced this year.

The report highlights a range of intriguing findings, with some trends staying constant, but others surprising us, and provides a great opportunity to reflect on public M&A last year.

We hope you enjoy this year's review and as always if you would like more detailed information on any specific aspects of our review or the underlying data we would be delighted to assist.

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2017: The year of the Trump bump

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2017 The year of the Trump bump

Russell Phillip

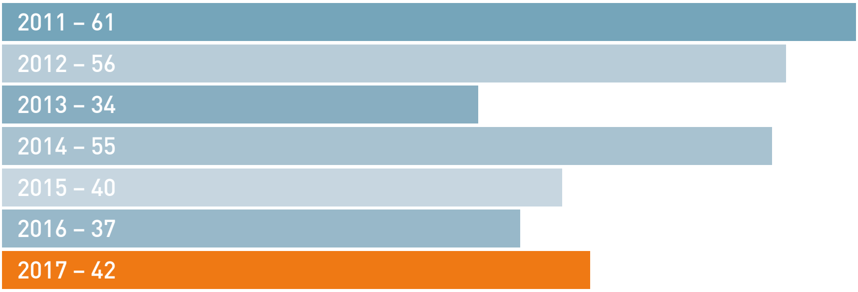
Whether you like him or not, Donald Trump's US presidential win has coincided with a prolonged upward march in global equity markets.

Following Trump's election win in November 2016, a weak global economic outlook suddenly turned quite rosy, with investors taking a "glass half full" approach on expectations of tax cuts, infrastructure spending and reduced business regulation.

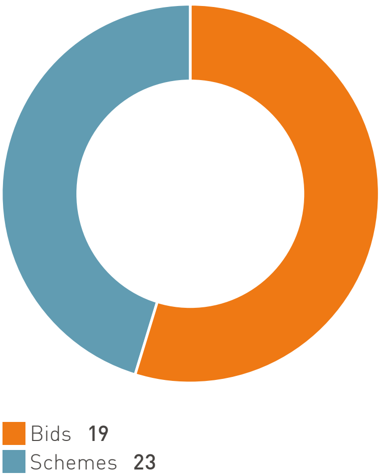
Despite the positive investor sentiment, we still experienced a relatively conservative approach to growth by way of public M&A in Australian markets, with the level of activity increasing only slightly from what we saw in 2016 (which was one of the quietest public M&A markets we have seen since starting this review).

However, with 17% (by volume) of the deals in our sample announced during December, including the $33 billion acquisition of the Westfield shopping centres (the largest ever Australian M&A deal and one of the biggest global deals of 2017), the level of public M&A activity looks to be on the rise in 2018.

Total deals above $25 million



Breakdown of deal type



Our review also showed:

- The **continued broadening out of public M&A activity** across a range of industry sectors. Whilst resource sector deals[1] continued to represent the largest proportion of our sample (by volume) in 2017 at 23.8%, the average value of those deals was significantly lower than in other sectors. For example, the software & services industry represented 16.7% (by volume) of our sample but had average deal values that were significantly higher than what we saw in the resources sector. The real estate sector also continued to see significant activity.
- The **average deal value of our sample was $1.3 billion** up by around 40% from 2016 levels, but this was significantly distorted by the impact of the Westfield transaction.

1 "Resource sector" excludes the energy sector, which represented 10% (by volume of our deal sample) and experienced significantly higher average deal values than the resources sector.

Excluding Westfield, the average deal value was only $420 million, a drop in average deal values by around 47% from 2016 levels.

- **Foreign bidders were once again active** in Australian public M&A markets, representing almost half of all bidders in our deal sample. We also saw a normalisation in the average premium paid by foreign bidders (being 36%), down from the high average premium of almost 69% that foreign bidders paid during 2016. The average premium paid by Australian bidders was quite low by historical control premium standards, at only 24.6% (this may have been affected by the increase in the number of deals in the real estate sector – 7 in 2017 compared to 2 in 2016 – where the premium offered tends to be much lower than for other industry sectors). Chinese/Hong Kong bidders were again noticeably quiet in 2017, with only two deals involving PRC bidders.

  Our deal sample identified four bidders headquartered in Western Europe, which is more than we have seen in recent years. France alone accounted for 3 of these deals and a whopping $33.9 billion by value, including the Unibail-Rodamco SE bid for Westfield, which is by far the largest contribution from this jurisdiction we have seen, and a sign of the broader resurgence in European deal activity last year.

- **Cash continued to be the most common form of consideration** offered during 2017, with 64.3% of deals in our sample offering "cash only" consideration compared to only 14.3% offering "scrip only" consideration. Debt funding was again prevalent in 2017, comprising some 40.5% of the deals surveyed that offered some form of cash consideration. Franked dividends continue to be used as a mechanism to bridge value gaps, with 8 of the deals in our sample involving the payment of a dividend to target shareholders. One of these deals (the DUET acquisition) involved the introduction of a dividend as a sweetener after the deal was first announced. Activist investors have been known to acquire stakes in targets with a view to agitating for a franked dividend, although we saw last year that this strategy will not always work, when Sandon Capital publicly pressed the Warrnambool Cheese & Butter board to declare a franked dividend in connection with Saputo's takeover, but was not ultimately successful, which was possibly a result of the practical difficulties involved in structuring such a proposal in the context of an off-market bid.

- Perhaps one of the more interesting statistics we saw this year is that **23.3% of all deals in our sample (excluding those that were ongoing at year end) were unsuccessful**. This compares with a failure rate of only 14% of deals in 2016, and is indicative of greater opportunistic activity by potential acquirers in seeking to execute public M&A deals, as well as tight competition for attractive targets. Targets that attracted two or more public bids included AWE Ltd, Asia Pacific Data Centre Group and SMS Management & Technology.

Beyond cash and scrip: Central Petroleum and contingent consideration

Sandy Mak

Estimating the value of exploration-stage mining assets of a target company is always a gamble. Last year, faced with a target board determined to give its shareholders exposure to potential future upside on its exploration assets, Macquarie Group obtained a board recommendation from Central Petroleum by offering shareholders contingent consideration in the form of a "contingent value note" (**CVN**).

After its initial 17.5 cent all-cash offer was rejected by the Central Petroleum board, Macquarie increased the consideration on offer to 20 cents plus one CVN per Central share. The CVNs allowed shareholders to get exposure to "exploration upside" in certain Central Petroleum exploration assets and came with a potential cash payment of up to 19.6 cents per share. The final value of the CVNs would be based on the volume of recoverable resources of those assets four years after the implementation date of the scheme.

Examples of contingent consideration being offered in deals are rare, but it is one option for bidders looking to make an attractive offer to shareholders where the value of a target company's assets depend on future matters.

Corrs acted for Macquarie on the Central Petroleum transaction.

