



# TAKEOVERS + SCHEMES REVIEW 2022

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M+A TAKES OFF



# THE GILBERT + TOBIN 2022 TAKEOVERS + SCHEMES REVIEW

2021 was a landmark year for public mergers and acquisitions involving ASX-listed companies.

## Some key themes were:

- + Public M+A activity skyrocketed in value and volume in 2021. There were 62 transactions valued at \$130.5 billion – up 48% by number and four times the aggregate transaction value in 2020.
- + Infrastructure assets attracted significant interest driven by increasing superannuation / pension funds needing to be deployed, with a combined aggregate deal value of \$44 billion (or 34% of total public M+A spend).
- + The largest ever Australian public M+A deal being Block, Inc's \$39 billion acquisition of Afterpay.
- + Retail + consumer, transportation + logistics and utilities sectors, which all featured multi-billion dollar transactions, led the way by transaction value. The greatest number of deals occurred in the energy + resources sector.
- + Private equity / private capital involvement in public M+A in 2021 hit \$44.8 billion and accounted for 35% of deals by value – almost double the 18% seen in 2020. Superannuation funds were front line bidders in four transactions with a combined market value in excess of \$40 billion.
- + ESG considerations were a key factor in many larger public M+A deals including Tilt Renewables, the Endeavour drinks demerger and the merger of Woodside and the BHP Petroleum business. Brookfield's takeover proposal for AGL shows there's more to come in 2022.
- + Foreign interest in Australian listed companies was up in absolute terms at \$61.9 billion but declined on a relative basis, down to 32% by number of all public M+A deals. Bidders from western countries (in particular, North America) were the most active, and interest from Asia was subdued. There were no Chinese bidders.
- + There was a significant increase in transactions involving scrip-only consideration. Schemes of arrangement again became the transaction structure of choice for deals valued over \$50 million.
- + There was a marked improvement in success rates, despite a fall in average premiums offered by bidders.

This Review examines 2021's public M+A transactions valued over \$50 million and provides our perspective on the trends for Australian public M+A in 2021 and what that might mean for 2022.

We trust you will find this Review to be an interesting read and a useful resource for 2022.

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# KEY HIGHLIGHTS

## LARGEST PUBLIC M+A YEAR IN AUSTRALIAN HISTORY

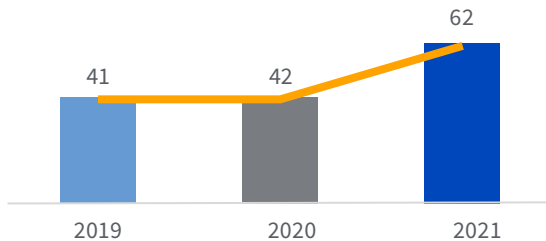
2021 was a landmark year for M+A in Australia.

Who would have thought that could be the case with COVID-19 disruptions, closed borders, supply chain challenges, climate change concerns and a spotlight on ESG.<sup>1</sup>

Nevertheless, public M+A activity skyrocketed in value and volume in 2021.

62 deals valued at over \$50 million were announced in 2021, up from 42 in 2020 and 41 in 2019. Aggregate transaction value almost quadrupled from \$32.8 billion in 2020 to \$130.5 billion in 2021. Unbelievable really.

Number of deals valued at over \$50 million



This significant increase was driven by six transactions exceeding \$5 billion:

- 1 **\$39 billion** acquisition of Afterpay by Block, Inc (formerly known as Square, Inc)
- 2 **\$23.6 billion** acquisition of Sydney Airport by a consortium led by IFM and Global Infrastructure Partners
- 3 **\$10.2 billion** acquisition of AusNet Services by a consortium led by Brookfield
- 4 **\$9 billion** takeover of Boral by Seven Group
- 5 **\$8.1 billion** merger between Santos and Oil Search
- 6 **\$5.1 billion** acquisition of Spark Infrastructure by a consortium led by KKR

The second half of 2021 was particularly prolific, with 63% of all deals (totalling 78% of aggregate transaction value) occurring in this six-month period.

In our view, the strong M+A conditions in Australia were driven by low interest rates, strong capital markets, the continuing growth of superannuation funds, increased vaccination rates and a sense that the COVID-19 threat was diminishing, which all supported a growth in confidence. At the same time technology trends, digitisation, decarbonisation, energy transition and other ESG matters created a need for portfolio management and acquisitions or divestments.

Many of these ingredients continue on into 2022 and we expect, at least, a strong first half of M+A. However, how long that continues may well depend on interest rates and inflation, which seem on the move up, as well as capital markets, which having risen strongly in 2021 and may feel too high for some. The Ukraine war and geo-political tensions may also dampen activity.

Ultimately while 2022 may fall short of 2021's heights, we expect a year that will be stronger than most before 2021.

<sup>1</sup> We did actually!! See our [2021 Takeovers and Schemes Review](#).



## PRIVATE EQUITY AND PRIVATE CAPITAL INVESTMENT GOING FROM STRENGTH TO STRENGTH

After a softer 2020 in terms of overall deal value, 2021 saw private equity and private capital investment return to prominence in public M+A. Despite being involved in fewer public M+A deals in 2021 compared with 2020 (seven down from 10), private equity / private capital involvement in public M+A hit \$44.8 billion and accounted for 35% of deals by value – almost double the 18% seen in 2020, although still less than the 44% recorded in 2019.

Private equity was a key player in many of the largest deals, with three out of the six transactions (Sydney Airport, AusNet Services and Spark Infrastructure) exceeding \$5 billion involving private equity / private capital bidders. Notably these transactions all involved prized infrastructure assets.

We expect private equity / private capital investment to be strong in 2022. All the major global and Australian based firms have, or are, raising new funds supported by increased superannuation / pension funding. These funds will need to be deployed. Indeed, should stock markets be rocky at times this year, further opportunities for private equity may arise.

## SUPERCHARGED SUPERANNUATION MOVES TO THE M+A FRONT LINE

Following on from the earlier general comment on private equity activity, 2021 also highlighted the increasing direct involvement of superannuation funds in public M+A in 2021.

Perhaps most prominent was Aware Super playing a role in the successful \$3.4 billion acquisition of Vocus Group, Future Fund and QIC teaming with AGL and Mercury NZ to takeover Tilt Renewables for \$2.8 billion, Sunsuper participating in the \$10.2 billion AusNet Services transaction, and AustralianSuper and QSuper forming part of the bidding consortium for Sydney Airport (with UniSuper also critical in that the entire deal was conditional on UniSuper, as the largest shareholder, seeking to retain its investment). The combined market value of these four transactions was \$40 billion plus.

**OF COURSE, A KEY ASPECT OF THESE DEALS WAS SUPERANNUATION / PENSION FUNDS, WITH LARGE AMOUNTS OF CAPITAL TO DEPLOY, SEEKING TO ACQUIRE COMPANIES WITH LONG TERM STABLE CASH FLOWS.**

Australian superannuation assets now total more than \$3.5 trillion significantly exceeding the total market capitalisation of all companies on the ASX. The \$3.5 trillion will only increase given Australia's compulsory superannuation system. It seems clear then we will see even more involvement of superannuation in Australian public M+A in 2022 and beyond.

### COMBINED DEAL MARKET VALUE:

Aware Super

Future Fund  
+ QIC

Sunsuper

AustralianSuper  
+ QSuper

**\$40 BILLION+**



## INFRASTRUCTURE, ENERGY + RESOURCES REMAIN PROLIFIC WHILE VALUE OF DEALS IN RETAIL + CONSUMER SOARS

There was significant interest in infrastructure assets (which cross a number of sectors, including transportation + logistics and utilities) in 2021. This included transactions involving Sydney Airport, AusNet Services, Spark Infrastructure, BINGO Industries and Tilt Renewables and with a combined aggregate deal value of \$44 billion (or 34% of total public M+A spend).

Interest in energy + resources also continued strongly from 2020, a year which saw the sector lead the market in terms of both deal activity and aggregate transaction value.

### THE LARGEST NUMBER OF TRANSACTIONS OCCURRED IN THE ENERGY + RESOURCES SECTOR IN 2021 (14 DEALS) WITH SANTOS' \$8.1 BILLION MERGER WITH OIL SEARCH BEING THE LARGEST.

Despite the keen bidder interest, energy + resources was no longer the dominant sector in terms of aggregate transaction value.



### RETAIL + CONSUMER SERVICES ACCOUNTED FOR 31% OF TOTAL DEAL VALUE BOLSTERED BY THE MARKET-LEADING \$39 BILLION AFTERPAY / BLOCK, INC TRANSACTION.

Transportation + logistics came in second by aggregate transaction value (18%), with utilities coming in third (16%).

## SCHEMES BECOME THE NORM ONCE AGAIN

In 2020, the divide between schemes of arrangement and takeovers was almost 50:50. 2021 saw schemes return to prominence for deals over \$50 million, with 79% of transactions using the structure.

This result is more consistent with the norm prior to 2020. It indicates that last year was likely an outlier driven by the rapid decline in equity markets with the onset of COVID-19 in the first half of 2020. This led to a larger than usual gap in the bid-ask spread of buyers and sellers and made takeover bids a more viable structure in many cases. Indeed, hostile transactions reduced from 26% of all transactions in 2020 to 13% in 2021. For transactions valued over \$1 billion, schemes also remained the preferred structure (94%).





## ALL SCRIP CONSIDERATION RISES IN PROMINENCE

The reduced use of cash consideration continued in 2021. All-cash was used in 63% of deals in 2021, consistent with the 2020 level (62%).

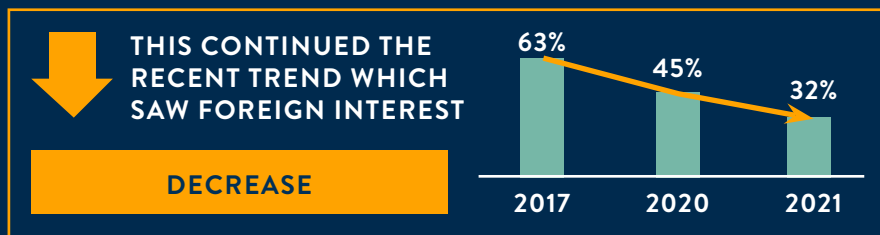
Scrip deals rose to prominence this year, with 31% of all transactions relying solely on scrip consideration, up from 21% in 2020. In our view, this reflects the rise in the number of mergers between equals and industry-based mergers (notably the \$8.1 billion merger between Oil Search and Santos), inflated stock prices, potentially a desire amongst some investors to retain exposure to a target's underlying assets post-acquisition and participate in synergy benefits but also the fact that larger deals maybe easier to fund by scrip rather than cash.

**ONLY 6% OF TRANSACTIONS INVOLVED THE OFFER OF A FIXED COMBINATION OF BOTH CASH AND SCRIP WITH NO CASH ALTERNATIVE, DOWN FROM 17% IN 2020.**

## FOREIGN INVESTMENT UP IN ABSOLUTE VALUE ON BACK OF AFTERPAY / BLOCK, INC DEAL BUT DOWN ON A RELATIVE BASIS

Deals involving foreign bidders accounted for \$61.9 billion (a high in the 10 years we have been preparing this Review) or 47% of total transaction value of all public M+A deals. These numbers are led by American-based Block, Inc's \$39 billion acquisition of Afterpay and the KKR-led consortium's \$5.1 billion acquisition of Spark Infrastructure. In this respect, foreign bidders remain key players in Australian M+A.

However, interestingly, on a relative basis, foreign interest in Australian ASX listed companies declined further in 2021 with only 32% of deals involving a foreign bidder.



A variety of factors may have caused this reduction, including the difficulties associated with physical due diligence stemming from travel restrictions, political tension between Australia and China and more strict regulatory settings with the now annual round of changes to the *Foreign Acquisitions and Takeovers Act 1975* (Cth). For the first time in many years, there were no Chinese bidders making an acquisition of an Australian public company.

However, more than anything, the fall in foreign acquisitions should be seen as a relative reduction. As discussed above, the rise in superannuation funding and funds has led to more Australian based capital being used for M+A.





# MARKET ACTIVITY

## PUBLIC M+A ACTIVITY AT ALL TIME HIGH

2021 was a landmark year for M+A in Australia (as well as globally). Public M+A activity skyrocketed in value and volume in 2021.

Some might be surprised that this could be the case with COVID-19 disruptions and challenges, closed borders, supply chain challenges, climate change concerns and companies facing an increased focus on ESG.

However, others would say the increased activity was not surprising given M+A was on the rise in the last quarter of 2020. Indeed, in our Review last year, we forecast that 2021 would be a strong year and the beginning of another roaring '20s.

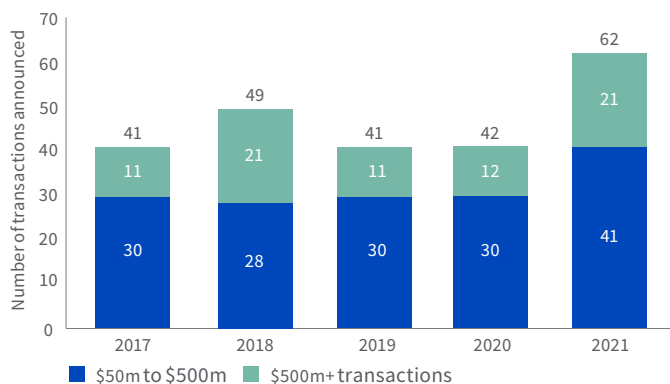
While our prediction proved to be accurate, we wouldn't be as bold as to say we foresaw how sharply M+A activity would increase in 2021. It was certainly "roaring", with both the number and value of deals in public M+A increasing considerably from 2020.

## DEAL NUMBERS

In 2021, there were a total of 62 transactions valued at \$50 million or more that were announced. This represented an incredible 48% increase from the previous year, which capped out at 42 deals. 62 transactions also eclipsed the previous high of 49 deals in 2018 by over 25%.

Similarly, the number of announced transactions with a value of \$500 million or more nearly doubled from 12 in 2020 to 21 in 2021, bringing activity back to the highs of 2018 which saw an identical number of deals in this high-price bracket.

Transaction announcements per year by number



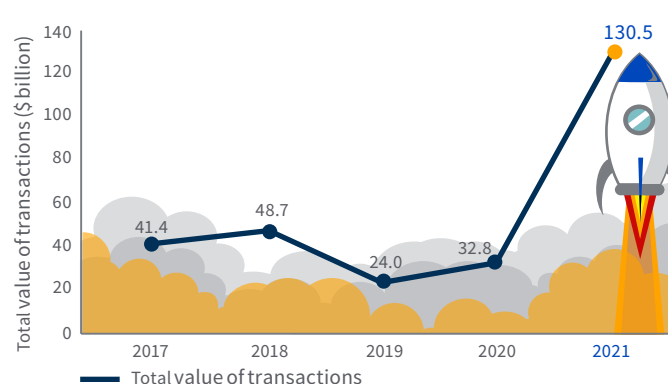
## DEAL VALUE

When measuring aggregate transaction value, the rise in public M+A activity in 2021 appears even more pronounced, increasing to an unprecedented \$130.5 billion in 2021, far-eclipsing the \$32.8 billion reported in 2020 by a stratospheric 298%.

We have been preparing this Review for over 10 years, and in all that time, the highest aggregate transaction value for any year was \$48.7 billion in 2019.

**It is safe to say the roaring '20s have come again.**

Total transaction value per year



## THE INCREASE IN AGGREGATE DEAL VALUE IN 2021 WAS A DIRECT RESULT OF AN INCREASE IN HIGH-VALUE DEALS.

The number of deals exceeding \$1 billion more than tripled from five in 2020 to 16 in 2021. Of those 16 deals, six transactions were valued in excess of \$5 billion, compared to only two deals in 2020.

One could say that the total transaction value headline has been inflated significantly by the two largest transactions of 2021, being:

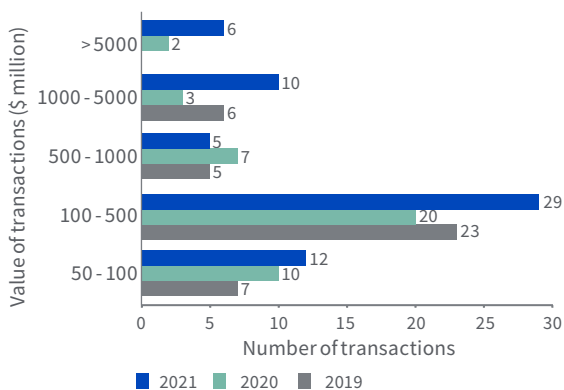
- + Block, Inc's \$39 billion acquisition of Afterpay; and
- + the \$23.6 billion acquisition of Sydney Airport by a consortium of bidders led by IFM and Global Infrastructure Partners (GIP).

Together, these two transactions accounted for a staggering \$62.6 billion, which represented 48% of 2021's aggregate transaction value, and greatly exceeded the \$32.8 billion value of all announced public transactions in 2020.

The only other successful public M+A transactions in Australia's history to eclipse \$20 billion in value were Wesfarmers' acquisition of Coles in 2007 and Unibail-Rodamco's acquisition of Westfield in 2017.

Similarly, there have only ever been 12 successful public M+A transactions in Australia valued at \$10 billion or more. Three of those occurred in 2021. In anyone's terms, M+A activity was booming in 2021.

### Distribution of transaction values



## COMPETING BIDS

Competitive bidding situations arose in many deals in 2021 which added to 2021's aggregate transaction value. This included:

- + Mainstream which received bids from three separate bidders - Apex (which was ultimately successful), SS&C Technologies and Vistra. Notably, Apex's final bid of \$400 million was more than double Vistra's initial bid of \$171 million. (For more information on this competing bid, see page 45.)
- + Apollo Consolidated where a \$181 million bid by Ramelius Resources trumped a bid by Gold Road Resources.
- + PM Capital Asian Opportunities Fund, where WAM Capital outlasted PM Capital Global Opportunities Fund with a bid of \$66 million.

There were other potential competing bids which were not formalised in the face of a higher offer, including APA's proposed acquisition of AusNet Services and multiple potential bidders for Tilt Renewables in a competitive bidding process/auction in which the consortium of PowAR (comprising QIC / Future Fund / AGL) and Mercury NZ ultimately succeeded.

## FOREIGN INVESTMENT UP OVERALL BUT DOWN ON A RELATIVE BASIS

Deals involving foreign bidders accounted for \$61.9 billion (a high in the 10 years we have been preparing this Review) or 47% of total transaction value of all public M+A deals. These numbers are led by American-based Block Inc's \$39 billion acquisition of Afterpay and the KKR-led consortium's \$5.1 billion acquisition of Spark Infrastructure. In this respect, foreign bidders remain key players in Australian M+A.

However, interestingly, on a relative basis, foreign interest in Australian ASX listed companies declined further in 2021 with only 32% of deals involving a foreign bidder. This continued the recent trend which saw foreign interest decrease from 63% in 2017 to 45% in 2020.

A variety of factors may have caused this reduction, including the difficulties associated with physical due diligence stemming from travel restrictions, political tension between Australia and China and more strict regulatory settings with the now annual round of changes to the *Foreign Acquisitions and Takeovers Act 1975* (Cth). For the first time in many years, there were no Chinese bidders making an acquisition of an Australian public company.

However, more than anything, the fall in foreign acquisitions should be seen as a relative reduction. As discussed on page 11, the rise in superannuation funding and funds has led to more Australian based capital being used for M+A.

## PRIVATE CAPITAL IN FOR MORE

Private equity firms and private capital continued their strong involvement in Australian public M+A in 2021.

While the number of deals involving private equity bidders dropped from 10 in 2020 to seven in 2021 (accounting for just 11% of all deals), the value of private equity or private capital led transactions topped \$44.8 billion and accounted for 35% of total deal value – up from 18% in 2020 although still less than the 44% recorded in 2019.

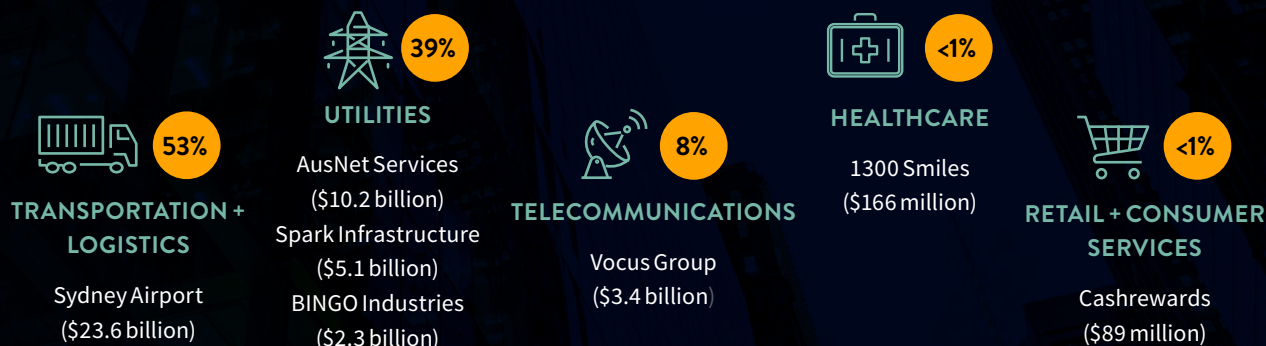
Private equity / capital was a key player in many of the largest deals, with three out of the six transactions (Sydney Airport, AusNet Services and Spark Infrastructure) exceeding \$5 billion.

Notably, private equity had a strong appetite for infrastructure assets, with 43% of announced private equity / private capital deals relating to acquisitions in this sector. Indeed, 92% of the total value of private equity spend related to infrastructure, which was a significant change from preceding years.

+ Private equity / private capital deployed the most capital in the transportation + logistics sector (53% of private equity / private capital spend in 2021), largely attributable to the IFM and GIP-led consortium's \$23.6 billion acquisition of Sydney Airport.

+ Interestingly, private equity / private capital was behind 75% of public deals in the utilities sector by number, and 86% of all utilities deals by value. If PowAR's \$2.8 billion acquisition of Tilt Renewables (which involved private capital as well as a trade buyer) was included in the mix, then private equity / private capital would have accounted for 100% of deals in the utilities sector by both number and value.

Private equity interest in the listed healthcare sector continued to decline, with the acquisition by Abano Healthcare (owned by BGH Capital and the Ontario Teachers' Pension Plan Board) of 1300 Smiles being the only private equity deal in this sector. We consider the reduced interest by private equity in healthcare M+A is a function of our data set, which focuses on takeovers and schemes, as there were a range of private M+A deals in the healthcare sector, including the EQT buy out of Icon Group for over \$2 billion. Separately, early 2022 has seen a bidding war break out between BGH Capital and CapVest for Virtus Health. Clearly, private equity will remain actively interested in this sector for many reasons, including the opportunities raising from COVID-19 pandemic, advances in healthcare and an ageing population.



## NFP WEIGHTS INTO PUBLIC M+A

For the first time, 2021 saw the involvement of the not-for-profit sector in public M+A. Calvary Health Care, a not-for-profit Catholic healthcare organisation established in 1885 by the Sisters of the Little Company of Mary, took ASX listed healthcare company, Japara, private via a \$374 million scheme of arrangement.

M+A certainly came in all shapes and sizes in 2021.





## SUPERANNUATION INVOLVEMENT IN PUBLIC M+A INCREASES

We predicted last year that the growth in the capital of Australian superannuation funds would drive these investors to listed markets.

This prediction rang true in 2021, highlighted by the following four transactions:

- + the IFM and GIP-led consortium's (inclusive of AustralianSuper and QSuper) \$23.6 billion acquisition of Sydney Airport, which also involved UniSuper (the largest target shareholder) retaining its interest through the deal;
- + Aware Super and Macquarie Infrastructure and Real Asset's (MIRA's) \$3.4 billion acquisition of Vocus Group;
- + the Brookfield-led consortium's (including Sunsuper) \$10.2 billion acquisition of AusNet Services; and
- + the PowAR consortium (inclusive of QIC and Future Fund) and Mercury NZ's \$2.8 billion acquisition of Tilt Renewables.

These transactions had a combined market value of \$40 billion, highlighting the growing strength of superannuation funds and their importance to public M+A.

In our view, the involvement of superannuation funds in the front line of Australian public M+A will only increase over the foreseeable future.

## TIMING OF ANNOUNCEMENTS

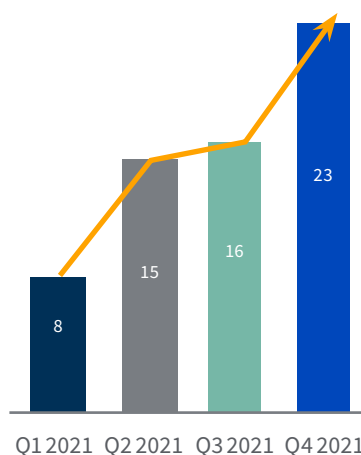
While 2021 proved to be a bumper year all round, it did in fact start off slowly. Only three deals were announced in January and February, being:

- + Verra Mobility Corporation's \$146 million acquisition of Redflex Holdings;
- + Essity Aktiebolag's \$760 million acquisition of Asaleo Care; and
- + iCollege's \$65 million acquisition of Redhill Education.

Timing of announcements (number of deals per month)



Deal activity steadily picked up throughout the year, particularly in October and in December, where nine deals were announced in each month. Indeed, the number of deals announced increased each quarter, rising from eight in Q1 to 23 in Q4, reflecting the increased confidence and continued access to cheap debt. This also reflects the second half skew to announcements we seem to see year after year.



The second half of 2021 was particularly prolific, with 63% of all deals (totalling 78% of aggregate transaction value) occurring in this six-month period.

Similar to previous years, we expect that transaction activity will slow leading into this year's federal government election, anticipated to be in May 2022. It is also likely that foreign bidder activity may ease as FIRB enters "caretaker" mode in the lead up to the election period and until the government is formed. During this time, as convention has it, the Treasurer will not make any significant or sensitive decisions.

## TRANSACTION HIGHLIGHTS

### \$20 BILLION+

- + Block, Inc's (formerly Square, Inc) \$39 billion acquisition of Afterpay
- + IFM and GIP-led consortium's \$23.6 billion acquisition of Sydney Airport

### \$5 BILLION+

- + Brookfield-led consortium's \$10.2 billion acquisition of AusNet Services
- + Seven Group's \$9 billion off-market takeover of Boral
- + Santos' \$8.1 billion merger with Oil Search
- + KKR-led consortium's \$5.1 billion acquisition of Spark Infrastructure

### \$1 BILLION+

- + Washington H Soul Pattinson and Company's \$4.6 billion acquisition of Milton Corporation
- + Aware Super and MIRA's \$3.4 billion acquisition of Vocus Group
- + Dye & Durham's proposed \$2.9 billion acquisition of Link Administration Holdings
- + PowAR consortium (comprising QIC / AGL / Future Fund) and Mercury NZ's \$2.8 billion acquisition of Tilt Renewables
- + MIRA's \$2.3 billion acquisition of BINGO Industries
- + Home Daily Needs REIT and Home Consortium's \$2.2 billion acquisition of Aventus Group
- + Ampol's proposed \$1.9 billion acquisition of Z Energy
- + Orocobre's \$1.8 billion acquisition of Galaxy Resources
- + Charter Hall's \$1.2 billion acquisition of ALE Property Group
- + IGO's proposed \$1.1 billion acquisition of Western Areas



## DEAL SPOTLIGHT: AFTERPAY

On 2 August 2021, Afterpay announced that it had entered into a scheme implementation deed with NYSE-listed Block, Inc. (formerly known as Square, Inc.) under which Block, Inc would acquire all of the issued shares in Afterpay by way of a scheme of arrangement. The scheme was implemented on 1 February 2022.

This transaction was the largest successful public M+A deal in Australia's history, and the biggest cross-border fintech deal globally. Gilbert + Tobin advised Afterpay on this transaction.

Set out below is an overview of key aspects of the transaction.

