NORTON ROSE FULBRIGHT

Australian public M&A deal trends report

2023 Edition: A few diamonds in the rough of a challenging year

Contents

Introduction

Anticipation was in the air at the opening of 2022

Following a bumper year of record-making mega deals in 2021, deal makers were eager to see whether 2022 would rise to even greater heights or languish in the shadows.

There were a number of promising indicators. Many of the drivers behind the surge in M&A activity in 2021 – historically low interest rates, stronger management of the COVID-19 pandemic, digital transformation and an abundance of private equity dry powder – remained present in the early months of 2022 and showed no immediate indication of retreating. Bidders were tentatively confident, with two mega deals being announced in February 2022 including the highly publicised acquisition of Crown Resorts by Blackstone at a revised price of $8.9 billion.

But it wasn't long before headwinds began to emerge that sent would-be deal makers running for cover. Just over a week after the announcement of the Crown Resorts acquisition, early reports of Russia's invasion of Ukraine sent shockwaves through securities markets across the globe. Swiftly imposed sanctions and retaliatory diplomatic actions plunged many of Australia's business supply chains into chaos. The war also ushered in a global energy crisis which saw domestic gas and electricity prices skyrocket.

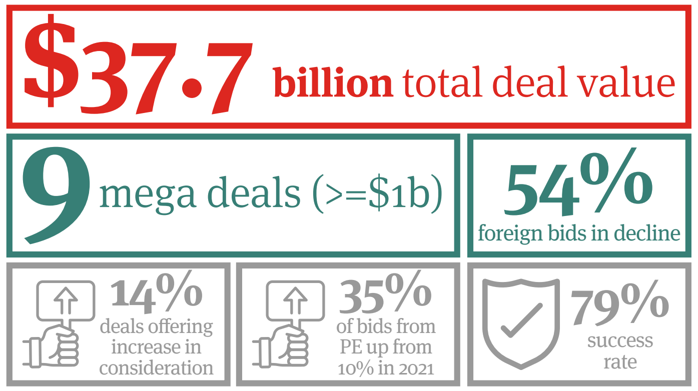
The effect of these events on Australian public M&A activity was palpable, with the 21 deals announced between January and July down 25% from the number announced across the same period in 2021.

The second half of the year fared little better. Rising inflation and interest rate hikes continued to slow M&A activity. A further 16 deals were added to the year's deal tally bringing the total to 37, the lowest since pre-Covid in 2019.

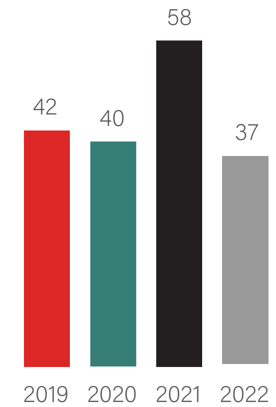
Despite the challenges, there were a number of notable highlights. Average deal value was up thanks to the announcement of 9 mega deals (being deals with consideration of $1 billion or more). Total deal value clocked in at $37.7 billion which, although below the eye-wateringly high figures of 2021, was still higher than 2020 and 2019 totals despite less deals on the books.

Australian software companies remained popular targets despite widespread layoffs and falling share prices amongst global SaaS providers, accounting for 24% of all deals (double the industry share recorded in 2021).

Also promising was the rise in interest from private equity and foreign bidders. Around 35% of all deals involved a private equity bidder, up 15% from the previous year, and more than half of all deals involved a foreign bidder.



There were 37 anounced deals surveyed in 2022 with a deal value of at least $50 million



In this report we review the past year of Australian public M&A activity and analyse various deal trends that have emerged regarding deal structuring, bidder origins, conditionality, the form and sources of consideration and premiums offered (to name a few). Having tracked many of these data points since 2019, can identify developing trends and market responses to domestic and international events, and use these insights to make predictions for the year ahead.

Outlook for 2023

BASED ON OUR RESEARCH OF TRENDS IN 2022, WE OUTLINE SOME OF OUR PREDICTIONS FOR THE AUSTRALIAN PUBLIC M&A MARKET FOR THE YEAR AHEAD.

Shareholder activism through public M&A

2022 saw a number of prominent instances of high-net worth individuals harnessing the higher profile nature of public M&A processes to push personal agendas and shape the future direction of targets. One of the most well-known instances of this phenomenon in Australia played out between software billionaire Mike Cannon-Brookes and ASX 100 energy company AGL Energy, where acquisition proposals by a Cannon-Brookes backed consortium were used to garner public attention and shareholder support for accelerating AGL Energy's shift away from coal-fired power generation. A summary of this saga is set out below.

The trend was not unique to Australia. In the United States, Elon Musk's successful $44 billion takeover of Twitter in late October 2022 spellbound market watchers worldwide. The takeover bid, which followed years of playful insinuations of a takeover by the Tesla CEO on his personal Twitter account, appeared driven in large part by Musk's personal views that the social media giant should adhere more closely to the principles of free speech.

While we by no means expect acquisition bids by wealthy "lone wolf" operators to become common occurrences in the Australian market, we do expect an increase in the use of public M&A processes as part of broader shareholder activism campaigns, particularly relating to ESG matters. Since targets are required to inform the market and respond to genuine acquisition proposals, shareholder activists can deploy such proposals to force a target to present a choice to its shareholders about the future values or strategic direction of the target company. We expect to see a rise in the number of unsuccessful bidders harnessing the related media attention to effect strategic change in their targets by other means, such as board spills.

Focus on deal certainty

Despite the relative downturn in M&A activity in 2022 we saw a proportionate increase in high value deals with restrained conditionality. We expect this trend to continue in 2023, with targets and bidders alike looking to bolster deal certainty in the face of ever-changing geopolitical and economic conditions.

Strategies that may be deployed by bidders to achieve greater deal certainty include offering strong control premiums, limiting the number of defeating conditions, seeking regulatory approvals (like FIRB clearance) upfront and ensuring funding arrangements are well advanced before launching an acquisition proposal.

Adapt and overcome

After a year of gruelling M&A conditions we expect the outlook for 2023 to improve, albeit slowly. Dealmakers have had time to adapt to and learn from the challenges set by rising inflation, higher interest rates, a volatile share market and a general economic downturn as Russia's war in Ukraine trundles on. The slowdown in M&A activity in 2021 has given bidders time to uncover new opportunities and we expect to see a gentle recovery from the lows of 2022.

Given the persistent economic uncertainty we expect to see dealmakers taking a magnifying glass to targets' bottom lines and demanding longer and more comprehensive due diligence before proceeding to make binding proposals.

Supply-chain driven M&A

While we expect to see a return to favour of historically stable industry sectors like energy, infrastructure, utilities, food and healthcare, we also expect to see some bidders drawn to targets which have the potential to boost their own operational resilience or which produce critical components in digital transformation projects across a range of industries. Miners and processors of essential metals underlying decarbonisation and electrification projects (e.g. copper and nickel) are expected to enjoy particular popularity.

Bidding war bonanza

We expect to see fiercer competition for high value targets in 2023. The prediction follows a relative increase in the proportion of deals with competing proposals in 2022 which jumped 5% to 27% of all deals. At the time of reporting, a number of bidding wars from 2022 have spilled into this year and show no sign of peace (e.g. Warrego Energy, Nitro Software). Tougher operating conditions are separating the wheat from the chaff and we imagine bidders will continue to pull out all the stops to win the highest quality targets in 2023. Expect pre-bid stakes, exclusivity deals and Takeovers Panel applications abound.

Private equity players

Private equity players showed up in force in 2022 and showed no signs of retreating by the year's end. Private equity bidders even ventured into unchartered territory, building pre-bid stakes and deploying concurrent takeover/scheme deal structures as novel tactics to secure success. With plenty of dry powder still to spend, we expect private equity to remain a key force in the 2023 Australian public M&A scene.

Rise in distressed M&A

As global economic downturns drag out we expect to see a rise in opportunistic bidders targeting distressed companies in undervalued sectors. While such approaches may be welcomed by target boards seeking to recover value for shareholders facing a deteriorating investment, other target boards may see such approaches to be disingenuous and unreflective of their companies' actual value. Such boards would be well served by having robust takeover response strategies in place and ready to be deployed when the sharks begin to circle.

ESG remains front of mind

In our 2021 report we said that environmental and social governance considerations would play a key role in 2022 and they did. Digital transformation and the transition to clean energy remain front of mind for many corporates at the dawn of 2023. We will be interested to see how these factors drive public M&A in the coming year.

Russia's war in Ukraine is also likely to have an impact in this respect. Companies that do business in Russia or with Russia's allies and sympathizers may face increased pressure from stakeholders to wind back or diversify their dealings as the war develops.

DEAL IN FOCUS: SHAREHOLDER ACTIVISM DRIVEN M&A

Shareholder activism serves as a powerful and evolving tool to influence the strategic direction of public companies. In 2022, this influence was brought into the spotlight for ASX 100 company AGL Energy (AGL).

In early 2022, software billionaire Mike Cannon-Brookes, through the Brookfield led consortium (including Cannon-Brookes' investment company Grok Ventures), submitted 2 non-binding proposals to acquire 100% of the shares in AGL at $7.50 and later $8.25 per share. While both proposals were rejected by AGL's board, Cannon-Brookes was able to harness the publicity generated by the proposals to garner support for his plan to accelerate the company's shift away from coal fired power generation.

While neither of the acquisition proposals went ahead, Cannon-Brookes, who had acquired an 11.3% stake in AGL through Grok Ventures, was able to successfully stir up AGL's strategic direction in other ways.

His public opposition of AGL's demerger proposal won support amongst other shareholders and was ultimately abandoned by AGL on 30 May 2022.

On 15 November 2022 Cannon-Brookes pulled off the successful election of his 4 nominee directors to the AGL board at the company's annual general meeting, a victory which will help Cannon-Brookes to accelerate AGL's shift to renewables.

We consider the increasing influence of high-net worth individuals using public M&A to drive shareholder activism to be an emerging trend in the Australian M&A sphere that has the potential to shape public companies in 2023.

2022 – A year in review

A snapshot of the top trends in 2022 with transaction values over $50 million

Decline in public M&A deal appetite

The first half of 2022 saw a noticeable decrease in the number of public M&A deals announced in Australia compared to the previous year. From January to the end of June 2022, only 18 deals with a deal value of at least $50 million were announced, which represented an 18% decrease on the 22 deals announced during the same period in 2021. The slow-down in M&A activity for the first half of 2022 was especially pronounced when compared with the frenzied activity during the second half of 2021, which saw a total of 36 deals announced.

The leading cause of the slow-down in M&A activity was the uncertainty and unpredictability that plagued local markets during the first half of 2022. Pent up consumer spending coupled with supply chain issues caused by pandemic restrictions and the war in Ukraine saw inflation rates in Australia reach levels not seen since 2001. As a result, the Reserve Bank of Australia was forced to raise interest rates twice from a record low of 0.1% to 0.85% in May and June 2022. This combination of high inflation and rising interest rates fuelled investor uncertainty and saw the local stock market fall by 13% during the first half of 2022.

The second half of the year did not fare much better. Only 19 deals were announced in the second half of 2022, down 47% from the same period the previous year. The contraction can again be contributed to monthly cash rate rises by the Reserve Bank of Australia (which hit a peak of 3.10% in December 2022), a plummeting AUD between August and November, a tech bust and continued uncertainty in the face of supply chain and labour challenges across all industries.

Some hope was delivered in the final 2 months of the year that saw a small jump in M&A activity and the announcement of the year's largest deal: BHP's $9.6 billion acquisition of Oz Minerals, summarised in our case study, adjacent..

The volatility is sure to see more talk about deal protection mechanisms, including tighter MAC clauses and earn-outs. Bidders will also worry about being labelled "too opportunistic" for pouncing on targets when share prices are down.