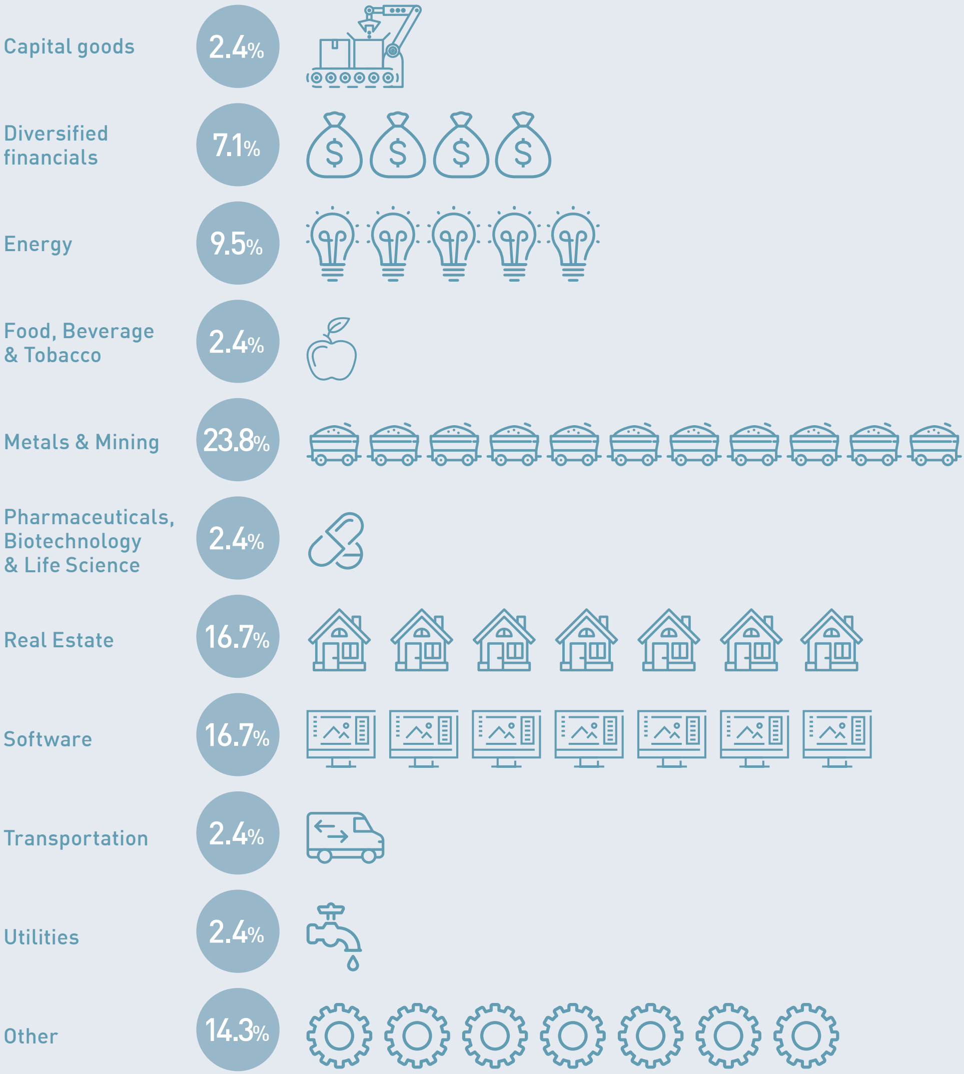
The resource industry - primed for better years ahead

Despite experiencing several years of negative investor sentiment, the resources sector remained the most active industry sector for public M&A activity in Australia. Deals in metals and mining represented 23.8% (by volume) of our deal sample (up from 18.9% in 2016), with deals in the energy sector comprising an additional 9.5% of the sample (up significantly from 2.7% in 2016). Average deal values in the resource sector also improved (up to $86.8 million from $73.8 million in 2016) with average deal values in the energy sector of $278 million (up from $35 million in 2016). However, average deal values in these sectors was still substantially lower than the average deal value outside of these sectors (excluding the Westfield deal) of around $480 million.

Encouragingly, our results showed activity in a much wider range of commodities. Unlike previous years, deals in the gold sector made up only 18% of all resource sector deals in 2017, which was the same number of deals that we saw in the copper, iron ore and silver sectors. The largest transaction in the resources sector was in copper, where two shareholders of Finders Resources have teamed up to make an unsolicited play for the company. As predicted in 2016, we have seen increased interest in battery focussed commodities, with the second largest transaction in the sector being the acquisition of cobalt company Cobalt One by Canadian company First Cobalt Corp.

The energy sector looks like one to watch in 2018, with three bidders now vying for the hand of AWE. Other deals in the sector included plays for Central Petroleum, Molopo Energy and Pan Pacific Petroleum. There were also some substantial private deals in the sector, including Origin Energy's $1.6 billion sale of its conventional upstream oil and gas business Lattice Energy to Beach Energy. Following the carnage caused by decade low oil prices, there are relatively few independent energy companies left that are listed on the ASX.

Deals by target industry sector



New technology versus old technology

Outside of the resources and energy sectors, public M&A activity during 2016 was well spread across a range of industry sectors, although the rise in deal values in the software services sector was noticeable:

- Whilst not the largest deal in our sample, **Oracle's $1.6 billion acquisition of Australian construction software company Aconex** (at a 46% premium to the last traded price and a 64% premium to the 3 month VWAP) shows just how far Australia's information technology sector has come. Other large deals in the sector included the acquisition of Asia Pacific Data Centre Group (following a competitive bidding process), the merger of Touchcorp and Afterpay, Japanese group ASG's acquisition of IT firm SMS Management & Technology, as well as Equinix's $1 billion private acquisition of Australian data centre provider Metronode.
- The $33 billion takeout of shopping centre group Westfield (announced in December 2017) is the **largest takeout of an Australian company by a foreign based acquirer** since SABMiller's near $13 billion acquisition of Fosters in 2011. Outside of Wesfield, Hong Kong based Cheung Kong Infrastructure's $7.5 billion takeover of DUET Group in the utilities sector was the next largest deal of 2017, with the 3 other "mega" deals (deals above $1b) being in the software & services sectors (Aconex ~$1.6b, Spotless ~$1.3b and Mantra Group ~$1.2b). The Australian Competition Tribunal finally approved the $7 billion Tabcorp / Tatts Group merger, which was the second largest deal announced in 2016.
- **Australian engineering firms continued to attract attention** with unsolicited bids being made for Spotless ($1.3b) by Downer EDI (which was ultimately successful) and Macmahon Holdings ($178 million) by Spanish-led construction group CIMIC (which was ultimately unsuccessful). Programmed Maintenance was also acquired by Japan's Persol group during 2017 for approximately $778 million.
- The **agricultural sector continues to attract investor interest**, although there appear to be relatively few publicly listed targets left. One of the larger deals in the sector was Canadian dairy giant Saputo's acquisition of the minority shares it did not already own in Warrnambool Cheese & Butter Factory valuing it at $700 million. Other noticeable transactions during the year included privately owned Craig Mostyn Group's partial buy-out of family-owned beef and lamb processor, V&V Walsh.
- Whilst not reflected in our deal sample, we again saw a **large number of private M&A deals complete in 2017** which probably accounts for the relatively buoyant mood of investment bankers and M&A lawyers during the year. Larger private M&A deals during 2017 included the New South Wales government's sale of a majority stake in Endeavour Energy (~$7.6b), TPG Capital's sale of Alinta Holdings (~$4b), CBA's sale of its life insurance operations to AIA ($3.8b), ANZ's sale of its life insurance business to Zurich ($2.85b), Rio Tinto's divestment of Coal & Allied Industries (~$2.7b) and Wesfarmers' sale of its Curragh coal mine ($700m).