### ALL-SCRIP CONSIDERATION

The scheme involved all-scrip consideration at a fixed exchange ratio of 0.375 Block Class A shares for each Afterpay share (Scheme Consideration). The Scheme Consideration was received in the form of:

- + ASX-listed Block CHESSE depository interests (Block CDIs) representing the Block Class A shares for all Afterpay shareholders with a registered address in Australia and New Zealand; and
- + NYSE-listed Block Class A shares for all other eligible shareholders,

with an ability for all shareholders to elect to receive the alternative to their default. Each Block CDI represented a beneficial interest in one Class A share.

#### Block shareholder approval

Block was required under the NYSE listing rules to obtain approval from its own shareholders in order to issue the Scheme Consideration.

In connection with this, Block was required to despatch a proxy statement to its shareholders. Proxy statements differ from the requirements and market practice relevant to Australian disclosure documents in a number of respects, including:

- + the requirement to include detailed background information in relation to all discussions between the parties prior to entry into definitive documentation, including details of negotiations around price and terms;
- + the inclusion of financial forecast information for the merged group prepared by Block and for which Afterpay took no responsibility; and
- + a written opinion from Block's financial adviser as to the fairness of the Scheme Consideration to Block shareholders.

#### Block's dual class structure

Block has a dual class stock structure, comprising Class A shares and Class B shares. Class B shares, which are held by certain of Block's executive officers and directors and their respective affiliates, have ten votes per share, while Class A shares have one vote per share.

The ten-to-one voting ratio between Class B and Class A shares meant that the holders of the Class B shares collectively controlled more than a majority of the combined voting power of Block's common stock. This had the effect that the Class B shareholders could control the outcome of matters put to a Block shareholder vote including the vote relating to the issue of the Scheme Consideration.



## Fixed exchange ratio

The Scheme Consideration was agreed at a fixed ratio, meaning that the number of Block securities received by Afterpay shareholders was not impacted by movements in either the Afterpay or Block share price. However, any movement in the share price of either company would necessarily have an impact on the value of the Scheme Consideration.

This was a point of significant interest throughout the period between announcement and implementation of the scheme, as both companies experienced significant share price volatility due to increased US regulatory focus on the buy now, pay later sector as well as rising interest rates and broader market uncertainty due to COVID-19 impacts. On the trading day prior to announcement of the scheme, Afterpay shares and Block shares closed at A\$96.66 and US\$247.26, respectively, and closed at A\$66.47 and US\$122.29, respectively, prior to implementation.

From a valuation perspective, there were a number of challenges presented by share price and general market volatility in the context of an all-scrip deal. This resulted in a heightened focus on

the independent expert's report, required for an Australian scheme, including if the share market volatility would result in any change in the expert's opinion throughout the transaction.

Afterpay ultimately sought a reconfirmation from the independent expert in the week prior to the scheme meeting that it continued to consider that the scheme was fair and reasonable and in the best interests of Afterpay shareholders. This reconfirmation was done through the issue of a supplementary letter. The Australian Securities and Investments Commission (ASIC) questioned whether such a reconfirmation was appropriate unless the valuation was effectively re-calculated using the full range of methodologies and procedures assessed in the original independent expert's report. The court, in considering ASIC's concerns, noted that ASIC's approach would give rise to real practical difficulty in scrip transactions in periods of market volatility. This is because it was entirely possible that by the time the full reassessment had been completed, market conditions would have changed again, reducing the utility of completing the full reassessment in the first place.

## CONDITION PRECEDENT TO CONDITION SUBSEQUENT



The scheme was subject to a number of regulatory conditions precedent, including approval from the Bank of Spain in connection with the change of control. When it became clear that the Bank of Spain approval would not be received prior to the scheme meeting scheduled for 6 December 2021, Afterpay announced that:

- + it intended to postpone its scheme meeting; and
- + Afterpay and Block were considering options to proceed with a scheme meeting in December 2021, notwithstanding the fact that the Bank of Spain approval was not expected to be received until mid-January 2022.

Afterpay then applied to the court for orders in connection with dispatching further materials to its shareholders to advise them that Afterpay and Block had agreed to convert the Bank of Spain approval from a condition precedent to a condition subsequent to the scheme becoming effective. From a practical perspective, this had the effect of Afterpay being able to take all steps required for the scheme to become effective (including to obtain the approval of both the Afterpay shareholders and the court for the scheme) prior to receipt of the Bank of Spain approval. Receipt of such approval satisfied the condition subsequent and locked in a timetable to implement the scheme.

The benefit of this structure was that the scheme was only conditional on the Bank of Spain approval after the effective date of 17 December 2021. From that time, it was no longer subject to other conditions precedent including a material adverse change condition precedent. This significantly reduced the deal execution risk of the transaction.

The potential risk with shifting a condition precedent to a condition subsequent in this manner is that, had the Bank of Spain approval not been received, the scheme would have automatically failed.

Such a structure has only been employed in a handful of previous schemes, primarily in similar circumstances where a regulatory approval is delayed. Courts in Australia have been willing to approve schemes that are subject to a condition subsequent where the outcome of satisfaction or failure of that condition subsequent is binary and requires no further decision-making or discretion on the part of the target company, where the “status quo” for the target company can largely be restored should the condition subsequent fail and where the relevant subsequent regulatory approval is to be determined within a specified timeframe.

## IMPACT ON SGX CONVERTIBLE NOTES

The conversion of the Bank of Spain approval into a condition subsequent had a significant impact on the \$1.5 billion zero-coupon SGX-listed convertible notes issued by Afterpay in March 2021 (SGX Notes). The terms of the SGX Notes included a change of control provision triggered by receipt of Afterpay shareholder approval. Under the terms, a change of control of Afterpay entitled the holders of the SGX Notes to, among other things, elect within 60 days to have their SGX Notes redeemed for their full A\$1.5 billion face value in cash (the payment of which was due a further 10 business days following the 60 day redemption period).

As such, in order to convert the condition precedent to a condition subsequent, the Afterpay board had to be willing and able to fund the redemption of all or a portion of the outstanding SGX Notes at their face value in circumstances where the scheme did not proceed. While Afterpay secured funding to address this risk, ultimately the Bank of Spain approval was received and the Scheme was implemented well in advance of the redemption date.

Convertible instruments are becoming increasingly popular as a means for companies to access capital and they can provide a board with more strategic options from a funding perspective. When issuing a convertible instrument, companies should give consideration to conversion right triggers, how the conversion price is calculated, how the exercise of the conversion right may fit into a broader regulated deal timetable and to what extent and circumstances the convertible instruments could survive a change of control transaction. While it is typical in the scheme context for the shareholder vote or effective date to trigger the change of control provisions of convertible instruments, it may be preferable to have the change of control triggered once the scheme is no longer subject to any conditionality instead.



# SECTOR ANALYSIS



## RETAIL + CONSUMER SERVICES

led the way in terms of aggregate transaction value (31%, with approximately 32 times the aggregate transaction value in the sector compared with the previous year)

## ENERGY + RESOURCES

was the dominant sector by number of deals (14 deals)



## PROFESSIONAL SERVICES, RETAIL + CONSUMER SERVICES AND FINANCIALS

sectors also saw strong public M+A activity by transaction volume



## TRANSPORT + LOGISTICS AND UTILITIES

stood out as key contributors to aggregate transaction value



## ENERGY + RESOURCES

The energy + resources sector was the strongest performing sector in 2020 by both number of transactions and aggregate transaction value.

In 2021, energy + resources was again the dominant sector by number of deals, accounting for 14 transactions (an equivalent number to 2020).

However, while the aggregate investment in the energy + resources sector increased from \$11.4 billion in 2020 to \$14.8 billion in 2021, the sector only ranked fourth by aggregate transaction value, contributing to 11% of total deal value (down from 37% in 2020). Despite the increased interest in energy + resources in 2021, it was eclipsed by the significant number of \$1 billion plus transactions in other sectors and indeed by the sheer volume of transactions this year.

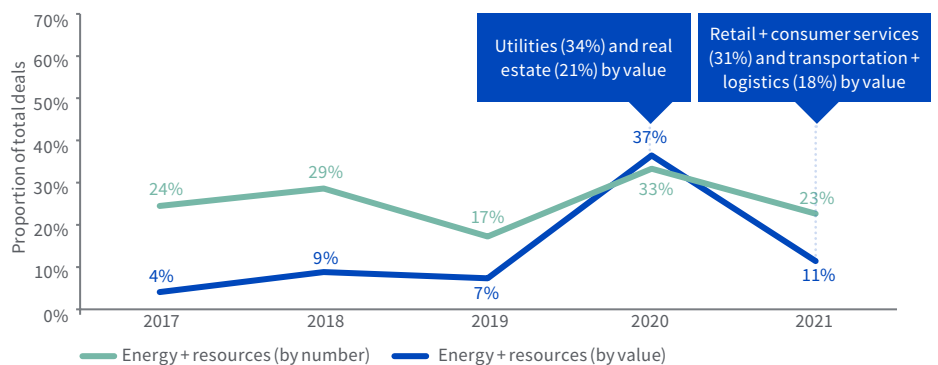
Four of the 14 deals in the energy + resources sector were valued over \$1 billion. Significant transactions in the sector included:

- + Santos' successful \$8.1 billion merger with Oil Search; and
- + Orocobre's successful \$1.8 billion acquisition of Galaxy Resources.

Interestingly, many of these larger transactions were driven by energy transition. Oil Search / Santos was a consolidation of (fossil fuel) gas companies, whereas Galaxy Resources / Orocobre was a new energy and metals transactions (lithium is used in batteries for, among other things, electric vehicles).

Metals & mining was the standout sub-sector, with 10 out of the 14 energy + resources transactions involving targets in this industry.

### Transactions in energy + resources and other significant sectors





## OTHER KEY SECTORS

Professional services was the second largest contributor to deal activity in 2021, with nine deals occurring in the sector. Three of these deals involved competing bids for Mainstream (a specialist third party administrator for the financial services industry) as the target – see page 45 for more information. This was followed by both the financials sector and retail + consumer sector at eight deals each.

In 2021, the retail + consumer services sector was the strongest performing sector by aggregate transaction value, accounting for 31% of total value.

However, 98% of the value in this sector was attributable to the market leading \$39 billion Afterpay / Block, Inc transaction.

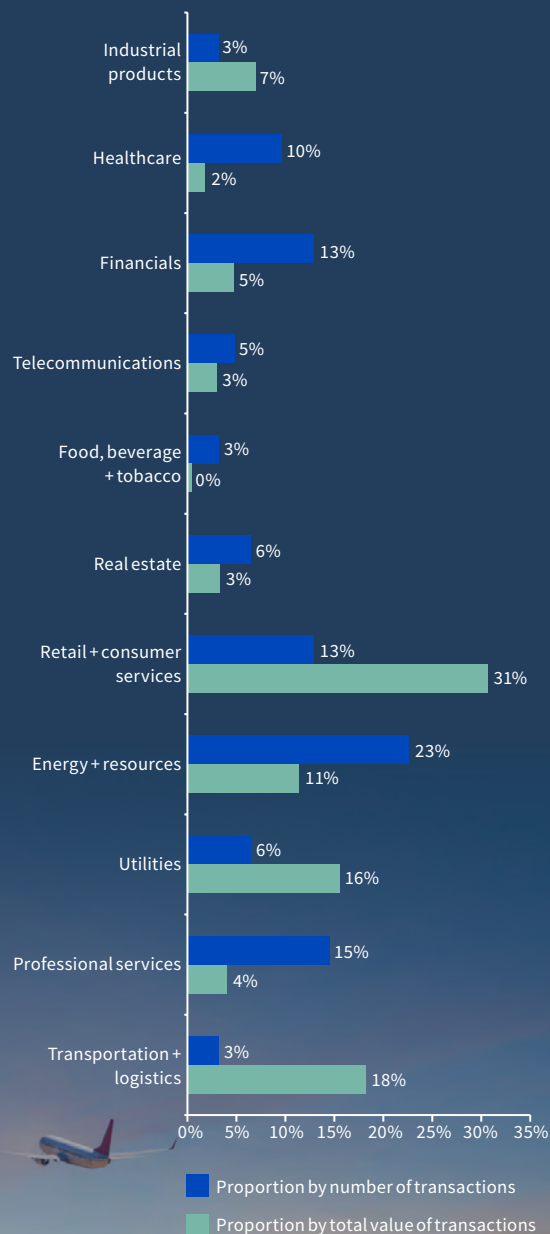
Transportation + logistics came in second by deal value (18%, with an aggregate transaction value of \$23.8 billion).

**THE TRANSPORTATION + LOGISTICS SECTOR'S METEORIC RISE FROM ZERO DEALS IN 2020 TO THE SECOND MOST VALUABLE SECTOR IN 2021 WAS DRIVEN BY THE \$23.6 BILLION SYDNEY AIRPORT TRANSACTION, WHICH ACCOUNTED FOR 99% OF THE VALUE IN THIS SECTOR.**

The utilities sector came in third (16%, with an aggregate deal value of \$20.3 billion), powered by the \$10.2 billion AusNet Services / Brookfield transaction. The aggregate transaction value in the food, beverage + tobacco sector, which ranked second by deal value last year, fell from 30% in 2020 to only 0.4% in 2021. The high transaction value in 2020 was attributable to one transaction, being Coca-Cola European Partners' \$9.8 billion acquisition of Coca-Cola Amatil.

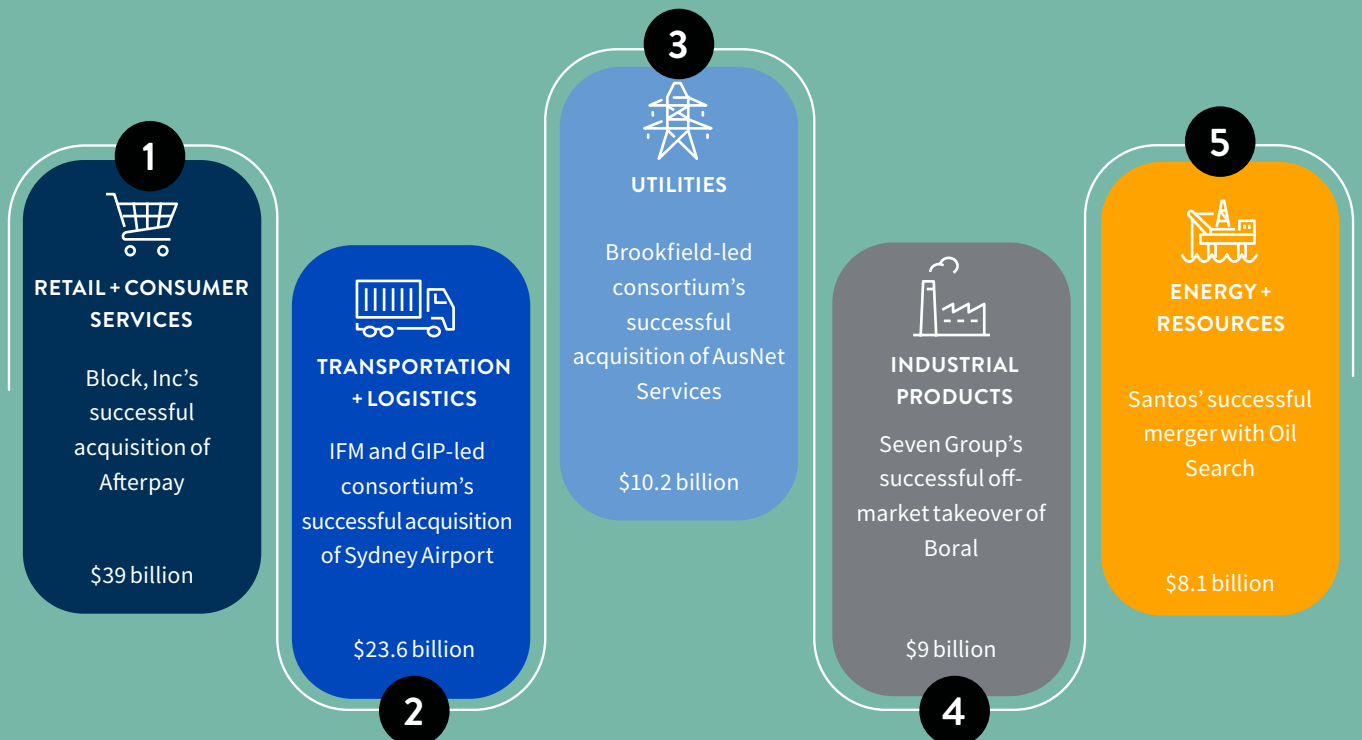
The proportion of aggregate transaction value for the healthcare sector fell from 4% in 2020 to 2% in 2021. Despite this, the number of deals in the sector increased from one deal in 2020 to six deals in 2021. COVID-19 undoubtedly had a significant impact on the sector, with hospitals and health systems feeling the brunt, counterintuitively, of diminished patient volumes and revenues, and increased labour and supply costs. We consider the reduced healthcare public M+A is a function of our data set, which focuses on takeovers and schemes, as there were a range of private M+A deals in the healthcare sector. We expect general interest in this sector to remain given the COVID-19 pandemic, advances in healthcare and an ageing population.

Transactions per sector (number v value)





The top five transactions by value came from five different sectors:



## SECTORS OF INTEREST FOR FOREIGN BIDDERS

In 2020, there was significant foreign interest in energy + resources and professional services. The sectors of greatest interest to foreign bidders in 2021 were professional services (six deals, up from three deals in 2020), retail + consumer services (four deals) and healthcare (three deals).

### Key sectors for foreign bidders



In terms of value, the retail + consumer services sector represented 61% of the total value of foreign bids, mainly attributable to Block, Inc's \$39 billion acquisition of Afterpay. This was followed by utilities with 28% of foreign bids by aggregate transaction value, with three out of four deals in the sector involving foreign bidders.

### Top foreign bids per sector 2021

Retail + consumer services	United States	Block, Inc's successful acquisition of Afterpay	\$39 billion
Utilities	Canada	Brookfield-led consortium's successful acquisition of AusNet Services	\$10.2 billion
Professional services	Canada	Dye & Durham's proposed acquisition of Link Administration Holdings	\$2.9 billion
Energy + resources	Korea	POSCO International's proposed acquisition of Senex Energy	\$852 million
Healthcare	Netherlands	Essity Aktiebolag's successful acquisition of Asaleo Care	\$760 million
Food, beverage + tobacco	Brazil	JBS SA's successful acquisition of Huon Aquaculture	\$426 million
Transportation + logistics	New Zealand	Tourism Holdings' proposed acquisition of Apollo Tourism & Leisure	\$144 million

### WHAT CAN WE EXPECT IN 2022?

- + As inflationary pressures continue to build, businesses in highly leveraged sectors which are disproportionately affected by any actual or anticipated increase in interest rates may become targets for opportunistic transactions by long-term buyers.
- + The effects of the COVID-19 pandemic will continue to be felt. Given this and the general ageing of the population and a renewed focus on health, we expect to see more M+A transactions in the health, aged care and pharmaceutical related sectors.
- + The transition to "net zero" will continue to result in greater investment in renewable energy and cause significant disruption to energy + resources companies dependent on fossil fuels, potentially leading to greater M+A activity in these sectors.
- + Infrastructure assets will remain attractive as growing superannuation / pension funds' hunger for long term stable cash flows continues.



# TRANSACTION STRUCTURES

## SCHEMES RETURN AS THE PREFERRED TRANSACTION STRUCTURE

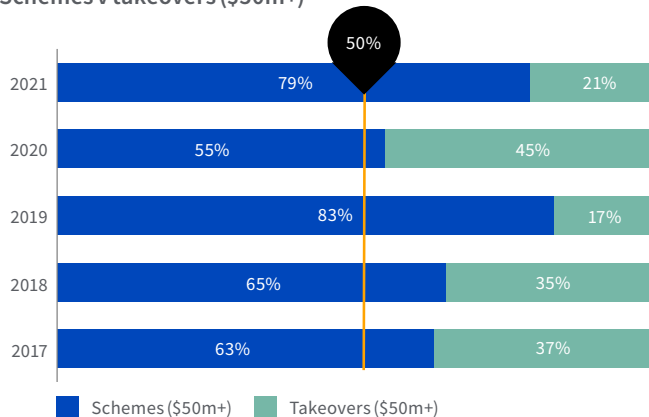
In 2021, normal service was resumed with schemes of arrangement returning as the strongly preferred transaction structure for deals over \$50 million, with 79% of transactions using this structure. This means that the results from 2020, where there was an almost 50:50 split between takeovers and schemes, were an outlier rather than a reversal of a five year trend which has seen schemes become the preferred transaction structure for Australian public M+A.

In 2021, the shift away from takeovers and back to schemes was driven by a number of factors: the stock market turmoil of early 2020 (causing at times a cavernous bid-ask spread between buyers and sellers) was long gone, the prevalence of mergers of equals using scrip consideration, rising share market valuations and clarity around valuation as the impacts of the pandemic were better understood. All of these ingredients resulted in a greater willingness of bidders to pay a strong price to succeed and target boards to contemplate friendly transactions which inevitably led to an increase in the use of schemes.

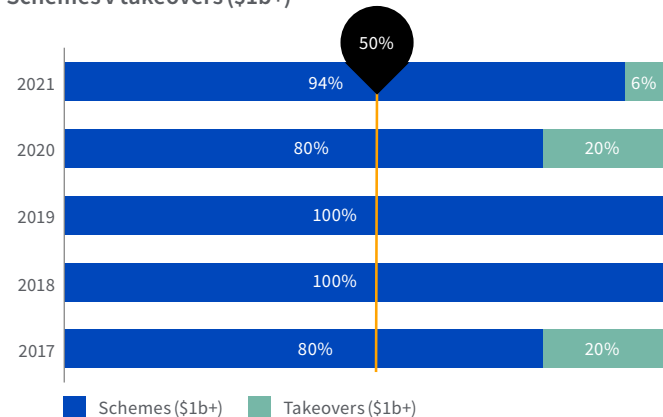
### FOR TRANSACTIONS VALUED OVER \$1 BILLION, SCHEMES OF ARRANGEMENT REMAINED THE DOMINANT STRUCTURE IN 2021 (94%).

Only one transaction in this category proceeded by way of a takeover, namely, the bid by Seven Group for Boral, a transaction that was never designed to result in 100% ownership and in which the bidder already started with a 23% shareholding (meaning the overall consideration to buy-out the minorities was significantly less than the headline deal value). This predominant use of schemes to implement large transactions is consistent with market practice over many years and is referable to a strong desire for transaction certainty in the context of “bet the farm” transactions, the need for due diligence and greater complexity of third party financing which is inevitably required for transactions of that size.

Schemes v takeovers (\$50m+)



Schemes v takeovers (\$1b+)



## PRE-BID STAKES IN TAKEOVERS AND SCHEMES

Pre-bid stakes were not as common in 2021 (39% of deals included some form of pre-bid compared with 48% in 2020).

Pre-bid stakes were much more prevalent in takeovers (62%) than in schemes (33%). Where a pre-bid stake was present, the type of pre-bid used was broadly consistent with previous years:

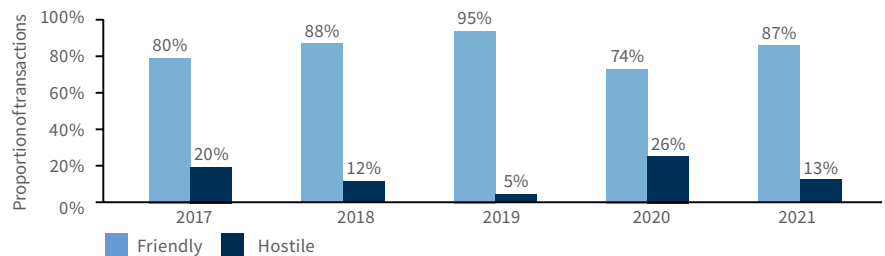
- + pre-bid agreements with shareholders were entered into in 33% of deals in 2021 (down from 40% in 2020);
- + an existing shareholding was present in 71% of 2021 transactions (up from 65% in 2020); and
- + the use of equity derivatives remained low at 4% (compared to 5% in 2020).

In a significant change from 2020, the preferred form of pre-bid stake in 2021 was the same whether the transaction was structured as a scheme of arrangement or a takeover. A physical pre-bid shareholding was in place in 75% of takeovers and 69% of schemes in which there was a pre-bid stake. In the past, it has been more common for pre-bid stakes where a scheme has been used to favour the use of pre-bid agreements (either an option or voting commitment) to avoid the fact that shares owned by a bidder cannot be voted in the same class as other shareholders voting on scheme proposals. This change from 2021 is likely, at least in part, to have been driven by the increased levels of competition in M+A causing bidders to want to secure a physical shareholding to deter competitors and provide a “second prize”, by way of profit on the stake if it is sold into a higher competing bid.

## HOSTILE BIDS DECLINE

Hostile transactions reduced from 26% of all transactions in 2020 to 13% in 2021. In our view, 2020 was the outlier in this regard. The steep decline of stock market and asset prices in early 2020 caused a significant gap in the bid-ask spread between buyers and sellers resulting in more acquirers taking opportunistic takeover bids straight to shareholders rather than seeking target board approval. 2021 saw increasing stock prices and renewed confidence in deal making and deal doing resulting in a return to more normal levels which helps explain the pivot back to schemes as the preferred transaction structure.

### Friendly v Hostile



The most notable hostile or unsolicited bid was the Seven Group’s \$9 billion off-market takeover bid for Boral, which was made at a narrow premium to allow Seven Group to increase its shareholding from 23% to 69.6% to consolidate control and gain a greater share in expected improvements in the performance of Boral in the years to come. Despite remaining hostile and not recommended by the Boral board, the bid was more successful than expected, delivering Seven Group majority control.

Whether a transaction was friendly or hostile had a significant impact on the chances of success in 2021, with 90% of friendly transactions being successful and only 43% of hostile transactions achieving success. Rising equity markets and the narrowing of the bid-ask spread meant that hostile transactions, often dominated by opportunistic bids when prices are depressed for a particular reason, were not only less common in 2021, they were much harder to complete successfully when they did eventuate.

## ON-MARKET BIDS REMAIN RARE

Of the 62 transactions valued at over \$50 million in the Australian market in 2021, only three were on-market takeover bids (being Gallin’s bid for McPhersons, Somers’ bid for Thorn Group and Samuel Terry Absolute Return Active Fund’s bid for Kangaroo Island Plantation Timbers). All three of these transactions were unsuccessful.

Perhaps Gallin’s takeover for McPherson’s was the most interesting as the target board chose to recommend that shareholders not accept the bid in reliance on future strategic plans lacking definition and a potential rival bid at a higher price. Following the close of Gallin’s bid, the potential rival bid did not eventuate (after that potential bidder conducted due diligence) and McPherson’s struggled in its financial performance. The McPherson’s share price is now 35% below the Gallin bid price, leaving significant questions about the judgement of the target directors’ recommendation not to accept the Gallin bid.

# FOREIGN BIDDERS

2021 saw a continuing trend of nations throughout the world placing an increased emphasis on national sovereignty and seeking to protect their country's assets, people and general well-being from a range of threats including geo-political, military, food security, consumer privacy, cyber security, data security and security of energy supply and key infrastructure.

Australia is no different.

Indeed, with Asia-Pacific geo-political tensions on the rise and an increasing awareness of cyber-attacks and data security, the now seemingly annual deluge of new and additional foreign investment regulation intensified.

With the range of new regulation, the involvement of FIRB in reviewing deals and imposing conditions on approvals increased.

That said, foreign investment remains important to Australia.

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**DEALS INVOLVING FOREIGN BIDDERS IN 2021 ACCOUNTED FOR \$61.9 BILLION (A HIGH IN THE 10 YEARS WE HAVE BEEN PREPARING THIS REVIEW) OR 47% OF TOTAL TRANSACTION VALUE OF ALL PUBLIC M+A DEALS.**

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However, interestingly, on a relative basis, foreign bids declined in 2021 with only 32% of all deals involving a foreign bidder. More than anything, the relative reduction in foreign acquisitions is in part due to the increased involvement of Australian superannuation funds in public M+A for infrastructure assets.

