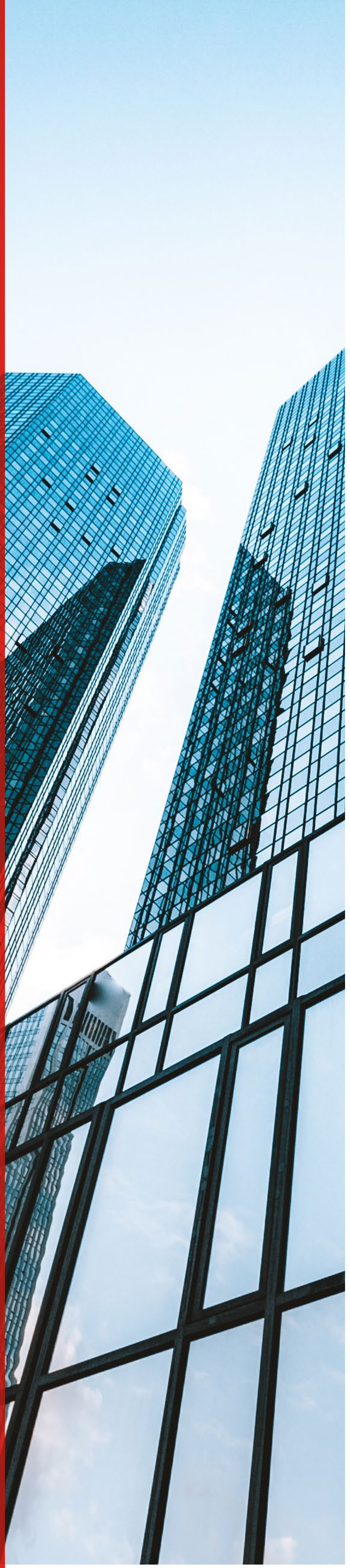
NORTON ROSE FULBRIGHT

Australian public M&A deal trends report

2020 Edition - the surprising resilience of M&A in a tumultuous year



Contents

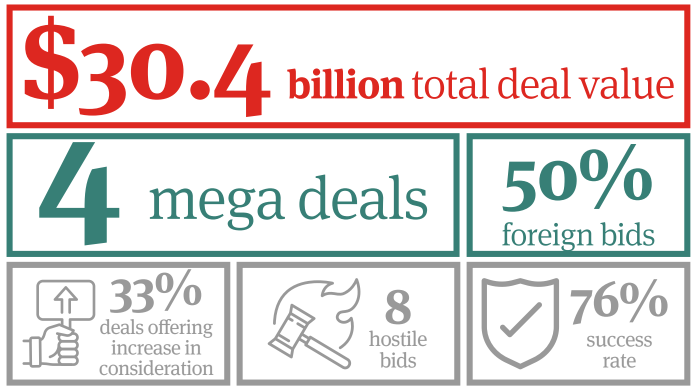
Introduction

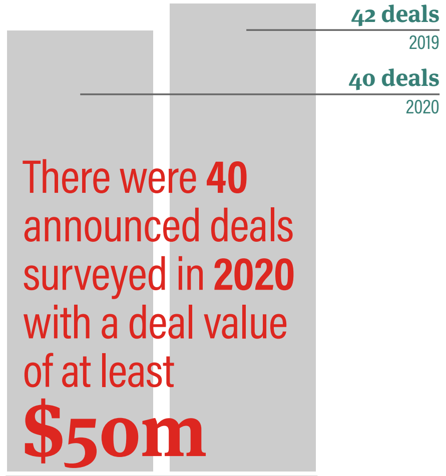
Before anyone could understand the full extent of the impact of the COVID-19 pandemic on the global economy, the start of 2020 already forecasted a year that was to be far from "normal", with Brexit, the US election and other significant events set to determine dealmaker sentiment. In Australia, 2020 also featured devastating bush fires and the country's political relationship with China reaching its lowest point in recent memory. Then of course 2020 was dominated by the COVID-19 pandemic, which for Australia involved border closures, lockdowns and business failures.