CBS takeover by DOCA of Ten Network

Adam Foreman and James North

The acquisition by CBS Corporation of 100% of the shares in Ten Network Holdings was one of the more notable and contentious take-privates of 2017. It was a novel transaction because it effectively involved a takeover of a listed entity without compliance with the usual procedures in Chapter 6 (which would ordinarily require a takeover bid or scheme of arrangement) because it was implemented by way of a Deed of Company Arrangement (DOCA) and associated relief from ASIC. This is only the third time we are aware of that a takeover has been implemented using this approach.

Following the appointment of voluntary administrators in June 2017, CBS (which was Ten's largest creditor at the time) put forward a proposal as part of a competitive bidding process to acquire the company. Under its proposal, CBS would compulsorily acquire all of the shares in Ten for nil consideration under a DOCA, pursuant to section 444GA of the Corporations Act (which confers on an administrator the power to transfer shares in a company in circumstances where the administrator has obtained either the consent of the shareholders or leave of the Court).

Strategically, it was important for CBS to obtain the support of the Ten employees for its bid, with Ten employees representing a majority by number of Ten's creditors (and CBS representing a majority by value). CBS spent a considerable amount of time engaging with employees in order to gain their support. Obtaining FIRB approval (which was received unconditionally) was also a key factor for CBS, given that News Corp commenced a media campaign to discredit the CBS bid as a foreign takeover of an Australian media asset.

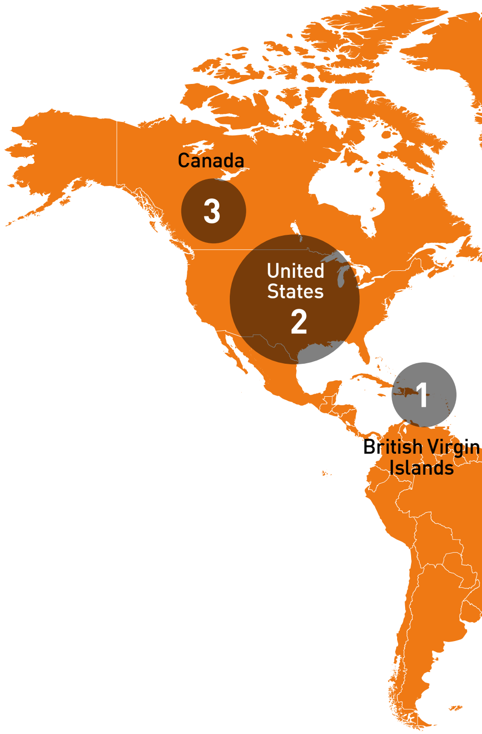
The deal was complicated by opposition from Lachlan Murdoch and Bruce Gordon, both of whom were significant shareholders in Ten. Through their private companies (being Illyria and Birketu), Murdoch and Gordon put forward a rival proposal to that of CBS, which would see existing shareholders retain approximately 25% of their current holding, and under which Ten would remain listed on ASX. Due to the delay in changes to media ownership laws, the rival bidders had to structure their bid in a manner that complied with the existing laws, which created uncertainty for their bid. Ultimately, Ten's creditors elected not to proceed with Illyria's and Birketu's revised proposal, deciding instead to execute the DOCA with CBS (a decision effectively carried by CBS and its employees).

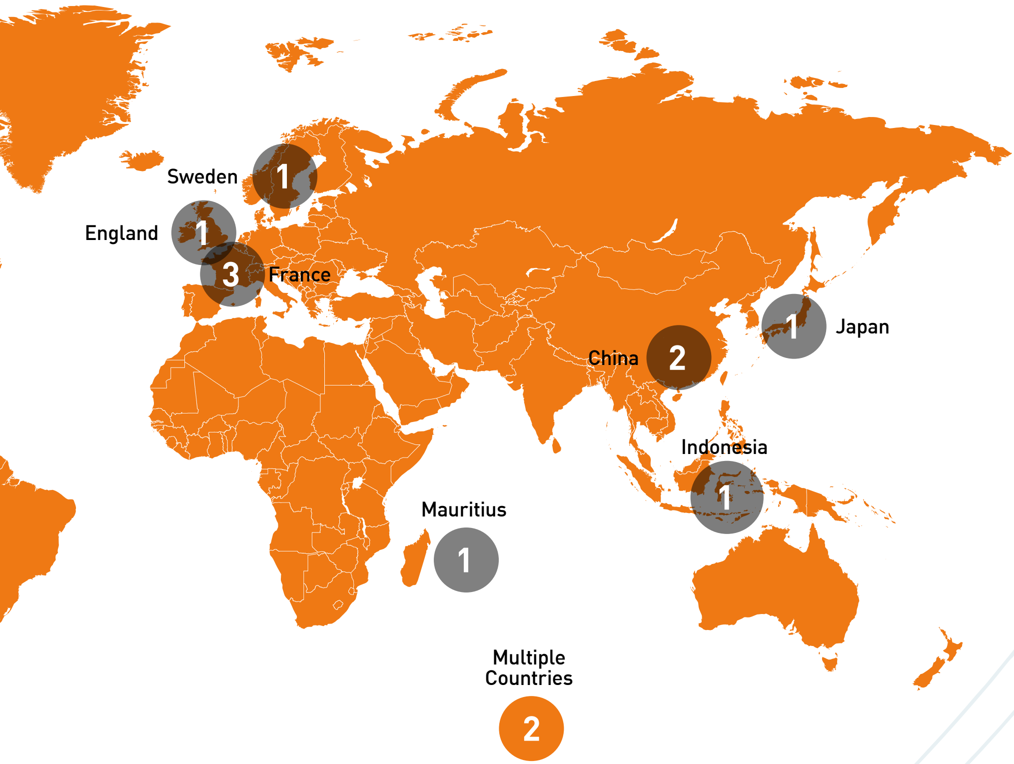
In order to grant leave under section 444GA for all issued Ten shares to be transferred to CBS, the Court needed to be satisfied that the transfer would not be unfairly prejudicial to the interests of the company's members. ASIC has in previous cases been willing to grant relief facilitating an acquisition where the Court makes this determination and an expert's report has been obtained which supports this conclusion and which is disclosed to shareholders. As in previous cases, the Court was prepared in this case to find there was no unfair prejudice, on the basis that there was no residual equity left for shareholders. An independent expert's report was prepared by KPMG in accordance with ASIC's requirements that valued Ten on both a "going concern" and "distressed" basis, concluding in both scenarios that the equity value was nil. ASIC also granted the required relief.