We explore the main themes of foreign investment regulation and foreign bids in 2021 below.





## FOREIGN INVESTMENT REGULATION AND FIRB

The Australian government's increasingly expansive views on national security have been evident for some time through the foreign investment review process, but 2021 was the year that they expanded to a new high.

The initial step involved amendments to the *Foreign Acquisitions and Takeovers Act 1975* (Cth) (FATA) (effective 1 January 2021) which created new regulated actions and new powers on the part of the Treasurer relating to national security risks. While the zero monetary threshold was mostly scrapped as of 1 January 2021 for many transactions, it continued for transactions where the target conducted any national security business.

From a national security perspective, the initial tranche of 2021 amendments gave the Treasurer the power to:



### **BLOCK, DIVEST OR IMPOSE CONDITIONS**

in relation to “notifiable national security actions” if the Treasurer considers them to be contrary to national security – this broadly covers a foreign person starting a national security business, acquiring an interest of 10% or more (and in some cases less than 10%) of a national security business or acquiring an interest in national security land and can capture offshore entities even when there is no Australian subsidiary.



### **“CALL IN” FOR REVIEW A BROAD RANGE OF TRANSACTIONS**

(including ones that are not otherwise caught by FATA) for a period of 10 years after completion, in order to determine if they are contrary to national security.



### **RE-REVIEW PREVIOUSLY APPROVED TRANSACTIONS**

if the Treasurer becomes aware that the application was misleading or that changed circumstances may give rise to national security risks.

Identifying whether a business is publicly known to be, or could be known following reasonable enquiry to be, carrying on business in Australia in whole or in part in one of the identified national security categories has proven to be a headache.

For starters, there are no hard and fast rules as to when a non-Australian entity is carrying on business in Australia – although FIRB has now provided some non-exhaustive guidance on this front. Moreover, it is only necessary for the target (whether Australian or not) to be carrying on a small amount of business in one of the national security categories to be caught, meaning significant amounts of due diligence may have to be done before a determination can be made about whether a target business is caught by the zero dollar thresholds.

In addition, many of the terms used are vague (such as, “critical” goods, services or technology) which, even with the benefit of guidance on FIRB's website, can be uncertain. Understanding whether a target stores classified information (defined to include information that has been classified as “protected” or higher within the [Australian Government Protective Security Policy Framework](#) (PSPF)), for example, will require a detailed understanding of the PDSF and the ability to make necessary inferences from other data that may become available in due diligence as to the likelihood or not that stored information is so classified. And finally, the government has set a very high bar for what constitutes “reasonable enquiries” – merely asking the target is insufficient.



All of this has been compounded by amendments made to the *Security of Critical Infrastructure Act 2018* (Cth) (SOCI Act), which came into effect in December 2021. The definition of national security business in FATA is tied to the definition of “critical infrastructure asset” in the SOCI Act, so these amendments have the effect of broadening the national security business categories from owners and operators of specified assets in the electricity, gas, ports and water / sewerage sectors to include owners and operators of additional specified assets in aviation, banking, broadcasting, data processing, data storage, the defence industry, domain name systems, education, energy market operators, financial market infrastructure, food and grocery, freight infrastructure, freight services, hospitals, insurance, liquid fuel, public transport, superannuation and telecommunications sectors. While the specific assets covered are relatively narrow, the breadth of the sectors suggests that a lot more transactions will be caught by the zero dollar threshold in 2022.

In conjunction with these latest amendments, the government has released an [updated guidance note](#) relating to national security risks. The note provides detailed and candid sectoral guidance on national security risks across a number of sectors. It is not

surprising that a number of sectors described in earlier versions of that note as sensitive are, as a result of the December 2021 amendments, now “notifiable national security actions” and subject to the zero dollar thresholds.

While the vast majority of transactions are still approved, the true scale of rejections cannot be determined because of the practice of quietly withdrawing applications after preliminary determinations have been made that the transaction is contrary to the national interest (or national security, where applicable).

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**WHILE FIRB DOES REPORT ON THE NUMBER OF WITHDRAWALS, THERE ARE ALSO OTHER REASONS TO WITHDRAW APPLICATIONS, MAKING THESE STATISTICS DIFFICULT TO INTERPRET.**

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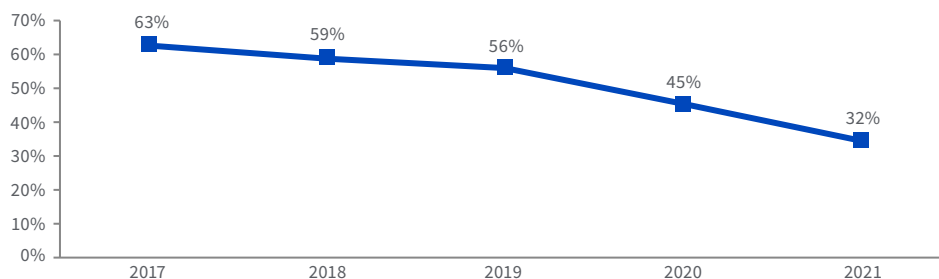
Nevertheless, rejections appear to be increasing. In addition, the government’s tougher stance on national security has led to changes in business behaviour, with Chinese bidders more likely to opt out of processes that involve national security businesses, on the basis that approval is unlikely.

## PUBLIC M+A TRANSACTIONS IN 2021: TALE OF TWO STORIES

With closed borders, the challenges of COVID-19, increased focus on security and with that foreign investment regulation in 2021, it should come as no surprise that the headline percentage of foreign bidder acquisitions in Australian public M+A in 2020 was at a low point over the last 10 years.

Indeed, foreign bidders accounted for only 32% of all announced deals over \$50 million in 2021. The relative decline of foreign bidder activity continued the downward trend of recent years. Indeed, one could say the decline has become steeper.

### Foreign bidders by number of transactions



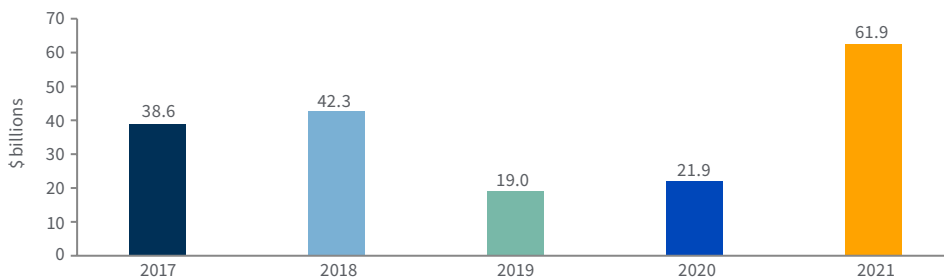
However, these percentage statistics do not tell the full story.

There were 20 foreign acquirer deals in 2021, which was slightly ahead of 2020 at 19 deals.

But when considering transaction value, deals involving foreign bidders accounted for \$61.9 billion, a high in the 10 plus years we have been preparing this Review, or 47% of total transaction value of all public M+A deals.

Indeed, notwithstanding the tougher foreign investment regulatory settings in 2021 and the decline in the percentage of foreign bidders amongst all bids, the aggregate transaction value of all foreign bids more than tripled last year.

### Foreign bidders by value



That all said, if we exclude the \$39 billion Afterpay / Block, Inc deal from the analysis, then the overall picture in 2021 was somewhat similar to 2020 in terms of foreign bidder deal numbers and aggregate transaction values.

Still, it's not uncommon to have one deal skew the data. For example, in 2020, almost half of the overall foreign deal value came from Coca-Cola European Partners' \$9.8 billion acquisition of Coca-Cola Amatil.

Whatever the case, foreign bidders remained significant players in the highest value public M+A transactions in 2021. Indeed, the three largest deals were either foreign or had a significant foreign component:



US based Block, Inc's \$39 billion acquisition of Afterpay.



US headquartered GIP teaming up with IFM and others to acquire Sydney Airport for \$23.6 billion. While we have classified this deal as an Australian transaction due to the consortium being majority Australian owned, GIP's involvement meant there was significant foreign investment in this transaction.



Canada's Brookfield, together with other Canadian pension funds, and Sunsuper's acquisition of AusNet Services for \$10.2 billion.



## WHERE DID THE BIDDERS COME FROM?

As illustrated in the world map below, in 2021 foreign bidders came from a range of continents and countries including North America (US, Canada and Bermuda), Europe (including the Netherlands, Norway, France and Germany), Asia (Korea, Singapore and Indonesia), South America (Brazil) and New Zealand.

However, when you break it down some more, there are some interesting themes in this:



**North American** bidders were involved in nine deals (which increases to 11 deals, if GIP's involvement in the bidding consortium for Sydney Airport and Ontario Teachers' Pension Plan's involvement in the acquisition of 1300 Smiles were included in the analysis)



**Europe** had six bidders, all from Western Europe



Asian bidders came from Western allies in **Singapore** and **Korea** plus **Indonesia**. Notably, there were no bids from Chinese companies

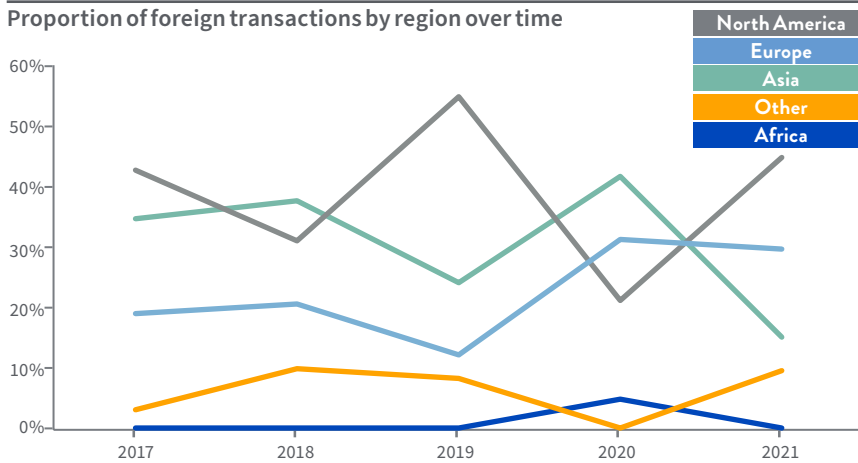


**New Zealand** had one bidder (which increases to two deals if Mercury NZ's involvement in the acquisition of Tilt Renewables was included)

In this respect, one can see the foreign investment regulatory settings and security concerns has resulted in a material shift in the home country of bidders such that the vast majority of foreign bids came from Western countries.



Proportion of foreign transactions by region over time



The largest number of foreign bidders from individual countries were:

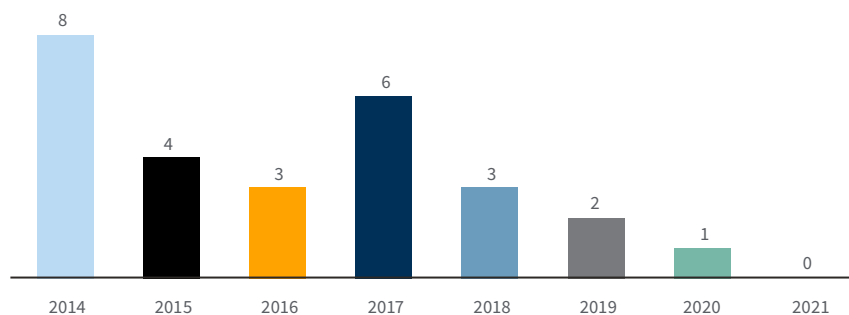


### ASIAN BIDDERS WERE DOWN OVERALL.

There were only three Asian bidders and two of those deals (iCar Asia / Carsome Group and Nusantara Resources / Indika Energy) were effectively intra-Asia deals as the target business was in Asia and not Australia.

The geo-political tensions with China and the continued (Australian government and media) sensitivity towards Chinese foreign investment, resulted in zero Chinese acquisitions. Only the POSCO acquisition of Senex was a true Asian bid for an Australian business.

Proposed acquisitions by Chinese acquirers including Hong Kong (2014-2021)



For sectors which were of interest to foreign bidders see Chapter 2.

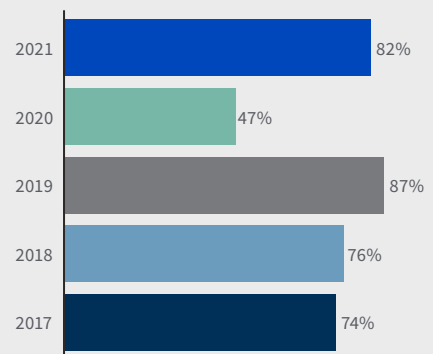
## FOREIGN BIDDERS' STRONG SUCCESS RATES

Foreign bidder success rates in public M+A transactions significantly improved in 2021 at 82% compared to 47% in 2020. This reflected a return to the success rates reported over most of the last 10 years.

We put this increase in 2021 back to usual levels as reflective of the greater number of opportunistic bids in 2020 following the initial impact of COVID-19 on asset prices which resulted in more unsuccessful deals. 2021 proved to be a much more normal year in this respect. Bidders seemed prepared to pay up for agreed deals leading to a greater success rate. As with 2020, in 2021 no listed company M+A deal failed for want of getting FIRB approval (at least not any transactions that were announced).

For completeness, it should be noted that this Review does not record confidential non-binding indicative offers which may not become public if rejected. If one takes this into account, the true success rates may have been lower.

Foreign bidder success rates



The success rate for 2022 does not include 12 transactions which were current as at 16 February 2022. The success rates for 2017 to 2021 have been updated to reflect the ultimate outcome of all transactions which were analysed in those past Reviews.

# CONSIDERATION TYPES

## RAINING PAPER

Strong equity markets encouraged bidders to propose, and targets to accept, scrip consideration in a trend which went well beyond the impact of the COVID-19 pandemic. Scrip-only deals accounted for 31% of transactions, a significant leap from previous years (21% in 2020 and 17% in 2019).

A highlight for Australian M+A, and indeed scrip-only consideration structures, was Block, Inc's acquisition of Afterpay. At \$39 billion, it is the highest value scrip-only deal, and the largest public company acquisition, in Australian history. (For further information, see the Deal Spotlight on Afterpay on pages 13 to 15). Santos' merger with Oil Search and Washington H Soul Pattinson and Company's acquisition of Milton Corporation were also notable for their respective \$8.1 billion and \$4.6 billion scrip-only market values.

The relative prominence of scrip in 2021 reflects the rise in actual or perceived "mergers between equals" and increasing consolidation within industry sectors (including the \$8.1 billion merger between Oil Search and Santos), continued high stock prices and potentially a desire amongst some investors to retain exposure to a target's underlying assets and also participate in the synergy benefits.

## CASH CONSIDERATION REMAINED SUBDUED

Only 63% of public M+A transactions in 2021 gave target shareholders the option to receive all cash consideration. This is consistent with levels observed in 2020, where 62% of deals offered all cash, but is a significant reduction from levels observed between 2017 and 2019.

Interestingly, all cash consideration was significantly less likely for takeover bids when compared to schemes, with only 46% of all takeover bids offering all cash consideration versus 67% for schemes, a factor we also attribute to the increase in industry consolidation mergers and continued high stock prices.

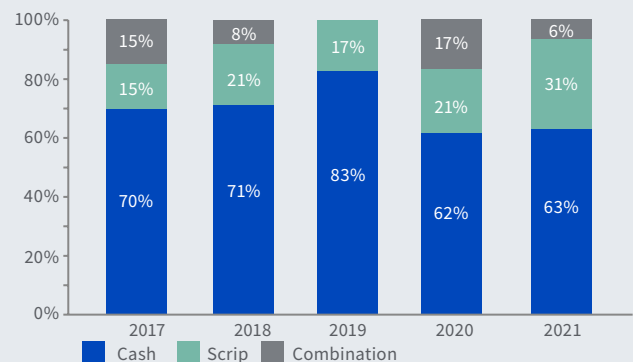
## COMBINATION CONSIDERATION OUT OF FAVOUR

There were only four transactions in 2021 which offered target shareholders a fixed combination of both cash and scrip with no all cash alternative. This represented 6% of announced transactions in 2021, down from 17% in 2020 (which was a five year high). The largest of these transactions was HomeCo Daily's \$2.2 billion acquisition of Aventus Group.

Only a handful of transactions gave shareholders the option to elect their preferred consideration structure. This included Aussie Broadband's proposed \$344 million acquisition of Over the Wire by scheme of arrangement, where target shareholders could elect either:

- + 80% cash consideration and 20% scrip consideration equating to \$4.60 cash and 0.23 Aussie Broadband shares for each Over the Wire share;
- + 100% cash consideration equating to \$5.75 cash per Over the Wire share;
- + 100% scrip consideration equating to 1.15 Aussie Broadband shares for each Over the Wire share; or
- + at least 1% but less than 100% scrip consideration with the balance payable as cash consideration.

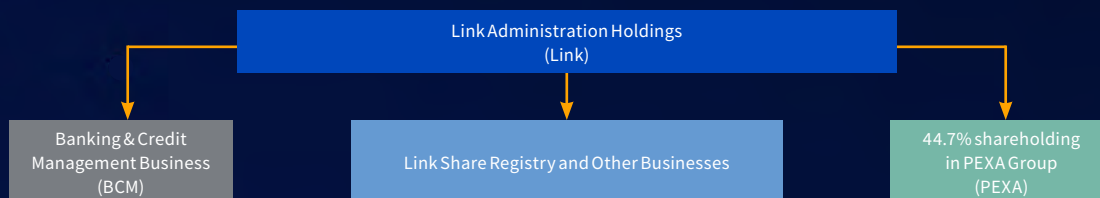
Types of consideration by number of transactions











## LINK – FINESSING CONSIDERATION STRUCTURES

2021 proved to be an interesting year for Link Administration Holdings Limited (Link). It supported the ASX listing of PEXA Group Limited (PEXA) (which it owned together with Morgan Stanley Infrastructure Partners and CBA) and retained its 44.7% shareholding in PEXA on listing in July 2020. It then received offers from Carlyle Group and Dye & Durham (D&D) to acquire Link (being whole of company deals) and commenced a sale process for its Banking and Credit Management business (one of its smaller divisions).



- 1 July 2021**  PEXA is listed on ASX; Link retains 44.7% interest in PEXA on listing.
- 5 November 2021**  NBIO from Carlyle Group to acquire Link for approximately \$2.8 billion, with consideration comprising:
  - + \$3.00 cash per share; and
  - + pro rata distribution of Link's shareholding in PEXA to Link shareholders (which at the time was valued on a look through basis at \$2.38 per share).
- 12 November 2021**  NBIO from Pepper European Servicing (PES) to acquire BCM business for up to \$86.5 million.
- 23 November 2021**  NBIO from LC Financial Holdings for BCM business for up to \$101.2 million.
- 22 December 2021**  Link enters into scheme implementation deed with D&D for \$5.50 per share (inclusive of an expected \$0.08 special dividend), valuing Link at \$2.9 billion. In addition, shareholders would be entitled to:
  - + retain a \$0.03 per share interim dividend; and
  - + an additional payment if the BCM business was sold within 12 months of the scheme being implemented (estimated, based on the LC Financial Holdings indicative offer price for BCM, at \$0.15 per share).
- 8 February 2022**  PES withdraws offer for BCM business; Link negotiating with LC Financial Holdings on an exclusive basis.

The all-of company offers dealt with the listed (and therefore liquid) PEXA shareholding and the BCM sale process somewhat differently. The bidders structured their offer consideration to best suit the configuration of the business they ultimately sought to acquire. For example, in the case of the Carlyle Group and D&D offers for Link:

- + The Carlyle Group was content to distribute Link's shareholding in PEXA to Link shareholders as part of its offer consideration, thereby reducing the effective cheque size for the acquisition; and
- + D&D was able to incorporate a contingent value component linked to the proceeds of any sale of the BCM business into the structure of their offer (while retaining Link's shareholding in PEXA).

## SOURCES OF FUNDING

Where cash consideration was used, it came from a variety of sources.

2021 showed a resurgence of bidders funding their acquisitions using at least a portion of their existing capital, with 85% of bidders doing so, reflecting the surprisingly strong balance sheets holding up through 2021.

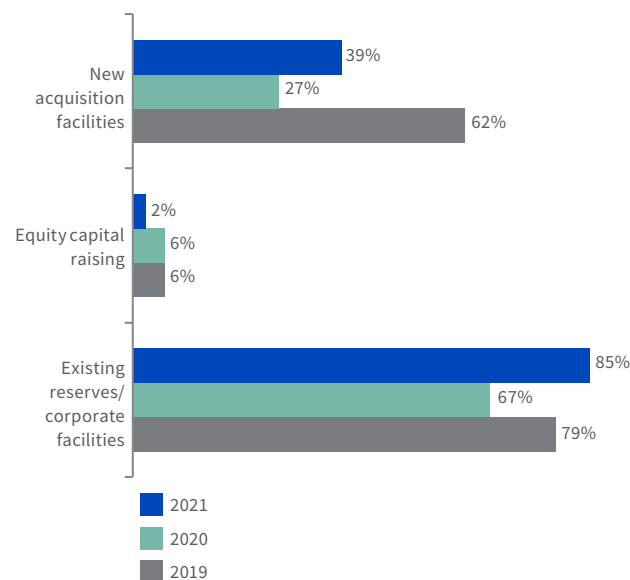
The number of transactions establishing new acquisition facilities (for the most part, secured debt facilities) increased from the 27% seen in 2020 to 39%, likely explained by the continued access to cheap debt for bidders. Several bidders used a combination of existing capital and new debt facilities.

Larger deals that used a mixture of funding sources in 2021 included:

- + **AusNet Services / Brookfield-led consortium** – \$10.2 billion funded from existing cash reserves and a syndicated facility agreement with various banks;
- + **Boral / Seven Group** – \$9 billion funded from existing cash reserves, undrawn facilities and a new unsecured syndicate term loan facility; and
- + **Spark Infrastructure / KKR-led consortium** – \$5.1 billion funded from existing cash reserves and secured debt facilities.

By the same token, it is not surprising that only one bidder, Aussie Broadband in its proposed acquisition of Over the Wire, undertook an equity capital raising to fund its acquisition – strong balance sheets, cheap debt and high equity prices pushed bidders toward more direct consideration alternatives.

### Sources of funds







## SPOTLIGHT: ESG

### 2021 saw an increased number of public M+A transactions in which ESG considerations were a key factor. More coming in 2022.

In 2021, companies worldwide, including Australia, had an increased focus on environmental, social and governance (ESG) matters. This was driven by growing attention by governments (both national and local), regulators, investors, financiers, customers, suppliers and the wider public on the manner in which corporates conduct their business. No longer is profitability in itself enough.

During 2021, at least seven significant M+A transactions had ESG matters as a driving consideration. Many of these involved public company acquisitions (and therefore form part of the data set analysed in this Review), but others involved demergers with a public company spinning off a valuable business which some investors found challenging for ESG reasons.

**Increasingly, ESG leadership and a strong ESG strategy is a key indicator of a quality business that will deliver long term value.**

#### ESG M+A transactions in 2021

	Target	Purchaser	Transaction type	Value
1	BHP petroleum business	Woodside	Merger	\$38.5 billion
2	Woolworths / Endeavour	N/A	Demerger	\$10.8 billion
3	AusNet Services	Brookfield consortium	Scheme	\$10.2 billion
4	AGL Energy / AGL Australia	N/A	Demerger	Approximately \$9 billion
5	Oil Search	Santos	Merger by scheme	\$8.1 billion
6	Spark Infrastructure	KKR consortium	Scheme	\$5.1 billion
7	Tilt Renewables	PowAR consortium and Mercury NZ	Scheme	\$2.8 billion

#### Three key drivers of ESG M+A in 2021:



Companies divesting assets with ESG concerns



Energy + resources assets being combined to support companies' long term ESG strategy



Infrastructure investors and superannuation funds investing in the energy sector, particularly renewable energy





### Demerging assets with ESG concerns

In 2021, Woolworths and AGL Energy each divested or demerged assets that they considered to be incompatible with their longer term ESG goals or standards:

- + **Woolworths' demerger of Endeavour Group.** Endeavour Group was Woolworths' retail, liquor and hospitality business. Woolworths noted increasing awareness of ESG considerations as a key risk associated with an investment in Endeavour Group. Its decision not to proceed with the development of a Dan Murphy's store in Darwin due to concerns of the potential impact on the local indigenous community, is an example of the role that ESG factors played in Endeavour's business.
- + **AGL Energy's demerger of AGL Australia.** AGL Energy has announced its plans to split its business in two. AGL Energy will be renamed "Accel Energy" and will focus on investment in existing operating sites as low carbon industrial energy hubs, as well as new clean energy projects. Another entity, AGL Australia (which will also be listed on the ASX as part of the demerger), will provide essential energy services to households and businesses (such as gas, electricity, broadband and other services), while investing in flexible energy trading, storage and supply and decentralised energy services. AGL Energy said demand for carbon neutral products and services, and demand for accelerated action on climate change, was a key reason for undertaking the transaction. See however "ESG driven investment" on page 33 which discusses the Brookfield / Cannon-Brookes takeover proposal for AGL Energy.



### Combining assets to support long term ESG strategy

In 2021, BHP agreed to merge its petroleum operations with Woodside, and Santos and Oil Search agreed to merge. These transactions were presented to investors as mergers to support longer term ESG initiatives. That said, the BHP / Woodside transaction could also be considered as BHP exiting assets that may not be compatible with BHP's longer term ESG objectives.

ESG benefits of these transactions were presented to investors as follows:

- + **BHP petroleum business' merger with Woodside.**
  - *"shared values and focus on sustainable operations, carbon management and ESG leadership."*
  - *"It will build on Woodside's existing targets to reduce net emissions by 15 per cent and 30 per cent by 2025 and 2030 respectively, on the pathway to its ambition of net zero by 2050, applying these to the combined portfolio."*
  - *"The combined business is expected to generate significant cash flow this decade to support the development of new energy products and low carbon solutions..."*
- + **Santos' merger with Oil Search.** *"The merger will create a company with a balance sheet and strong cashflows necessary to successfully navigate the transition to a lower carbon future with the combination of Santos' leading carbon capture and utilisation capability combining with Oil Search's ESG programs in PNG and Alaska to provide a strong foundation."*



### Investment in energy

In 2021, infrastructure investors and superannuation funds pursued investments in energy, in particular renewable energy. Key transactions included the PowAR consortium and Mercury NZ's acquisition of Tilt Renewables, KKR-led consortium's acquisition of Spark Infrastructure and Brookfield-led consortium's acquisition of AusNet Services. Further details of these transactions are set out below:

- + **PowAR consortium's acquisition of Tilt Renewables.** PowAR is a partnership comprising Queensland Investment Corporation, the Future Fund and AGL Energy. The PowAR consortium acquired Tilt Renewable's Australian operations while Tilt's New Zealand subsidiaries were acquired by Mercury NZ, an electricity generator and retailer.
- + **KKR-led consortium's acquisition of Spark Infrastructure.** Other members of the consortium were Ontario Teachers' Pension Plan Board and Public Sector Pension Investment Board.
- + **Brookfield-led consortium's takeover of AusNet Services.** Other members of the consortium included Sunsuper, Alberta Investment Management Corp., the Investment Management Corp. of Ontario and Healthcare of Ontario Pension Plan. One of Brookfield's aims in acquiring AusNet Services was to connect *"new and decentralised energy sources to bring renewable energy to Victorian communities."*

While not the focus of this Review, in 2021 infrastructure investors also pursued private M+A in renewable energy. This included:

- + **ICG / Shell / Meridian Energy** - Infrastructure Capital Group (ICG) and Shell Energy Operations acquired Meridian Energy's Australian operations for \$729 million. As part of the transaction, ICG acquired a portfolio of renewable generation assets and development projects and Shell acquired Powershop, an online energy retailer focusing on renewable energy.
- + **Palisade / First Sentier / Macarthur wind farm** - Funds managed by Palisade Investment Partners and First Sentier Investors acquired a 50% interest in the Macarthur wind farm from HRL Morrison and Co. The deal value is believed to be close to \$1 billion.