DEAL IN FOCUS: BHP'S 9.6 BILLION ACQUISITION OF OZ MINERALS

BHP Group Limited (BHP) is on its way to acquire OZ Minerals Limited (OZL) via a scheme of arrangement after its revised "best and final" offer of $9.6 billion was accepted by the OZL Board. While the scheme is subject to OZL shareholder approval which is expected to be sought in late March / early April 2023 (and other regulatory approvals), judging by the jumps in share prices of both BHP and OZL, it appears that shareholder approval is likely to be obtained unless a superior proposal emerges. If the scheme is successful, it would be the largest mining deal in Australia since Barrick Gold bought Equinox Minerals in 2011 for $5.78 billion.

Price

BHP's initial offer of $25 a share was rejected by OZL's board. The revised offer of $28.25 per share represents a ~$1.1 billion increase to the initial offer and represents a 49.3% premium to the trading price of OZL shares prior to the initial offer in August 2022. There are no financing conditions and BHP planned to use its cash reserves and existing debt facilities to fund the deal. The scheme comes with a reciprocal break fee of $95 million, meaning either party that wants to walk away will have to pay $95 million to the other.

Why is BHP so keen?

With the world moving to clean energy, BHP has been looking to increase its exposure to raw materials used in electric vehicles and clean energy production and to boost its supplies of copper and nickel, 2 of the most in-demand battery metals essential to support the global megatrends of decarbonisation and electrification, such as building electric cars and clean energy infrastructure. The key attraction of OZL to BHP was OZL's long-life copper and nickel assets. In addition, the acquisition of OZL will solve BHP's problem relating to its underperforming Olympic Dam mine and supply problems that have challenged its Western Australian nickel division. OZL's Prominent Hill and Carrapateena mines operate adjacent to BHP's Olympic Dam mine in South Australia and present clear opportunities for synergies. BHP will be able to consolidate its copper holdings in South Australia to create its own copper basin in the region. The acquisition will also allow BHP to link its Nickel West mine in Western Australia with OZL's nearby West Musgrave copper-nickel operation. With the demand and price for the red metal likely to significantly increase given its central role in electrification, the acquisition will put BHP in a strong position.

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Average deal value holds steady

While large public M&A contracted in 2022 compared to the previous year, average deal value remained steady. Average deal value was just over $1.02 billion, which was lower than the 2021 average of $1.20 billion (after excluding the outlier mega deals, Afterpay and Sydney Airport) but surprisingly strong given the year's volatility.

There also remained a good number of "mega deals" in 2022 (being deals with values over $1 billion). There were 9 mega deals in 2022 which, while lower than the 18 mega deal frenzy of 2021, was ahead of the 2019 and 2020 figures (7 and 4 mega deals respectively).

Although overall M&A activity was down, the figures show that bidders weren't shy at offering big numbers to acquire high quality targets in 2022.

9 mega deals

$1.02 billion average deal value

Increase in foreign interest

The proportion of foreign bidders versus Australian bidders increased to 54% in 2022 compared with 43% the previous year. However, the value of foreign bids as a percentage of all bids dropped to 57% (compared to 69% in 2021). This trend can be linked to a slump in the Aussie dollar between March and November which made Australian targets cheaper to buy than their foreign counterparts. However, global inflation, rising interest rates and the fact that many foreign economies are bracing for a recession seems to have dampened the extent to which foreign bidders were able to take advantage of favourable fluctuations in the exchange rate.

For further information foreign investment and a breakdown of the origins of bidders, head to page 14.

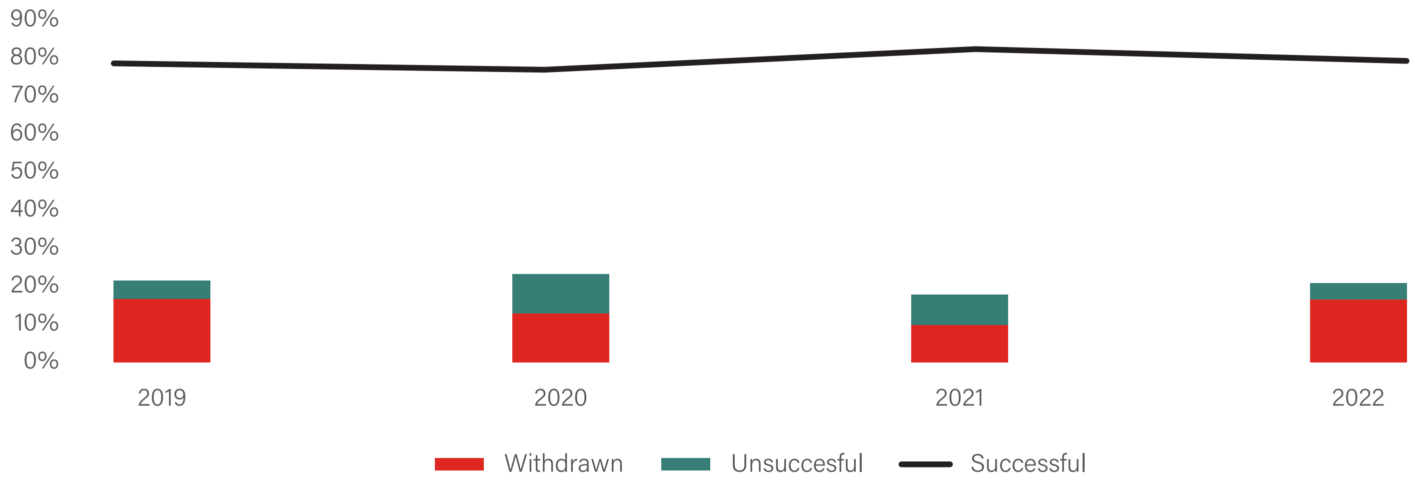
Success rates

Of the 2022 deals which have closed or been withdrawn at the date of reporting:

2019	2020	2021	2022
79% successful	77% successful	82% successful	79% successful
17% withdrawn	13% withdrawn	10% withdrawn	17% withdrawn
5% unsuccessful	10% unsuccessful	8% unsuccessful	4% unsuccessful

Our analysis of 4 years of data has shown a consistent success rate of around 80% in Australian public M&A deals. What stands out in 2022 is the relatively few instances of failed deals (4%, compared to 8% and 10% in the previous 2 years), while the percentage of actively withdrawn deals increased to 17% (from 10% and 13% in the previous 2 years). This may show a preference amongst bidders for greater certainty in the outcome of their transactions. Bidders that were less willing to leave the success of their bids to chance or at the behest of shareholders, proactively withdrew their bids to pursue other opportunities.

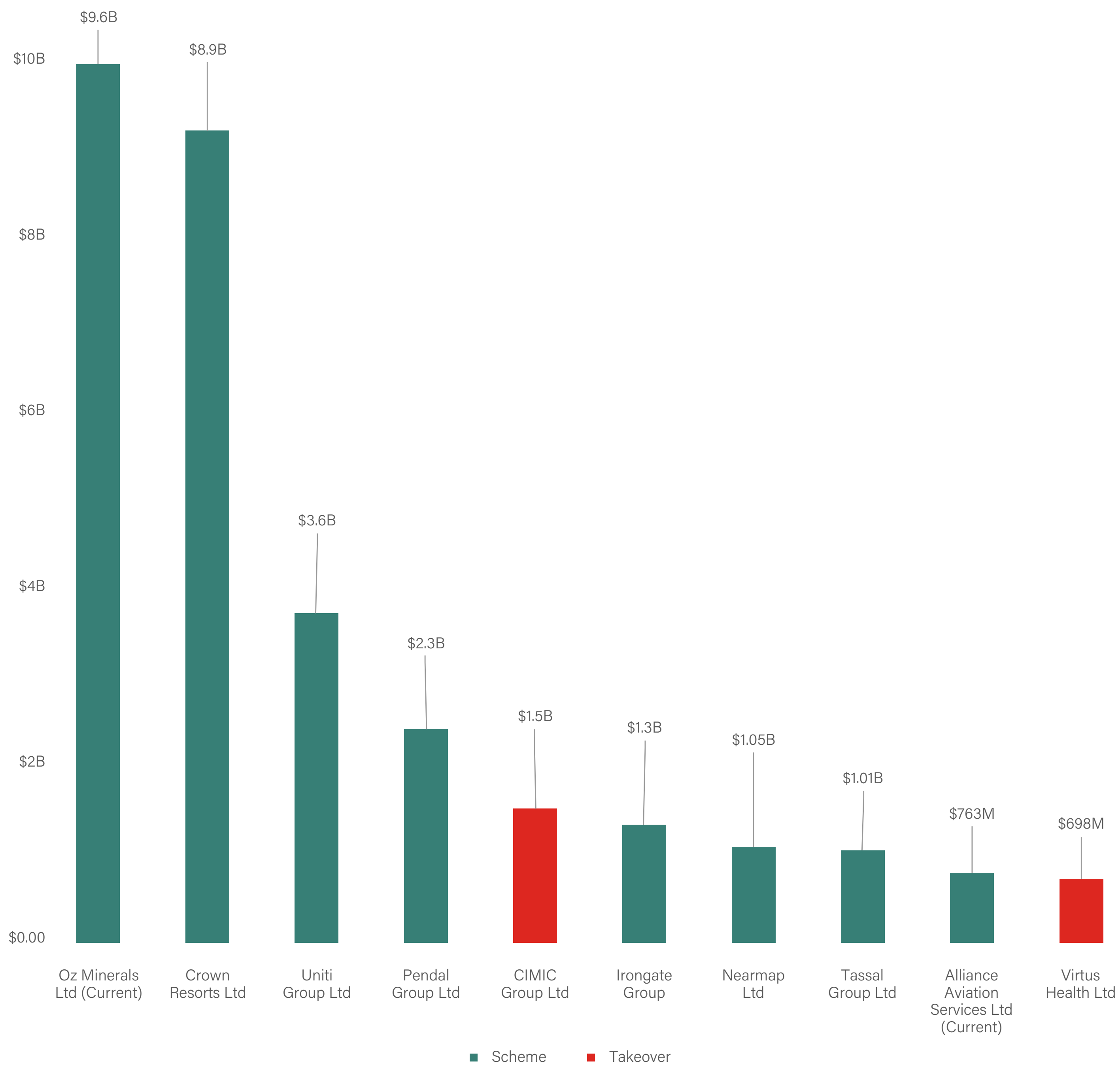
Deal status



Top 10 deals by value for 2022

The top 10 deals by value for 2022 are set out in the chart below. It was a strong start to the year with the February announcement of an $8.9 billion acquisition of Crown Resorts by Blackstone, but BHP stole the show at the 11th hour with the announcement of its $9.6 billion proposed acquisition of Oz Minerals by scheme on 22 December 2022. A summary of the Oz Minerals deal is set out on page 6.

Bidders from the big end of town tended to use schemes rather than takeovers as their preferred deal structure. Only 2 takeovers made it into the top 10, being HOCHTIEF's $1.5 billion bid for Cimic Group and BGH's hotly contested bid for Virtus Health.