In this case, an interesting argument was put to the Court, which was that the existence of an alternative proposal under which shareholders would retain at least some equity in the company was relevant to the question of whether there was any value left in the equity and shareholders were being unfairly prejudiced. However, the Court did not accept this argument, deciding that the existence of the alternative proposal did not support any finding of unfair prejudice. In particular, the Court highlighted that the alternative proposal was not presently capable of implementation, given that creditors had instead voted to support the CBS DOCA.

Corrs acted for CBS on all aspects of the transaction including the applications for ASIC relief and orders from the Court enabling the transaction to proceed.

Foreign bidders by location




Sweden
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Tails will wag on the Belt and Road

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Tails will wag on the Belt and Road

Andrew Lumsden and Lizzie Knight

As Chinese authorities strengthened their scrutiny of Chinese outbound investment, Chinese deal making activity slipped in 2017 by nearly a third with Asia Pacific outbound transactions nearly halving.

Despite the slowdown, mergers and acquisitions by Chinese companies along the Belt and Road initiative soared to USD33 billion of investment by the third quarter of last year.

In this the year of the dog – a year of caution and prudence – in general we expect a cautious recovery of Chinese outbound investment, with a tail that will wag for targets on the Belt and Road.

Deposits payable upfront by Chinese bidders will continue to be the norm.

Exuberance reined in

As predicted in our 2016 M&A Review, efforts to stabilise the yuan saw a heightened scrutiny of Chinese outbound investment by Chinese authorities resulting in a reduction of deal making by Chinese investors and lengthy approval times for outbound deals.

The Chinese government said in August it would introduce restrictions on Chinese private companies making overseas investments in areas including real estate and entertainment to curb "irrational buying". In particular, regulators tightened approvals reviewing deal agreements in considerable detail and requiring lenders to assess their exposure to offshore acquisitions by several large companies which have been active in overseas acquisitions including Dalian Wanda and the Fosun Group. These three companies between them had spent a record US$220 billion in overseas assets acquiring landmark properties, from movie studios to European football clubs.

The scrutiny and review by lenders has seen Dalian Wanda sell its stake in UK flagship property One Nine Elms, its projects in Australia – Goldfields and Jewel resort projects – and a US$1.2bn stake in its listed films unit to Alibaba.

As predicted in our 2016 M&A Review, the perception of increased regulatory risk (including capital outflows) meant successful Chinese investors needed to demonstrate a high degree of credibility with sellers and provide clarity on funding.

Consistent with Australian market practice from 2013 (see our article Reverse break fees payable upfront – The new name of the PRC M&A Game). European deal makers wary about the clamp down on capital outflows increasingly asked for the payment of upfront deposits in 2017 including:

- CC Land put down a US$52.7 million deposit for its £1.15 billion acquisition of the Cheesegrater skyscraper in London.
- Zhengzhou Coal Mining Machinery a US$64 million deposit for the acquisition of Robert Bosch's starters and generators business for 10 times as much.
- China's ZTE paid a US$10 million deposit before its acquisition of a 48 percent shareholding in Turkey's Netas Telekomunikasyon for US$101 million.

Belt and Road Initiative – investment soars

The increased scrutiny by Chinese authorities of outbound deals, has not impacted on mergers and acquisitions in countries along the Belt and Road Initiative which soared in 2017.

Unveiled in 2013, the Belt and Road Initiative is aimed at building a modern-day Silk Road of connectivity and trade by land and sea (see our article China's One Belt One Road – A new opportunity for Australian expertise). In 2017, President Xi Jinping committed US$124 billion to the Belt and Road Initiative, strong support that investments in the Belt and Road Initiative are strategic and not exuberant. Indeed at 19th National Congress President Xi Jinping confirmed that the Belt and Road Initiative is crucial to China's "opening-up".

Consistent with this state endorsement, anecdotally, Chinese companies enjoy a relatively smooth approvals process for deals along the Belt and Road. In support of this, China's foreign exchange regulator – the State Administration of Foreign Exchange – stated that Chinese companies would be encouraged to participate in the Belt and Road activities.

Chinese companies' buying spree in the logistics industry, bolstered by the Belt and Road Initiative, is gathering pace, with both the number of deals and the value of those deals hitting a new record in 2017 – with the aggregate amount of Chinese firms' M&A in logistics reaching US$32.2 billion through mid-December of 2017, more than double the US$12.9 billion seen in all of 2016.

Deals have included:

- **Global Logistics Properties** – A private equity consortium of Hopu Investment Management, Hillhouse Capital Group, Vanke Group and the financial service investment arm of Bank of China was backed by GLP CEO Ming Mei in its US$11.6 billion acquisition of GLP marking Asia's largest private equity buyout. GLP is Asia's biggest warehouse operator and boasts a US$41 billion portfolio of assets spread across China, Japan, Brazil and the United States.

- **Logicor** – China Investment Corp acquired European logistics company Logicor for US$13.8 billion representing the largest-ever European real estate deal in terms of transaction value and the fourth-largest Chinese foreign acquisition to date.
- **Alibaba Group** – Invested US$1 billion in June to raise its stake in Southeast Asian online retailer Lazada Group, a move to further expand its global footprint in overseas markets. Launched in 2012, Lazada helps more than 135,000 local and international sellers as well as 3,000 brands serving the 560 million consumers in the region.
- **Cargo drones** – On 1 February Everpine announced its acquisition of a controlling stake in Distar Air – a Czech company that designs Samba light aircraft. Everpine intends to covert the two seat Samba light aircraft into drones capable of reaching the Xinjiang province, with the cost of running these cargo-drones the same as running a truck.

What does it mean for Australia?

The Belt and Road Initiative is all about trade and connectedness and as you may recall, in May 2016, President Xi Jinping included Australia on the Belt and Road map.

In 2018, we expect to see a cautious recovery of Chinese outbound investment with a particular focus on assets and industries which support the Belt and Road Initiative. As commerce increases the resulting benefit of rising demand for goods will be a focus on logistics facilities and management. The acquisitions by non-Chinese investors including the $1.05 billion bid by US Equinix of Metronode and the $200 million acquisition of a logistics portfolio by Singapore's ARA Asset Management shows the recognition by investors of the likely importance of these assets this year.

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Planning for success: Recommendations and strategic stakes

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Planning for success: Recommendations and strategic stakes

Sandy Mak, Adam Foreman & Tatiana Stein

For several years we have been saying that a lack of a board recommendation almost guarantees failure in all deals and that recommended schemes are almost always guaranteed success. So this year, we were a little surprised by our statistics.

After three years of no deals in our sample being successful without a recommendation – our survey results show that two (out of six) non-recommended bids in 2017 fell into our "successful" deal category. When it came to schemes, there was a significantly lower success rate than previous years, with only 80% of recommended schemes proceeding to implementation.