## SHAREHOLDER ESG ACTIVISM

In 2021, activist shareholders made ESG issues important in M+A. For example, JBS SA's \$426 million acquisition of Huon Aquaculture (one of Australia's largest salmon producers) was subject to an ESG campaign from Dr Andrew Forrest, controller of the second largest shareholder in Huon, focusing on environmental and animal welfare standards (see page 44 for further details).

## ESG DRIVEN INVESTMENT

In 2022, ESG investors are taking a more active role in making ESG issues important in M+A. For example, shortly before this Review was released, a consortium of Brookfield (Canadian asset manager) and tech billionaire Mike Cannon-Brookes (co-founder and co-CEO of Atlassian) made two non-binding takeover proposals to acquire AGL Energy at modest premiums to the AGL share price. As part of the proposal, the consortium suggested a decarbonisation plan for AGL that involved AGL's target for "net zero" emissions being brought forward by 12 years to 2035 and a further \$10 billion being invested in the energy transition to close down AGL's remaining coal power stations by 2030, 15 years earlier than AGL's current timelines.

Each proposal was quickly rejected by AGL's Board on the basis that it materially undervalued AGL, was not in the best interests of AGL shareholders and that AGL's proposed demerger of AGL Energy (discussed above) would deliver better value for AGL shareholders. Shortly following this rejection, Mr Cannon-Brookes tweeted that the consortium would now be "putting our pens down - with great sadness". Notwithstanding that, one can't help but feel there may be some further steps in this dance - if not by Brookfield / Cannon-Brookes then by others. One thing is for sure: companies owning coal fired power stations are certain to attract a lot of ESG commentary and investor interest in 2022 and beyond. It will be interesting to see how boards of these companies respond.

## PREDICTIONS FOR 2022

In 2022, we expect to see:

- + continued M+A from public companies divesting assets that are less conducive to ESG-conscious investment (eg. legacy fossil fuel assets) and increasing investment in ESG-oriented assets (eg. renewables, hydrogen, lithium, carbon capture and storage);
- + M+A activity in the energy sector continuing to be an area of activity (with speculation that Origin Energy will separate its retail business and / or demerging its upstream/downstream gas business) and ESG investors taking a more active role (with Brookfield / Cannon-Brookes takeover bid for AGL being representative of what we're likely to see more of);
- + M+A activity in other ESG sensitive sectors such as agriculture and food, financial services and healthcare; and
- + increased focus by bidders on ESG as part of their due diligence (it now being common place for many acquirers, particularly funds, to commission stand alone ESG due diligence reports).

However, as one would expect, M+A activity involving ESG considerations will ultimately be determined by overall commercial and financial considerations (in addition to ESG factors) including capital allocation, financial return and business strategy.

# SUCCESS FACTORS

## SUCCESS RATES UP, WITH A PERFECT SCORECARD IN HIGH-VALUE TRANSACTIONS

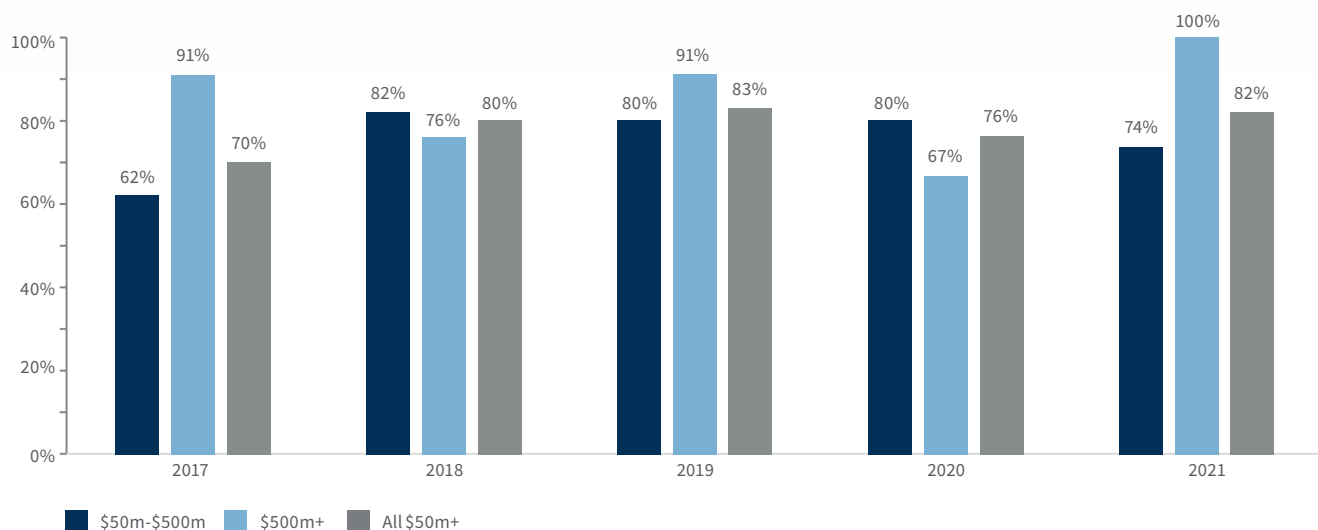
82% of all public M+A transactions valued over \$50 million were successful in 2021. This represents a material increase from the headline success rate of 76% in 2020 as bidders, targets and the market more broadly adjusted to the “new normal” of executing deals against the backdrop of the COVID-19 pandemic.

At the outset, it should be noted that our data is based on announced transactions which involve a takeover bid or, in the case of a scheme of arrangement, an agreed implementation deed. This may overstate the true success rate as many transactions fail at the non-binding offer stage and may not be announced which means

this is impossible to track. Nevertheless, the publicly announced data does give an accurate picture of the success of bidder’s converting an agreed deal or a deal announced by the bidder into a successful one.

In this context, high-value transactions (i.e. those valued above \$500 million) had a 100% success rate in 2021, significantly up from 67% in 2020. It was in transactions valued between \$50 million to \$500 million where success was not assured, with 74% of these transactions successful (the lowest success rate in this category since 2017).

### Success rates



The success rates for 2022 described in this Chapter do not include 12 transactions which were still current as at 14 February 2022. The success rates for 2017 to 2021 have been updated to reflect the ultimate outcome of all transactions which were analysed in those past Reviews.



It is interesting to observe the circumstances in which transactions were not successful in 2021:

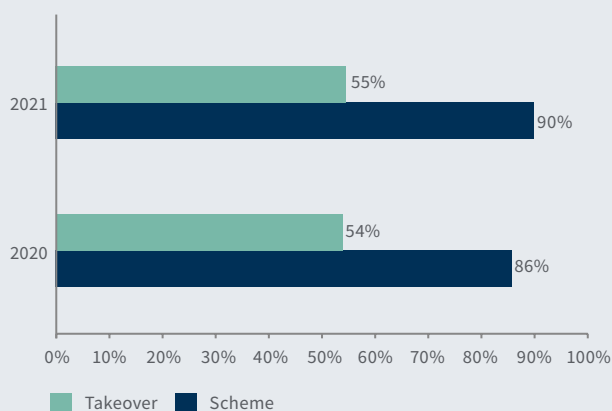
- + **Competing bids for Mainstream.** A competitive process to acquire Mainstream saw three competing offers emerge, with Apex ultimately defeating SS&C and Vistra. Apex had to pay up big to win the day, offering a 133% premium to the price originally tabled by Vistra and recommended by the Mainstream board. For further information on this transaction, see page 45.
- + **Boards say “no” to on-market bids.** The three on-market bids valued over \$50 million had a few things in common – they were unsolicited, pitched at skinny premiums and rejected by the target board. Each such bid was ultimately unsuccessful. Albeit the bidder for Thorn Group was able to double the size of its shareholding to just below 50% and the McPherson’s shareholders may question their board’s recommendation given the current share price is significantly (35%) below the bid price.
- + **Board recommendation doesn’t guarantee success.** The board of PM Capital Asian Opportunities Fund (PAF) made clear to shareholders that it considered a merger with PM Capital Global Opportunities Fund to be a better option than a hostile takeover bid from WAM Capital (WAM). The majority of shareholders agreed with the board, but this wasn’t enough to get the merger over the line, as WAM used its stake in PAF to vote down the merger. WAM ultimately achieved its objective, securing the recommendation of the PAF board and acquiring 100% of PAF. The transaction was also notable for the potential for conflicts of interest to arise as each of the merger parties, Capital Asian Opportunities Fund and PM Capital Global Opportunities Fund, had the same investment manager and the successful application by WAM to the Takeovers Panel which made a declaration of unacceptable circumstances in respect of various matters relating to the acquisition of shares by shareholders connected with the investment manager following the announcement of the deal.
- + **No COVID casualties.** Unlike 2020, where we saw multiple announced deals that did not proceed on the basis of MAC conditions or other conditions triggered by the impact of the COVID-19 pandemic, no public company acquisition valued over \$50 million failed in 2021 due to the prolonged period of uncertainty caused by the pandemic. The key difference being bidders in 2021 were able to take account COVID-19 factors before launching.

## SCHEMES PROVIDE A MORE CERTAIN PATH TO SUCCESS

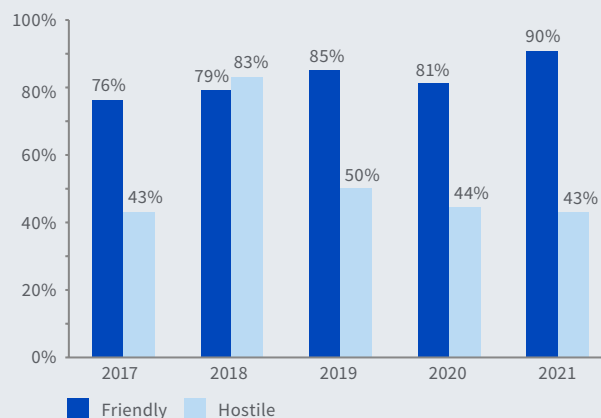
**CONSISTENT WITH 2020, WE SAW SCHEMES DELIVER MUCH HIGHER SUCCESS RATES AS COMPARED TO TAKEOVERS IN 2021 (90% VS 55%).**

While friendly bids for PrimeWest, Cashrewards and Apollo Consolidated achieved successful outcomes, only 43% of hostile bids were successful (broadly on par with 2020). The highlight here was Seven Group’s bid for Boral, which showed that hostile bids can still be very effective (even for billion dollar transactions).

Success rates for takeovers v schemes



Success rates for friendly and hostile transactions



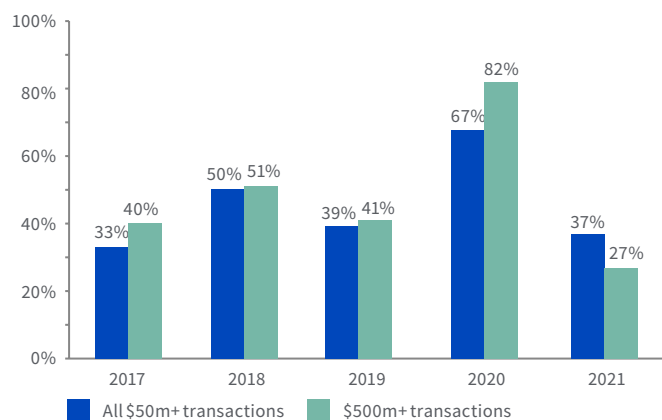
## DECREASE IN PREMIUMS ON LARGER DEALS

The average premium offered by bidders for all transactions over \$50 million dropped to 37% in 2021 after reaching 67% in 2020. This fall could be said to reflect the lower stock prices in the first half of 2020 requiring a higher premium to get target boards and shareholders to agree to accept acquisition proposals. That is, it was in some respects inevitable with generally higher stock prices in 2021 that the premiums in bids would be lower than 2020.

**FOR TRANSACTIONS VALUED OVER \$500 MILLION, THE AVERAGE PREMIUM WAS 27%, PERHAPS REFLECTIVE OF THE LARGE CHEQUE SIZES FOR DEALS OF THAT SCALE.**

Interestingly, scrip premiums were on average just over half the size of premiums in cash deals (24% compared with 43%).

### Average premiums paid



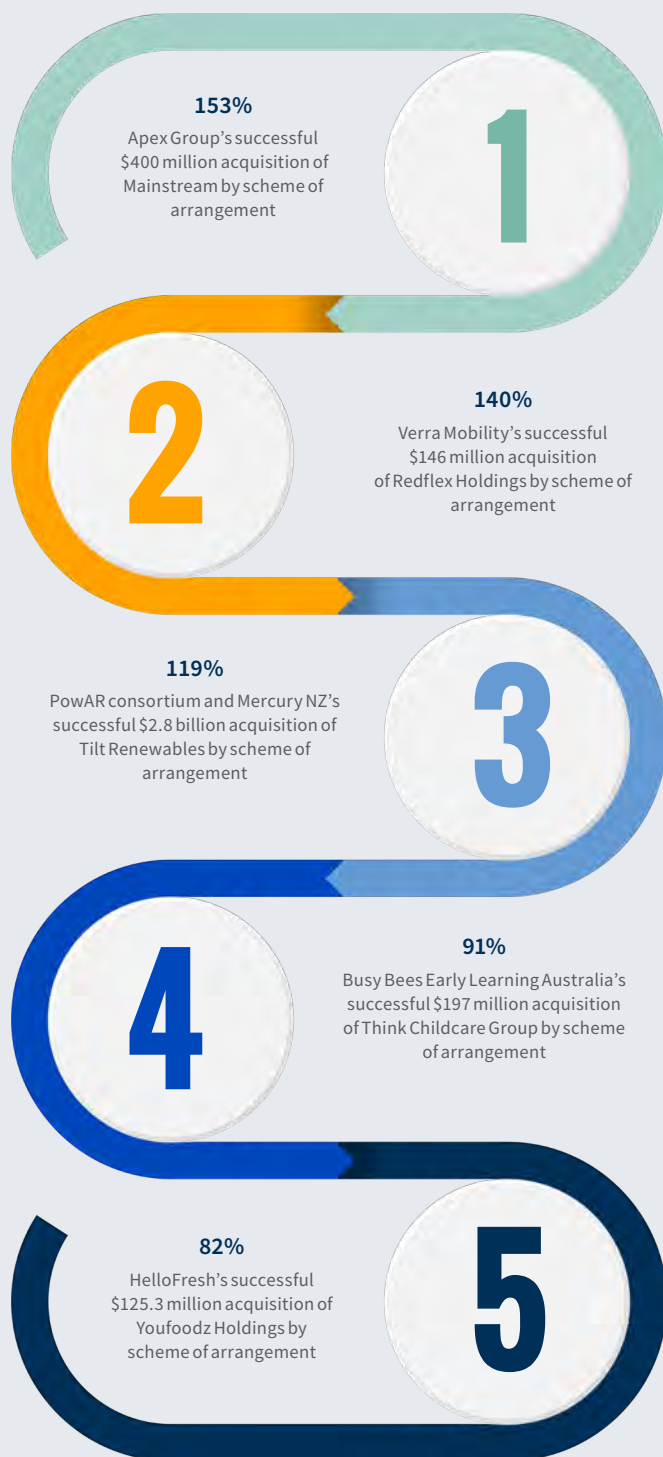
The competing bids for Mainstream and the scheme for Redflex both made the list of the top 10 highest premiums offered over the past five years. The acquisition of Tilt Renewables fell just short of the top 10, with a final premium of 119%.

### The top 10 transactions by premium offered in the past five years

- OVER 320%**  
 Competing bids for Cardinal Resources including Dongshan Investments' proposed \$665 million takeover bid (380%); Shandong Gold's successful \$565 million acquisition (330%); Nord Gold's and Engineers & Planners Co's proposed \$552 million takeover bids (each, 320%)
- 275%**  
 PT Bayan Resources TBK's successful \$515 million acquisition of Kangaroo Resources by scheme of arrangement
- 233%**  
 Zijin Mining Group's proposed \$90 million takeover bid for Nkwe Platinum
- 203%**  
 Hub24's proposed \$60 million acquisition of Xplore Wealth
- 177%**  
 Merck & Co's successful \$502 million acquisition of Viralytics by scheme of arrangement
- 153%**  
 Apex Group's successful \$400 million acquisition of Mainstream by scheme of arrangement at a 153% premium, defeating competing bids from Vistra (9% premium offered) and SS&C Technologies (150% premium offered)
- 142%**  
 Hancock Prospecting's successful \$426 million takeover bid for Atlas Iron
- 141%**  
 Advanced Personnel Management's successful \$74 million acquisition of Konekt by scheme of arrangement
- 140%**  
 Verra Mobility's successful \$146 million acquisition of Redflex Holdings by scheme of arrangement
- 120%**  
 OZ Minerals' successful \$418 million takeover bid for Avanco Resources

■ 2018 ■ 2019 ■ 2020 ■ 2021

## Top five premiums paid in 2021



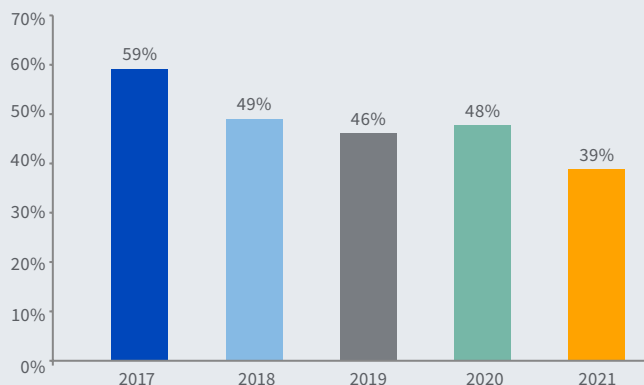
## PRE-BID STAKES

The bidder had a pre-bid stake of some kind in 39% of all transactions valued over \$50 million in 2021. This was the lowest proportion we have seen in the last five years.

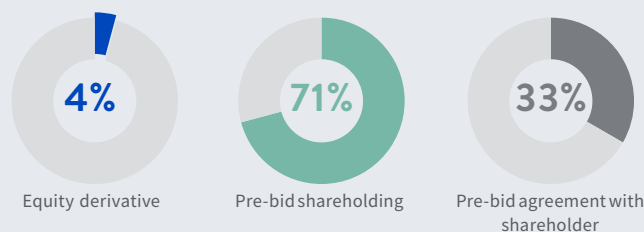
A pre-bid shareholding remained the most common form of pre-bid stake in 2020, being used in 71% of all transactions involving a pre-bid arrangement. This was followed by pre-bid agreements with shareholders, which were present in 33% of all transactions involving a pre-bid arrangement.

The move away from cash settled equity swaps observed in recent years has continued, with only one bidder using this type of instrument (or at least insofar as is evident from public disclosures), being Seven Group in its hostile bid for Boral. At the time the off-market takeover bid was announced, Seven Group had an interest in approximately 23.18% of Boral. The equity swap acquired by Seven Group approximately one month before the hostile bid was announced was limited to 3% (taking its interest to 22.98% at that time), which was all that was permitted under its creep capacity. Seven's interest increased to 23.18% by the date of announcement of the bid as a result of Boral's on-market buyback.

### Bidders starting with pre-bid stakes



### Types of pre-bid arrangements (2021)





# TRANSACTION TIMING

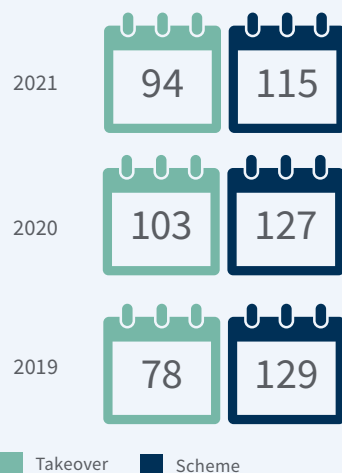
## DEALS WERE DONE MORE QUICKLY, BUT THE DIFFERENTIAL BETWEEN TAKEOVERS AND SCHEMES REMAINED CONSTANT

The time taken to implement both takeovers and schemes of arrangement has materially shortened over 2021, but takeovers remain on average quicker to implement than schemes.

For 2021, we saw:

- + the time taken to implement a takeover fall by 9%, moving from an average of 103 days in 2020 to 94 days in 2021; and
- + the time taken to implement a scheme of arrangement fall by 9%, moving from an average of 127 days in 2020 to 115 days in 2021.

### Average days to end of takeover offer v scheme implementation date



Traditionally, takeovers take less time on average to implement than a scheme.

In 2021, takeovers took on average 94 days to complete, compared to an average of 115 days for a scheme of arrangement.

However, it is worthwhile noting that the average time period for takeovers was significantly skewed by the iCollege takeover of Red Hill Education, which took 232 days thanks to a protracted competing bid duel. Without this deal, takeovers would have taken on average just 70 days (rather than the average of 94 days).

The reduction in overall timing for both takeovers and schemes seen in 2021 was most probably driven by:

- + the reduction in the proportion of deals being hostile (and the accompanying increase in the proportion of agreed deals); and
- + the increase in success rates for all transactions.

While the timing differential between takeovers and schemes narrowed a little in 2021, being 21 days in 2021 compared to 24 days in 2020, the data shows that takeovers remain potentially materially quicker to implement than schemes of arrangement. This advantage might also be amplified by the fact that under a takeover, board control is often obtained prior to the close of the offer (i.e. when the bidder obtains more than 50%) whilst with a scheme of arrangement, board control is only obtained upon implementation of the scheme.

While the complete data set indicates that the takeover timing advantage remains relatively low compared to previous surveys, stripping out iCollege / Red Hill Education as the outlier transaction reveals a more material average timing differential of 36 days. This is more in line with what was observed in 2017, 2018 and 2019 – the advantage was 46 days in 2017, 30 days in 2018 and 51 days in 2019.

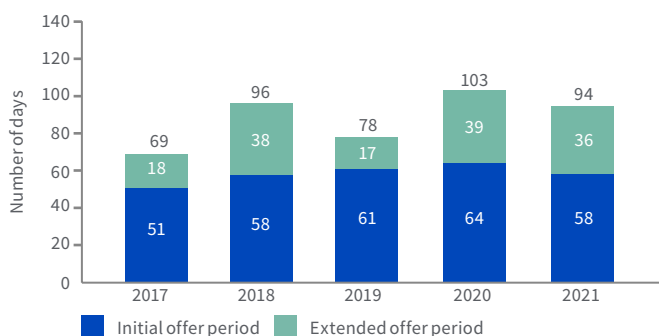
This reflects the continuing self-selection of takeovers when a quick and speedy outcome is expected to be achieved, and schemes being the preferred acquisition method if that is not the case.

## TIMING IN TAKEOVERS

As stated above, in 2021 there was a material reduction in the average time taken for a takeover from announcement to close of the offer – from 103 days in 2020 to 94 days in 2021.

This reduction was largely driven by the reduction in the average initial offer period of the takeovers (from 64 days in 2020 to 58 days in 2021). There was a smaller reduction in the average extensions of the offer period under the takeovers (from 39 days in 2020 to 36 days in 2021).

### Timing in takeovers

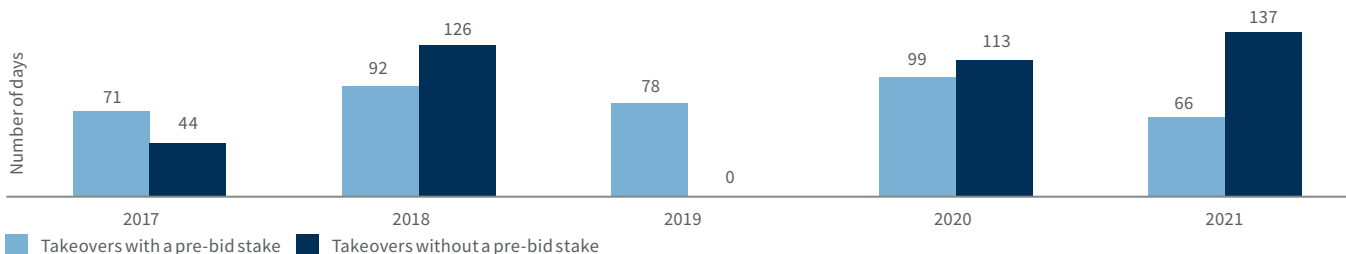


As can be seen below, there was a material reduction in the average time taken for a takeover when the bidder started with a pre-bid stake. While we have seen over the survey period that bidders with a pre-bid stake achieved completion of the takeover in a shorter period of time, that period itself fell materially last year. That is, in 2020 the average time taken for a takeover where the bidder had a pre-bid stake was 99 days, and in 2021 that period fell to 66 days.

The 2021 data made it abundantly clear that a pre-bid stake is an important factor in securing a speedy takeover outcome.

Bidders without a pre-bid stake took much longer to gain control, with the average time to complete a takeover without a pre-bid stake rising from 113 days in 2020 to 137 days in 2021.

### Days to close of takeover bid: impact of pre-bid stake

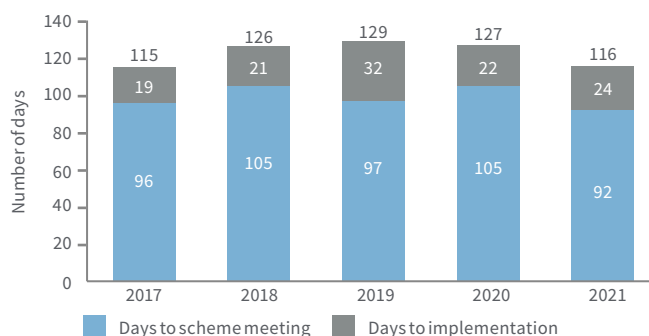


## TIMING IN SCHEMES OF ARRANGEMENT

As shown below, the time period between announcement of a scheme of arrangement and its implementation date has been relatively stable over the last five years. This is obviously to be expected in the context of such a regulated process.

Just under half (16 out of 33) of all successful schemes announced during 2021 took between 100 – 122 days from announcement to the scheme implementation date.

### Timing in schemes



This is consistent with the general timing “rule of thumb” of between three to four months to implement a scheme. However, with just over 24% of all schemes completing in less than 100 days, schemes of arrangement may be implemented in close to three months (with clear sailing and calm seas), but rarely less than three months.

**IT IS INTERESTING TO NOTE THAT THE TIME PERIOD FROM ANNOUNCEMENT OF THE TRANSACTION TO THE DATE OF THE SCHEME SHAREHOLDER MEETING HAS REDUCED ON AVERAGE BY APPROXIMATELY TWO WEEKS.**

# IMPLEMENTATION AGREEMENTS AND BID CONDITIONS

## IMPLEMENTATION AGREEMENTS

Implementation agreements continued to be a standard feature of agreed transactions in 2021, present in all 53 recommended transactions.

## DEAL PROTECTION MEASURES

In addition to standard obligations on the target board to recommend the transaction to shareholders (in the absence of a superior proposal and, where applicable, subject to a favourable independent expert's report), the usual suite of exclusivity provisions were present in the implementation agreements for the vast majority of agreed transactions, namely:



Restrictions on the target soliciting competing proposals (i.e. no-shop) and talking to potential competing bidders unless approached with a potentially superior proposal (i.e. no-talk).