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2022 - Restrained activity

Monthly deal count

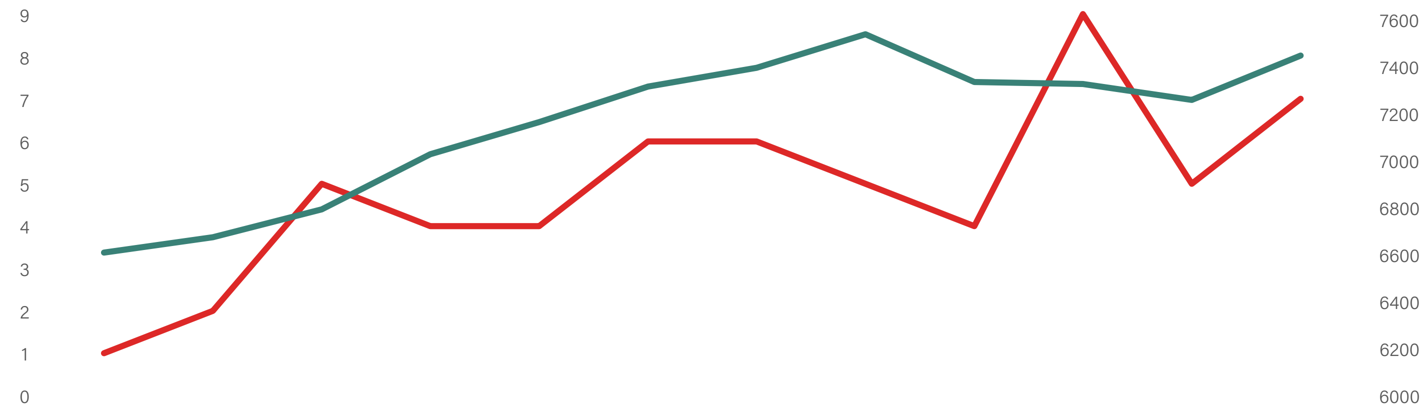
22 deals announced **Jan-Jun 2021**

18 deals announced **Jan-Jun 2022**

36 deals announced **Jul-Dec 2021**

19 deals announced **Jul-Dec 2022**

Deals announced by month | 2021



Deals announced by month | 2022

Overall deal activity was down in 2022 but some curiosities emerged when we analysed the monthly deal announcements against general market conditions across the year.

The year started quietly with no deals announced in January and only 2 in February. This was consistent with previous years where prospective dealmakers put their deals on ice for the holiday period before re-emerging in February. February also saw the announcement of 2 of the year's largest deals (CIMIC and Crown). This is perhaps not a coincidence as high stakes bidders may be seeking to maximise use of the holiday downtime to refine and prepare their proposals before making a strategic announcement around the time of return to business as usual to ensure the best prospects of success.

Interestingly, while the share market fell between March and June in response to the war in Ukraine and inflation concerns, M&A activity was stable with 43% of the year's deals announced in that same period. We didn't see any correlating jump in hostile takeovers during these months, so we expect the trend to be a result of premeditated proposals involving targets that were simply less impacted by the economic and geopolitical turmoil.

The market recovered in July before diving again in September, taking deal activity with it, primarily in response to inflationary pressures and a number of consecutive cash rate hikes by the Reserve Bank of Australia. In September, when the cash rate hit 2.35% following another 0.50% rise, not a single large deal was announced.

By November, both the Australian share market and M&A activity had recovered, having overcome the initial shock of war in Europe and developed confidence in where interest rates and inflation would peak by keeping eyes on the early signs out of the United States.

Structure and execution of deals

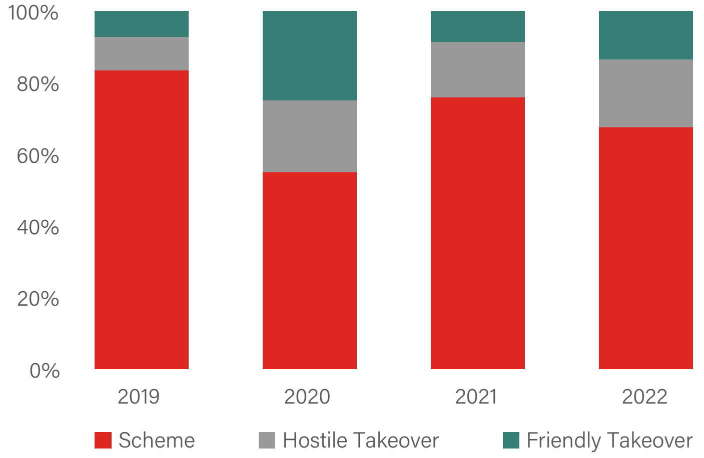
The volatility saw bidders being more concerned with deal certainty and risk mitigation. We saw an increased focus on deal protection mechanisms, including tighter material adverse change clauses and earn-outs featuring in some deals. Similarly, targets were less tolerant of highly conditional deals and continued to demand cash or part-cash consideration.

Schemes continue to be preferred

Schemes of arrangement and takeover bids are the 2 most common methods for acquiring control of an Australian listed company. A scheme requires agreement between the bidder and the target board and therefore is considered 'friendly', whereas a takeover bid may be either 'friendly' or 'hostile'.

Although 2022 saw a decline in deal activity, those willing to transact preferred to do so by way of scheme of arrangement as opposed to a takeover bid. The cooperative deal-making and "all or nothing" approach afforded by the scheme of arrangement process may explain why most acquisitions of listed target companies are structured this way. For instance, in 2022 68% of deals were undertaken by way of scheme, compared to 76% in 2021 and 55% in 2020.

Takeovers v schemes



Hedging bets: Scheme and takeover run alongside one another

Last year we reported that bidders were getting creative, highlighted by the JBS acquisition of Huon Aquaculture which was structured as two alternative and concurrent schemes of arrangement and a takeover bid structure which ultimately succeeded as a scheme. This year, the acquisition of Virtus Health was structured in a similar way. We set out a summary of the deal adjacent.

DEAL IN FOCUS: INVENTIVE TACTICS DEPLOYED FOR CONTROL OF VIRTUS HEALTH

Between March and July 2022, a bidding war played out for assisted reproductive service provider, Virtus Health Limited (**VRT**). The 2 relevant bidders were private equity firms CapVest Partners LLP (**CapVest**) and BGH Capital Pty Ltd (**BGH**). The proposals were as follows:

- BGH proposed an acquisition of 100% of VRT by scheme of arrangement at $7.10 per VRT share.
- CapVest proposed 2 alternative structures, being an acquisition of 100% of VRT by scheme of arrangement at $7.60 per VRT share or, alternatively, an acquisition of at least 50.01% of VRT by off-market takeover bid at $7.50 per VRT share.

CapVest's initial proposal became the subject of a Takeovers Panel application by BGH, who successfully convinced the Panel that certain exclusivity features of a process deed entered into by CapVest and VRT at the announcement of CapVest's non-binding proposal constituted unacceptable circumstances.

Following the Panel's declaration, BGH made a revised proposal of $7.65 per VRT share to acquire 100% of VRT by scheme. CapVest countered by offering to acquire 100% of VRT by scheme at $7.80 per VRT share, less an interim dividend, or a minimum of 50.1% of VRT via a simultaneous off-market takeover bid at $7.70 per VRT share, less permitted distributions, conditional on (among other things) the scheme failing.

A bidding war broke out between CapVest and BGH resulting in CapVest entering a Transaction Implementation Deed with VRT at a revised price, 4 more Panel applications and 2 review applications.

While CapVest's funding arrangements and 2-pronged structure had initially appealed to the VRT board, their recommendation was ultimately revoked following a conclusion by the independent expert that the CapVest scheme was not in the best interests of VRT shareholders in light of BGH's revised offer of $8.15 per share announced on 24 May 2022. Approval of the CapVest scheme had also become increasingly precarious in light of the 22.38% voting power amassed by BGH as at 24 May 2022.

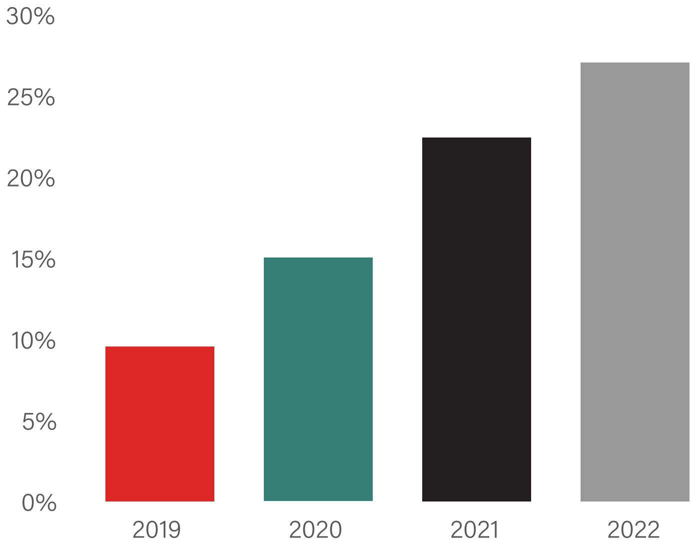
Given the change of recommendation, VRT terminated the Transaction Implementation Deed and paid CapVest a break fee of $7,192,147. CapVest obtained consent from ASIC to withdraw the offers under its bid on 3 June 2022. BGH's recommended bid was successful and it went on to compulsorily acquire VRT on 25 July 2022.

Bid wars

The competition for snapping up targets was more heated in 2022. We saw an increase in the percentage of deals with a competing bid or proposal to 27%, compared with previous years (for instance in 2021, only 13% of deals involved a rival bidder). This could be reflective of the market's perception of targets being generally undervalued enough to draw newcomer bidders out of the woodwork.

Perhaps the most interesting of competing bids for a target in recent times was the bid for Virtus Health, a global leader in assisted reproductive services listed on the ASX. We summarise this bidding war above. Also of note is the highly publicized battle for Perth-based energy company Warrego Energy Ltd which, at the time of this report, has been won by Hancock Energy after successfully overcoming rival bids by Beach Energy and Strike.

Deals with competing proposals



"Volatility saw bidders being more concerned with deal certainty and risk mitigation. We saw an increased focus on deal protection mechanisms including tighter material adverse change clauses and earn-outs."

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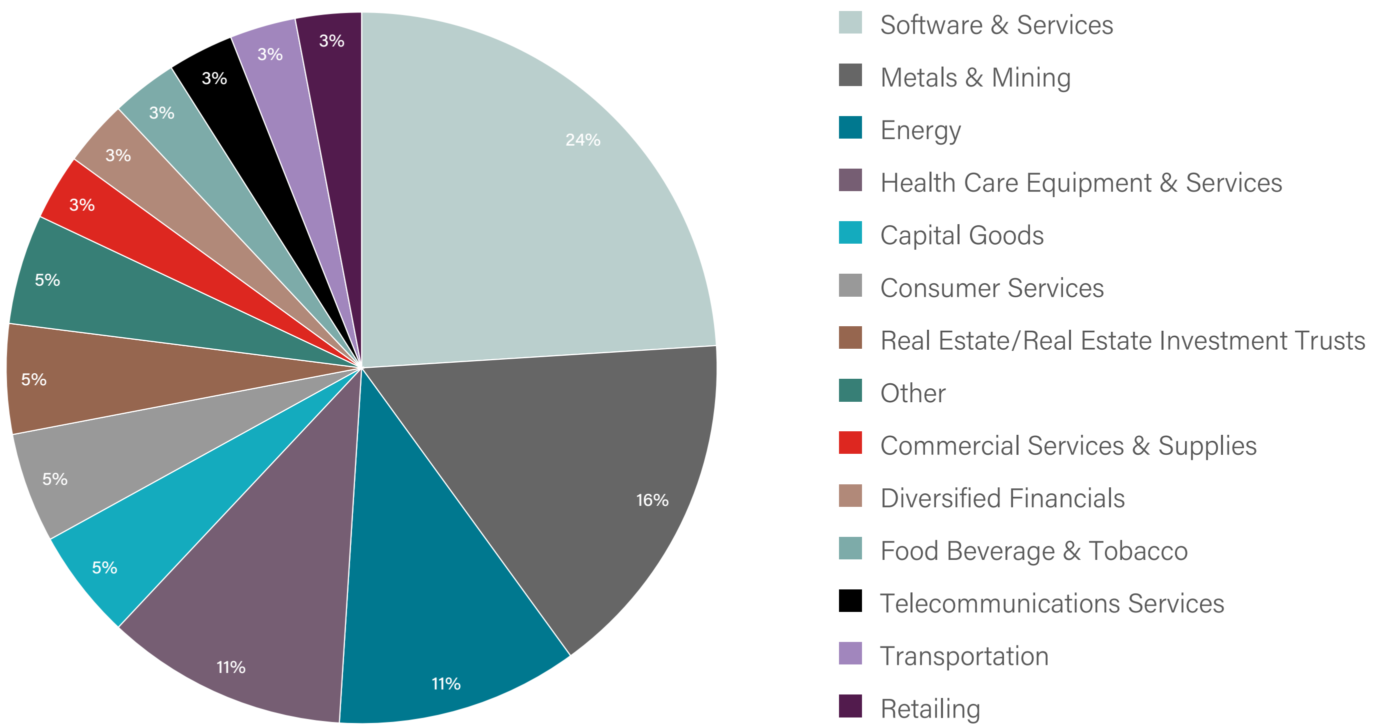
What are they buying? Target industry break down

Software and services was the top industry for deal-making in 2022, accounting for 24% of deals, followed by metals and mining, which made up 16% of deals. Energy and healthcare equipment and services were the equal third most popular industries for investment in 2022, each accounting for 11% of all deals.