Of course, the statistics tell only part of the story. When we looked beyond the numbers, it became apparent that our advice did not need to change. The outcome in many cases was the result of the specific circumstances.

While, as we saw in 2017, a recommendation will not protect a bidder against all contingencies, target recommendations are still key to securing a successful outcome, particularly where the bidder is looking to acquire 100%.

Target recommendations – still one of the keys to success

Keeping things friendly

When it comes to board recommendations it is really the end game that bidders need to have in mind. Our survey results from previous years have shown that a failure to secure a final target board recommendation virtually assures an unsuccessful outcome. From 2014-2016, there was not a single deal in our survey sample that was successful without a target board recommendation.

This year, our statistics told a different story. Of those deals with results known at the time of writing, 6 failed to get a final positive recommendation from the target board – 5 takeover bids and 1 scheme. Of these, 2 out of the 5 takeover bids fell into our "successful" bid category – being bids with actual acceptances from target shareholders and where all offer conditions are either fulfilled or waived.

If our statistics were taken at face value, this would mean that there was a 33% success rate for non-recommended deals (2 deals in total). Given that there were no "successful" non-recommended deals in the previous 3 years, we delved deeper into the statistics.

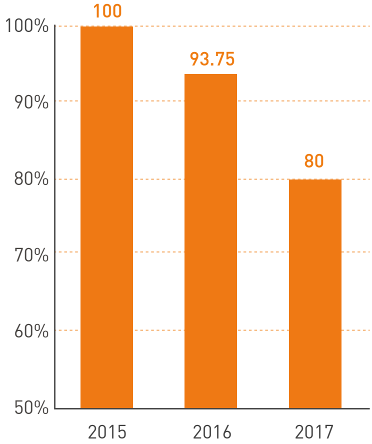
The explanation, unsurprisingly for us lawyers, lay in the definitions. Pinnacle Ethical Investment Holdings' off market takeover bid for Hunter Hall, while technically "successful" (based on this survey's definition of success which includes unconditional takeover bids which have closed), resulted in Pinnacle acquiring a mere 0.8% interest in Hunter Hall in the context of a competitive bid process where a rival bidder managed to acquire a considerably greater interest of approximately 46.3%. By most standards, this would have been a spectacularly unsuccessful outcome.

The second deal (rightfully) falling into our successful non-recommended deal category is the on-market bid by Brand Acquisition Co for PAS Group, which saw Brand Acquisition Co increase its stake in PAS Group to 64.98%. Although this deal was a success, Brand Acquisition Co already held a 48.56% stake in PAS Group at the outset of the offer, so the final outcome only represents an increase in its shareholding of around 16%.

Having said that, there was probably one other deal on the other side of the ledger that should have been categorized as a successful "non-recommended" deal, which was Downer's bid for Spotless, given that the board still recommended that shareholders reject until after Downer acquired 67% and control.

Still, when we compare non-recommended bids to the results for recommended bidders, the value of a board recommendation becomes clear. Not only were 100% of recommended takeover bids successful in 2017, but of the 9 successful recommended deals, 6 bidders achieved 100% and bidders in the remaining 3 deals increased their shareholding in the target by 40.63%, 47.33% and 67.81% respectively (ie significantly more than the 16% increase achieved by Brand Acquisition Co).

Target recommendations: not quite a "done deal"



Schemes are target driven processes and by their nature will almost always be recommended by the target board. Of the 22 schemes announced in 2017 with results known at the time of writing, all but one managed to secure a final recommendation from the target board. The exception was DWS' bid for SMS Management & Technology where the board changed its initial recommendation following the emergence of a superior proposal by ASG Group, which was offering 11% more per share than the implied value of DWS' bid. In the circumstances, DWS declined to exercise its matching right and the ASG scheme was ultimately successful.

While 100% of recommended bids were successful in 2017, schemes did not fare as well – with only 80% of recommended schemes ultimately achieving a successful outcome. The success rate for recommended schemes in 2017 is lower than in previous years – with 93.75% of recommended schemes achieving a successful outcome in 2016 and 100% in 2015.

The three recommended schemes that were unsuccessful in 2017 despite obtaining a final positive recommendation all failed for very different reasons:

- **Vocal dissident shareholders** - Macquarie's bid for Central Petroleum was voted down by shareholders following two small groups of shareholders campaigning against the scheme. One of the groups of shareholders also forced an adjournment of the scheme meeting by requisitioning a shareholders meeting to vote on a resolution to replace the directors of Central. Central had to update its scheme disclosure material in light of the new developments and give shareholders additional time ahead of the scheme vote to consider the new material. Although the vote was close, in the end, only 67.2% of votes cast were in favour of the scheme, about 8% shy of the 75% threshold.
- **Material adverse change in Tanzanian law** - The Denham Capital-backed offer by Tremont Investments to acquire Cradle Resources was terminated as a result of proposed changes to Tanzanian law that were announced while the scheme was on foot. It appears that the proposed changes triggered a "Material Adverse

Change" condition in the scheme implementation agreement, with Cradle conceding in its announcement of the failed deal that if the proposed changes to Tanzanian law were passed without significant amendment, its primary asset, being the Panda Hill nobium project in Tanzania, would be likely to be adversely affected. This example is a reminder of the benefit of being clear and specific in drafting Material Adverse Change conditions as the clause in this case specifically refers to proposed changes in law affecting the relevant mining project. The Takeovers Panel has previously indicated in cases involving Flinders Mines and NGM Resources that it may be unacceptable for parties to rely on Material Adverse Change conditions where they have been too broadly drafted and/or it is not clear that the trigger was intended to be captured.

- **Blocked by bidder shareholders** - Stratex International's reverse takeover of Crusader Resources was blocked by Stratex International shareholders who requisitioned an EGM at which a resolution was passed to terminate the proposed scheme. While the deal required the approval of Stratex shareholders in any event, the requisition was made to hold a meeting to terminate the transaction in advance of the already scheduled Stratex meeting. The shareholders who requisitioned the meeting of the AIM-listed bidder held an aggregated 24 per cent stake in Stratex. The scheme was terminated just weeks before the scheme meeting was due to be held according to the indicative timeline. The transaction highlights the risks associated with a structure that allows bidder shareholders an opportunity to vote and thereby contradict the views of the board in determining to proceed with the transaction. The example is timely given that the ASX only just amended at the end of 2017 its rules so that listed bidders undertaking a reverse takeover of another listed entity are no longer exempt from the requirement to get securityholder approval. We are therefore more likely to see bidders put in this position in the future.

The Cradle and Crusader deals are examples of the many circumstances where the presence or absence of a target recommendation has no bearing on the outcome of the deal at all – if a bidder vote is required the target recommendation will not be particularly relevant and a positive recommendation is certainly no match for a change in Tanzanian law.

Shareholders reject Central recommendation

The Central Petroleum scheme merits further discussion as a case study where the retail shareholders chose, unusually, to disregard the recommendation of their board of directors. The case also illustrates the power of social media in influencing shareholders' views on value and the challenges that bidders and targets face when seeking to respond in a timely fashion to external commentary on the transaction, in circumstances where all material communications to scheme shareholders must be approved by a court.