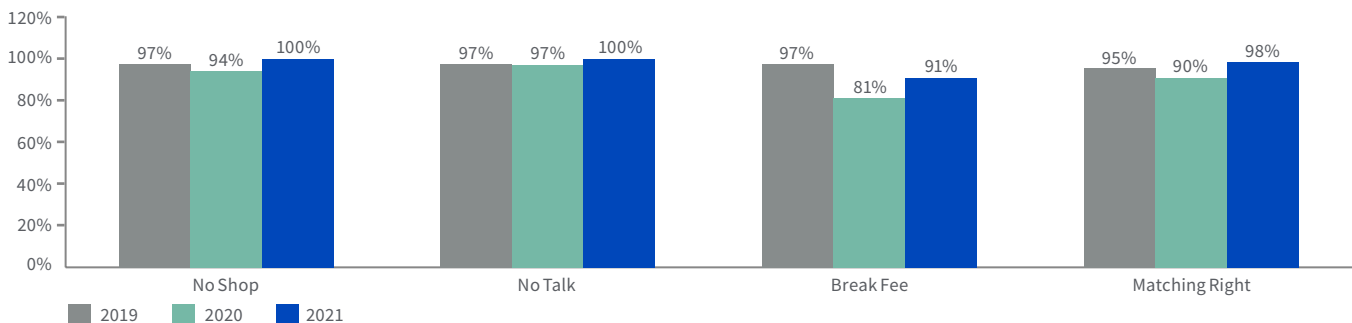
Obligations on the target to notify the bidder if it receives a competing proposal.



Matching rights in favour of the bidder if a superior proposal emerges, giving the bidder an opportunity to match or better the superior proposal before the target board can change its recommendation. See page 45 for commentary on the battle for Mainstream, where matching rights were in the spotlight.

While our Review generally tracks deal protection measures in binding scheme and takeover implementation agreements, there were also some important developments in deal protection measures during the due diligence phase prior to agreement of binding implementation agreements. This is discussed further in the section on the Takeovers Panel in Chapter 9.

### Frequent deal protection mechanisms





## BREAK FEES

In 2021, there was an increase in the proportion of target boards who agreed to pay break fees in friendly transactions on the occurrence of certain trigger events, including a change in recommendation by the target board or material breach of the implementation agreement by the target.

The percentage of agreed transactions which included break fees rose from 81% in 2020 to 91% in 2021, resulting in a return to levels observed in 2018 and 2019 (92% and 97%, respectively). As noted in last year's Review, the fall in break fees in 2020 was attributable to a greater number of smaller deals with low premiums and certain deals where the bidder held a significant pre-bid stake.

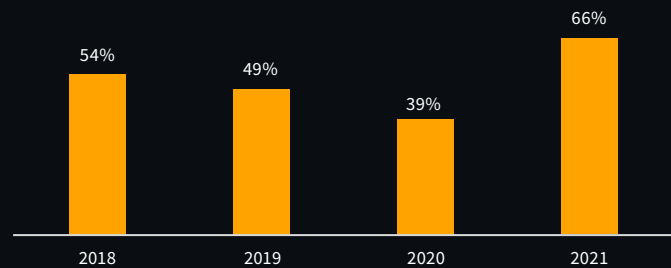
Where recommended transactions in 2021 did not have a break fee it was for similar reasons to that seen in 2020, including the Templeton Global Growth Fund and Antipodes Global Investment Company acquisitions (both low-premium fund transactions).

For the most part, the quantum of break fees stayed within the Takeovers Panel's 1% guidance (based on the target's equity value at the offer price). The highest percentage was in Paragon Care's \$83.6 million acquisition of Quantum Health Group, which had a break fee and reverse break fee of \$1 million (representing 1.2% of the target's equity value). This relatively small departure from the Takeovers Panel's guidance is consistent with similar examples from the past, where the break fee can be in excess of 1% of the

target's equity value in relatively lower value bids where it is clearly demonstrated that the bidder's actual costs exceed the 1% threshold.

Reverse break fees were increasingly prominent in 2021, with 66% of agreed transactions valued at \$50 million or more including a reverse break fee.

### Reverse break fees



Reverse break fee triggers included:

- + failure to satisfy conditions relating to regulatory or shareholder approvals required by the bidder; and
- + material breach of the implementation agreement by the bidder.

In all cases, the quantum of the reverse break fee was the same as the break fee payable by the target.

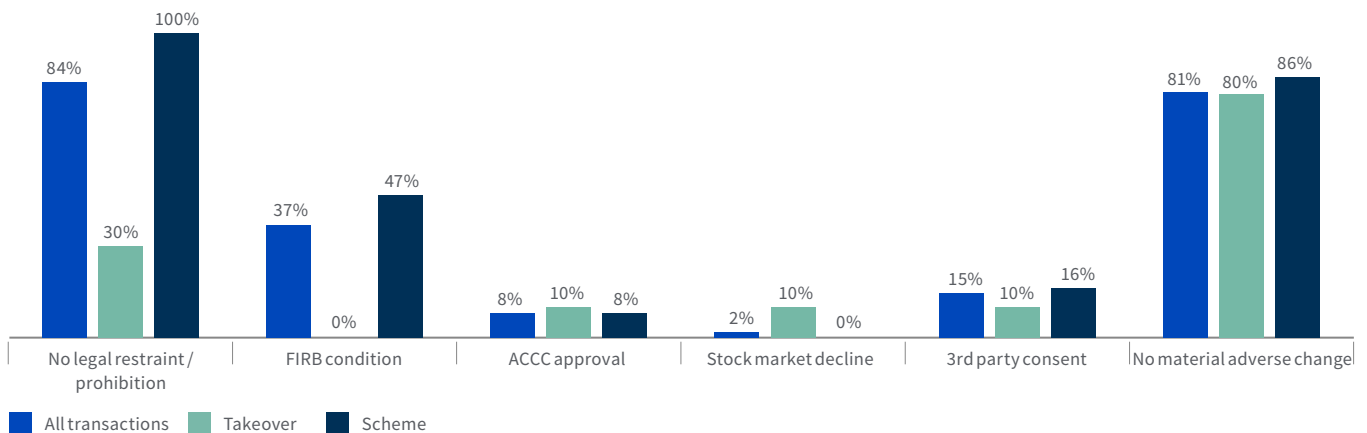




## BID CONDITIONS

A range of bid conditions were included in the off-market takeovers and schemes announced in 2021.

### Frequency of conditions



### FIRB

#### 47% OF ALL SCHEMES OF ARRANGEMENT IN 2021 WERE SUBJECT TO A FIRB CONDITION.

By comparison, no takeovers were subject to this condition (down from 41% of takeovers in 2020, though reverting to the 0% seen in 2019). This shows that where foreign bidders are involved, schemes are the transaction structure of choice. In the one on-market takeover bid with a bidder that required FIRB approval (Somers' bid for Thorn Group), Somers obtained FIRB approval seven days prior to lodging its bidder's statement.

### Material adverse change (MAC)

Across all transaction structures, MAC conditions were present in only 81% of deals, a continuation of the 2020 trend which saw the use of MAC conditions decrease from 98% in 2019 to 79% in 2020.

86% of all schemes of arrangement had MAC conditions, as did 80% of off-market takeovers (slightly up from 78% for schemes and down from 82% for off-market takeovers in 2020).

### GENERALLY, IT IS NOT SO MUCH A QUESTION OF WHETHER THERE WILL BE A MAC CLAUSE, BUT RATHER WHAT THE MAC CLAUSE WILL LOOK LIKE.

Falls in EBITDA, revenue, or net assets of the target are common triggers for a MAC. There of course can be a wide range in the detail of the MAC triggers (and also the exceptions to such triggers, i.e. where certain events will not count for an assessment of whether the MAC has been triggered).

The two largest announced transactions of 2021 (being Block, Inc's acquisition of Afterpay, and the IFM and GIP-led consortium's acquisition of Sydney Airport) both included MAC conditions, although not in the typical form for Australian transactions:



- + For Block's acquisition of Afterpay, the MAC was not tied to particular financial metrics, in line with US practice. On one view, this may be more difficult for a bidder to rely on, as courts often take a pro-target stance on the adverse changes required to trigger a general MAC.



- + For the Sydney Airport acquisition, the MAC was limited to the occurrence of specific events relevant to the operation of the airport (eg the cancellation of key licences). This target-friendly position came out of the significant public negotiations on price and terms which played out before that transaction was agreed.

### Minimum acceptance conditions

Of the 10 off-market takeover bids in 2021, seven (70%) initially had a minimum acceptance condition, a slight decrease from 82% in 2020 and a return to the level seen in 2019 (71%).

Generally, bidders leaned towards including a minimum acceptance condition with a 90% threshold (this was the case in five out of 10 off-market takeovers). In addition, Ramelius Resources' acquisition of Apollo Consolidated initially had a 90% minimum acceptance condition, which was later removed by entry into an amended unconditional implementation agreement.

The remaining two off-market takeovers that included a minimum acceptance condition (other than JBS' alternative bid for Huon Aquaculture, which is described on page 44) were WAM Capital's proposed acquisition of PM Capital Asian Opportunities Fund, and Westgold Resources' withdrawn proposal to acquire Gascoyne Resources, each requiring that the bidder only achieve a 50.1% shareholding. Westgold's bid was intriguing, as it was made while Gascoyne was in the process of acquiring Firefly Resources, and its bid was conditional on the scheme implementation deed between Gascoyne and Firefly (Firefly SID) being terminated. Despite the Gascoyne board determining that the final Westgold bid was superior for Gascoyne shareholders, by this point in time Firefly's shareholders had approved the scheme and agreed to be acquired by Gascoyne, and Gascoyne, as bidder under the Firefly SID, had no termination rights. As such, Westgold ultimately withdrew its bid for Gascoyne.

### Unconditional bids

Unconditional takeover bids continued to be relatively rare, with only four bids being unconditional from the outset. In each instance, the bid was considered hostile and rejected by the target's board.

As mentioned above, Ramelius Resources amended its initial bid for Apollo Consolidated to make it unconditional, responding to the fact that its initial bid was countered by Gold Road Resources' unconditional bid and Gold Road Resources taking a 19.99% stake in Apollo, rendering its 90% minimum acceptance condition practically impossible to achieve.



### Minimum acceptance tactics

JBS' acquisition of Huon Aquaculture (Huon) attracted significant media interest, in part because of one of its significant shareholders, Andrew Forrest's investment vehicle, Tattarang Agrifood.

On 6 August 2021, JBS entered into a scheme implementation deed to acquire Huon. Five days later, Tattarang increased its stake in Huon from 7.3% to 18.5% while campaigning against JBS with allegations of a history of bribery and corruption and poor animal welfare standards.

Taking into account JBS' 40% interest in Huon (which it was not able to vote), and typical voting turnout levels, Tattarang's

18.5% could have effectively prevented the scheme vote from being passed.

In response, JBS entered into a new agreement with Huon, and subsequently made an off-market takeover bid for Huon which was for the same price, and was conditional on the scheme not going ahead. It also included a minimum acceptance condition with a 50.1% threshold (which of course could include JBS' stake). This alternative bid is a good example of a strategy which bidders can use where a significant shareholder is threatening to vote against a scheme of arrangement. Ultimately, JBS and Tattarang made peace and the scheme proceeded, with JBS securing Tattarang's vote by adopting Forrest's "no pain, no fear" animal welfare mantra.





## HIGHLIGHT:

# CONTEST FOR MAINSTREAM

Mainstream Group Holdings Limited (MAI), an ASX-listed company which is primarily a fund administrator for fund managers, superannuation trustees and listed companies, found itself the object of attention from three different suitors, receiving 15 different bids over a period of 13 weeks.



In March 2021, MAI and Vistra entered into a scheme implementation deed (SID) under which it was proposed that Vistra would acquire MAI at a price of \$1.20 per share. The SID, unusually, contained go-shop arrangements, providing MAI with the option to solicit competing bids for a period of one month. The go-shop arrangements were included against the backdrop of a relatively low premium for the Vistra offer (only 12%), and were presumably tolerable to Vistra on the basis it also took a call option from existing shareholders over 19.99% of MAI's shares. This call option had an exercise price of \$1.20, and was exercisable where equal or superior proposals for MAI arose. However, if a superior proposal was to emerge prior to the expiry of the go-shop period, Vistra was obliged to vote those shares in support of the superior proposal. Through this, if the go-shop period resulted in higher offers, Vistra stood to gain the economic benefit of the higher offer in respect of the shares the subject of the call option, but would not have any ability to frustrate the success of that superior proposal.

Prior to the expiry of the go-shop period on 11 April 2021, SS&C emerged with a superior bid at \$2.20 per share, entering into a SID with MAI conditional on Vistra not exercising its matching right, MAI terminating the Vistra SID and MAI making payment of the Vistra break fee.

After execution of the SID between MAI and SS&C, a third bidder, Apex, emerged by submitting to MAI an NBIO at a higher offer. This triggered the matching rights of SS&C under the SID with MAI, which it exercised. A protracted competitive bidding competition between SS&C and Apex began, with Apex increasing its price in each round and SS&C exercising its matching rights in respect of each higher Apex bid. Ultimately, Apex's bid of \$2.80 just over two months later, representing a 133% premium from Vistra's initial bid, was not matched by SS&C and MAI and Apex entered into a SID in June 2021. MAI delisted in October 2021.

# THE REGULATORS

## TAKEOVERS PANEL

**THE TAKEOVERS PANEL HAD ANOTHER BUSY YEAR IN 2021 ALBEIT INTERESTINGLY THE CASE LOAD WAS MATERIALLY LOWER THAN THE 2020 NUMBERS.**

The Panel received 20 applications in 2021, which was significantly down on the prior two years which had well over 35 applications in each year. Nevertheless, 20 is consistent with the years before 2019-2020. Perhaps one reason for the lower number of applications in 2021 was a lower percentage of hostile bids (13% in 2021, down from 26% in 2020) and a greater proportion of schemes of arrangement (79% in 2021 compared with 50% in 2020) reflecting market conditions more conducive to agreed takeovers / schemes as compared to the market value dislocation in 2020 with the initial upheaval caused by COVID-19.

Nevertheless, the Takeovers Panel applications together with various other active matters including the potential for takeover law reform (more on that below) and consideration of new or revised regulatory guidance made it another busy year for the Panel executive team.

As is usual, the Takeovers Panel received applications on a variety of topics including bidder's statement disclosure, offer conditions, exclusivity arrangements, underwriting for capital raisings impacting control, association matters, breaches of the 20% rule and transactions impacted by decisions by conflicted directors.

Some key Takeovers Panel cases and developments in 2021 included as follows.

### Exclusivity arrangements

#### AusNet Services

This matter concerned one of the largest public company transactions in 2021 which involved competing bids by Brookfield and APA for AusNet Services (AusNet).


AusNet received various non-binding indicative proposals from APA and Brookfield to acquire AusNet via a scheme of arrangement. Following several of these proposals, Brookfield increased its proposal to an indicative price at \$2.50 cash per share on the condition that AusNet enter into a confidentiality and exclusivity deed with Brookfield which provided for Brookfield to conduct due diligence and for the parties to negotiate a scheme implementation deed on an exclusive basis for at least eight weeks. AusNet entered into such a deed. Shortly thereafter, APA made a further proposal at \$2.60 per share payable in cash and scrip. Importantly, the exclusivity arrangement with Brookfield did not include a fiduciary exception for AusNet to consider any higher proposal during an eight week period following signing. The confidentiality deed also contained a \$5 million cost reimbursement or break fee arrangement for the benefit of Brookfield if Brookfield diligently pursued the proposal and AusNet ceased to do so.

APA made an application to the Panel seeking a declaration of unacceptable circumstances alleging that the eight week exclusivity period without a "customary" fiduciary out hindered the acquisition of control in an efficient, competitive and informed market and denied AusNet shareholders an opportunity to participate in the benefits of the control proposal.

AusNet (and Brookfield) made submissions to the effect that the circumstances were not unacceptable as:

- + the AusNet board decided in good faith that acceptance of the proposed exclusivity arrangements was necessary to secure Brookfield's cash proposal and therefore in the best interests of AusNet's shareholders; and
- + APA had not been significantly disadvantaged as AusNet would be free to provide APA due diligence access at the end of the exclusivity period if the circumstances justified it.





Having regard to all the facts and circumstances of the matter, the Panel decided in *Ausnet Services Limited 01 [2021] ATP 9* that the arrangement had or was likely to have an anti-competitive effect given, among other matters:

- + the no-talk exclusivity restriction prevented the AusNet board from responding to any competing proposal, including an unsolicited proposal or a proposal that had been publicly announced;
- + there was no 'fiduciary out' to the no-talk restriction;
- + the length of the exclusivity period of eight weeks;
- + AusNet did not conduct an effective auction process before entering into the exclusivity arrangement; and
- + AusNet delayed in disclosing the full terms of the exclusivity arrangements, noting the cost reimbursement provision was not disclosed by AusNet.

The Panel made orders:

- + permitting AusNet to engage with competing proposals, including APA's proposal, if these proposals are considered superior; and
- + ensuring that the market, and potential competing bidders, are aware of all material terms of the exclusivity arrangements.

APA had also sought a further order (which the Panel declined to make) preventing AusNet and Brookfield entering into a scheme implementation agreement for five weeks after the end of the exclusivity period in order to allow it to "catch up" to Brookfield.

Interestingly, the order and declaration of unacceptable circumstances were made 26 days, say four weeks, after the exclusivity arrangement was entered into. In any public company transaction, before a counter-bidder can get due diligence access it would need to agree a confidentiality deed with the target, that might take a further week or two. In this context, regardless of Brookfield's eight week exclusivity arrangement being found to be unacceptable, Brookfield gained an important four to six week head start over any counter-bidder.

Indeed, Brookfield ultimately entered into a scheme implementation deed a couple of weeks after the Panel's orders at \$2.65 cash per share (having increased its prior proposal in the face of competition from APA) and was successful in acquiring AusNet.

The AusNet board will feel they achieved a strong outcome for shareholders which was made possible via the exclusivity arrangements.

It was perhaps then a pyrrhic victory for APA at the Takeovers Panel. The matter shows that even though APA was successful in gaining access to due diligence earlier than it would have had the Brookfield exclusivity period been upheld, it wasn't able to match Brookfield's final bid in its binding offer, nor a major shareholder's preference for cash, and so was ultimately unsuccessful.

## Virtus Health

It wasn't long after the decision in *AusNet Services* before the issue of exclusivity agreements in relation to indicative proposals was back before the Panel in relation to competing proposals by BGH Capital and CapVest Partners to acquire Virtus Health (Virtus).

In December 2020, BGH acquired a 19.9% stake in Virtus by an aftermarket share raid for 10% and a swap over 9.9%. BGH then made a non-binding indicative proposal to the Virtus board seeking to acquire Virtus by scheme of arrangement at a price of \$7.10 per share.

While Virtus was considering the BGH proposal, it received a further non-binding indicative proposal from CapVest to acquire Virtus by scheme of arrangement at a price of \$7.60 per share. CapVest also indicated that, if the scheme failed, it would be willing to make a takeover offer with a 50.1% minimum acceptance condition at \$7.50 per share. The CapVest proposal was only received after Virtus agreed to enter into a process deed with CapVest which provided for CapVest to conduct due diligence and for the parties to negotiate a scheme implementation deed on an exclusive basis for nine weeks. The exclusivity arrangement included a standard fiduciary out which only applied three to four weeks after the deed was signed. During this initial period, Virtus was not able to consider any superior proposal. The process deed also contained other common exclusivity arrangements these as notification rights, matching rights and provision of equivalent information. The deed also contained a break fee arrangement for the benefit of CapVest (of either \$2 million or \$4 million, depending on the trigger).

BGH made an application to the Panel seeking a declaration of unacceptable circumstances alleging that the process deed and the circumstances in which it had been entered into failed to meet the minimum standard of conduct required of participants to preserve an efficient, competitive and informed market for the acquisition of control of Virtus.



Virtus submitted that the circumstances were not unacceptable and had not hindered, but had in fact promoted, competition for the acquisition of control of Virtus. Virtus submitted that its board had carefully considered each of the elements of the process deed, as well as its overall effect, and decided that the protections given to CapVest under the process deed were necessary and reasonable in the context given the opportunities for an auction for control had been significantly reduced as a result of BGH tabling its proposal immediately after acquiring a 19.99% pre-bid stake. Virtus submitted that these were reasonable protections to agree to so as to create contestability for control when it otherwise might not have existed and given the price proposed by CapVest was a significant premium to the price proposed by BGH and, based on the valuation work undertaken by Virtus, sufficient to justify endorsement.

The Panel considered that the exclusivity arrangements, considered as a whole, and having regard to the factual matrix of this matter, inhibited or were likely to inhibit the acquisition of control of Virtus taking place in an efficient, competitive and informed market (see Takeovers Panel [media release](#)).

The Panel considered that the following aspects of the exclusivity arrangements in the process deed, taken together, had an anti-competitive effect:

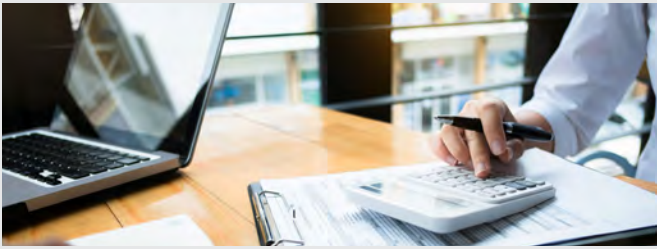
- + the fiduciary out did not apply during a period of approximately one month;
- + the effectiveness of the fiduciary out was unclear in certain circumstances and was limited by the notification obligation;
- + the equivalent information provision was not subject to any exception for sensitive information of a bidder; and
- + the duration of the exclusivity arrangements and the fact that they were granted at the indicative proposal stage where there is no guarantee that Virtus shareholders would receive a binding bid.

The Panel made orders that:

- + Virtus and CapVest were prohibited from entering into a scheme implementation agreement and CapVest was prohibited from making a takeover bid for Virtus, for ten business days (on the basis that the one month period during which the fiduciary out applied had already expired by the time that Panel made its orders); and
- + some of the exclusivity arrangements in the process deed were to be amended to ensure it is clear that the fiduciary out is effective and that the equivalent information provision contains an exception for bidder sensitive information.

As a result of these two decisions, it appears that entering into exclusivity arrangements (without a fiduciary exception) in response to indicative, non-binding proposals is likely to be susceptible to being declared unacceptable, even where target boards believe that the arrangements, in all the circumstances, either promote competition or are otherwise in the best interests of shareholders.





### Dividend reinvestment plan: Thorn Group

This was an application made and determined in 2020 albeit the reasons for the decision were released in 2021 (see [Thorn Group Limited 01 & 02 \[2020\] ATP 29](#)). The matter is interesting as it is the first time the Panel had to consider the impact of a dividend reinvestment plan (DRP) on control of a company.

Thorn Group was a company with a significant amount of cash and its board was considering the company's future business opportunities and / or a return of cash to shareholders. Its major shareholder, Somers, owned 30.6% of Thorn. Two of the three Thorn board members were nominees of Somers. The second largest shareholder and other significant shareholders were critical of Thorn and its governance and were seeking a change of the board by requisitioning a shareholders meeting and proposing member resolutions. Thorn considered that the proposed meeting and member resolutions were invalid. Litigation soon followed.

During this time, Thorn announced a large special dividend in relation to which the DRP would operate (with a relatively short time for elections to participate in the DRP to be made) and the potential for a future significant buy-back.

Shareholders holding only 39% of the issued capital, including Somers, participated in the DRP. Following the DRP, Somers' shareholding increased to 39.4% in reliance on item 11 of section 611 of the *Corporations Act* (an exemption for an increase in voting power via a DRP).

The second largest shareholder made an application to the Panel for a declaration of unacceptable circumstances which the Panel made for a number of reasons including:

- + lack of disclosure at the time of announcing the DRP of the potential control effect;
- + lack of information about the merits of reinvesting in the company given the company had not identified future use of its cash funds and uncertainty over future business plans;

- + short time to closing date for elections in the DRP (eight days after announcement);
- + potential effect on control and lack of communication with shareholders;
- + incongruence between the DRP followed by a large share buy-back;
- + potential conflicts at the board at the time it made its decision to proceed with the special dividend and the DRP; and
- + potential to impact the voting and outcomes of the resolutions concerning changes to the board requisitioned by shareholders.

In making its decision, the Panel said that the DRP exception is “to allow shareholders to reinvest back into a company to fund continuing operations and future growth. Its purpose is not for passing control to a shareholder at a discount using the company's own funds” and, in the Panel's view, “the size of the special dividend and the existence of substantial shareholders on Thorn's register, together with the contributing factors described above made it inevitable that applying the DRP to the special dividend could have a significant effect on control that was inconsistent with the purposes” of the DRP exception and the takeover provisions.

Most dividend reinvestment plans will not require scrutiny for the purpose of relying on the item 11 exception. In this matter, it was an unusual combination of factors that led to the circumstances being unacceptable including the failure to consider the control effects of the large special dividend particularly in light of the known or likely preferences of Thorn's major shareholders, the failure to disclose the potential control effects, the issue of DRP shares before the requisitioned meeting to replace Somers' nominees on the Board (and this meeting had not been held by the date it was required to be held) and the failure of the Thorn board to consider the potential conflicts of interest of directors when considering the potential control effects.

The Takeovers Panel made orders cancelling the shares issued to Somers under the DRP (other than the number of shares that would allow Somers to retain its pre-DRP percentage shareholding) and requiring Thorn to pay the dividend in cash to Somers.

The decision may not have wide reaching effect as most DRPs will not require scrutiny that the facts of this case demanded. That said, it is an interesting example of the difficulties that may arise from the decisions of directors who may be subject to conflicts of interest.



### Truth in takeovers – shareholder statements

After seemingly much internal deliberation, ASIC decided not to go ahead with its comprehensive review of [ASIC Regulatory Guide 25](#) known as “Truth in Takeovers” (RG25) which requires that bidders, targets and substantial shareholders be held to public statements. This is somewhat disappointing given RG25 is essentially good regulatory policy but has not been updated for almost 20 years since it was first issued in which time the market has significantly developed in reliance on the policy. Still, perhaps market participants may not have liked some revisions which we understand ASIC to have been contemplating so maybe this is a good outcome overall. Best not to mess with something that is not fundamentally broken.

But is it broken?

Most would say the policy works well insofar as public statements by bidders are concerned ensuring bidders cannot deviate from last and final statements about bid price and closing dates.

However, one area of concern in recent years is whether or not the policy should apply to shareholders, and in particular retail shareholders? These shareholders may not even know about RG25 or be sophisticated enough to realise the consequences of their statements or how bidders and targets may use statements made by them (including by aggregating with statements made by others).

In particular, a number of recent Takeovers Panel cases have arisen out of ambiguous statements by shareholders including [Finders Resources 02 and 03R](#) (2018) and [Cardinal Resources 02](#) (2020) and some years before that in [BreakFree Limited 03 and 04](#) (2003) and [Bullabulling Gold](#) (2014). Some of these matters also involved bidders and targets surveying, collecting and / or “harvesting” intention statements from shareholders to accept or reject bids which were then summarised in bidders or targets statements.

ASIC RG25 expressly applies to substantial shareholders but does not expressly state if it applies to other shareholders. Separately, ASIC has previously said that it discourages securing and disclosing shareholder intention statements. The market seems to be disregarding this ASIC commentary as seeking shareholder intention statements is quite commonplace in most takeover bids and schemes and it is clear that these statements can be influential to other shareholders when they consider whether or not accept a bid.

The Takeovers Panel generally expects substantial shareholders to be bound by public statements of intent. However, the Panel has not generally applied RG25 to non-substantial shareholders albeit the position often depends on the circumstances and facts of the matter. Of course, adopting different approaches for different shareholders is unfair and perhaps applying the policy to substantial shareholders in itself may be too restrictive or unfair particularly if the facts or circumstances concerning a takeover transaction change.

Then, of course, what about statements made by target directors who will often hold shares? It is not uncommon for director statements recommending acceptance or rejection, and accompanying statements about the directors’ intention in respect of their own shareholdings, to be repeated without qualifications. Should target directors be held to these unqualified statements? Should they be in a different category from other shareholders?