In this report we take a look at the year that was for Australian public M&A activity, 18 months on from the ASX's "big drop" when global markets tumbled to lows not seen since the Great Recession of 2008. From 23 March 2020 onwards, deal making was (not surprisingly) sluggish, as the effects of the COVID-19 pandemic reached our local shores and both Commonwealth and State Governments implemented lockdowns and border closures. Despite this slow start, a strong rally from June onwards saw total deal numbers similar to previous years (40 deals announced in 2020, as opposed to 42 in 2019).

We saw a rise in the total deal value of all surveyed deals, from $28.2 billion in 2019 to $30.4 billion in 2020. The 2020 number needs to be read in the light of the whopping $9.6 billion contribution from a single deal, Coca-Cola European Partners plc's scheme of arrangement (**scheme**) acquisition of Coca-Cola Amatil Ltd.

A snapshot of the top trends in 2020 with transaction values over $50 million.





2020 saw a surprising proportion of hostile bids (20% in 2020 vs 2% in 2019) and there was a downturn in the number of deals structured as schemes (55% in 2020 vs 83% in 2019). Despite foreign investment being scrutinised more closely under FIRB's temporary $0 monetary threshold in 2020, 50% of bidders were of overseas origin (although this is down almost 15% from 2019). The Australian share market closed on 31 December 2020 only 1.4% shy of where it started, demonstrating a remarkable rollercoaster ride for Australian markets, which recovered strongly from late March 2020 and through the second half of the year.

2020 saw just as many deals with material adverse change conditions as previous years, and while some deals may have taken longer to close, the success rates for completed deals remained relatively high at 76%, compared to a 79% success rate in 2019. Of the 40 deals announced during 2020, 1 deal is yet to close at the time of reporting.

In summarising the 40 takeovers and schemes announced to market during 2020 with a deal value of at least $50 million, this report considers how the Australian public M&A market has fared during what has been a remarkable 12 months and attempts to forecast (rather cautiously) what the coming year may bring, as we see a steady return to deal maker confidence. Our methodology is explained in pages 24-25.

We welcome the opportunity to discuss our findings with you.

Australian public M&A deal trends report – 2020

A year in review

Rise in hostile bids and a proportionate takeover

In 2020, 20% of the deals announced were hostile bids, a marked increase compared with recent years (in 2019, only 2% of bids were hostile). By way of contrast, 2019 saw 83% of deals announced undertaken by way of scheme, the most cooperative deal structure: only 7 were undertaken by way of takeover bids, and only one being a hostile bid. 2020 was a year where bidders got creative. Not only did we see the return of on-market takeover bids, but we also saw a proportionate takeover bid, which is considered a particularly aggressive deal structure and is not commonly used by bidders. It involves the bidder making an offer to each security holder for a specified portion, rather than 100%, of their securities. See our summary of this bid at **page 7.**

Rise in total deal value

The total deal value of the 40 bids announced in 2020 was $30.4 billion at the time of reporting. While beating 2019's $28.2 billion total deal value of all bids over $50 million, this figure is propped up significantly by Coca-Cola European Partners plc's scheme acquisition of Coca-Cola Amatil Ltd in November 2020, valued at $9.6 billion and accounting for just under one third of the total 2020 deal value. Without the Coca-Cola scheme, the total deal value for 2020 would have been $20.8 billion, a significant dip from 2019's total deal value. There was also a decline in the number of "mega deals" in 2020 (being deals with values over $1 billion). In comparison with the 7 mega deals announced in 2019, there were only 4 mega deals were announced in 2020.