2022 deals by industry



Healthcare Equipment & Services

Healthcare equipment and services was the equal 3rd most common industry for M&A activity, with 4 deals announced in 2022. Deal-making has been continually increasing in this sector with common factors driving activity including an ageing population increasing demand for health services, continuously rising consumer expectations of healthcare providers and increased government spending. Much of the activity has centred on the competing bids for Virtus Health, the largest IVF provider in Australia. Additionally, COVID-19 related healthcare has been a key driver of M&A activity in this sector, evident by the high profile acquisition of smartphone-based diagnostics company ResApp. Such activity reflects the continuing significant growth opportunities in the sector and its relative immunity from widespread economic uncertainty.

Energy

Energy targets were involved in 4 of the 37 deals announced in 2022, making energy the equal 3rd most popular target industry. Probably the most dramatic of these played out in the fierce battle for control of Perth-based energy business, Warrego Energy. Warrego, which controls gas field assets in the Cooper Basin, Surat Basin and Perth Basin drew the eye of multiple high-profile bidders (including Gina Reinhardt's Hancock Energy) in late 2022 following a surge in domestic and international oil and gas prices. We will be interested to see whether energy will remain a crowd favourite amongst bidders in 2023 as rising inflation and cost of living are expected to put a dampener on domestic energy consumption rates.

Software & Services:

Software and services accounted for 9 of the 37 deals announced in 2022 and was the most popular industry for public M&A activity in Australia. Notable deals in software include the $1.055 billion acquisition of geospatial-tech specialist Nearmap by Thoma Bravo via scheme of arrangement and the ongoing battle between Potentia and Alludo to acquire PDF tools provider Nitro Software which saw an escalation on 5 January 2023 when Potentia made an application to the Takeovers Panel in respect of various aspects of Alludo's bid. The popularity of software-based targets may be explained by the market perception that the software bubble brought on by the rush to remote working during the pandemic has popped and opportunistic bidders consider software targets to now be undervalued.

Metals & Mining:

Metals & mining accounted for 6 of the 37 deals announced in 2022 and was the 2nd most popular industry for public M&A activity in Australia. Gold continued to be a popular sector for activity, with 5 of the 7 metals & mining deals announced being bids for small and mid-tier gold companies. This included Oklo Resources and Big River Gold as scheme targets, and DGO Gold as a takeover target in the first half of 2022. The appetite for consolidation in the gold sector has been buoyed by, among other things, larger gold miners seeking to replace their depleting reserves by acquiring smaller miners and projects. Interestingly, two bids for ASX-listed gold miners came from Canadian-based gold companies, highlighting the international interest in the Australian gold sector. Further, 3 of the 5 deals involving gold were announced in the first half of the year, most likely a result of higher gold prices during the early stages of 2022.

The fact that gold and other precious metals are their own financial asset can also make partial or full scrip deals particularly appealing to shareholders. Early signs are suggesting we will see more scrip deals involving Australian gold targets in 2023, such as the recent announcement of Newmont Corp's $24.5 billion all-scrip proposal to acquire gold and copper miner Newcrest by scheme of arrangement.

DEAL IN FOCUS: TERMINATED ACQUISITION OF SEZZLE

On 28 February 2022, Australian buy-now, pay-later (BNPL) provider Zip Co Limited (Zip) announced that they had entered into an agreement to acquire US-based BNPL provider Sezzle Inc (Sezzle) by way of a statutory merger under the laws of the State of Delaware. Interestingly, while Sezzle operates and is incorporated in the State of Delaware, they are listed on the ASX, having undertaken an IPO in 2019. While there are a number of reasons for a company to list on a foreign securities exchange, in the case of Sezzle, it was most likely because the BNPL industry in Australia was more established than in the US in 2019 and Australian investors were pushing ASX-listed BNPL shares to record highs at the time (e.g. Afterpay shares rose by 153% and Zip shares by 249% during 2019). As such, the ASX was an attractive place for BNPL providers to list and raise equity.

A statutory merger is unique in the context of public M&A activity involving 2 ASX-listed entities. Under section 251 of the Delaware General Corporation Law, 2 corporations incorporated in Delaware can merge into a single surviving entity if both corporations' boards and shareholders approve the merger. While Zip is incorporated in Australia, they established a wholly-owned subsidiary, Miyagi Merger Sub, Inc, (registered in Delaware) solely for the purpose of merging with Sezzle. The all-scrip consideration represented an implied valuation of Sezzle of approximately A$491 million and represented a 22.0% premium based on the then current share prices of A$1.78 (Sezzle) and A$2.21 (Zip). It was intended for the merger to close by the end of the third quarter of the 2022 calendar year.

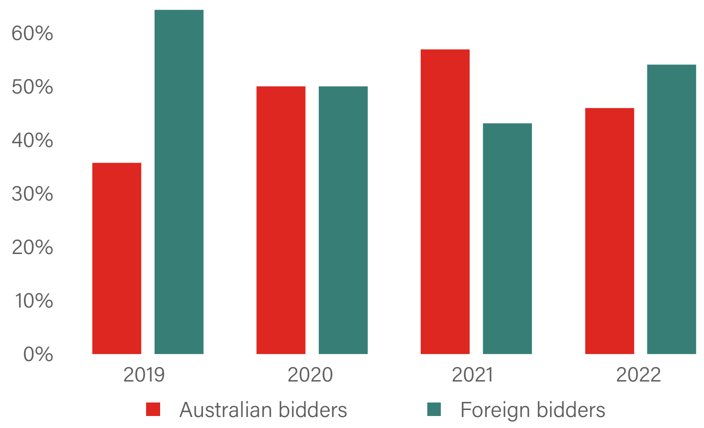
However, the Zip-Sezzle merger fell victim to the market turmoil in the technology and BNPL sectors. On 12 July 2022, Zip announced that both companies had mutually agreed to terminate the proposed merger. During the period of 28 February 2022 (date of announcement) and 12 July 2022 (date of termination), the share prices of Zip and Sezzle had fallen by approximately 76% and 85% respectively. As a result of the termination, Zip said that it would pay Sezzle AUD$16 million in break fees, which is about half the value of the break fee contemplated in the original merger agreement.

Overall, the failure of this BNPL deal can be contrasted to the successful Afterpay/Square Inc. deal last year. The Afterpay acquisition was valued at a record A$39 billion and reflected the technology and BNPL boom that occurred during 2020 and the early part of 2021. Moreover, this change in sentiment towards the BNPL industry highlights the challenges moving forward for the sector.

Foreign players

Foreign bidders accounted for 54% of all bids by number in 2022, more than the 43% share reported in 2021 and the 50% share in 2020. However, the total value of the bids announced by foreign bidders decreased in 2022, with foreign bids making up 57% of the total deal value on offer (down from 69% in 2021). That said, the high share in 2021 was buoyed by Square's $39 billion acquisition of Afterpay, whereas the most valuable foreign bidder deal announced in 2022 was Blackstone's $8.9 billion acquisition of Crown Resorts.

Australian v foreign bidders

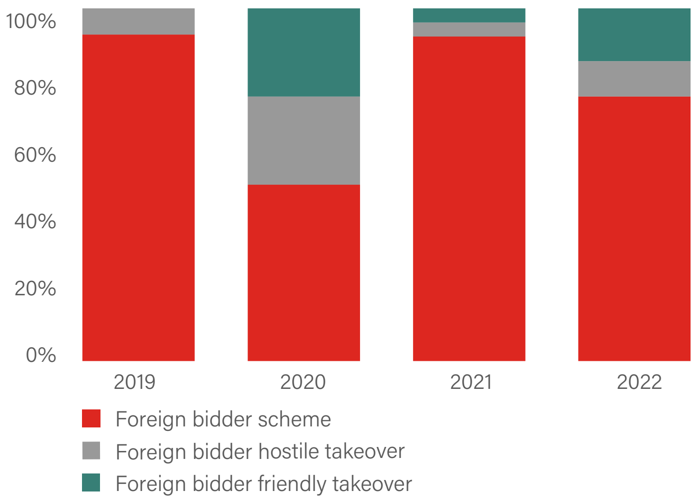


Interestingly, while there was an increase in the percentage of foreign bids compared to Australian bids in 2022, the total number of foreign bids actually decreased from 25 bids in 2021 to 20 bids in 2022. This was most likely a reflection of the decrease in public M&A activity globally, which has seen the number of deals announced decrease by 36% in 2022. As such, the decrease in the number of foreign bids has less to do with conditions in Australia and more to do with a decrease in appetite for deals generally caused by market and geopolitical volatility, higher inflation and rising interest rates.

Foreign bidders once again favoured schemes to takeovers in 2022, with only 25% of foreign bidders structuring their deal as a takeover. This is materially higher than our historical data in 2021 (8% of foreign bidder deals were takeovers) and 2019 (7% of foreign bidder deals were takeovers), but is still well below the proportion of foreign deals structured as schemes.

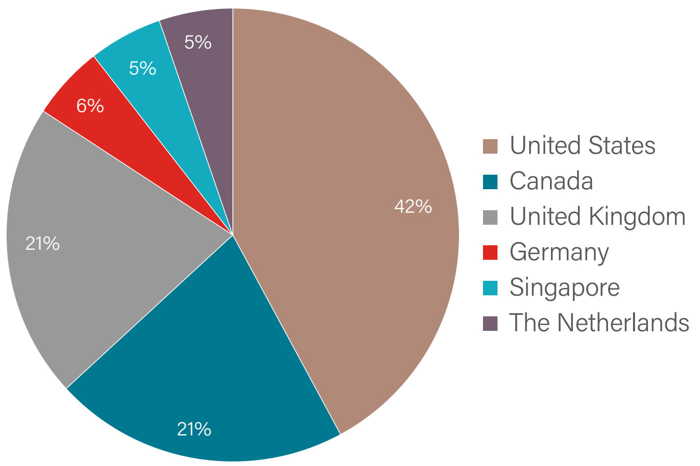
Of the 14 foreign deals which have closed or were withdrawn, 79% succeeded, whereas 14% were withdrawn and 7% failed. The success rate is slightly down on the numbers from last year, where 82% of foreign bids succeeded.

Deal structure of foreign bidder deals



In 2022, the United States continued to account for the highest share of foreign bidder deals, with 8 deals or 32% of all foreign bidder deals. This was followed by Canada and the United Kingdom, which each accounted for 16% of foreign bidder deals. Again, of note, no foreign bidder deals came from China.