Given the various uncertainties, it seems that shareholder statements is an area where the market would benefit from some clear regulatory guidance. ASIC has seemingly vacated the area, at least for now. It remains to be seen if the Takeovers Panel will venture further into this space, noting it has already done so once in [Guidance Note 23](#) in respect of qualifications of shareholders statements, consent for these statements to be published and related disclosure matters.



## Takeover law reform

On 30 April 2021, the Treasurer announced that the Government would “conduct a public consultation process to consider broadening the role the Panel plays in control transactions, including potentially giving advance rulings and expanding the Panel’s remit to include members’ schemes of arrangement”. In doing so, he noted that the Takeovers Panel was a “regulatory success story” and the Government wanted to explore how its role could be expanded to further reduce the costs of M+A.

### Advance rulings power

Currently parties to a takeover can discuss uncertain points of law or practice or facts giving rise to a potential Takeovers Panel matter with the Panel executive. However, these discussions, while helpful, would not bind a sitting Panel.

In this context, it would seem that giving the Takeovers Panel an advance rulings power, which could operate in a manner similar to ASIC’s waiver and exemption power, must be a positive development which would assist in providing certainty in takeovers (and thereby reduce costs).

That said, the technicalities in the approach to exercising this power would not be without some difficulties which might reduce the cost and efficiency benefits. For example, all parties affected by any advance ruling would want to be consulted. In addition, one might expect the availability of an appeals process from decisions concerning the exercise of this power (noting the Panel itself has power to hear appeals from ASIC decisions to exercise its waiver power). Nevertheless, the existence of a binding advance ruling power, with appropriate safeguards, would surely be a positive development.

### A greater role for the Takeovers Panel in schemes of arrangement?

Perhaps, more controversially, the consultation is also exploring the possibility of moving the role of the Courts in approving schemes of arrangement to the Takeovers Panel.

The desire to do so is borne out of a view that the Court process is cumbersome, expensive, time consuming and antiquated.

Of course, some have a very different view, believing the Court supervision adds integrity and fairness to the process and is best placed to apply relevant legal principles that have evolved in case

law over many many years. With respect to those views, these are matters that a well respected specialist regulatory body like the Takeovers Panel could easily undertake.

There are, of course, other potential models that could be tested or tried including:

- + maintaining the role of the Courts, or a modified version of it, but have the Takeovers Panel replace ASIC in its review role and in assisting the Court, as has been done in New Zealand; or
- + retaining Court approval for schemes of arrangement for those parties who wish to seek Court approval of the acquisition for whatever reason but creating a new, additional, regulatory model for acquisitions of public companies involving shareholder approval but with no court approval. Shareholder approval could be by way of 75% of votes cast by independent shareholders (ie the 50% headcount test applying in schemes could be avoided). This new approach could leverage off existing disclosure requirements in bidder and target statements (and / or scheme booklets). The Takeovers Panel could regulate disputes in relation to this mode of acquisition in much the same way as it does for takeover bids.

This new approach would in effect provide a third mainstream way to acquire Australian public companies in addition to schemes and takeover bids. It could be said to be analogous with US regulation which allows mergers and takeovers to take place in this manner.

### Where to next?

It is not clear how far the Government or Treasury has progressed in its considerations of these matters and if they have concluded on a preferred way forward. However, with a federal election due by May 2022 and parliamentary sitting dates limited (with those to come to be taken up with the budget), any proposed legal reform of this nature, if it is to proceed, will have to wait until post-election.

Takeover law reform is, of course, not a key electoral issue and so it seems we will need to wait until the second half of 2022 to see if these worthy reform initiatives are picked up by a re-elected Liberal government or a new Labor government. One suspects if Labor wins the election, these initiatives might be further down the list for a first term new government.





## ASIC

**Back to the future...with an eye on recovery?**

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**AMID THE ONGOING COVID-19 PANDEMIC, THE GOLDEN AGE (... FOR LAW FIRMS) OF “WHY NOT LITIGATE?” IS SEEMINGLY COMING TO AN END.**

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The hypervigilant response to the Banking Royal Commission’s criticism that ASIC was underutilising civil penalty litigation when dealing with misconduct has seemingly run its course. After several public and high-profile losses, ASIC has now changed tack, with new leadership and its [Corporate Plan 2021-25](#) excluding all mention of the “why not litigate?” approach and instead favouring a focus on economic recovery. We expect this approach to have little impact on the regulation of M+A in Australia.

The new enforcement approach focuses upon matters involving the most significant harm to the community. Whilst this shift in enforcement approach suggests the Royal Commission’s diminishing influence, it recognises that ASIC will better serve

the public by focusing its litigation resources on instances of serious misconduct while using its other powers to efficiently and effectively respond to less severe, yet still unlawful or undesirable corporate behaviour.

ASIC’s Corporate Plan and its accompanying [Statement of Intent](#) responds to the Federal Government’s [Statement of Expectations](#) for ASIC. This statement begins with the expectation that ASIC will “*identify and pursue opportunities to contribute to the Government’s economic goals, including supporting Australia’s economic recovery from the COVID pandemic*”. Other focuses include that ASIC will “*work closely with the Government and Treasury*” and “*consult with the Government and Treasury in exercising its policy-related functions*”.

This represents a significant shift in Government attitudes with the 2018 Statement of Expectations emphasising the importance of ASIC's independence in maintaining confidence in the regulatory framework. The previous iteration also highlighted ASIC's enforcement role and directed the regulator to target financial sector misconduct. It remains to be seen whether the government's desire to put a bridle on ASIC's policy-making functions will have any impact on the refresh of the numerous modifications to the *Corporations Act 2001* (Cth) which ASIC has made historically to help facilitate M+A transactions, and which is due to occur later this year (more below).

In June 2021, the Government announced new ASIC leadership, with Mr Joseph Longo appointed as Chairperson and Ms Sarah Court as Deputy Chairperson. Mr Longo has a background as a corporate lawyer, in-house counsel at an investment bank and national director of enforcement at ASIC. Ms Court has previously served as an ACCC commissioner, where she was responsible for enforcement matters. The new Deputy Chairperson has flagged that enforceable undertakings, which the Royal Commission criticised, were appropriate in certain circumstances and would be a priority for ASIC alongside faster investigations.

In June 2021, the *Financial Regulator Assessment Authority Act 2021* (Cth) was introduced in response to the Royal Commission. This legislation established the Financial Regulator Assessment Authority (FRAA), which is tasked with assessing the effectiveness and capability of ASIC and the Australian Prudential Regulation Authority (APRA). In November 2021, Federal Treasurer Josh Frydenberg announced the launch of the FRAA's review of ASIC. This review will focus on assessing ASIC's strategic prioritisation, planning, decision-making, surveillance, and licensing functions. The report is due to be delivered by the end of July 2022.

Albeit a change in approach, ASIC was still active in its enforcement work, concluding 50 financial services enforcement matters between 1 January and 30 June 2021. In this period, the Courts imposed \$29.6 million in civil penalties. Moreover, as of 1 July 2021, ASIC recorded 26 criminal and 18 civil financial services-related matters still before the Courts.



## Regulatory changes / guidance in public M+A

### 'Canvassing' shareholder intention statements

ASIC has been closely inspecting shareholder intention statements that arise in schemes of arrangement. The regulator highlighted the fine line that a bidder walks between 'canvassing' an existing shareholder and obtaining a relevant interest that would be in breach of relevant interest limits in section 606 of the *Corporations Act*.

In one example, ASIC requested that the scheme company tag a substantial holder's votes at a scheme meeting after they reversed their stated intention to vote against the transaction. The reversal coincided with an increase in consideration offered by the bidder. ASIC was concerned that an agreement, arrangement, or understanding had been reached impacting voting rights. Ultimately, no objection to the scheme was lodged as the tagged votes did not impact the outcome of the scheme. This is a timely reminder that a prospective bidder must consider the relevant interest limitations before engaging with a significant shareholder.

### Disclosures outside of the scheme booklet

ASIC has reiterated that it regularly monitors transactions, including disclosures made outside of a scheme booklet. The regulator may intervene in situations where disclosure does not meet the same standards that would be expected in the scheme booklet.

On one occasion, an acquirer under a proposed scheme of arrangement was questioned by ASIC for providing conflicting disclosures to shareholders about an offer. The bidder planned to contact shareholders by phone, email and letter in relation to the scheme. ASIC was concerned as the communications were in conflict with information in the scheme booklet and included reference to an offer premium without balanced disclosure.

ASIC discussed its concerns with the bidder, and the communications were amended. It is important to remember that ASIC may request a copy of any relevant communications between a scheme proponent or bidder and shareholders when monitoring a scheme of arrangement transaction, which may include call scripts, emails, or letters.

### Stub equity in control transactions

ASIC has continued to provide further guidance around stub equity offers, typically made by private equity bidders, to ensure that protections are maintained for retail investors. A stub equity offer is when scrip is offered in a special purpose vehicle which owns the target company post-implementation. ASIC has advised that it is expected that company directors and independent experts provide opinions on scrip consideration for control transactions, where stub equity is offered as one of the alternative forms of consideration. ASIC has recommended best practices for stub equity transactions which include:

- + an expert valuation and opinion on the scrip offered;
- + target directors' recommendation on the scrip option; and
- + both of the above to be displayed clearly and prominently in the scheme booklet.

ASIC has recommended that disclosure in a control transaction that includes stub equity should also include:

- + the terms of the stub equity, including any mandatory custodial arrangements and securityholder agreement;
- + the rights and protections which will be available to target holders who elect to receive stub equity, compared with the rights and protections currently available (as a target shareholder); and
- + the risks associated with accepting stub equity consideration.

### Market integrity - leaking or mishandling of information

Market integrity continues to be a significant focus for the corporate watchdog. ASIC has stated that it closely monitors trading around important market announcements to uncover insider trading and other unscrupulous market behaviour. In a control transaction, ASIC has emphasised that all parties have a role to play in managing information about the transaction. This includes:

- + requiring external contractors and consultants to enter confidentiality agreements;
- + having an explicit approach towards handling of inside information (for instance, the implementation of a protocol); and
- + recording who, and when an individual, received the inside information.



## ASIC Intervention in schemes - GetSwift

### ASIC CONTINUED ITS PURSUIT OF FORMER MARKET DARLING GETSWIFT, OPPOSING A PROPOSED SCHEME FOR RE-DOMICILIATION TO CANADA.

ASIC had commenced proceedings against GetSwift and its directors Mr Hunter, Mr Eagle and Mr Macdonald in February 2019 for making misleading statements and breaching continuous disclosure obligations in market announcements between February and December 2017.

While these civil proceedings were still progressing, GetSwift entered a Scheme Implementation Deed with a Holdco in September 2020 to re-domicile through a “top-hat” scheme. All of the issued GetSwift shares would be transferred to Holdco, and GetSwift shareholders would be given one Holdco share for every seven GetSwift shares. At the same time, the Holdco would then be re-listed on the NEO Exchange in Canada.

ASIC appeared in [GetSwift Ltd \(No.2\) \[2020\] FCA 1733](#) on behalf of the Commonwealth and in its own right as a contingent creditor in anticipation of its civil action against the company. In particular, ASIC opposed the scheme anticipating that GetSwift would be liable for potential fines and investigating costs stemming from the civil action.

The Federal Court approved the scheme conditional on an undertaking from GetSwift to alleviate the concerns that ASIC raised. GetSwift entered into a deed poll with the Holdco that Holdco would provide sufficient funds to the company to “*discharge its liabilities to the extent that GetSwift is unable to...in respect of the ASIC proceedings.*”

In November 2021, ASIC was successful in its subsequent Federal Court action against GetSwift and three of its directors. ASIC is currently seeking pecuniary penalty orders against GetSwift and these directors.

#### Expiry of takeover class orders in 2023: watch this space

ASIC has noted it will begin seeking feedback and consulting on updates to a number of class orders (including [\[CO 13/521\] Takeover bids](#)) with respect to takeovers and control transactions that are due to expire in 2023. This is the first time stakeholders will have had an opportunity to comment on the class orders for a decade and the consultation process is likely to begin in early 2023.



## ACCC

### ACCC court action to restrain IVF clinic transaction

The ACCC, under the leadership of Mr Rod Sims (more on the ACCC leadership below), continued to take an aggressive approach to merger enforcement in 2021.

In last year's Review, we noted the significant amount of merger litigation which had played out in the Federal Court over the course of 2019 and 2020. Virtus Health's attempted acquisition of Adora Fertility from Healius is an example of this trend towards merger litigation continuing into 2021. The transaction was ultimately discontinued following court intervention by the ACCC, which reflects the ACCC's growing sensitivity about parties notifying their deals to the ACCC and providing the ACCC with what it considers to be sufficient time to conduct a public review.

Virtus Health and Adora Fertility are providers of IVF services with fertility clinics in Brisbane, Sydney and Melbourne. Virtus Health notified the ACCC of its intention to acquire Adora Fertility on 30 August 2021, but the transaction was not conditional on ACCC approval. On 21 September 2021, the ACCC commenced a public review of the transaction.

In early October, the merger parties advised the ACCC that they would complete the transaction on 15 October 2021. The ACCC filed proceedings in the Federal Court on 13 October seeking an urgent injunction to stop the proposed completion.

The Federal Court granted the ACCC a final interlocutory injunction on 25 October 2021, restraining completion of the transaction until the proceedings brought by the ACCC were finalised. The parties subsequently elected to discontinue the transaction, bringing the court action to an end.

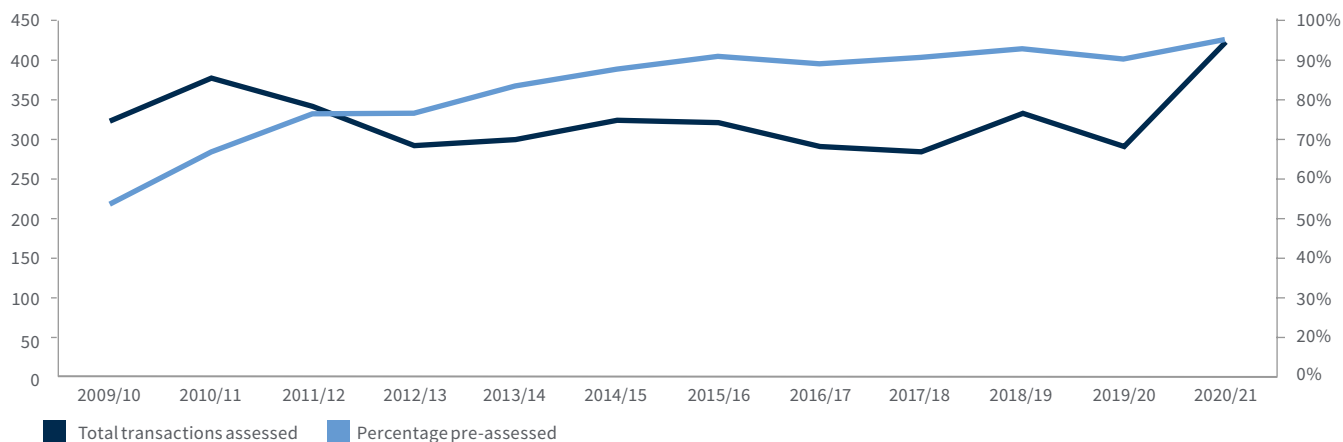
At the time of the court action, the chair of the ACCC, Mr Rod Sims, stated that the parties had "*shown complete disregard for the usual merger assessment process*".



### Post-closing enforcement investigations

In addition to commencing litigation over Virtus / Adora, the ACCC launched two post-merger enforcement investigations into transactions – Fitbit / Google and Newcastle Agri Terminal / Qube – which completed before the ACCC had completed its review of the transaction. In the case of Qube and Newcastle Agri Terminal, the ACCC stated that the parties had "*not provided sufficient time or information*" to allow the ACCC to assess the competitive impact of the transaction. Given these situations, and the ACCC's broader push for changes to the merger clearance process which are discussed below, a key strategic consideration for parties contemplating any form of transaction involving a competitor with material competitive overlap in 2022 will be the timing and manner of notification of potential transactions.

### Mergers assessed by ACCC, FY10 – FY21



### ACCC assessment numbers and time periods

Consistent with the record high of M+A activity discussed throughout our Review, the ACCC's published statistics for merger reviews (described on page 56) show that 2021 had the highest number of transactions assessed by the ACCC since at least 2009/10, when current records began.

However, the number of more in-depth public reviews undertaken by the ACCC was down by ~30% from the previous year, reflecting the fact that the ACCC pre-assessed a record 95% of transactions that were notified to it (the highest since records began).

During 2021, the average time taken to complete a public merger review was 78 days (~11 weeks) for investigations that did not progress to a "phase 2" review following publication of a statement of issues and 194 days (~28 weeks) for investigations that did proceed to phase 2. These timeframes are similar to long-term averages. The ACCC does not publish statistics for timing of pre-assessments, but based on Gilbert + Tobin's experience, the pre-assessment process took an average of about four weeks in 2021.

In 2021, no transactions which were publicly reviewed by the ACCC were outright opposed and only one was which was cleared subject to undertakings (Veolia / Suez).

Two transactions were notified and subsequently withdrawn, including the proposed merger of Aon and Willis Towers Watson which had been the subject of a "red light" statement of issues. Overall in 2021, the ACCC published five Statements of Issues, including two "red light" (Aon / Willis Towers Watson and Cargotec / Konecranes) and three "amber light" transactions, which were ultimately cleared unconditionally.

### ACCC push for merger law reform

Following long-standing concerns about difficulties it has faced in enforcing merger laws in court, Mr Sims outlined far-reaching potential reforms to the merger control regime in Australia in 2021. However, the future of these potential reforms remains uncertain under the current government and the forthcoming change in leadership at the ACCC.

In a speech on 27 August 2021, Mr Sims identified a range of concerns that the ACCC has with the existing regime for merger notification and reviews. Australia's current regime is a voluntary, non-suspensory judicial enforcement model. To prevent a merger, the ACCC must go to Court and prove that the future

anti-competitive effects of a transaction are "likely". Some, including Mr Sims, consider this to be too high a bar for the competition regulator.

In light of concerns with the existing process, Mr Sims proposed three key potential reforms:

- + **A formal mandatory, suspensory clearance-based model.** This system would require mandatory notification to the ACCC for transactions above specified thresholds before completion. This is similar to the system that operates in the US, EU, China and a number of other jurisdictions. The ACCC's clearance decisions would be subject to limited merits review in the Australian Competition Tribunal.
- + **Changes to the substantive merger test.** These changes would include updating the merger factors to focus on the structural elements of competition that are changed by the acquisition, amending the definition of "likely" to clarify the degree of probability of the substantial lessening of competition (SLC) to be established, adding a deeming provision that transactions involving a merger party with substantial market power will SLC and allowing consideration of the competitive effects of other agreements between merger parties.
- + Reforms to deal with acquisitions **by large digital platforms.**

The future of these options for reform remains uncertain. Treasurer Josh Frydenberg has shown little appetite for the proposals, responding to Mr Sims speech by stating that "*matters of merger law policy rest with the government*" and "*I do not want to put more regulatory barriers in front of business*".

### Change in ACCC leadership

We remind readers that there will also be a change in leadership at the ACCC in 2022. We are delighted that Gilbert + Tobin's very own Ms Gina Cass-Gottlieb will be taking over from long-standing chair Mr Sims. This position has historically been highly influential in determining priorities of the ACCC. We look forward to seeing what impact this change of leadership has on the ACCC's position on merger law reform and assessment of mergers more generally.

Whatever that may prove to be, we have no doubt the approach will be well considered. We are also sure that the administration and enforcement of competition law in Australia will be in good hands with Gina.

## APRA

### APRA's policy and supervision priorities reflect a returned focus to its longer-term prudential agenda

Following a period focussed on addressing the challenges arising from COVID-19, APRA's recently announced policy and supervision priorities place a heightened emphasis on “*new and emerging financial risks, practices and business models that are testing traditional regulatory boundaries and supervisory practices*”, including rapid digital evolution. Taking heed of the learnings from the pandemic, APRA is also focussed on bolstering regulated entities' ability to withstand unexpected financial or operational shocks.

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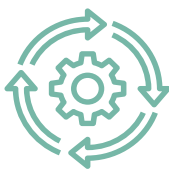
#### Key policy and supervisory priorities include (amongst others):



A multi-year plan to modernise APRA's prudential architecture to ensure it remains fit for purpose taking into account new risks, practices and business models.



Improving crisis preparedness.



Working with Treasury and ASIC to implement the Financial Accountability Regime, which expands to the Banking Executive Accountability Regime to insurance and superannuation.



Rectifying substandard industry practices and unacceptable product performance in superannuation.



Cyber risk preparedness and responsiveness across banking, insurance and superannuation.

#### Increased focus on superannuation performance with implementation of Your Future, Your Super reforms

The Government's broad-reaching Your Future, Your Super reforms came into effect in July 2021. APRA's implementation of the reforms involves an annual performance test for MySuper products, enhancing standards on investment governance and reporting on findings from a thematic review on expenditure management.

The purpose of these annual performance tests is to hold superannuation funds accountable for underperforming products and to increase member awareness about the performance of their fund.

This has significant consequences for underperforming funds. If a MySuper product fails the first performance test, the trustees of the fund must inform members that the fund has failed the test and provide members with information

about the YourSuper comparison tool which will be administered by the Australian Taxation Office and allow members to compare performance and fees of all MySuper products. Products that fail the test two years in a row are prohibited from accepting new members until their net investment performance improves, with the intention being that flows of contributions into these funds will be stemmed and members will be better protected. Trustee directed products will also form part of the annual performance tests from this year.

APRA released the results of its first MySuper product performance test in August 2021. While 84% of MySuper products passed the performance test, APRA identified 13 products that had failed.

As implementation of the reforms continues, APRA will continue to be focussed on underperformance in superannuation.





### APRA exercises new approval powers in superannuation

As we have previously flagged, amendments to the *Superannuation Industry (Supervision) Act 1993* (Cth) (SIS Act) that commenced in July 2019 have given APRA new powers to supervise changes of control of RSE licensees after an RSE licence is granted. Where the RSE licensee is a body corporate, an investor must now apply to APRA for approval before acquiring a “controlling stake” in the RSE licensee. A controlling stake is more than 15%, including the acquirer’s direct and indirect control interests and the direct control interests held by any “associates” of the acquirer. Holding a controlling stake in an RSE licensee without APRA approval is a **criminal offence** of strict liability, with a penalty of 400 penalty units (currently \$222, so \$88,000) for each day on which the person holds the stake without approval.

This brings APRA’s powers in relation to superannuation in line with other financial services such as banking and insurance. Under the *Financial Sector (Shareholdings) Act 1998* (Cth), APRA has power delegated by the Treasurer to approve stakes of more than 20% (previously 15%) in a bank or insurer. Failure to seek approval is also an offence with a maximum fine of 400 penalty units (currently \$88,800).

APRA can only approve an application if it has no reason to believe that the proposed ownership structure would mean the RSE licensee may be unable to satisfy one or more of its trustee covenants imposed by the SIS Act. These include covenants that the RSE licensee will:

- + perform its duties and exercise its powers in the best interests of beneficiaries (however, a Bill currently before Parliament proposes to change this to the best financial interests of beneficiaries);
- + give priority to the duties to and interests of beneficiaries over the duties to and interests of other persons where there is a conflict; and
- + not enter into any contract or do anything else that would prevent the trustee from properly performing or exercising its trustee functions and powers.

APRA has now approved three change of control applications using its approval powers, all arising from the sale by the major banks of parts of their wealth management businesses:

- + in December 2019, APRA approved applications from IOOF Holdings and a wholly owned subsidiary to hold a controlling stake in OnePath Custodians and Oasis Fund Management, which were owned by ANZ;
- + in May 2021, APRA approved another application from IOOF Holdings Limited to hold a controlling stake in NULIS Nominees (Australia) (known as NULIS), part of NAB’s MLC wealth management business;
- + in November 2021, APRA approved KKR’s acquisition of a 55% stake in Colonial First State from CBA.

As the trend towards industry consolidation in superannuation continues, applications to APRA under the approval power may increase going forward, depending on the structure of the transactions.