$30.4 billion total deal value

$9.6 billion Coca-Cola deal value

Temporary FIRB reform

The temporary $0 monetary threshold screening introduced in March 2020 in response to the COVID-19 pandemic resulted in almost every foreign investment being scrutinised by FIRB. FIRB's processing deadlines for applications consequently increased from 30 days to up to 6 months. Although the pre-March 2020 monetary thresholds for 'notifiable actions' and 'significant' actions have now been reinstated, the new FIRB rules give FIRB more powers and bidders will need to navigate these rules and factor in longer approval processes. FIRB is increasingly focusing on national security, data protection and critical infrastructure, and foreign bidders should expect increased costs and uncertainty in any bid where FIRB could be involved. Further information regarding the FIRB changes is available in our earlier publication **here.**

The resurgence of on-market bids

2020 saw 2 on-market takeover bids, a mechanism that was not used in the previous 2 years. The first was Golden Investments' successful $250 million bid for Stanmore, for which Norton Rose Fulbright Partners David Jewkes and Adam Edelman advised the bidder (see **page 8** of the report for a summary on some of the interesting aspects of this deal). The second was the unsuccessful competitive bid by Nordgold to acquire Cardinal Resources, an auction in which 4 bidders emerged and Shandong was ultimately the successful bidder. It's unclear whether this rise of on-market takeover bids will continue in 2021 or whether their use in 2020 reflected a perceived desire for quick and certain cash returns for investors during an uncertain year. As at the date of this report, 2021 has already seen an on-market bid announced by Gallin Pty Ltd for McPhersons Ltd.

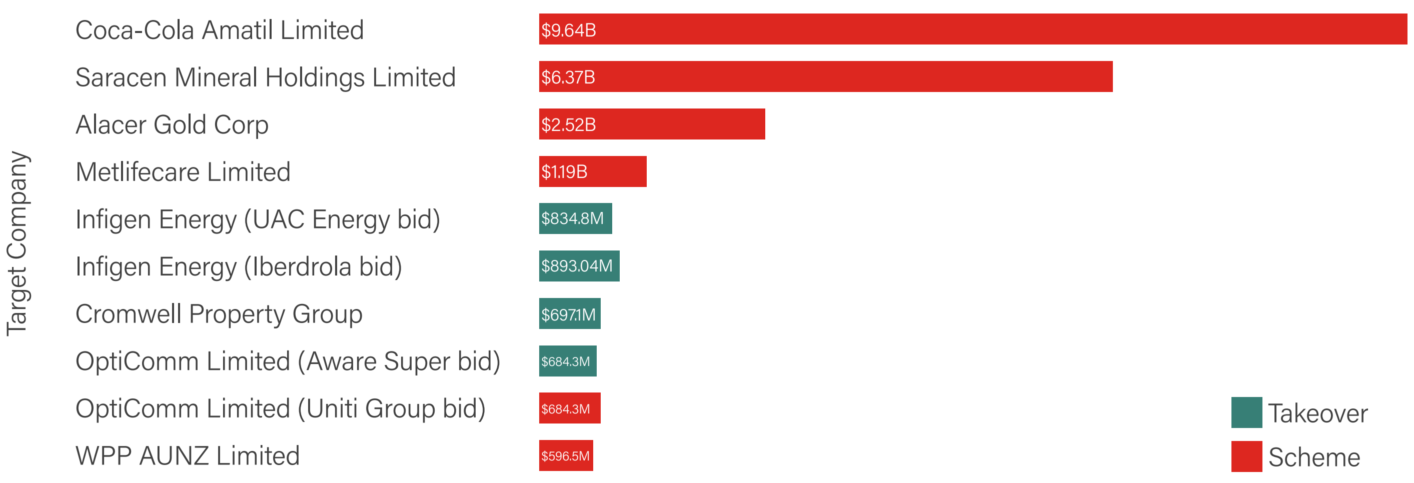
Gold, gold, gold (and a bit of iron ore)