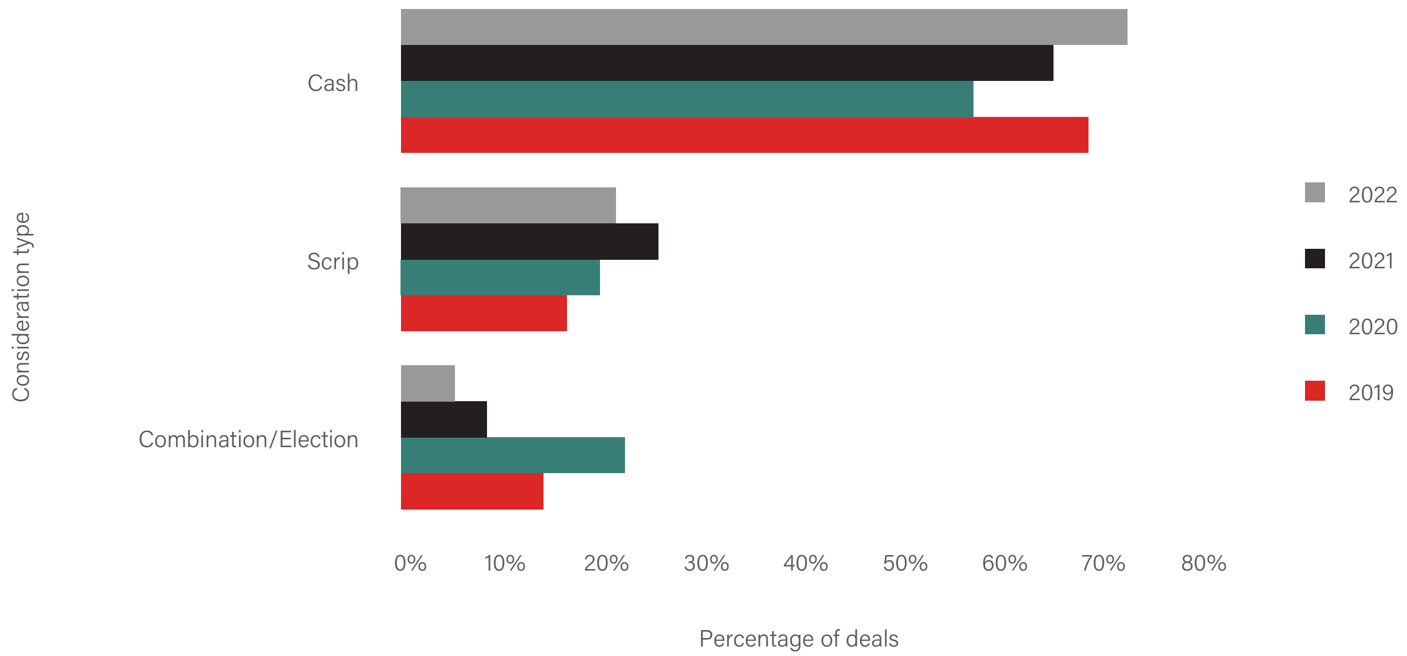
2022 Foreign Bidders by Origin



Consideration

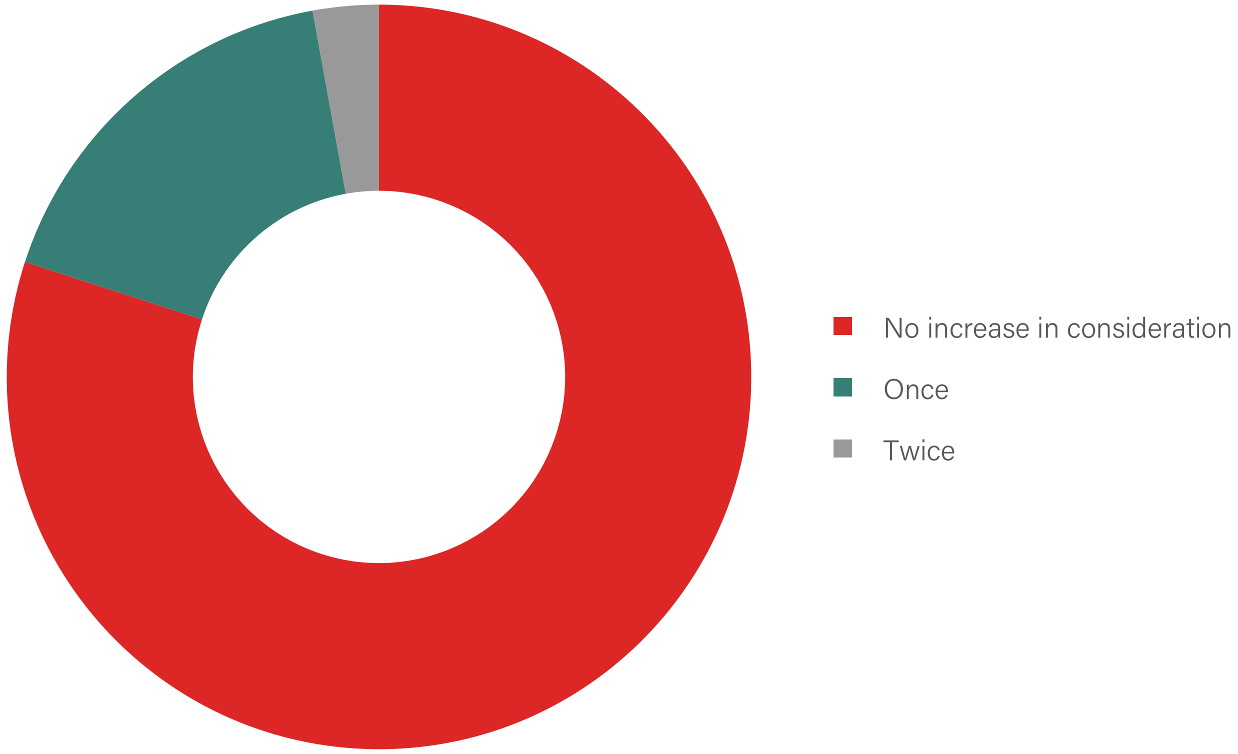
Cash surges as preferred consideration

- In 2022, 73% of deals announced offered cash as the only form of consideration, up from 66% in 2021 and 69% in 2019.
- 22% of deals offered scrip as the only form of consideration, slightly down from 26% in 2021 but generally continuing the upward trend since 2019.
- 5% of deals offered shareholders a combination of cash and scrip or a choice to elect cash or scrip consideration. This reflects a slight downturn from 2021, where only 9% of deals offered combination consideration and quite a drop from 23% of bidders offering mixed consideration in 2020.



Despite the steady increase in all scrip deals, as usual, investors continue to prefer cash over scrip. Cash minimises shareholders' exposure to any business downside due to market fluctuations in times of uncertainty and enables the value of the entity to be determined more concretely at the time of buying and selling. Interestingly, bidders did not appear to show a greater preference for scrip or combination consideration despite rising interest rates increasing the cost of cash.

Increases in consideration

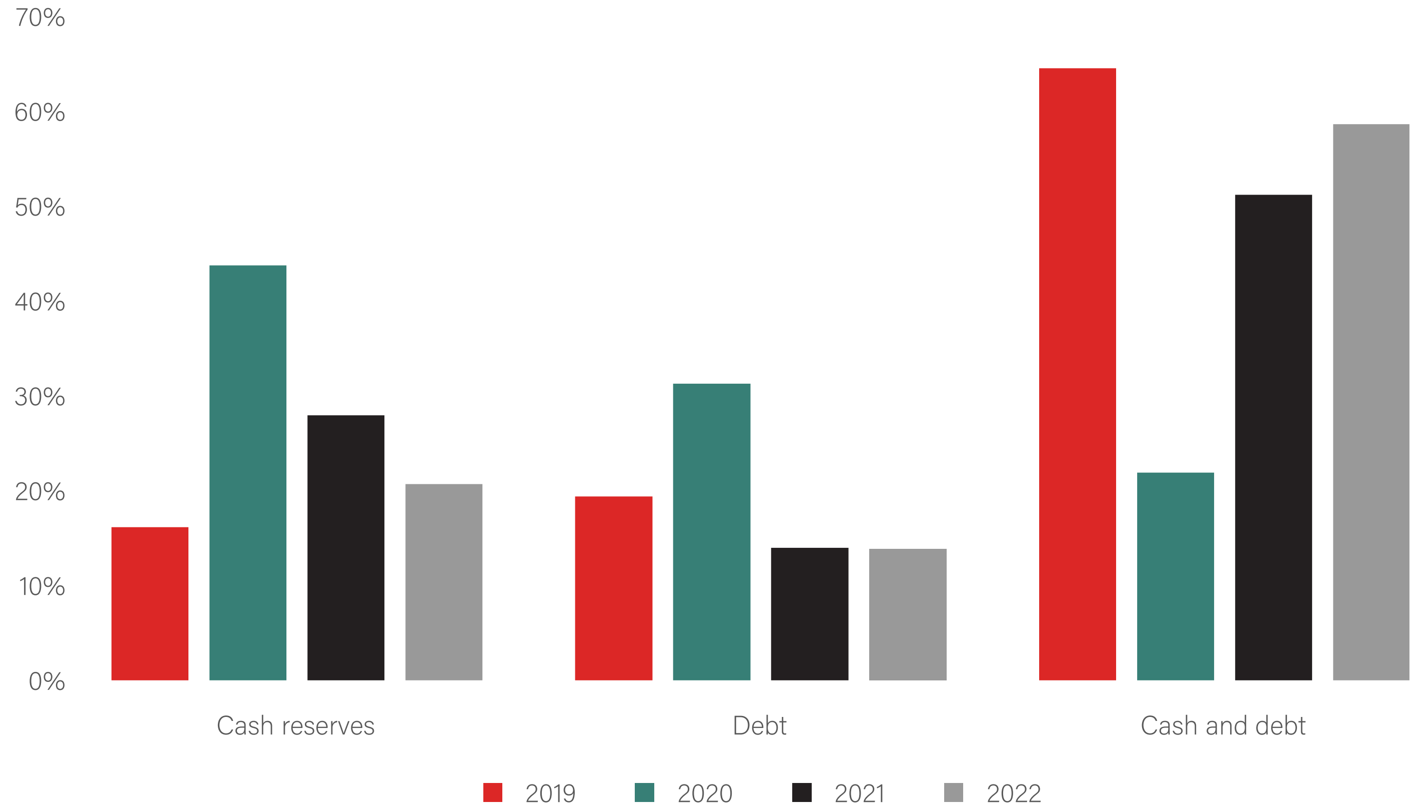


24% of bidders increased the cash consideration offered to target shareholders one or more times this year, compared to 19% in 2021 and 33% in 2020. Increases in consideration tended to be driven by competition for the target (such as in the case of Nitro Software and Warrego Energy) or in response to low acceptance rates (such as in the case of MACA).

Another reason bidders increased consideration was in response to unfavourable conclusions by the independent expert. Such was the case in respect of the ResApp Health scheme with one of the world's leading biopharmaceutical companies. The initial consideration offered by the bidder under the scheme was $0.115 per share but this was below the value range of $0.146 to $0.207 per share determined by independent expert. Following a period of consultation and negotiation regarding the scheme consideration, the bidder agreed to increase the consideration to either $0.146 per share or $0.207 per share, depending upon the outcome of a clinical validation study. While the results of the study were unsatisfactory, the bidder nonetheless agreed to raise the scheme consideration to $0.208 per share in August and the scheme was implemented.

“Increases in consideration tend to be driven by competition for the target or in response to low acceptance rates.”