# 2021 PUBLIC M+A TRANSACTIONS

Target	Bidder	Transaction Type	Status	Bidder Origin	Consideration Type (Cash/Scrip/Combination)	Final Transaction Value A\$
Afterpay Ltd	Block, Inc (formerly Square, Inc)	Scheme	Successful	United States	Scrip	\$39 billion
Sydney Airport	IFM Australian Infrastructure Fund; IFM Global Infrastructure Fund; AustralianSuper; Qsuper; Global Infrastructure Partners	Scheme	Successful	Australia	Cash	\$23.6 billion
AusNet Services Ltd	Brookfield; Sunsuper Superannuation Fund; Alberta Investment Management Corporation; Investment Management Corporation of Ontario; Healthcare of Ontario Pension Plan	Scheme	Successful	Canada	Cash	\$10.2 billion
Boral Ltd	Seven Group Holdings Limited	Takeover (off-market)	Successful	Australia	Cash	\$9 billion
Oil Search Limited	Santos Ltd	Scheme	Successful	Australia	Scrip	\$8.2 billion
Spark Infrastructure Group	Kohlberg Kravis Roberts & Co LP; Ontario Teachers' Pension Plan Board; Public Sector Investment Board	Scheme	Successful	Canada	Cash	\$5.1 billion
Milton Corporation Ltd	Washington H Soul Pattinson and Company Ltd	Scheme	Successful	Australia	Scrip	\$4.6 billion
Vocus Group Ltd	Aware Super Pty Ltd as trustee for Aware Super, Macquarie Group Ltd & Macquarie Infrastructure Australia Pty Ltd	Scheme	Successful	Australia	Cash	\$3.4 billion
Link Administration Holdings Ltd	Dye & Durham Corporation	Scheme	Current	Canada	Cash	\$2.9 billion
Tilt Renewables Ltd	PowAR consortium & Mercury NZ Limited	Scheme	Successful	Australia / New Zealand	Cash	\$2.8 billion

Target	Bidder	Transaction Type	Status	Bidder Origin	Consideration Type (Cash/Scrip/Combination)	Final Transaction Value A\$
Bingo Industries Ltd	Macquarie Infrastructure and Real Assets	Scheme	Successful	Australia	Cash	\$2.3 billion
Aventus Group	HomeCo Daily Needs REIT; Home Consortium	Scheme	Successful	Australia	Combination	\$2.2 billion
Z Energy Limited	Ampol Limited	Scheme	Current	Australia	Cash	\$1.9 billion
Galaxy Resources Ltd	Orocobre Ltd	Scheme	Successful	Australia	Scrip	\$1.8 billion
ALE Property Group	Charter Hall WALE Limited; Host-Plus Pty Limited	Scheme	Successful	Australia	Cash	\$1.2 billion
Western Areas Ltd	IGO Limited	Scheme	Current	Australia	Cash	\$1.1 billion
Senex Energy Limited	POSCO INTERNATIONAL Corporation	Scheme	Current	Korea	Cash	\$852 million
Australian Pharmaceutical Industries Ltd	Wesfarmers Limited	Scheme	Current	Australia	Cash	\$773 million
Asaleo Care Ltd	Essity Aktiebolag (publ)	Scheme	Successful	Netherlands	Cash	\$760 million
PrimeWest	Centuria Capital Group	Takeover (off-market)	Successful	Australia	Combination	\$620 million
Antipodes Global Investment Company Ltd	Antipodes Global Shares (Quoted managed Fund)	Scheme	Successful	Australia	Scrip	\$561 million
Huon Aquaculture Group Ltd	JBS S.A	Scheme	Successful	Brazil	Cash	\$426 million
Class Limited	Hub24 Ltd	Scheme	Successful	Australia	Combination	\$405 million
Rhipe Ltd	Crayon Group Holding ASA	Scheme	Successful	Norway	Cash	\$403 million
Mainstream Group Holdings Ltd	Apex Group Limited	Scheme	Successful	Bermuda	Cash	\$400 million
Mainstream Group Holdings Ltd	SS&C Technologies Holdings	Scheme	Withdrawn	United States	Cash	\$381 million
Intega Group Limited	SHV Holdings NV	Scheme	Successful	Netherlands	Cash	\$376 million
Japara Healthcare Ltd	Little Company of Mary Health Care Ltd	Scheme	Successful	Australia	Cash	\$374 million
Over the Wire Holdings Ltd	Aussie Broadband Ltd	Scheme	Current	Australia	Cash	\$344 million
APN Property Group Ltd	Dexus Funds Management Limited	Scheme	Successful	Australia	Cash	\$320 million

Target	Bidder	Transaction Type	Status	Bidder Origin	Consideration Type (Cash / Scrip / Combination)	Final Transaction Value A\$
Templeton Global Growth Fund Ltd	WAM Global Ltd	Scheme	Successful	Australia	Cash	\$316 million
Mortgage Choice Ltd	REA Group Ltd	Scheme	Successful	Australia	Cash	\$244 million
iCar Asia Ltd	Carsome Group Pte Ltd	Scheme	Successful	Singapore	Cash	\$238 million
Empired Ltd	Capgemini Australia Pty Ltd	Scheme	Successful	France	Cash	\$216 million
Think Childcare Group	Busy Bees Early Learning Australia Pty Ltd	Scheme	Successful	Australia	Cash	\$197 million
Westoz Investment Company Ltd	WAM Capital Ltd	Scheme	Current	Australia	Scrip	\$194 million
Apollo Consolidated Ltd	Ramelius Resources Ltd	Takeover (off-market)	Successful	Australia	Combination	\$181 million
McPhersons Ltd	Gallin Pty Ltd	Takeover (on-market)	Unsuccessful	Australia	Cash	\$172 million
Mainstream Group Holdings Ltd	Vistra Group Holdings (BVI) Ltd	Scheme	Withdrawn	Australia	Cash	\$171 million
Creso Pharma Ltd	Red Light Holland Corp	Scheme	Withdrawn	Canada	Scrip	\$168 million
1300 Smiles	BGH Capital / Abano Healthcare	Scheme	Successful	Australia / Canada	Cash	\$166 million
Apollo Consolidated Ltd	Gold Road Resources Limited	Takeover (off-market)	Unsuccessful	Australia	Cash	\$163 million
Bardoc Gold Ltd	St Barbara Ltd	Scheme	Current	Australia	Scrip	\$152 million
Redflex Holdings Limited	Verra Mobility Corporation	Scheme	Successful	United States	Cash	\$146 million
Apollo Tourism & Leisure Ltd	Tourism Holdings Limited	Scheme	Current	New Zealand	Scrip	\$144 million
Ozgrowth Ltd	WAM Capital Ltd	Scheme	Current	Australia	Scrip	\$131 million
Youfoodz Holdings Ltd	HelloFresh SE	Scheme	Successful	Germany	Cash	\$125 million
Minotaur Exploration Ltd	Andromeda Metals Ltd	Takeover (off-market)	Current	Australia	Scrip	\$111 million
5G Networks Ltd	Webcentral Group Ltd	Scheme	Successful	Australia	Scrip	\$107 million
Gascoyne Resources Limited	Westgold Resources Limited	Takeover (off-market)	Withdrawn	Australia	Scrip	\$102 million
Swick Mining Services Ltd	DDH1 Limited	Scheme	Successful	Australia	Scrip	\$99 million
Dragontail Systems Limited	YUM Brands Inc	Scheme	Successful	Australia	Cash	\$93 million



Target	Bidder	Transaction Type	Status	Bidder Origin	Consideration Type (Cash/Scrip /Combination)	Final Transaction Value A\$
Cashrewards Limited	1835i Group Ventures Pty Ltd	Takeover (off-market)	Successful	Australia	Cash	\$89 million
Quantum Health Group Ltd	Paragon Care Ltd	Scheme	Successful	Australia	Scrip	\$84 million
Focus Minerals Ltd	Theta Gold Mines Ltd	Takeover (off-market)	Current	Australia	Scrip	\$82 million
Nusantara Resources Ltd	PT Indika Energy Tbk	Scheme	Successful	Indonesia	Cash	\$80 million
Thorn Group Ltd	Somers Ltd	Takeover (on-market)	Unsuccessful	Bermuda	Cash	\$71 million
PM Capital Asian Opportunities Fund Limited	WAM Capital Limited	Takeover (off-market)	Successful	Australia	Scrip	\$66 million
PM Capital Asian Opportunities Fund Limited	PM Capital Global Opportunities Fund Limited	Scheme	Unsuccessful	Australia	Scrip	\$66 million
Redhill Education Ltd	iCollege Limited	Takeover (off-market)	Successful	Australia	Scrip	\$65 million
Kangaroo Island Plantation Timbers Ltd	Samuel Terry Asset Management Pty Ltd as trustee for Samuel Terry Absolute Return Active Fund (STAM)	Takeover (on-market)	Unsuccessful	Australia	Cash	\$59 million
Valmec Ltd	Altrad Australia Pty Ltd	Scheme	Successful	France	Cash	\$52 million

# OUR APPROACH

In this Review, we provide our key observations from an analysis of the 62 public takeovers and scheme transactions for the acquisition of ASX-listed companies announced in 2021<sup>2</sup>.

We have only analysed transactions which have a market value of over \$50 million because they are the transactions of most relevance to our clients and friends in the M+A advisory community. Also, smaller transactions can involve unusual aspects which can skew the analysis.

We have included all transactions where the parties had entered into an agreement or where the bidder had announced an offer or an intention to proceed with a firm offer in 2021. We have traced the progress of these transactions until 16 February 2022.

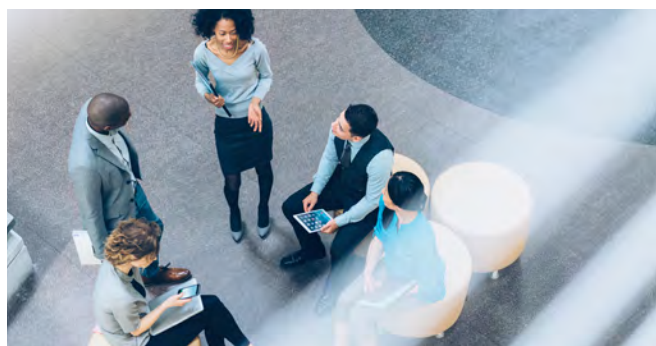
A full list of transactions analysed is set out on pages 60 to 63.

The primary sources of data used in compiling the Review were bid documents and ASX announcements prepared by the bidder and target and lodged with ASX, which were supplemented by information from websites of regulatory bodies.

We have classified a scheme as “successful” if it has become effective, and a takeover bid as “successful” if it is (or has become) unconditional and the bidder has substantially increased its shareholding in the target having regard to their existing shareholding and objectives.

We have classified a transaction as “hostile” where a firm offer was announced and was not initially recommended by the target board and as “friendly” where the transaction was recommended on its announcement. If the target board’s first public statement is that shareholders should “do nothing” while it considers the offer, we have classified the transaction as “friendly” or “hostile” based on their subsequent initial recommendation to “accept” or “reject”.

<sup>2</sup> For completeness we note that Agnico Eagle Mines’ acquisition of Kirkland Lake Gold, two Canadian miners, has been excluded from the analysis despite Kirkland having a CDI listing on the ASX. Kirkland only had on issue a very small number of CDIs listed on the ASX (1,000,000 ordinary shares in the form of CDIs, representing less than 1% of its securities on issue).



Where this Review refers to a transaction’s value, the reference is to the value of 100% of the target’s equity based on the offer price per share (and where the primary consideration was scrip, the offer price per share was based on the bidder’s share trading price on the date of the announcement of the offer).

Transactions referred to as providing cash consideration refer to transactions with all cash consideration or the ability for shareholders to elect to receive all cash consideration.

Unless otherwise specified, where this Review refers to the premium offered in a transaction, it refers to the final premium measured against the closing price of the target shares on the day prior to any announcement of the transaction or a potential transaction. In the case of transactions involving multiple bidders, the premium of the second and later bids is measured against the pre-bid closing price referable to the first bid. However, if it is clear that news of the proposed bid has been leaked, the closing price on the day prior to the date of the leak is used as the reference price.

Unless otherwise specified, all dollar references in this Review are to the Australian dollar. Transactions announced in a foreign currency have been converted to Australian dollars based on the RBA’s historical exchange rate data on the day of announcement.

# ABOUT GILBERT + TOBIN

Gilbert + Tobin is the law firm businesses trust to effect positive outcomes in defining moments.

Our people combine exceptional talent and energy across transactions, regulatory issues and disputes. We strive to deliver outstanding results and are proud of the difference we make in our role as a leading employer and corporate citizen.

We provide commercial and innovative legal advice to major corporate and government clients across Australia and internationally. We are a trusted legal adviser for many industry leaders who value our entrepreneurial culture and determination to succeed.

Gilbert + Tobin has a strong emphasis on corporate transactional work. Chambers (the most respected of all legal directories) has given us a Band 1 ranking in each of Corporate/M+A, Equity Capital Markets, Private Equity, Competition + Antitrust and Banking + Finance (Acquisition and Corporate Finance), among other areas. We were named 'Law Firm of the Year' for Competition Law in the 2022 edition of Best Lawyers.

Our M+A team comprises highly experienced partners and lawyers who achieve commercial results through creative solutions and perseverance. We advise on M+A transactions of the highest commercial

significance, but are equally able to deliver significant value on smaller deals.

We are regularly retained to assist boards of public and private companies as well as private equity firms to navigate challenging issues that arise in complex and contested M+A transactions.

We also have a demonstrated track record of assisting listed entities with robust takeover defence strategies. By providing the best available strategic legal advice, we can assist in ensuring unwelcome approaches at inadequate prices do not succeed and, if control is to pass, it does so at the best price possible in the circumstances.

Alternatively, if a friendly and agreed deal is sought, we are well placed with our knowledge of transaction structures and market precedents to ensure a transaction can be agreed in a timely and cost efficient manner.

Gilbert + Tobin's reputation for expert advice extends beyond our M+A team to a broad range of areas including corporate advisory, equity capital markets, competition and regulation, banking and infrastructure, technology and digital, energy and resources, disputes and investigations, real estate and projects and employment.

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# RECENT GILBERT + TOBIN TRANSACTIONS

- + Afterpay on its \$39 billion acquisition by Block, Inc (formerly Square, Inc), the largest public M+A deal in Australia's history and the largest cross border fintech deal globally
- + Agilex Biolabs on its \$301.3 million (enterprise value) acquisition by HLS Pathology Holdings
- + Agnico Eagle on its \$14.6 billion acquisition of ASX listed Kirkland Lake Gold
- + Anhauser-Busch InBev on the \$16 billion sale of Carlton & United Breweries to Asahi Group, the largest M&A transaction in Australia in 2019/20
- + APM Human Services International on its successful \$972 million IPO and ASX listing
- + APN Property Group on its \$320 million acquisition by Dexu by scheme of arrangement
- + ARA Group on its \$5.2 billion acquisition by ESR and related downstream takeover acquisition issues in relation to Cromwell Property Group
- + ARA Group on its unsolicited \$2.3 billion proportional takeover bid for Cromwell Property Group
- + Ascender (backed by Potentia Capital and Five V Capital) on its US\$500 million acquisition by Ceridian
- + Australian Clinical Labs on its acquisition of the business and assets of Medlab Pathology
- + Australian Clinical Labs on its \$809 million IPO and ASX listing
- + Automic Group on Five V Capital's substantial investment in the company
- + Aventus Group on the \$2.2 billion merger with HomeCo Daily Needs REIT and Home Consortium
- + Bank of America as lead manager and underwriter to Regis' \$650 million equity raising to fund the acquisition of a 30% interest in the Tropicana Gold Mine
- + Bank of America and Canaccord Genuity as joint lead managers and underwriters of Core Lithium's \$91 million placement
- + Barrenjoey and Shaw & Partners as joint lead managers and underwriters of Dubber Corporation's \$110 million placement
- + BB Retail Capital and other shareholders on the US\$330 million sale of Honey Birdette to Playboy
- + BCI Media Group on Byggfakta Group's acquisition of BCI Media Group
- + BCI Minerals on its \$360 million capital raising, as part of its broader \$1.2 billion funding package for its Mardie Salt and Potash project
- + BGH Capital led consortium (including BGH Capital, AustralianSuper and Rod Jones) on its \$2.1 billion acquisition of Navitas by scheme of arrangement – the largest take private by an Australian PE fund
- + BlueBet on its \$80.1 million IPO and ASX listing
- + Burnham and Guardian Trust on the \$1.3 billion sale of Jandakot Airport
- + Calvary (Little Company of Mary Health Care) on its \$374 million acquisition of Japara Healthcare by scheme of arrangement
- + Canaccord Genuity and Bank of America Securities as joint lead managers and underwriters of Lynas Corporation's \$425 million ANREO and institutional placement
- + Canberra Imaging Group on its sale to Sonic Healthcare
- + Catcha on its joint US\$200 million acquisition with Carsome of iCar by scheme of arrangement
- + Cardno on the US\$500 million sale of its Americas Consulting Division and Asia Pacific Division by related entities of Stantec, Inc.
- + Carlyle on its proposed \$2.8 billion takeover of Link Group
- + Cashrewards on its response to 1835i's (ANZ's) off market takeover offer
- + CIMIC on its response to the \$1.5 billion takeover offer by Hochtief
- + Citi, Jarden and J.P. Morgan as joint lead managers of the Lynch Group's \$439.4 million IPO and ASX listing
- + Cleanaway Waste Management on its proposed \$2.5 billion acquisition of Suez Australia and various acquisitions and joint ventures
- + CPE Capital on its \$200 million disposal of Cell Care by trade sale
- + Credit Suisse and Bell Potter as joint lead managers of Nickel Mines' \$350 million ANREO
- + Credit Suisse and Citi as joint lead managers and underwriters of Coronado Global Resources Inc's US\$100 million ANREO

**“GILBERT + TOBIN IS DEFINITELY ONE OF - IF NOT THE - STRONGEST OVERALL CORPORATE PRACTICES FOR BOTH PUBLIC AND PRIVATE MARKETS.”**

Chambers Asia Pacific 2022

- + Credit Suisse as underwriter of the \$77 million sale of HMI's shareholding in oOh!Media
- + Crescent Capital Partners on the sale of 49% of Myhealth Medical Holdings to Medibank
- + Darby Allied Operations on the acquisition of Salmon Earthmoving Holdings
- + De Grey Mining on its \$125 million placement to support exploration and pre-feasibility works relating to its Mallina Gold Project
- + Deep Yellow on its proposed \$687 million all-scrip merger with Vimy Resources
- + Dexus Industria REIT on its \$400 million equity capital raising and acquisitions of Jandakot Airport and various industrial properties
- + Fermentum on its acquisition by Lion
- + Five V Capital on its investment and partnership with Penten
- + Firefinch on the proposed \$268 million demerger of Leo Lithium (which holds the Goulamina Lithium Project) and subsequent ASX listing of Leo Lithium
- + Firefinch on its non-underwritten \$100 million institutional placement
- + Goldman Sachs and UBS as joint lead managers and underwriters of Bank of Queensland's approx. \$1.325 billion placement and ANREO
- + Goldman Sachs as lead manager and underwriter of Wisr's \$50 million institutional placement
- + Goldman Sachs and UBS and joint lead managers and underwriters of Computershare's \$835 million PAITREO
- + Goldman Sachs and Jefferies as joint lead managers and underwriters of HomeCo Daily Needs REIT's \$88.3 million underwritten placement
- + Hollard Group on its \$625 million acquisition of CBA's general insurance business for an upfront consideration
- + Intega Group on its \$376 million acquisition by Kiwa N.V. by members' scheme of arrangement
- + Intertek plc on its \$855 million acquisition of SAI Global's assurance and standards divisions
- + Isentia Group on its acquisition by Access Intelligence Plc by scheme of arrangement
- + Jacobs Engineering on sell-down (by way of block trade) of \$505 million worth of shares in Worley
- + Jaybro on its acquisition of Delnorth
- + Jefferies and Bell Potter as joint lead managers and underwriters of Clarity Pharmaceutical's \$358.6 million IPO and ASX listing
- + J.P. Morgan and Morgan Stanley as joint lead managers of Blackstone's Milestone Logistics Group's \$3.5 billion IPO and ASX listing
- + JP Morgan as lead manager and underwriter of Evolution Mining's \$400 million placement to fund the acquisition of gold assets from Northern Star Resources
- + Jurox on its acquisition by Zoetis
- + Kin Group on its \$172 million takeover offer for McPherson's
- + KKR on the acquisition of a 55% interest in Colonial First State and establishment of a strategic partnership with Commonwealth Bank of Australia
- + KKR's US\$1.7 billion Asia Real Estate Fund on multiple investments
- + KKR on the the sale of a major stake in GreenCollar to Ontario Teachers' Pension Plan
- + KKR on the \$350 million acquisition of Education Perfect from Mupla International and Five V Capital
- + Liverpool Partners on Orro Group's acquisition of e-Secure
- + LK group on its acquisition of Brand Collective group from Anchorage Capital Partners
- + Macquarie Capital and UBS as joint lead managers and underwriters of Irongate Group's placement to fund the acquisition of commercial real estate
- + Macquarie Capital as lead manager of HomeCo Daily Needs REIT's placement to fund the acquisition of Town Centre Victoria Point
- + Macquarie Capital and Morgan Stanley as joint lead managers of HealthCo Healthcare and Wellness REIT's \$650 million IPO and ASX listing
- + Macquarie, JP Morgan and Barrenjoey as joint lead managers of Ventia Services Group's \$1.45 billion IPO and ASX listing
- + Macquarie Infrastructure and Real Assets (MIRA) and Aware Super on their \$3.4 billion acquisition of Vocus Group by scheme of arrangement
- + Macquarie Infrastructure and Real Assets (MIRA) on the \$2.3 billion acquisition of Bingo Industries
- + Medical Specialists and Management shareholders on EQT's \$2.4 billion acquisition of Icon Group
- + Moly-Cop on the acquisition of JLW Services
- + Morgan Stanley, Moelis, Credit Suisse and E&P as the joint lead managers and underwriters of Newmark Capital's proposed \$345 million IPO and listing of the Newmark Property REIT on ASX
- + Morgans as the sole lead manager and underwriter of Step One's IPO and ASX listing
- + Morrison & Co and Commonwealth Superannuation Corporation on the sale of CSC's stake in the Macarthur Wind Farm
- + Nusantara Resources on its acquisition by PT Indika Energy by scheme of arrangement
- + OneVentures on its 55% secondary selldown of interests in human resources technology company Employment Hero – the transaction was part of the Series E funding round from New York based VC fund Insight Partners, valuing Employment Hero at \$800 million

- + Opthea on its US\$128.1 million American Deposit Share issue and NASDAQ listing
- + Ord Minnett as lead manager and underwriter of SSM's \$185 million placement and ANREO to fund (in part) the acquisition of Lendlease Services
- + Orica on the \$180 million sale of its Minova business to Aurelius Group
- + Pact Group, Cleanaway, Asahi Beverages and Coca-Cola Europacific Partners on the establishment of a joint venture to build and operate a new PET recycling facility
- + Pepper Money (backed by KKR) on its \$1.3 billion IPO and ASX listing
- + Peter Warren Automotive on the acquisition of Penfold Motors Group
- + Peter Warren Automotive Group on its \$483 million IPO and ASX listing
- + Pinnacle Investment Management Group on its fully underwritten \$105 million institutional placement and non-underwritten SPP
- + PowAR Consortium (QIC, Future Fund, AGL) on its \$3.1 billion acquisition of Tilt Renewables by scheme of arrangement
- + Probe Group (backed by Quadrant Private Equity and Five V Capital) on the merger with rival outsourcing outfit Stellar BPO, to create Australia's largest locally-owned outsourcing services business
- + Probe CX on its acquisition by KKR
- + Oaktree Capital on DDH1's proposed \$150 million IPO and ASX listing
- + Quadrant Private Equity on its \$650 million acquisition of Affinity Education from Anchorage Capital
- + Quadrant Private Equity through the Quadrant Growth Fund on the \$100 million acquisition of the Prime100
- + Quadrant Private Equity on its \$200 million acquisition of TSA Management from Living Bridge
- + Quadrant Private Equity on the demerger of QMS Media's sport business, TGI Sport and subsequent sale of a strategic stake in TGI Sport to Bruin Sports Capital
- + Quadrant Private Equity, Five V Capital, Rodney Kagan and other shareholders on the sale of Probe CX to KKR
- + Roads Retained Interest (owned by the NSW Government) on the \$11.1 billion sale of its 49% interest in WestConnex
- + Sandfire Resources on its \$97 million blocktrade of a 16.2% interest in Adriatic Metals
- + Sandfire Resources on its fully underwritten \$1.24 billion equity raising to fund the acquisition of MATSA
- + SG Fleet Group on its \$1.5 billion acquisition of LeasePlan ANZ for a combination of cash and SG Fleet shares and associated equity capital raising
- + Sime Darby Allied Operations on the acquisition of Salmon Earthmoving Holdings
- + SiteMinder on its \$1.36 billion IPO and ASX listing
- + SiteMinder on its \$100 million funding round involving Fidelity, AustralianSuper, BlackRock, Ellerston Capital, Pental Group, and Washington H. Soul Pattinson
- + Southern Star Research on its sale to Quadrant Private Equity
- + Square Peg Capital on the US\$350 million sale of its interest in Vend to Lightspeed
- + SS&C Technologies on its proposed \$381 million acquisition of Mainstream Group by scheme of arrangement
- + STORY3 Capital Partners, LLC on its acquisition of a majority stake in Coco Republic
- + Superloop on its proposed \$494 million acquisition by QIC by scheme of arrangement
- + Syrah Resources on its \$150 million equity raising, including convertible note issue to AustralianSuper (2021)
- + Syrah Resources on its \$250 million equity raising via placement and entitlement offer (2022)
- + Telstra on its proposed \$2.1 billion acquisition, in partnership with the Australian Government, of Digicel Pacific
- + Telstra in relation to the merger of Fox Sports Australia (owned by News Limited) and Foxtel (owned 50/50 by News Limited and Telstra)
- + Tilt Renewables on the \$1.07 billion sale of the 270MW Snowtown 2 wind farm to Palisade Investment Partners and First State Super
- + TPG on its sell-down of a minority stake in Novotech Health Holdings (NHH) pursuant to a competitive sale process, with the transaction valuing NHH at \$2.4 billion
- + TPG on the proposed takeover of Smartgroup in consortium with Potentia Capital and Aware Super
- + UBS as lead manager and underwriter of Costa Group's \$190m PAITREO to fund the acquisition of the assets of a central Queensland based citrus grower
- + UBS and Ord Minnett as underwriters (and together with MA Moelis, lead managers) of MA Financial's \$100m institutional placement to fund the acquisition of BNK's mortgage aggregation business, Finsure Holdings and its subsidiaries
- + UniSuper, the major shareholder in Sydney Airport, on its participation in the \$24 billion acquisition of Sydney Airport by Sydney Aviation Alliance by scheme of arrangement
- + Virtus Health's defence in respect of rival acquisition proposals by BGH Capital and CapVest Partners in excess of \$660 million
- + Vulcan Steel on its \$930 million IPO and ASX listing
- + West African Resources on its acquisition of the 6.8Moz Kiaka Gold Project and up to approximately \$136.53 million capital raising consisting of a 2 tranche placement and SPP



# ABOUT THE AUTHORS



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Neil is co-head of Gilbert + Tobin's M+A/Corporate Advisory group and is also a member of G+T's board of partners.

Neil's practice centres on mergers and acquisitions (with particular expertise in listed company takeovers and cross-border acquisitions), Takeovers Panel matters, private sales and disposals, private equity transactions, equity capital raisings and other capital management transactions, and corporate governance matters.

Neil is recognised as a leading Australian Corporate and M+A lawyer by leading directories including Best Lawyers, Chambers Global, Chambers Asia-Pacific, The Legal 500, Doyles and International Who's Who of M+A Lawyers. Best Lawyers named him Melbourne's "Lawyer of the Year" in one of M+A, Corporate/Governance, Equity Capital Markets or Private Equity in eight of the last ten years, including Corporate Lawyer of the Year in 2022. Neil was also named M+A Partner of the Year at the 2020 Lawyers Weekly Partner of the Year Awards.

Neil is a member of the Federal Government's Takeovers Panel, the primary forum for resolving takeover disputes, and a Senior Fellow of the University of Melbourne Law School.

Neil has recently advised on the following significant transactions:

- + UniSuper, the major shareholder in Sydney Airport, on its participation in the \$24 billion acquisition of Sydney Airport by Sydney Aviation Alliance by scheme of arrangement;
- + Dexus Industria REIT on its \$400 million equity capital raising and acquisitions of Jandakot Airport and various industrial properties;
- + PowAR consortium (QIC, Future Fund, AGL) on its \$3.1 billion (enterprise value) acquisition of Tilt Renewables by scheme of arrangement;
- + Cleanaway on its proposed \$2.5 billion acquisition of Suez's Australian business and \$500 million acquisition of Sydney waste assets from Suez;
- + APN Property Group on its \$320 million acquisition by Dexus by scheme of arrangement;

- + Catcha Group on its joint US\$200 million acquisition with Carsome of iCar by scheme of arrangement to create the largest digital automotive marketplace in SE Asia;
- + Nusantara Resources on its acquisition by PT Indika Energy by scheme of arrangement;
- + Kin Group on its on-market takeover bid for McPhersons;
- + Anheuser-Busch InBev on its \$16 billion sale of Carlton & United Breweries to Asahi Group, the largest M+A transaction in Australia in 2019 / 2020;
- + DuluxGroup on its successful \$4.2 billion acquisition by Nippon Paint by scheme of arrangement;
- + BGH Capital consortium (including AustralianSuper and Rod Jones) on its \$2.1 billion acquisition of Navitas by scheme of arrangement, the largest take private by an Australian PE fund;
- + Jacobs Engineering Group on the \$4.6 billion sale of its energy, chemicals and resources group to WorleyParsons;
- + Tilt Renewables on its \$1.07 billion sale of the Snowtown 2 windfarm to Palisade Investment Partners and First State Super;
- + TPG Capital on its \$1 billion (enterprise value) acquisition of Greencross; and
- + Syrah Resources on its \$250 million capital raising to fund the expansion of its spherical graphite AAM facility with offtake to Tesla and on its innovative \$210 million capital raisings in 2019 and 2020 involving convertible note issues to AustralianSuper.

**NEIL IS "A VERY SEASONED CAMPAIGNER AND ONE OF THE BEST M&A LAWYERS IN MELBOURNE" AND "A FANTASTIC PERSON TO WORK WITH ON A LARGE PUBLIC M&A TRANSACTION."**

Chambers Asia-Pacific 2019



## **COSTAS CONDOLEON**

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Costas is co-head of Gilbert + Tobin's M+A/Corporate Advisory group and is also a member of G+T's board of partners.

Costas has significant experience in mergers and acquisitions, takeovers, corporate and securities law, capital markets, directors' duties and corporate governance and the listing rules.

Costas is known for his experience in advising on some of Australia's most prominent, novel and complex deals.

Costas is widely recognised as one of Australia's leading strategic corporate, mergers and acquisitions and securities lawyers by leading directories including Best Lawyers, Chambers Global, Chambers Asia-Pacific.

Costas is an adjunct member of the Faculty of Law at the University of Sydney where he lectures in the Masters of Laws course of Takeovers and Reconstructions.