The second largest M&A transaction announced in 2020 was the merger by way of scheme between Northern Star and Saracen (deal value of $6.3 billion). The transaction saw Northern Star become a $16 billion gold miner, now ranking as a global top-10 gold miner by market value. Other gold transactions included Newcrest's secondary listing on TSX, the sale of Ravenswood, the competitive bids for Cardinal Resources and the acquisition of Spectrum Metals by Ramelius Resources. With the price of gold at its current record levels, global economic uncertainty and an ongoing global money printing race, the gold faithful will see continue to see good times ahead in 2021. Australian iron ore miners also enjoyed a strong finish to the year, with the iron ore price buoyed by Chinese port stocks depleting and high demand as Chinese steelmakers continue to ramp up production.

Success rates

2019	2020
79% successful	77% successful
17% withdrawn	13% withdrawn
5% unsuccessful	10% unsuccessful

Top 10 deals by value for 2020

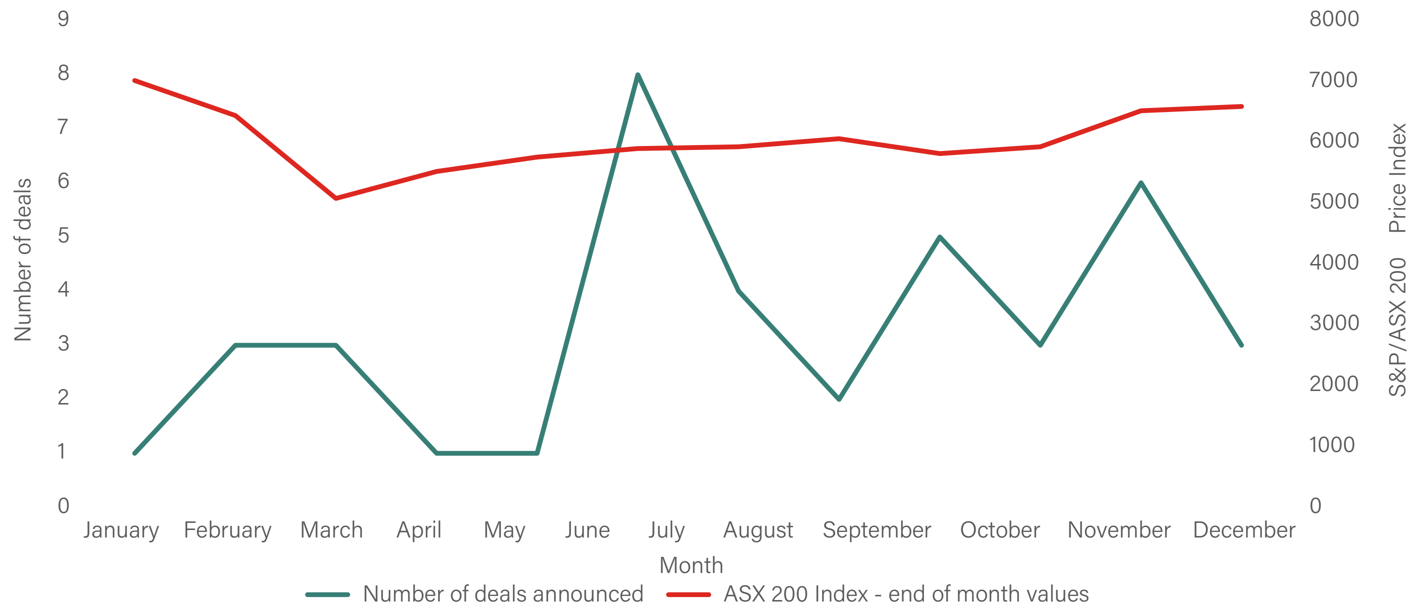


Post lockdown uptick

Monthly deal count

9 deals
announced
Jan-May 2020

31 deals
announced
Jun-Dec 2020



A 6 month stretch of activity unlike any other

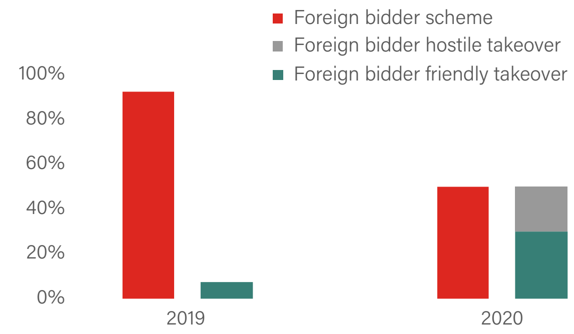
By the end of March 2020, the Australian economy experienced for the first time the severity of the COVID19 pandemic, with the market "crash" on 23 March 2020 and countrywide lockdowns. The remainder of the first half of the 2020 calendar year saw deal count an all-time low with only 9 deals announced between January and May 2020. Despite the second wave of the coronavirus sending Victoria into one of the world's toughest lockdowns for over 3 months, there was a significant uptick in market confidence and activity with 8 deals announced in June 2020. The remaining half of the year continued on this trajectory, with an average of nearly 4 deals announced each month between July and December, November being the busiest month for deal-making with 6 bids announced. Putting 2020's darkest day for the Australian market in March aside, the ASX 200 month-end index fared better and with less volatility when compared to deal-making trends.

Australian public M&A deal trends report – 2020

Structure and execution of deals

Schemes remain the preferred deal mechanism

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'.



Return of the takeover

While a slight preference for acquiring control via court-approved schemes was maintained in 2020 (55% of surveyed deals were schemes vs 45% takeovers), this preference is a stark contrast to 2019 where 83% of deals were structured as schemes, and just 17% as takeovers.