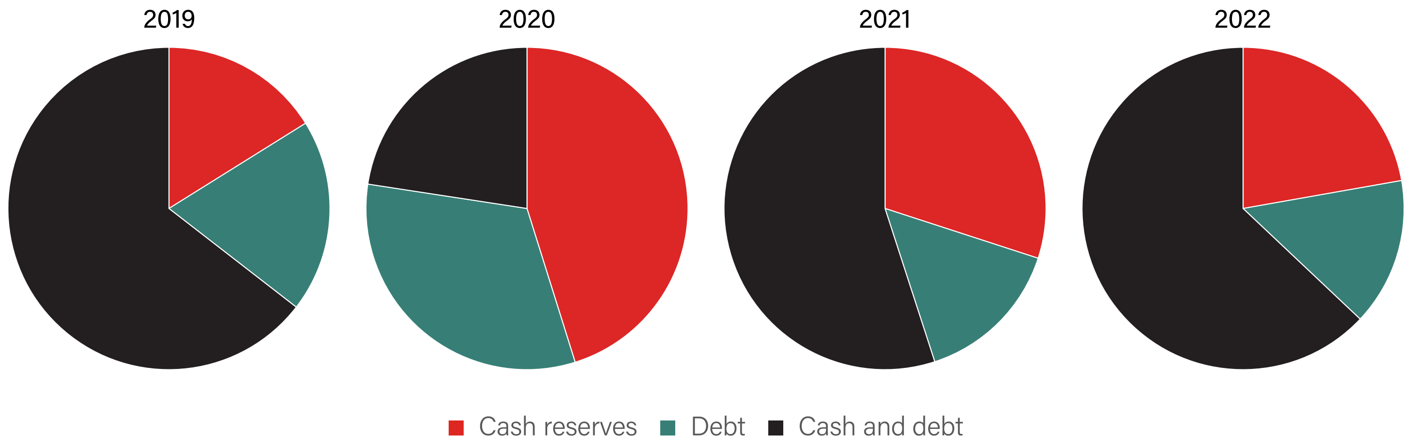
Source of funding



In 2022, combined cash and debt was by far the most common stated source of funding for bidders. 59% of deals announced in 2022 were paid for using cash and debt. This was up from 51% in 2021 and 25% in 2020, but down from 65% in 2019.

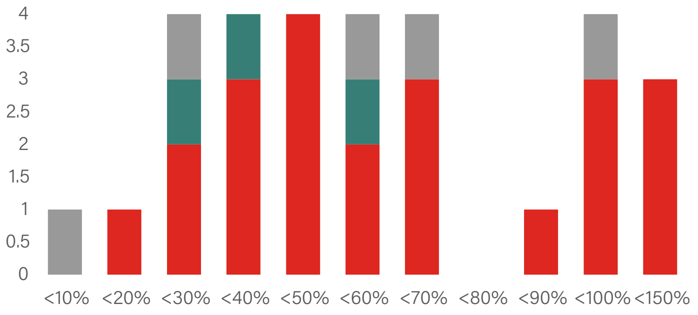
Debt was used to fund 14% of deals in 2022, which was on par with 2021 figures and a decrease from 31% in 2020 and 19% in 2019.

21% of deals drew on cash reserves as a source of funding. This was down from 28% in 2021 and 44% in 2020, with both years up on the 16% in 2019.

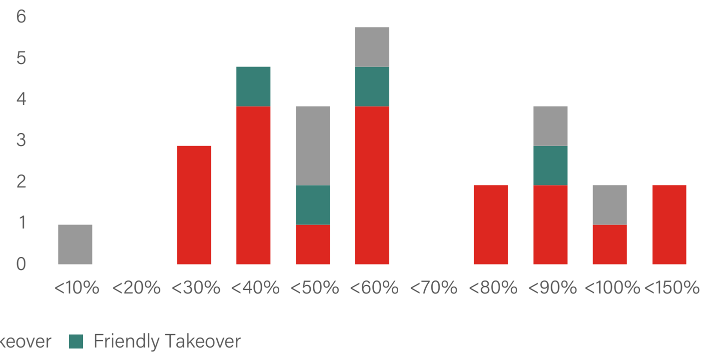


Premiums

Premium to closing price day prior to announcement



Premium to one month VWAP



Quoted premiums were up significantly in 2022 compared with the previous year. The average premium offered by bidders to the target's closing price the day prior to announcement was 62.20%, nearly double the 31% average in the previous year. Average premiums to one month volume-weighted average price (**VWAP**) were also up at 61.69% compared to 33% in 2021. The trend shows that bidders were willing to pay more to secure control of a valuable target.

The graphs illustrate 2 premiums commonly quoted by bidders. The first being the premium to the "undisturbed" share price, which we take as being the one month VWAP up to the date of an announcement of a bid, and the second being the premium to a target's share price the trading day prior to an announcement.

One month VWAP premiums ranged between 4% and 172%. The 2022 data recorded fewer outliers than in 2021 as a significant proportion of bidders offered premiums of >90%. The most common range for one month VWAP premium offered by bidders was 50 – 60%.

62% average

60-70% most common range (schemes)

40-50% most common range (takeovers)

One month VWAP premium to the announcement*

62% average

50-60% most common range (schemes)

60-70% most common range (takeovers)

Premium to share price the trading day prior to the announcement*

Premiums offered to a target's closing trading price a day prior to an announcement typically ranged between 20% and 70%, with an average premium of 62%.

* Where more than one mode range appeared in the data, we have selected the range closest to the data point average.

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Private equity involvement

Private equity bidders returned to the Australian public M&A scene in droves in 2022. The proportion of deals involving a private equity bidder spiked to 35% in 2022, a sharp turnaround from what has been a steady decline in private equity bidder activity in recent years. The result stands in particular contrast to the unexpected decline in the proportion of private equity bidders to 10% of all deals that we reported in 2021.

Some of the increase can be put down to competition amongst private equity bidders for valuable Australian targets, such as the battle between BGH and CapVest for Virtus Health in Q2 2022 (summarised on page 10) and between local private equity firm Potentia Capital and KKR-owned Alludo for Nitro Software in Q4 2022.

Private equity bidders appeared to enthusiastically spend dry powder by offering attractive premiums for Australian listed targets. The average premium on closing price prior to transaction announcement by private equity bidders was 67.19% (up 5 percentage points from the general average).

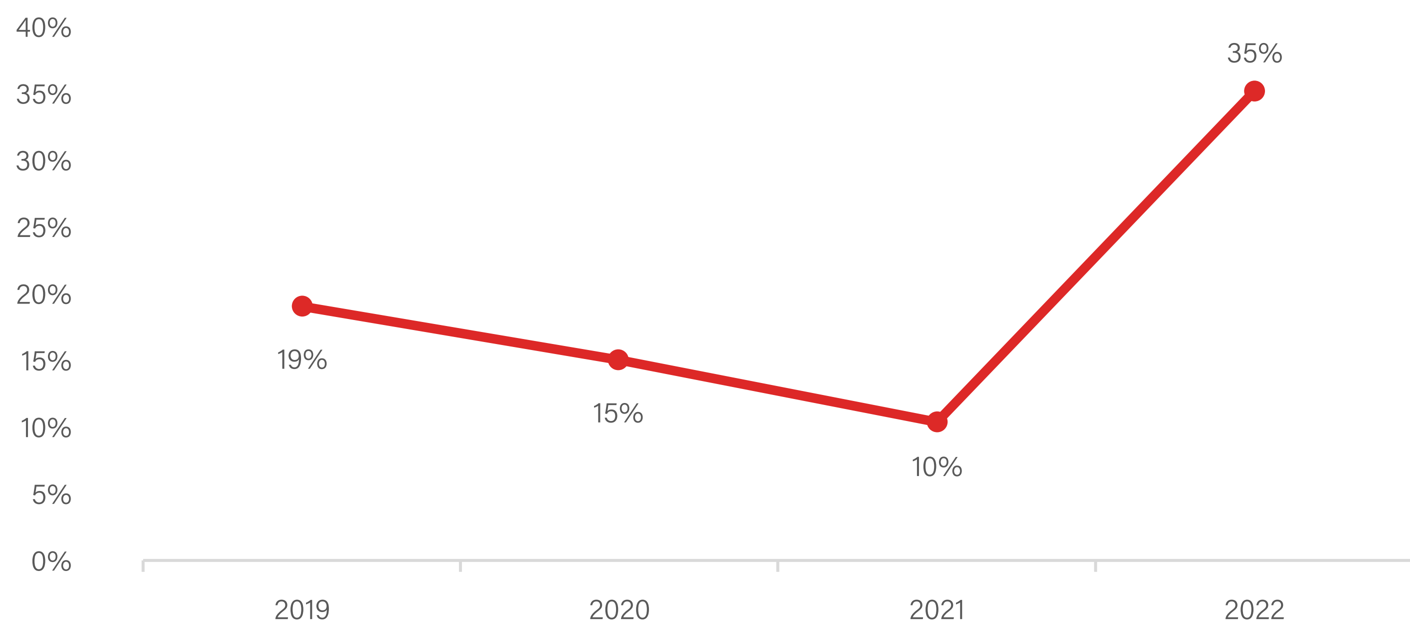
Targets in industries that fared well during pandemic years, such as healthcare and software, enjoyed particular attention from private equity bidders. Only 3 of the 13 deals reviewed involving private equity bidders involved targets that fell outside these sectors.

DEAL IN FOCUS: BLACKSTONE SCHEME TAKEOVER OF CROWN

In March 2022, US private equity giant Blackstone approached Crown with a non-binding indicative offer of $11.85 per share to acquire 100% of Crown shares. Further offers were made including the final binding offer of $13.10 per share to be paid in cash via scheme of arrangement. State governments including in Victoria, New South Wales and Western Australia approved Blackstone as a suitable holder of a casino licence, however, the deal was not without constraints. It was subjected to strict conditions that aligned with government policies aimed at stamping out money laundering and gambling addiction. The deal was finalised on 24 June 2022 and saw James Packer, Crown's largest shareholder, pocketing a hefty $3.36 billion in exchange for his 37% interest in the company.

Blackstone's acquisition of Crown is another win for the private equity heavyweight. The deal adds further credentials to Blackstone's existing portfolio of casino business which include MGM Grand, Mandalay Bay and numerous casinos across Europe and Las Vegas.

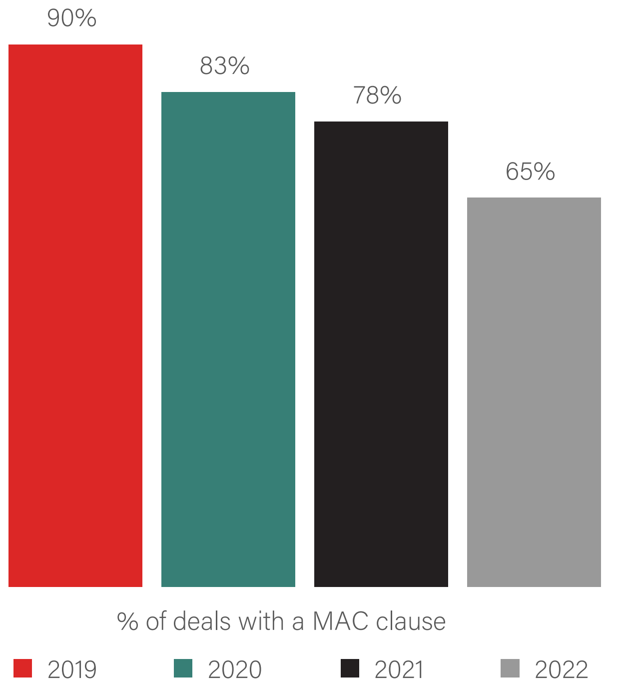
Deals involving a private equity bidder



Conditionality

MAC clauses

A material adverse change or "MAC" clause is a condition that can allow a party or parties to abandon a transaction or obtain a lower purchase price where unforeseen circumstances occur between signing and completion or implementation have a detrimental impact on the target or, in deals involving scrip consideration, the bidder.