In that case, oil and gas explorer and producer Central Petroleum's board of directors initially rejected a proposal from a Macquarie Group entity at 17.5 cents per share, but eventually recommended the transaction when Macquarie offered 20 cents a share plus a novel contingent value note (see page 10) to enable Central Petroleum shareholders to share in the potential upside of certain exploration assets.

Notwithstanding the board's recommendation and the opinion from the independent expert that the transaction was fair and reasonable and in the best interest of shareholders, two separate groups of shareholders mounted challenges to the transaction and issued communications to shareholders seeking to oust the incumbent board. Commentary on the transaction and its merits was also rife on investor chat sites such as "Hot Copper".

Ultimately, after a number of extensions to the timetable to enable supplemental disclosures to be made to shareholders, the scheme was voted down by a narrow margin but the board spill was unsuccessful.

It is possible the result may have been influenced by the level of voter turn-out which was relatively low at around 64% (average is around 70%). Voter turn-out can be extremely important in overcoming a vocal minority that is opposed to a scheme. For example, Vocus was able to get its deal with Amcom approved despite TPG voting its 19.99% stake against the deal by employing a comprehensive proxy solicitation campaign which saw an unprecedented turn-out at the meeting of around 88%.

The transaction underscores the importance of not underestimating investor sentiment – which may not always be economically rational - and also illustrates some of the practical difficulties for target companies undertaking a scheme of arrangement, where their ability to respond quickly to unverified commentary on a transaction can be hampered by the requirement to have all communications to shareholders approved by the court.

Corrs acted for Macquarie on the Central Petroleum scheme of arrangement.

Non-binding approach announcements on the rise

Binding transaction announcement	**59.50%**
Non-binding approach announcement	**40.50%**

In 2017 we saw an increase in the number of deals where a non-binding, preliminary proposal was disclosed in respect of the deal (an "approach announcement") before any binding bid or arrangement between the target and bidder was announced. In the last year, an approach announcement was made in 40.5% of deals, up from only 24% of deals in 2016 and 27.5% of deals in 2015. In fact, this is the highest rate of approach announcements we have seen since we began collecting this kind of data in 2011.

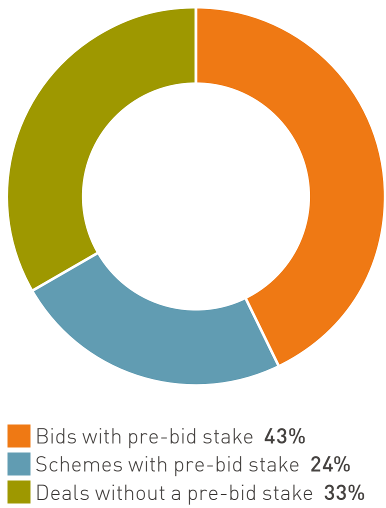
Target companies' motivations for making approach announcements are often unclear. But in a year with almost twice as many rival bids as in 2016, the increase in approach announcements may be the result of attempts by target companies to try to take advantage of a more competitive public M&A environment and generate a competitive auction process. In some cases, the decision to make an approach announcement is due to the target board taking a conservative approach to disclosure obligations, but often the decision is strategic and is used, for example, in an effort to flush out rival bidders.

Consistent with previous years, the majority of approach announcements in 2017 were made by the target (14 out of 17 announcements). Two announcements were made jointly in the context of the inter-conditional Afterpay Holdings and Touchcorp schemes. The remaining approach announcement was made by First Cobalt Corp (a bidder) on the TSX Venture Exchange in the context of its bid for Cobalt One. Given that the announcement was made on First Cobalt's home exchange, it may have been compelled to make the announcement under Canadian law, rather than for strategic reasons.

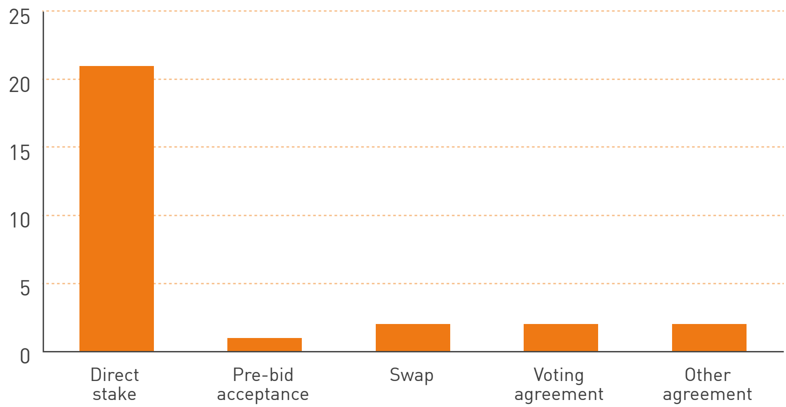
However, target companies are not the only entities to use the disclosure of approach announcements tactically. Bidders will sometimes release their own offer letters in an effort to apply pressure on target boards to engage with them (sometimes called a "bear hug" announcement). When Propertylink Group announced that it had rejected a joint proposal from Centuria Capital Group and Centuria Industrial REIT, Centuria reacted by issuing a 14 page announcement outlining the history of the engagement between the parties and releasing a copy of the approach letter to the market.

A similar tactic was employed by China Energy Reserve and Chemical Group (CERCG) in relation to its unsolicited takeover bid for AWE Limited. The approach by CERCG was made while AWE's share purchase plan was on foot, thus prompting disclosure of the approach by AWE. CERCG then wrote to ASX requesting that ASX release the full terms of its proposal to the market "in the interests if a fully informed market". As an interesting post-script, CERCG subsequently issued a formal apology in a national newspaper to investment bank RBC for questioning, in CERCG's written proposal, the independence of RBC's research on AWE due to RBC's involvement as lead manager and underwriter of AWE's recent capital raising – an apology which would, presumably, not have been necessary had CERCG not "outed" its own offer letter.

Deals beginning with a pre-bid stake



Different forms of pre-bid stake



Continued popularity of equity swaps to build stakes

We are seeing a continuing trend towards bidders taking a pre-bid stake with 67% of bidders commencing with a pre-bid stake in 2017 compared with 59% in 2016 and 47% in 2015. In 2017 pre-bid stakes took a number of different forms, including equity swaps, pre-bid acceptance agreements and voting agreements.

It was notable that we continued to see in 2017 the use of equity swaps to build strategic stakes in listed companies. Examples last year included:

- ESR entering into a physically settled equity swap (conditional on FIRB approval) to enable it to acquire an economic stake in two listed REITs – Propertylink Group and Centuria Capital – in circumstances where FIRB capped the direct interest it could acquire in those entities at 10%
- Bruce Gordon's regional television broadcaster WIN Corporation building his economic interest in its metropolitan counterpart the Nine Network to 19.99% using an equity swap – which is above the 15% it is capped at under the applicable media ownership regulations

While swaps are often used because of the flexibility they offer parties, care needs to be taken in determining the terms and disclosing the relevant arrangements, particularly in the context of a control transaction.