Costas has recently advised on the following significant transactions:

- + CIMIC Group on its response to the \$1.5 billion takeover bid by HOCHTIEF Australia;
- + Virtus Health on its response to competing take private proposals from BGH Capital and CapVest Partners LLC, and associated Takeovers Panel proceedings;
- + Macquarie Infrastructure and Real Assets (MIRA) on its \$2.6 billion acquisition of Bingo Industries by scheme of arrangement;
- + MIRA and Aware Super on their \$3.5 billion acquisition of Vocus Group by scheme of arrangement;
- + Agnico Eagle Mines on its \$11 billion scrip merger with the ASX listed Kirkland Lake Gold;
- + ARA Group on its \$5.2 billion acquisition by ESR and related downstream takeover acquisition issues in relation to Cromwell Property Group;
- + Cashrewards on its response to 1835i's (ANZ's) off market takeover offer;
- + ARA Group on its unsolicited proportional \$2.3 billion takeover bid for the Cromwell Property Group;

- + Investa Property Group on the \$3.4 billion contested acquisition (by trust scheme) of Investa Office Fund between Oxford Properties and Blackstone;
- + Ruralco on its defence of Nutrien's \$615 million bid by scheme of arrangement;
- + Adamanten on its takeover of Legend Corporation by scheme of arrangement;
- + GrainCorp on its defence of LTAP's \$2.4 billion unsolicited proposal;
- + Iron Mountain on its successful and innovatively designed \$3.8 billion scrip acquisition of Recall Holdings by scheme of arrangement;
- + Vocus Communications on its \$4.3 billion merger of equals with M2 Group by scheme of arrangement;
- + CIMIC on its successful \$256 million unsolicited takeover bid for Sedgman, and associated Takeovers Panel proceedings; and
- + Anchorage Capital on its successful \$212 million contested acquisition of Affinity Education by scheme of arrangement, and associated Takeovers Panel proceedings.

**COSTAS IS A "RESPONSIVE AND SKILLED M+A PRACTITIONER" WITH "AN AMAZING LEGAL MIND", PROVIDING AN "OUTSTANDING MIX OF TECHNICAL SKILL AND COMMERCIAL JUDGEMENT." HE IS ALSO "DOWN TO EARTH - HIS EGO DOESN'T GET IN THE WAY."**

Chambers Global

**"HE IS AN EXCEPTIONAL OPERATOR. HE IS BRILLIANT AT DISTILLING AND EXPLAINING COMPLEX LEGAL SCENARIOS FOR BOARD MEMBERS AND EXECUTIVES. HE IS HIGHLY COMMERCIAL, PRAGMATIC AND POSSESSES DEEP TECHNICAL SKILLS."**

IFLR1000 2021



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Rachael specialises in mergers and acquisitions, equity capital market transactions and advising on securities law and listing rule matters generally. Rachael’s clients include listed companies, private equity firms, investment banks and foreign entities.

Best Lawyers Australia 2020 named Rachael ‘Lawyer of the Year’ for Private Equity Law. Lawyers Weekly awarded Rachael ‘Dealmaker of the Year’ at the 2019 Women in Law Awards and ‘Mergers and Acquisitions Partner of the Year’ at the 2019 Partner of the Year Awards. Rachael is recognised as a leading equity capital markets, private equity and mergers and acquisitions lawyer by major directories including Chambers Asia-Pacific, Chambers Global and Best Lawyers.

Rachael has recently advised on the following significant transactions:

- + Afterpay on its \$39 billion acquisition by NYSE-listed Block (formerly Square), Inc. by scheme of arrangement;
- + Quadrant and Five V on its sale of Probe to KKR;
- + Isentia on its acquisition by UK-based technology and software company Access Intelligence;
- + Quadrant Private Equity on the demerger of the sport business from Quadrant backed QMS Media and the sale of a strategic stake to Bruin Sports Capital;
- + L Catterton, on the sale of RM Williams to Andrew Forrest’s private investment group Tattarang;
- + QuadPay on its \$337 million acquisition by Zip Co, which will permit Zip Co to compete with Afterpay in the US Market;
- + Quadrant Private Equity on the \$570 million public-to-private of ASX-listed digital signage and sports advertising company QMS Media by scheme of arrangement;
- + Konekt on its acquisition by Advanced Personnel Management by scheme of arrangement;
- + TPG Capital on its \$1 billion public-to-private of ASX-listed pets and vets company, Greencross, by scheme of arrangement utilising stub equity and the bolt-on acquisition of the country’s largest veterinary specialist and emergency pet care group, Animal Referral Hospital;
- + Harbour Energy on its (ultimately unsuccessful) proposed US\$14.4 billion acquisition of Santos by scheme of arrangement; and
- + APN Outdoor on its \$1.6 billion aborted merger with oOh!Media.



## ADAM D’ANDRETI

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Adam specialises in equity capital markets transactions and advising on Australian securities law issues. His practice also extends to acting on public and private M+A transactions, advising on the ASX listing rules, executive remuneration, corporate governance, shareholder activism, shareholder matters and general corporate law issues.

Adam is recognised as a leading Equity Capital Markets lawyer by Chambers Global and Chambers Asia-Pacific. He won “Capital Markets Partner of the Year” at each of the 2020 and 2021 Lawyers Weekly Partner of the Year Awards.

Adam has recently advised on the following significant transactions:

- + Cashrewards on its acquisition by 1835i (ANZ’s VC subsidiary) by off-market takeover bid;
- + Automic Group, a cloud based share registry platform, on Five V Capital’s substantial investment in the company, valuing Automic Group at over \$200 million;
- + SiteMinder on its \$1.36 billion initial public offering and ASX listing, which included a \$627 million capital raising;
- + Orcon (formerly Vocus NZ) on its proposed ASX dual-listing and IPO;
- + BlueBet on its proposed IPO and ASX listing;
- + Macquarie Capital, JP Morgan and Barrenjoey as joint lead managers of the Ventia Services Group’s \$2.4 billion IPO and ASX listing;
- + Morgans as the sole lead manager and underwriter of Step One’s \$81 million IPO and ASX listing; and
- + Pinnacle Investment Management on its \$105 million institutional placement underwritten by Macquarie Capital and Wilsons to fund its acquisition of a 25% interest in Five V Capital and associated share purchase plan.

**“THE ADVICE RECEIVED IS ALWAYS PRAGMATIC, COMMERCIALY AWARE BUT WITH A DEEP LEVEL OF SPECIALIST EXPERTISE AND KNOWLEDGE. I AM ALWAYS CONFIDENT THAT I AM GETTING THE BEST POSSIBLE ADVICE FROM THE TEAM.”**

Chambers Asia Pacific 2021





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Karen has over 20 years’ experience as a strategic mergers and acquisitions and corporate advisory lawyer. Karen has acted on a number of Australia’s significant strategic corporate transactions, including a range of takeovers, schemes of arrangement, mergers, demergers, acquisitions and divestments, and equity capital raisings.

Karen has established a strong reputation for advising boards and management on corporate governance issues including governance practices and processes, risk management, board effectiveness, continuous disclosure, regulatory investigations, related party transactions, directors’ duties and executive remuneration.

Karen is a member of the Australian Takeovers Panel, a government appointed peer review body that regulates corporate control transactions in widely held Australian entities.

Karen has recently advised on the following significant transactions:

- + Roads Retained Interest (owned by the NSW Government) on the \$11.1 billion sale of its 49% interest in WestConnex;
- + Virtus Health on proposed schemes of arrangement by CapVest Partners and BGH Capital;
- + Sydney Airport trustee on its 2020 \$2 billion entitlement offer and various governance issues;
- + Opteon in relation to the investment by Anacacia Capital;
- + Telstra on a major corporate transformation strategy involving a comprehensive review of Telstra’s operations and strategic demerger options;
- + Newmont Mining Corporation on the restructure of its Australian business; and
- + Saracen Mining on its takeover bid for Bligh Resources.

Karen was previously Head of Corporate at PwC Legal from 2017-2021 and prior to that, a partner at Clayton Utz for 15 years.



**DEBORAH JOHNS**

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Deborah advises on mergers and acquisitions, complex joint ventures, funds establishment, venture capital, corporate governance and commercial transactions.

She has over 17 years of M+A experience around the world, acting for both buyers and sellers in a wide range of transactions. She has also advised a range of government and private clients on long-term, complicated joint venture arrangements in Australia and internationally.

Deborah is an expert in matters relating to the *Foreign Acquisitions and Takeovers Act 1975* (Cth) and is a member of the Law Council’s Foreign Investment Committee. She has led the firm’s participation in the consultation processes in relation to Australia’s foreign investment rules and edits the firm’s Doing Business in Australia guide.

Deborah is recognised as a leading Investment Funds lawyer by Chambers Asia-Pacific and has been recognised by Best Lawyers Australia since 2014 in the Funds Management category.

Deborah has recently advised on the following significant transactions:

- + Square Peg Capital on the USD\$350 million sale of its interest in Vend to Lightspeed;
- + OneVentures on its 55% secondary selldown of interests in human resources technology company Employment Hero - the transaction was part of the Series E funding round from New York based VC fund Insight Partners, valuing Employment Hero at \$800 million;
- + 1835i, the newly created independent venture capital and incubator arm of ANZ, on its spinout from ANZ;
- + Stantec in connection with its acquisitions of Wood & Grieve and GTA Consultants; and
- + Rubicon Technology Partners on the acquisition of software company, QSR International, and the bolt on of Planet Software.



**ALEX KAUYE**

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Alex specialises in mergers and acquisitions and equity capital markets transactions, with particular expertise in private equity.

Alex is recognised as a market leading individual in various independent directories, including Best Lawyers and IFLR1000.

Alex has recently advised on the following significant transactions:

- + KKR on various transactions, including:
  - the acquisition of a 55% interest in Colonial First State and establishment of a strategic partnership with Commonwealth Bank of Australia;
  - the sale of a major stake in GreenCollar to Ontario Teachers' Pension Plan;
  - the acquisition of Education Perfect from Mupla International and Five V Capital;
  - the acquisition of MYOB by scheme of arrangement;
- + TPG on various transactions, including:
  - the sell-down of a minority stake in Novotech Health Holdings (NHH) pursuant to a competitive sale process, with the transaction valuing NHH at \$2.4 billion;
  - the proposed takeover of Smartgroup in consortium with Potentia Capital and Aware Super;
- + DuluxGroup on its \$4.2 billion acquisition by Nippon Paint by scheme of arrangement; and
- + Damstra on its successful IPO and subsequent scrip for scrip merger with Vault Intelligence.



**KEVIN KO**

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Kevin advises on strategic mergers and acquisitions and corporate transactions, specialising in public takeovers (friendly and hostile), schemes of arrangement, private M+A deals, equity capital markets transactions and general corporate and securities law matters.

Kevin has recently advised on the following significant transactions:

- + Macquarie Infrastructure and Real Assets (MIRA) and Aware Super on their \$3.6 billion acquisition of Vocus Group by scheme of arrangement;
- + MIRA on its \$2.6 billion acquisition of Bingo Industries by scheme of arrangement;
- + Investa Property Group on the \$3.4 billion contested acquisition by trust scheme of Investa Office Fund between Oxford Properties (OMERS) and Blackstone;
- + Ruralco Holdings on its \$469 million acquisition by Agrium Australia, a subsidiary of Nutrien, by scheme of arrangement;
- + SiteMinder on its \$150 million pre-IPO capital raising;
- + SG Fleet Group on its acquisition of LeasePlan ANZ and associated capital raising;
- + Web.com on its \$105 million acquisition of Dreamscape Networks by scheme of arrangement;
- + Rockworth Capital Partners on its 18% investment in Elanor Investors Group and related strategic alliance arrangements;
- + Chengtun Mining Group on its \$109 million acquisition of Nzuri Copper by scheme of arrangement; and
- + Shaw and Partners on its sale to EFG International.

**“THE ADVICE RECEIVED IS ALWAYS PRAGMATIC, COMMERCIALY AWARE BUT WITH A DEEP LEVEL OF SPECIALIST EXPERTISE AND KNOWLEDGE. I AM ALWAYS CONFIDENT THAT I AM GETTING THE BEST POSSIBLE ADVICE FROM THE TEAM.”**

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**THE TEAM COMPRISE “TENACIOUS NEGOTIATORS WHO SUGGEST COMMERCIAL SOLUTIONS TO ISSUES FACED ON TRANSACTIONS. SOME OF THE BEST M+A DEAL MAKERS IN THE INDUSTRY.”**

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Ben specialises in mergers and acquisitions, general corporate and energy law. His practice covers private / negotiated sales and disposals, cross border mergers and acquisitions, takeovers, joint ventures, capital raisings, and corporate governance matters.

Ben’s clients include listed companies, global companies, private equity groups and start-ups.

Ben is recognised as a leading lawyer for mergers and acquisitions and corporate law by Best Lawyers and is ranked by Legal 500 Asia Pacific in the Corporate and M+A category.

Ben has recently advised on the following significant transactions:

- + Orica on the \$180 million sale of its Minova business to Aurelius Group;
- + Cleanaway on its \$501 million acquisition of Suez’s Recycling and Recovery business in Australia;
- + BGH consortium on its \$2.1 billion acquisition of Navitas by scheme of arrangement;
- + Neptune Energy on its US\$3.9 billion acquisition of ENGIE’s E&P assets;
- + Jadestone Energy on its US\$195 million acquisition of the Montara oil field from PTTEP;
- + Ansell on the \$800 million sale of its Sexual Wellness business to Humanwell Healthcare/Citic;
- + Orica on the \$750 million sale of its Chemicals business (since renamed Ixom) to Blackstone;
- + Jadestone Energy on its acquisition of the Stag oil field from Santos and Quadrant Energy;
- + Ixom on its acquisitions of Australian Botanical Products and LogiChem;
- + Detector Technology on its acquisition of ETP Ion Detect;
- + MoneyPlace on its sale to Liberty Financial; and
- + Schweppes Australia on its acquisition of an Australian water businesses.



**SUSANNAH MACKNAY**

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Susannah specialises in mergers and acquisitions and equity capital markets transactions and advising on disclosure, corporate governance and other listing rules matters. She also has experience advising listed companies on responding to activist shareholders.

Before joining Gilbert + Tobin, Susannah was a partner of Slaughter and May in London where her practice focused on cross-border transactions.

Susannah has recently advised on the following significant transactions:

- + Telstra on its proposed \$2.48 billion acquisition of Digicel Pacific, PNG’s leading digital network;
- + UniSuper, the major shareholder in Sydney Airport, on its participation in the \$24 billion acquisition of Sydney Airport by Sydney Aviation Alliance by scheme of arrangement;
- + Catcha Group on its joint US\$200 million acquisition with Carsome of iCar by scheme of arrangement to create the largest digital automotive marketplace in SE Asia;
- + KKR on its \$350 million acquisition of Education Perfect from Mulpha International and Five V Capital;
- + Intertek plc on its \$855 million acquisition of SAI Global’s assurance and standards divisions;
- + LK group on its acquisition of Brand Collective group from Anchorage Capital Partners;
- + Cleanaway Waste Management on its proposed \$2.5 billion acquisition of Suez Australia and and \$500 million acquisition of Sydney waste assets from Suez;
- + APN Property Group its successful \$320 million acquisition by Dexus by scheme of arrangement;
- + TPG on its sell-down of a minority stake in Novotech Health Holdings (NHH) pursuant to a competitive sale process, with the transaction valuing NHH at \$2.4 billion; and
- + IFM Investors on its investment in Zuuse (the investment was the first by IFM’s new private equity growth fund).





**CRAIG SEMPLE**  
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Craig specialises in general corporate law with an emphasis on mergers and acquisitions, equity capital markets, takeovers and schemes of arrangements.

Craig is regarded as one of Australia’s leading M+A lawyers (most recently acknowledged by Chambers Asia Pacific 2022). Best Lawyers has recognised Craig since 2010 in seven practice areas, including Mergers + Acquisitions, Equity Capital Markets, Corporate Law, Corporate Governance and Practice and Private Equity. Craig has also been named by Best Lawyers as a Melbourne “Lawyer of the Year” in one of Mergers + Acquisitions, Corporate Law, Private Equity or Corporate Governance over the last nine years, most recently in 2022 for Mergers + Acquisitions.

Craig has recently advised on the following significant transactions:

- + SS&C Technologies on its proposed \$381 million acquisition of Mainstream Group by scheme of arrangement;
- + Opthea on its listing on NASDAQ and subsequent establishment of an At-the-market issuance facility;
- + IOOF on its \$975 million acquisition of ANZ’s One Path Pensions and Investments and aligned dealer groups businesses and on its acquisition of Wealth Central as part of IOOF’s “Advice 2.0 transformation strategy”;
- + Anheuser-Busch InBev on the \$16 billion sale of Carlton & United Breweries to Asahi Group, the largest M+A transaction in Australia in 2019/20; and
- + Xero on its issue of US\$700 million of convertible notes listed on the Singapore Exchange and associated call spread arrangements.

**“CRAIG IS APPRECIATED FOR HIS “IMMENSE KNOWLEDGE OF M+A IN AUSTRALIA,” AND IS LAUDED AS “AN EXCEPTIONALLY GIFTED LAWYER WHO IS COMFORTABLE WITH BOTH THE MICRO AND MACRO ASPECTS OF THE TRANSACTION.”**

Chambers Asia-Pacific 2021



**SARAH TURNER**  
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Sarah specialises in mergers and acquisitions (particularly takeovers and schemes of arrangement), capital raisings (particularly those with control implications), advising on securities law and Listing Rule matters and corporate advisory and governance work.

Sarah was recognised by Best Lawyers 2021 for Mergers + Acquisitions, Equity Capital Markets, Corporate Governance Practice and Corporate Law.

Sarah has recently advised on the following significant transactions:

- + Sandfire Resources on its \$1.244 billion placement and accelerated non renounceable entitlement offer to purchase the MATSA complex;
- + De Grey Mining on its fully underwritten \$125 million placement to accelerate and expand activities at its Mallina Gold Project;
- + Deep Yellow on its proposed \$687 million all-scrip merger with Vimy Resources;
- + West African Resources on its acquisition of the 6.8Moz Kiaka Gold Project and up to approximately \$136.53 million capital raising consisting of a 2 tranche placement and share purchase plan;
- + BCI Minerals on its placement and accelerated non renounceable entitlement offer;
- + Panoramic on its accelerated non renounceable entitlement offer’s and on the successful defence of the hostile takeover bid by Independence Group; and
- + Exore Resources on its acquisition by Perseus Mining by scheme of arrangement.



**JEREMY JOSE**  
SPECIAL COUNSEL

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Jeremy has over 15 years' experience in the areas of competition and consumer law and market regulation, gained at Gilbert + Tobin and from over 9 years' experience at the ACCC.

Jeremy has advised clients in relation to a range of high profile and important transactions, ACCC investigations into alleged criminal cartel and anti-competitive bundling conduct and various matters relating to electricity, gas, water and infrastructure access and regulation.

Jeremy has extensive experience in merger regulation arising from over six years as a senior member of the ACCC's merger review team. During that time, Jeremy was involved in the assessment of many large and complex transactions including BG / Shell, Foxtel / Austar, AGL / Macquarie Generation and BHPB – Rio Tinto (iron ore JV). During his time at the ACCC, Jeremy also had a leading role in the ACCC's East Coast Gas Inquiry.

Jeremy has recently advised on the following significant transactions:

- + Tabcorp in relation to competition clearance for its \$12 billion merger with Tatts;
- + Anheuser-Busch InBev in obtaining ACCC clearance for its global merger with SABMiller and for its \$16 billion sale of CUB to Asahi;
- + Brookfield in relation to the Australian regulatory aspects of its global acquisition of Genesee & Wyoming Australia;
- + Telstra on its restructure with News Corporation of the ownership of Foxtel and Fox Sports;
- + Whitehaven on its bid for the Queensland coal assets of Rio Tinto;
- + The Stars Group in relation to its acquisitions of CrownBet and William Hill;
- + a client in relation to an ACCC investigation into alleged criminal cartel conduct;
- + a health-sector client in relation to an ACCC investigation into alleged anti-competitive bundling arrangements;
- + a major energy retailer in relation to the ACCC's ongoing electricity and gas inquiries; and
- + a number of clients in relation to regulatory issues under the national gas and electricity laws.



**EBONY KEENAN-DUNN**  
SPECIAL COUNSEL

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Ebony has experience in advising both public and private company clients in relation to mergers and acquisitions, corporate fundraising, private equity transactions and general corporate and commercial issues. She has particularly strong experience in listed company takeovers and schemes of arrangement, and has acted on more than twenty-five control transactions and a significant number of primary and secondary capital raisings for her clients.

Ebony has recently advised on the following significant transactions:

- + KKR on the successful acquisition of a 55% interest in Colonial First State (CFS) and establishment of a strategic partnership with Commonwealth Bank of Australia;
- + KKR on the corporate aspects of its \$3.2 billion acquisition of Arnott's Biscuits and certain international operations of Campbell Soup;
- + BGH Capital consortium (including AustralianSuper and Rod Jones) on its successful \$2.1 billion acquisition of Navitas by scheme of arrangement, the largest take private by an Australian PE fund;
- + KKR on its \$2 billion acquisition of MYOB Group by scheme of arrangement; and
- + MYOB on the sale of its interest in Acumatica and rollover into the acquiring entity.

Prior to joining Gilbert + Tobin, Ebony was special counsel with a large global firm where she gained experience in Australia, London and Dubai

**“THEY ARE VERY RESPONSIVE, REALLY GOOD ON NEGOTIATIONS AND ONE OF THEIR PARTICULAR STRENGTHS IS THEIR COMMERCIALITY.”**

Chambers Asia Pacific 2022



**TANYA MACDONALD**  
SPECIAL COUNSEL

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Tanya is a special counsel in Gilbert + Tobin’s competition and regulation group. She specialises in complex merger clearances, cartel investigations, misuse of market power complaints, financial services and telecommunications regulation and competition and regulatory compliance. Tanya has advised clients in the banking, general and life insurance, superannuation, energy, telecommunications, online wagering, broadcasting, packaging, chemicals, commodities trading, manufacturing and explosives and fertiliser industries.

A selection of Tanya’s experience includes:

- + acting for KKR on regulatory aspects of its acquisition of a 55% interest in Colonial First State and establishment of a strategic partnership with Commonwealth Bank of Australia;
- + acting for Hollard on the regulatory aspects of its acquisition of its acquisition of CommInsure General Insurance from the Commonwealth Bank of Australia;
- + advising a large life insurance provider on the competition law and regulatory aspects of several potential acquisitions;
- + advising clients on significant merger clearances in the banking, insurance, energy, broadcasting, online wagering, telecommunications, mining services and manufacturing sectors;
- + acting for the Australian Banking Association in obtaining ACCC authorisation to implement recommendations arising from the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry and authorisation to enable banks to offer financial relief and other support packages to customers impacted by COVID-19;
- + advising a range of industry associations and financial services companies on their response to various legislative amendments and recommendations to industry arising from the Royal Commission and ASIC and industry-led inquiries, reports and reviews affecting the banking, insurance and mortgage broking industry; and
- + lead lawyer on the Gilbert + Tobin team acting for Telstra in its restructure with News Corporation of the ownership of Foxtel and Fox Sports and advising Telstra in a range of other merger-related, competition and regulatory matters.



**LISA D’OLIVEYRA**  
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Lisa is a senior lawyer with experience in mergers and acquisitions, equity capital markets transactions, company law and corporate governance.

Lisa is responsible for a range of strategic initiatives designed to foster key client relationships and originate new business. She spearheads a number of programs designed to add value to a range of current and prospective clients, including boardroom events, thought leadership (including publications on developments in M+A and corporate governance) and continuing professional development for in-house counsel clients. Lisa also manages the firm’s relationship with key industry organisations including ACC Australia.

Prior to joining Gilbert + Tobin, Lisa was a senior lawyer at a top tier global law firm. Lisa has also worked at Davis Polk & Wardwell in New York



**OLIVIA BLAKISTON**  
LAWYER

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Olivia is a lawyer in Gilbert + Tobin’s Corporate Advisory group. Olivia specialises in public and private mergers and acquisitions, private equity transactions, equity capital market transactions and advising on securities law and listing rule matters generally. Olivia acts for a range of clients including private equity firms, privately/founder owned business, listed corporates and investment banks.

Olivia’s experience includes advising on the following transactions:

- + Afterpay on its \$39 billion acquisition by NYSE-listed Block, Inc. by scheme of arrangement;
- + Isentia Group on its acquisition by UK-based technology and software company Access Intelligence;
- + Quadrant on its \$570 million public-to-private acquisition of QMS Media by scheme of arrangement; and
- + TPG on its \$970 million public-to-private acquisition of Greencross by scheme of arrangement.



# AWARDS + RECOGNITION

## 2022 BEST LAWYERS AUSTRALIA

75 G+T partners were recognised as leaders across 50 areas of law. Among these, nine partners were named Lawyer of the Year in their respective specialisations including five Corporate Advisory partners (Peter Cook, Darren Fittler, Justin Mannolini, Neil Pathak and Craig Semple).

Best Lawyers also named Gilbert +Tobin as:

- + Law Firm of the Year for Competition Law in 2022
- + Law Firm of the Year for Corporate Law in 2021
- + Law Firm of the Year for Corporate Law and for Private Equity Law in 2020
- + Law Firm of the Year for M+A in 2019

## 2022 CHAMBERS ASIA-PACIFIC AWARDS

52 Gilbert +Tobin partners are recognised by Chambers in 21 areas of law. We are one of only two Australian law firms to be ranked Band 1 in each of Corporate/M+A, Equity Capital Markets, Private Equity and Competition & Antitrust. We are also ranked Band 1 in Acquisition Finance, Corporate Finance, TMT, Fintech and Charities.

## 2021 CLIENT CHOICE AWARDS

Gilbert + Tobin was named 'Most Innovative Law Firm' in the 2021 Client Choice Awards researched by Beaton for the fourth year in a row.

## 2022 LEGAL 500

Gilbert + Tobin is ranked Tier 1 across ten different practice areas: Corporate/M+A, Equity Capital Markets, Banking and Finance, Competition and Trade, Data Protection, Dispute Resolution, Intellectual Property, IT and Telecoms, Project Finance and Restructuring and Insolvency.

## 2021 IFLR1000

Gilbert + Tobin is ranked Tier 1 in M+A, Private Equity, Equity Capital Markets and Leveraged Finance and is one of only two firms with Tier 1 rankings across these four areas.

## 2021 MERGERMARKET AUSTRALIAN M+A AWARDS

Gilbert + Tobin won:

- + Technology, Media, and Telecom M+A Legal Adviser of the Year
- + Private Equity Legal Adviser of the Year
- + Advised on TMT M+A Deal of the Year (MIRA/Aware Super's acquisition of Vocus Group)

## 2021 AUSTRALASIAN LAW AWARDS

Gilbert + Tobin won:

- + Law Firm of the Year (101-500 lawyers)
- + Excellence in Technology & Innovation

## 2021 LAWYERS WEEKLY AUSTRALIAN LAW AWARDS

Gilbert + Tobin won Transaction Team of the Year.

## 2020 DOYLE'S GUIDE

Gilbert + Tobin is ranked 1st Tier for Corporate Law.

## 2020 MERGERMARKET AUSTRALIA M+A AWARDS

Gilbert + Tobin won:

- + M+A Legal Advisor of the Year
- + Consumer M+A Legal Advisor of the Year
- + Mid-Market M+A Legal Advisor of the Year (US\$5 – \$150 million)
- + Energy Mining & Utilities M+A Deal of the Year (Iberdrola's acquisition of Infigen)

## 2020 FINANCIAL TIMES INNOVATIVE LAWYER AWARDS ASIA-PACIFIC

Gilbert + Tobin won Most Innovative team (GTDocs) and was shortlisted for Most Innovative Firm and Managing Client Relationships.

## 2020 ASIALAW AWARDS

Gilbert + Tobin was named Australian Firm of the Year





# GILBERT + TOBIN M+A PARTNERS



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