The use of MAC clauses dropped again in 2022 and were seen in only 65% of deals, continuing a general downward trend in their use since 2019. The drop may be due to a growing perception of MAC clauses as a "toothless tiger", since growing adoption of exhaustive carve outs to MAC clauses has made it difficult for bidders to confidently rely on them to abandon a deal. We also expect ongoing economic headwinds and geopolitical volatility to have hardened targets' resolve to wholesale reject MAC clauses in negotiated deals.

Reliance on MACs

No 2022 deals that were withdrawn or otherwise failed were as a result of MAC conditions being triggered. Bidders faced considerable difficulty in relying on MAC clauses which contained extensive carve outs for adverse economic events arising from general economic, industry or political conditions or changes in those conditions.

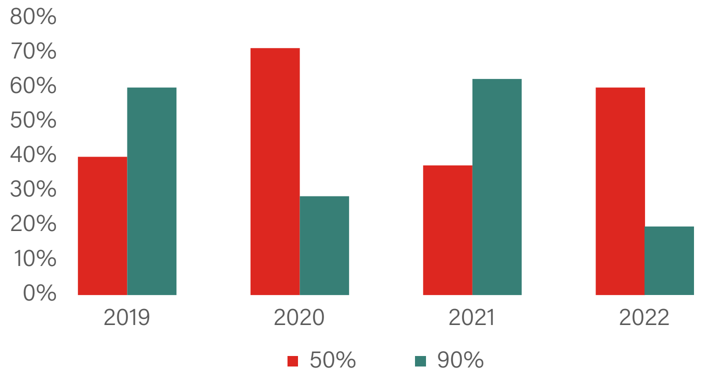
ASIC WEIGHS IN ON MACS

In its September Corporate Finance Update, ASIC weighed in with its expectations on the drafting of MAC conditions. In its update, ASIC said that it expected MAC conditions to "contain objective and quantifiable standards by which the parties to a transaction, and their securityholders, can determine whether a material adverse change has occurred" and to be drafted so as to avoid circularity.

In a public M&A context, MAC conditions must not be self triggering (for e.g. if they are drafted subjectively or semi-subjectively in a manner that would enable a party to enliven them by forming a particular view). However, public M&A counterparties regularly agree MAC conditions that do not set quantifiable financial or other triggers and instead rely on general, qualitative thresholds. This has increasingly been the case where a direct comparison of financial metrics is not appropriate due to business disruptions caused by general economic, geopolitical or pandemic related events.

It remains to be seen, then, whether ASIC's comments will result in a change in approach to the drafting of MAC clauses in Australian public M&A deals.

Minimum acceptance conditions in takeovers



Of the 12 takeovers announced in 2022, only 5 were conditional on either a 50.1% or 90% minimum acceptance condition. These thresholds are typical for off-market takeovers – a bidder with more than 50% control can determine the board of the target, while a holding of 90% or more of all the securities from each bid class enables compulsory acquisition.

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The reduction in minimum acceptance conditions follows a general trend away from highly conditional bids in 2022. Further, of the deals that included minimum acceptance conditions, bidders favoured the lower 50.1% threshold. Only one deal (Gold Road's takeover bid for DGO Gold) contained a bespoke minimum acceptance condition of 80%, though Gold Road ultimately acquired an interest in 97.86% of DGO Gold's shares and was able to exercise compulsory acquisition powers.

42% of takeovers had a minimum acceptance condition

Independent Expert Reports

The role of an independent expert is typically to opine on whether a deal is in the best interests of target shareholders. Over 80% of deal documentation annexed an independent expert report in 2022, up from around 50% in the previous year. It is market practice for independent experts' reports to be included in scheme booklets, however the 2022 data suggests that independent expert reports were increasingly produced for takeover bids as well. Independent expert reports were produced for 5 of the 12 takeover bids announced in 2022.

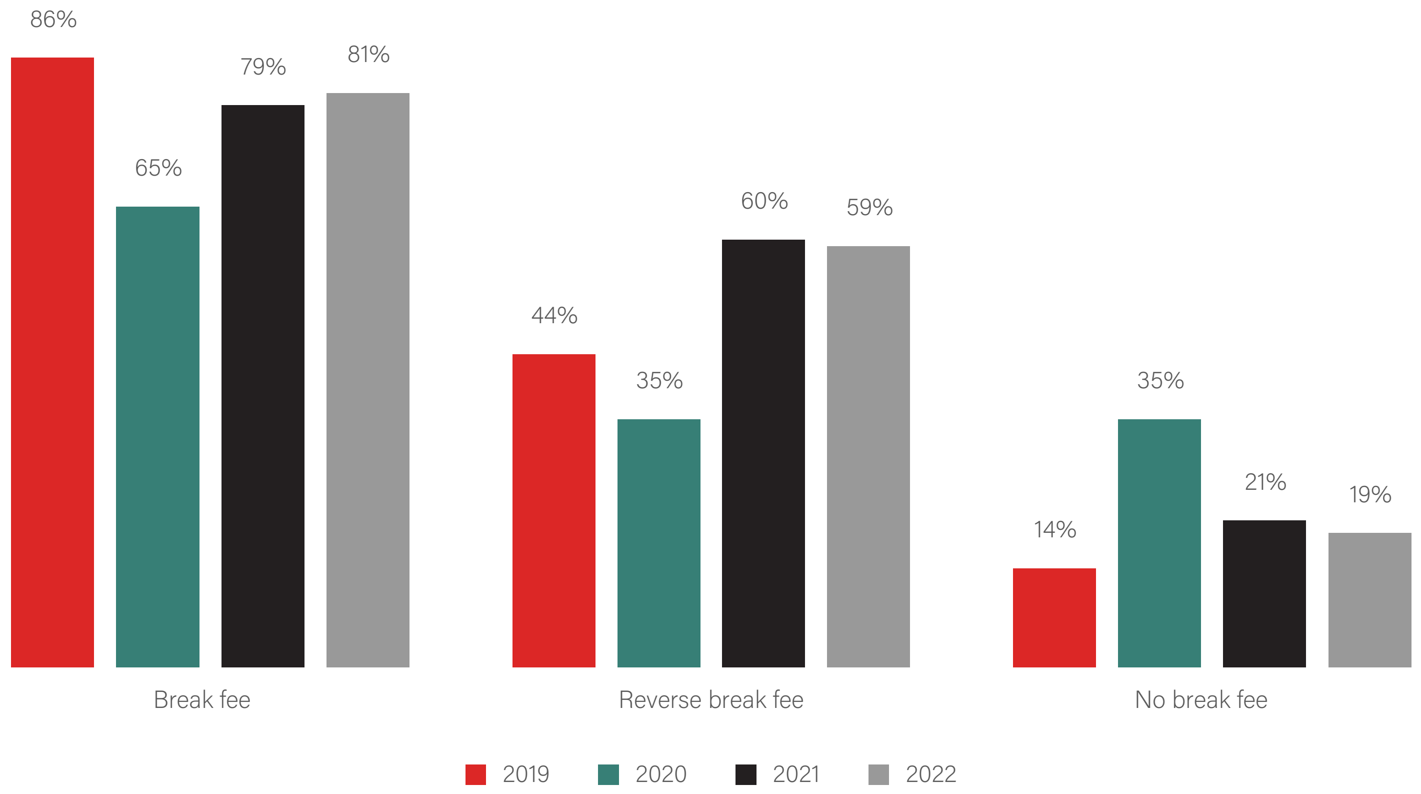
DEAL IN FOCUS: WHEN THE INDEPENDENT EXPERT DISAGREES

In April 2022, one of the world's leading biopharmaceutical companies offered to acquire 100% of the shares in ResApp for A$0.115 per share in cash by way of a scheme of arrangement. The directors of ResApp unanimously recommended that ResApp shareholders vote in favour of this scheme, subject to the independent expert's report and in the absence of a superior proposal.

In a surprising turn, the independent expert disagreed with the ResApp Board in its draft report and determined the value of a ResApp share to be between A$0.146 and A$0.277, with a preferred value of A$0.207. This led to a period of consultation and negotiation between the parties which resulted in an increased offer of: (A) A$0.207 per share upon satisfactory results from a data confirmation study of ResApp's COVID-19 detection tool; or (B) A$0.146 per share in the event of unsatisfactory data confirmation results. In a revised draft to their report, the independent expert supported this revised scheme and concluded that it was fair and reasonable to ResApp shareholders and in their best interests.

Despite the condition for a satisfactory data confirmation study not being satisfied, the bidder nonetheless agreed to raise the scheme consideration to $0.208 per share in August and the scheme was implemented.

Deal protection: Break fees



Bidders continued to expect targets to pay break fees in 2022. A break fee is a fee payable by a target to a bidder if the target does not proceed with the proposed deal under certain specified conditions. The proportion of deals that included a break fee rose slightly in 2022 to 81%, up from 79% and 65% respectively in the previous 2 years.

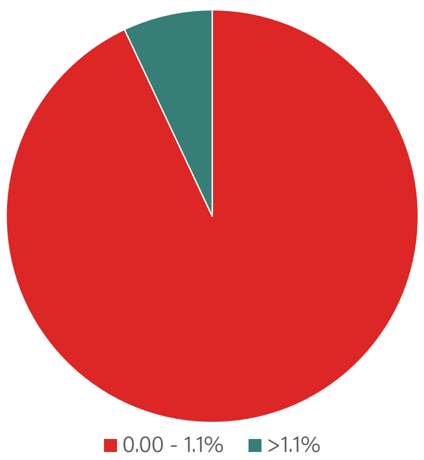
Reverse break fees (being fees paid by a bidder to the target in the event the bidder abandons the deal in certain circumstances) were also up in 2022. Of the 37 deals reviewed, reverse break fees featured in 24 deals (being 65% of all deals).

The data appears to show an increased insistence by targets that deal protection mechanisms are reciprocal, when they are used.

The quantum of break fees remained steady in 2022, with the vast majority of break fees falling below 1.1% of total consideration.

This consistency is to be expected in the context of clear guidance from the Takeovers Panel that break fees should not exceed 1% of the equity value of the target. That said, 7% of the break fees reviewed exceeded the Panel's guidance by more than 0.1%.

Of the deals with break fees, **93%** specified a break fee of between 0% and 1.1% of total consideration and **7%** specified a break fee of more than 1.1%



Regulatory developments

Foreign Investment Review Board (FIRB)

A suite of amendments to the Foreign Acquisitions and Takeovers Regulations 2015 commenced on 1 April 2022. According to the Explanatory Statement attached to the amendment bill, the amendments aimed to 'support the improved administration of Australia's foreign investment framework by clarifying certain aspects of the Principal Regulations and streamlining the processing of less sensitive types of investment.'

The amendments ushered in a number of notable changes to the framework, including increasing the threshold for acquisition of interests in Australian media businesses and unlisted Australian land entities requiring prior notification from 5% to 10%, expanding the scope of the moneylending exemption available to certain foreign persons to acquire and enforce security interests over Australian assets, and introducing a new exemption for acquisitions which will not increase a foreign person's percentage interest in the entity. While the amendments will be welcomed by foreign investors generally, we do not expect them to have any particular influence over the Australian public M&A landscape which typically involve transactions that fall outside the ambit of available exceptions and threshold limits.