This was highlighted last year when the Takeovers Panel was asked to consider the correctness of statements regarding Coltrane Asset Management's swap exposure in Spotless during the course of its takeover by Downer EDI. The Panel found that statements to the effect that Coltrane had a relevant interest in the same percentage of shares as its physically settled swap exposure, being 10.64%, were inaccurate and misleading because the extent to which the counterparty had in fact hedged by holding shares was not known. Accordingly, it was more correct to say that its relevant interest was "up to" 10.64%, noting that the interest would vary depending upon the extent to which the exposure was hedged by the counterparty. A similar issue was raised in relation to GPT's disclosure of its swap in Commonwealth Office Properties Trust in 2013.

However, the Panel and ASIC went further this time, and suggested that if a target is going to restate and rely upon a statement of shareholder's interest, it has an obligation in these circumstances to take reasonable steps to verify the correctness of the statement, particularly where the stake is likely to be important to the outcome of the takeover.

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The Race to the finish: Bid conditions & the end game

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The Race to the finish: Bid conditions & the end game

James Morley, Jonathan Farrer & Clementyne Rawlyk

An enhanced competitive landscape and weaker initial bid premiums saw a greater number of bidders increase their bid price in 2017. However, in return bidders sought more bang for their buck – with more takeovers than prior years imposing a 90% minimum acceptance condition.

There was also an increase in Takeovers Panel applications (often from rival bidders), which also reflected the increase in competition. While bidders continued to protect themselves through the use of material adverse change conditions, the use of institutional acceptance facilities and price ratchets was again low in 2017.

Rise in price increases

This year, bidders increased their offer price after the deal became public in 21.5% of deals (9 out of 42 deals). This is significantly higher than the number of price increases in 2016 (14%).

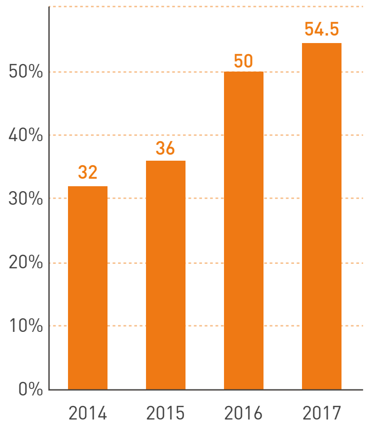
This could be due to a number of factors, including:

- the increase in competitive transactions in 2017 meant many bidders needed to increase their price to stay in the game. Seven targets in our survey were the subject of multiple bids (compared to only two targets in 2016).
- the initial premium offered by bidders in 2017 was lower than in 2016 (27.9% compared to 35%), meaning price increases were coming from a lower starting point.
- seven of the nine deals which involved a price increase were not initially recommended by the target board. In four of these cases, the target board changed their initial recommendation specifically as a result of the price increase.

Minimum Acceptance Conditions

68.7% of off-market takeover bids had a minimum acceptance condition, which is relatively consistent with previous years.

The use of a 90% minimum acceptance threshold continues to rise year on year, up from 32% of bids in 2014 to 54.5% of bids last year.



Percentage of minimum acceptance conditions set at 90%

By contrast, the use of a 50% / 50.1% minimum acceptance threshold decreased significantly from 50% in 2016 to just 36.3% in 2017.

However, 67% of bidders with a 90% minimum acceptance condition waived that condition and each one successfully proceeded to compulsory acquisition of the target. The average percentage held by these bidders at the time of waiver was 73%. As we would expect, this suggests that waiving a 90% minimum acceptance condition is often necessary to attract sufficient acceptances to reach the compulsory acquisition threshold. That said, one other deal successfully completed in 2017 without the bidder waiving their 90% minimum acceptance threshold.[2]

2 At the time of writing, the remaining deal which imposed a 90% minimum acceptance condition was still ongoing.

Material Adverse Change conditions still a frequent feature of deals

76% of announced bids and schemes in 2017 were subject to a condition that no material adverse change (MAC) occur in respect of the target. This is similar to the 2016 results (where a MAC was used in 73% of deals) and consistent with previous years where this figure generally has hovered around 80%.

Targets were able to successfully negotiate a number of varied exclusions and carve outs from MAC conditions. For example, there were increased instances of exclusions for changes in accounting policies, stock market index fluctuations and changes in tax rates / laws - the latter potentially reflective of recent changes in US corporate tax rates. We also saw one deal where a bidder was able to successfully rely on a MAC to terminate a scheme transaction following a proposed adverse change in Tanzanian law which was specifically identified in the clause (see page 27).

By way of contrast, 2017 saw fewer economical / political carve outs and exclusions for movements in currency exchange rates and industry conditions. Exclusions for natural disasters were also low.

Takeovers Panel applications

The number of Takeovers Panel applications relating to deals within our survey rose markedly in 2017 – approximately 15 applications in total were made in relation to six different bids, compared to just one application in 2016. This is likely due to the fact that, as noted above, there was an increase in competitive transactions in 2017 (noting that a number of these applications were initiated by a rival bidder). Notwithstanding the increased number of applications in 2017, the Takeovers Panel made declarations of unacceptable circumstances in connection with only two transactions. Interestingly, Aurora Fortitude's bid for Molopo Energy was the subject of more than eight applications and review applications alone, and the Panel's decision in relation to three of these applications has now been referred to the Federal Court for judicial review.

Institutional acceptance facilities remain uncommon

Institutional acceptance facilities were only used in two takeover offers in 2017 (i.e. the same number as in 2016).

Price ratchets rarely used

Only one bidder agreed to conditionally increase its offer price upon receiving a specified number of acceptances. There were no price ratchets used at all in 2016.

Aggressive tactics in Downer EDI bid for Spotless

Adam Foreman

Downer EDI's bid for Spotless provides a good example of the more aggressive tactics we saw from bidders last year and also the potential risks associated with such an approach. Within 24 hours, Downer had conducted an after-market raid acquiring 15% of the register, raised more than $1bn to fund its takeover bid from institutions as part of an accelerated entitlement offer and lodged its bidder's statement. The bid was subject to a 50% rather than 90% acceptance condition and was launched without due diligence on non-public information. It also included in its bid a condition that there is no "earnings downgrade" announced in the short term. The approach was clearly intended to maximise pressure on the target and minimise any interloper risk. However, Downer faced a number of risks including that it raised the cash to fund a 100% acquisition without its bid becoming unconditional and that it may acquire less than 90% and not be able to proceed to compulsory acquisition (which turned out to be the case).

In the end, Downer was able to successfully acquire control without a board recommendation, but was only able to acquire 87% of the shares, just short of the compulsory acquisition threshold, after the hedge fund Coltrane Asset Management acquired a 10.6% stake and refused to accept the offer.