What is likely to have a greater impact on foreign investment in Australian public companies are the concurrent amendments to the Security of Critical Infrastructure Act 2018. Australia's foreign investment laws currently require all investments of 10% or more in a "national security business" to obtain prior FIRB approval. The definition of "national security business" under the FIRB rules is linked to the definition of "critical infrastructure asset" under Australia's critical infrastructure legislation. The critical infrastructure amendments, which came into force in two tranches on 3 December 2021 and 1 April 2022, significantly expand the scope of "critical infrastructure assets" to 22 categories, including in the defence, food and grocery, transport, communications, health, data storage and education sectors. As explored on page 15, the reforms do not appear to have put a dampener on foreign investment but, where foreign bidders are involved, we can expect to see a greater proportion of deals conditional upon FIRB approval to complete.

Takeovers Panel

The Takeovers Panel handed down 9 decisions with reasons in 2022 (excluding instances where the Panel varied orders or made a preliminary decision to not conduct proceedings). This is a remarkably high number of decisions to be made in a year which has seen such a significant drop in M&A activity and is the same number of decisions with reasons handed down during the M&A frenzy of 2021.

Significant takeovers considered by the Takeovers Panel include:

1. *Virtus Health Limited* [2022] ATP 5 in which the Panel made a declaration of unacceptable circumstances in relation to various aspects of the exclusivity arrangements put in place between Virtus Health (as target) and CapVest (as bidder) which the Panel considered to have an anti-competitive effect. These included that the "fiduciary out" to the exclusivity arrangements did not apply for a 1 month period, a non-public information provision was not subject to any exception and the fact that the exclusivity arrangements were granted by Virtus at the indicative proposal stage when there was no guarantee that Virtus shareholders would receive a binding bid.
2. *Nex Metals Explorations Ltd 05* [2022] ATP 12 in which the Panel found information deficiencies in Nex Metals' replacement target's statement in response to the off-market scrip takeover bid by Metalicity to constitute unacceptable circumstances.

The Panel also has 2 active consultations on foot. The first relates to revised guidance on deal protection mechanism in response to the Panel's recent decisions on Virtus and AusNet. Targets can expect greater scrutiny on 'hard exclusivity' arrangements and deal protection mechanisms deployed at early stages of a control proposal. The second consultation paper relates to revised guidance on insider participation in control transactions. The revisions are expected to broaden the scope of who the Panel considers to be an 'insider' and to "clarify the Panel's expectations as to when an insider should disclose to the board or sub-committee any approach that might lead to a control proposal".

Should the Takeovers Panel have jurisdiction over schemes?

In 2022 the question of who is best to vet a takeover by scheme of arrangement was put to the test after the Australian Government announced it would consult on expanding the role of the Takeovers Panel in control transactions in a consultation paper entitled **Corporate control transactions in Australia published by the Australia Government Department of Treasury**. We set out below some of the arguments for and against the Takeovers Panel having jurisdiction over schemes as extracted from commentary on the subject.

Arguments for	Arguments against
All control transactions, whether they occur by way of takeover or scheme, should be dealt with by the same body (ie the Panel), applying the same principles and rules.	The current system is not broken, so doesn't need fixing. There is little evidence that investors miss out on credible takeover opportunities or are not treated fairly.
Schemes should also uphold the Eggleston Principles of fair shareholder treatment.	The scheme process does satisfy the Eggleston Principles, with the exception of equal opportunity. The ability to treat one shareholder differently, with the fully informed approval of the broader body of shareholders, is a key benefit of the scheme of arrangement structure.
Transferring jurisdiction over schemes to the Panel may significantly reduce costs. The cost involved in the court process can be particularly prohibitive for smaller capitalisation transactions.	Claims that there will be significant costs savings are overstated and pale in significance compared to overall transaction costs.
Panel members have specialist knowledge in relation to takeovers, and can make decisions on disclosure and voting issues by reference to market practice.	Many of the Panel members do not have the necessary experience. Judges who deal with schemes regularly tend to have deeper experience in dealing with disclosure disputes.
If a disclosure issue is tested in the Panel, the parties are more likely to get a more consistent result than in the courts.	There is no evidence to suggest that having the Panel involved will speed up resolution of disputes or provide a more consistent outcome.

Norton Rose Fulbright's John Elliott, Senior Adviser, Strategic M&A also commented on the potential change for the International Financial Law Review stating:

> *"The reality is that the scheme of arrangement process, timetable and disclosure requirements do ensure that the Eggleston Principles will be satisfied, except for equal opportunity, to the extent that shareholders can approve any particular shareholder being treated differently from the overall body of shareholders by voting in favour of such treatment, through a resolution on which that particular shareholder is not allowed to vote."*

Three takeaways for targets

1. Get exclusivity arrangements right

Target boards should exercise caution when asked to provide periods of "hard exclusivity" (being exclusivity arrangements without a fiduciary out) or other deal protections to prospective bidders in the early, non-binding stages of a control proposal. While the practice seems to be garnering greater market acceptance, recent decisions by the Takeovers Panel (AusNet and Virtus) demonstrate the risk of such arrangements amounting to unacceptable circumstances. The Panel is currently undertaking a public consultation on revised deal protection guidance which should provide greater clarity to target boards on the dos and don'ts of exclusivity arrangements.

2. Break fees – make it mutual

Targets can feel empowered to seek reverse break fees in negotiated deals, with the practice creeping closer to parity with the instance of regular break fees. Reverse break fees (being a fee paid by the bidder to the target if the bidder abandons the deal in certain circumstances) have become increasingly common in recent years and have been deployed by targets to bolster deal certainty and mitigate execution risk. While bidders appear more willing to accept a reverse break fee where they themselves are seeking a regular break fee, targets should be mindful of the potential consequences of enforcing a reverse break fee on an otherwise friendly bidder (including eroding good relations and harming the prospects of future bids by the bidder).

3. Private equity on the mind

Private equity bidders showed up in force in 2022 and showed little sign of retreat by the year's end. Target boards wanting to be well prepared to assess future control bids by private equity players would do well to understand the private equity model and know the key players. Disclosures by private equity bidders should be closely scrutinized by target boards to properly evaluate a bid's merits, including the strategic rationale, price and operational intentions.

Three takeaways for bidders

1. Strong premiums yield strong results

Bidders wanting to secure control of their target, particularly in the face of competing bids, can expect to pay much higher premiums to do so. The average premium to 1 month VWAP nearly doubled in 2022 and, astoundingly, just under a third of all bidders offered premiums of >80%. Bidders that were able to take advantage of slumping share prices through the middle half of the year by offering attractive premiums saw higher success rates in their deals as shareholders sought to realise immediate value from dwindling investments.

2. Reconsider extensive conditionality

Extensive conditionality was out in 2022, with significant drops in the use of minimum acceptance conditions in takeovers and MAC conditions across all deals. Bidders looking to bolster the prospects of their offer should consider their need for these and other conditions carefully.

3. Cash talks

As the cost of money rises with interest rates, targets are looking more favourably upon bidders who can offer cash. Economic and geopolitical turmoil have dampened shareholder interest in scrip or combination deals and the resounding call seems to be "show me the money."

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Report methodology

Reported deals:

Norton Rose Fulbright reported on takeover bids and schemes of arrangements announced during the calendar year ended **31 December 2022**, which were valued at $50 million or more. As at the date of publishing this report, **12** surveyed deals remain current and are yet to complete. Where an offer document was not been released to the market, we have not included certain trends in our results.

AUD:

All dollar figures reported are in Australian dollars unless otherwise stated. Any break fees or deal values not originally in Australian dollars have been converted using the Australian dollar currency rate quoted at the time of reporting.

Sources:

Unless otherwise indicated, the data and information in this report has been generated from our own research, market analysis and primary sources that are publicly available including ASX announcements, bidder and target statements, implementation agreements and scheme booklets.

Deal terms differ depending on the circumstances surrounding each deal and we have exercised our judgment in interpreting and categorising these terms for the purpose of this report where they were not directly comparable.

Announcement date:

The announcement date reported in respect of a takeover bid is the earlier of the date that a public announcement is made that a bidder intends to make a takeover bid or the date that the takeover bid is actually made. The announcement date in respect of a scheme is the date a public announcement is made that an agreement has been entered into to propose a scheme (for instance, a scheme implementation deed).

Consideration:

The value of the consideration, for the purposes of calculating deal values in this report, was calculated as follows:

- where the consideration included non-cash consideration, such as scrip, it was valued as at the announcement date using the same methodology as used in the initial announcement. If no value was cited in the initial announcement the value was calculated using the closing market price of the bidder scrip prior to the initial announcement (or such other appropriate date to reflect the undisturbed share price) where listed and/or the foreign exchange rate on the announcement date (as applicable); and
- where the final consideration depended upon the movements in the value of bidder scrip or the foreign exchange rate, the value of the final consideration was recalculated using the value of the bidder scrip or foreign exchange rate as at the time such adjustments were made.

Deal value:

Where a deal was successful, the value of the deal is the final consideration paid or payable per issued security in the target multiplied by the aggregate number of those securities at the end of the offer period for a takeover bid or record date for a scheme. Where a deal remained ongoing as at **31 December 2022**, the value of the deal is the consideration offered per issued security in the target as at that date multiplied by the aggregate number of securities in the target subject to the offer as at that date.

Premiums:

To extract trends from offer premiums we analysed data from offer documents which quoted a premium to the closing price on the last trading day prior to the announcement of a bid and to the one-month VWAP to announcement of the bid. If either of these premiums was not cited in the takeover announcement it was not included in our results. For instance zero premiums, negative premiums and any other forms of premiums which were not calculated against the trading price the day prior to the bid announcement or as a one-month VWAP were not included in our reporting. Premiums quoted exclude deals where the bidder did not offer a premium for control (or offered zero premium).

Deal categorisation:

Takeovers initially recommended by the target board on the date of the announcement are regarded as "friendly". Conversely takeovers not initially recommended by the target board on the date of the announcement are regarded as "hostile".

Rounding:

Some percentages reported will not add to 100% as numbers have been rounded up.

Success:

- A takeover bid is referred to in this report as successful if any securities were acquired under the takeover offer if it was unconditional or after the satisfaction or waiver of all conditions in the case of a conditional takeover bid. A scheme is referred to in this report as being successful if court approval is obtained and the scheme became effective.
- A bid is unsuccessful if the acceptances received from shareholders are less than 50%, even if the deal is declared unconditional. Lapsed deals recorded as unsuccessful deals.
- A bid is recorded as withdrawn when the ASX has received notification from the companies involved that the deal is withdrawn or where the bidder returns all acceptances back to shareholders.

Currency of information:

Unless otherwise indicated, information in relation to the deals in this report is current to **31 December 2022**.

About the authors

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Jeremy Wickens is a commercial-minded and responsive Corporate, M&A and Equity Capital Markets lawyer based in Melbourne. He is fortunate to have had a rich career over the past 20 years, and has been involved in some of Australia's most significant projects and transactions, including the recent highlight of leading negotiations on the scheme implementation agreement for Vodafone Hutchinson's $16.8 billion merger of equals with TPG Telecom.

He is recognised in Best Lawyers in Australia in the practice areas Corporate, Equity Capital Markets, Mergers and Acquisitions, Natural Resources and Oil & Gas.

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Ellen is a talented emerging lawyer specialising in Corporate, M&A, Equity Capital Markets and Projects. Ellen leads transaction delivery and provides advisory support for both domestic and international clients across a range of industries but with a particular focus on technology, professional services and energy markets. In her 4 years with NRF's Melbourne corporate team, Ellen has been a highly valued and efficient team member on a number of first-of-their-kind transactions. Highlights in the public M&A space include her involvement in the team advising on Vodafone Hutchinson's $16.8 billion merger with TPG Telecom in 2020 and her role as transaction delivery lead and advisor to 5G Networks on its merger with Webcentral Limited by way of 'top-hat' scheme in 2021. Ellen is known for delivering high-quality and commercial advice that reflects a true appreciation for the motivations driving her client's activities.

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