This leaves Downer in a similar position to that which Saputo was left after its bid with 87% of Warrnambool Cheese & Butter as a result of Kirin/Lion Nathan acquiring a 10% stake and holding out. Ultimately, after having waited patiently since 2013, Saputo was able to acquire the remaining shares including the Lion stake under a new bid last year.

Downer will need to carefully consider what it now does. If it wishes to acquire the remaining shares, it will clearly need to engage with Coltrane at some point, but will need to be careful not to breach the takeovers laws which promote equality of treatment and prohibit reaching any understanding about disposal outside of a bid or other permitted transaction.

Methodology

The Corrs Chambers Westgarth 2017 M&A Year in Review comprises a deal sample of:

- 42 takeover bids and schemes of arrangement involving an Australian listed target;
- announced between 1 January 2017 and 31 December 2017; and
- with a deal value over $25 million.

A full list of all deals surveyed is set out in the following table. Information in relation to these deals is current to late-January (unless otherwise specified in this survey). As at that date, seven schemes and five takeovers from the deal sample were ongoing.

The information gathered for our survey was largely obtained from primary sources such as ASX announcements, bidder and target statements and scheme booklets.

	Target	Bidder	Date announced	Deal value	Bid / Scheme	Final %
1	DUET Group	CK William Australia Bidco Pty Ltd	16/01/2017	$7,412,309,583	Scheme	100%
2	Hunter Hall International Ltd	Pinnacle Ethical Investment Holdings Ltd	23/01/2017	$54, 619, 628	Bid	0.80%
3	Mcmahon Holdings Ltd	CIMIC Group Investments Holdings Pty Ltd	24/01/2017	$174, 133,530	Bid	Failed
4	Warrnambool Cheese and Butter Factory Company Holdings LTD	Saputo Dairy Australia Pty Ltd	30/01/2017	$697,570,597	Bid	100%
5	Heemskirk Consolidated Ltd	Northern Silica Corporation	13/02/2017	$42,197,693	Bid	100%
6	Rubik Financial Ltd	Temenos Solutions Australia Pty Ltd	15/02/2017	$70,611,955	Scheme	100%
7	SMS Management & Technology Ltd	DWS Ltd	27/02/2017	$106,224,473	Scheme	Failed
8	Centuria Urban REIT (CUA)	Centuria Metropolitan REIT (CMA)	3/03/2017	$170,331,453	Scheme	100%
9	Central Petroleum Ltd	Macquarie MPVD Pty Ltd	10/03/2017	$89,836,096	Scheme	Failed
10	Cradle Resources Ltd	Tremont Investments Ltd	10/03/2017	$54,360,114	Scheme	Failed
11	Amex Resources Ltd	Waratah International (Asia) Ltd	13/03/2017	$54,021,540	Bid	100%
12	Spotless Group Holdings Ltd	Downer EDI Services Pty Ltd	21/03/2017	$1,263,033,705	Bid	87.80%
13	Touchcorp Ltd	Afterpay Touch Group Ltd	30/03/2017	$190,785,322	Scheme	100%
14	Afterpay Holdings Ltd	Afterpay Touch Group Ltd	30/03/2017	$331,218,906	Scheme	100%
15	Brookfield Prime Property Fund	Brookfield BPPF Pty Ltd as trustee for Brookfield BPPF Investments Trust	7/04/2017	$432,191,957	Scheme	100%
16	Generation Healthcare REIT	NWH Australia AssetCo Pty Ltd	24/04/2017	$507,707,398	Bid	100%
17	Grays eCommerce Group Ltd (GEG)	Eclipx Group Ltd (ECX)	4/05/2017	$178,900,000	Scheme	100%
18	SMS Management and Technology Limited (SMX)	ASG Ltd	14/06/2017	$123,365,412	Scheme	100%
19	Crusader Resources Ltd	Stratex International plc	15/06/2017	$54,000,000	Scheme	Failed

	Target	Bidder	Date announced	Deal value	Bid / Scheme	Final %
20	The PAS Group Ltd	Canaccord Genuity (Australia) Limited on behalf of Brand Acquisition Co, LLC	16/06/2017	$69,712,339	Bid	64.98%
21	Seymour Whyte Ltd	VINCI Construction International Network	26/06/2017	$113,049,456	Scheme	100%
22	Royal Wolf Holdings Ltd	GFN Asia Pacific Holdings	12/072017	$90,016,650	Bid	100%
23	Cobalt One Ltd	First Cobalt Corp	14/07/2017	$140,000,000	Scheme	100%
24	Programmed Maintenance Services Ltd	PERSOL Holdings Co Ltd	14/07/2017	$791,520,099	Scheme	100%
25	Asia Pacific Data Centre Group	NextDC Ltd	26/07/2017	$215,050,187	Bid	Failed
26	Pepper Group Ltd	Red Hot Australia BidCo Pty ltd	10/08/2017	$675,198,318	Scheme	100%
27	Tian An Australia Ltd	Oasis Star Limited	11/09/2017	$59,000,000	Bid	76.07%
28	Molopo Energy Ltd	Aurora Fortitude Absolute Return Fund	12/09/2017	$33,620,487	Bid	Ongoing
29	Asia Pacific Data Centre Group	360 Capital FM Limited	13/09/2017	$224,250,195	Bid	67.31%
30	Enice Holding Company Ltd	Tech World Ltd	5/10/2017	$114,000,000	Scheme	Ongoing

	Target	Bidder	Date announced	Deal value	Bid / Scheme	Final %
31	Mantra Group Limited	Accor S.A	12/10/2017	$1,182,198,513	Scheme	Ongoing
32	Goldfields Money Ltd	Firstmac Holdings Ltd	16/10/2017	$28,601,754	Bid	Failed
33	Finders Resources Ltd	Eastern Field Developments Limited	24/10/2017	$177,644,466	Bid	Ongoing
34	Altona Mining Limited	Copper Mountain Mining Corporation	20/11/2017	$93,000,000	Scheme	Ongoing
35	Integral Diagnostics Limited	Capitol Health Limited	29/11/2017	$347,453,278	Bid	Ongoing
36	Strategic Minerals Corporation NL	QGold Pty Ltd	4/12/2017	$28,180,214	Bid	Ongoing
37	AWE Limited	China Energy Resource and Chemical Group Australia Pty Ltd	8/12/2017	$463,000,000	Bid	Ongoing
38	Tox Free Solutions Ltd	Cleanaway (No 1) Pty Ltd	11/12/2017	$665,884,102	Scheme	Ongoing
39	Westfield Corporation	Unibail Rodamco SE	12/12/2017	$33,000,000,000	Scheme	Ongoing
40	Queensland Mining Corporation	Moly Mines Ltd	15/12/2017	$50,339,755	Bid	100%
41	Aconex Ltd	Vantive Australia Pty Ltd	18/12/2017	$1,556,454,050	Scheme	Ongoing
42	AWE Limited	Mineral Resources Ltd	21/12/2017	$526,000,000	Scheme	Ongoing

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