However, schemes were the preferred structure for the 4 mega deals announced in 2020. The preference for schemes in mega deals is commonly attributed to the desire for schemes' all or nothing outcomes for acquiring control of the target.

Rise in hostile bids

Of the 18 takeover bids launched in 2020, 10 were recommended by the boards of the target company and therefore "friendly", while 8 were "hostile" unsolicited bids not recommended by the board (20% in 2020, vs just 2% hostile bids in 2019).

Deal in focus: Stanmore on-market takeover

In April 2020, Singapore-based Golden Investments* launched an on-market hostile takeover offer for all of the shares in Stanmore that it did not already own or control (at the time of making the offer Stanmore was the largest shareholder with voting power of 31%). As it was an on-market bid, and therefore unconditional, on the day the bid was announced the bidder commenced buying Stanmore shares on-market, increasing its interest to above 50%. Control therefore passed on the day the unsolicited bid was announced.

As part of its bid defence strategy, Stanmore announced a 1 for 33 bonus issue on the opening date of Golden Investments' offer. This effectively represented an increase of 3.03% to the aggregate value of Stanmore's shares. As Golden Investments held a 51% interest in Stanmore at the time the bonus issue was announced, it was not able to withdraw from the bid as the withdrawal right in section 652C of the Corporations Act was no longer available.

*Represented by Norton Rose Fulbright Perth Partners, David Jewkes and Adam Edelman

The strongest example of a hostile bid during the year was **ARA Asset Management Holdings' (ARA)** bid for **Cromwell Property Group (Cromwell)**, which was structured as a proportional takeover whereby ARA sought to acquire only a proportion – 29% – of the Cromwell securities ARA did not already own. Proportional takeovers involve the bidder making an offer to each security holder for a specified portion of their securities, rather than all of their securities. Unsolicited proportional takeovers are perceived as particularly hostile and are quite uncommon.

Decline in mega deals

There was a decline in $1 billion-plus "mega" deals in 2020, with only 4 mega deals announced in 2020, down from 7 in 2019. The largest deal was Coca-Cola European Partners plc's $9.6 billion all cash scheme offer for Coca-Cola Amatil Ltd, followed by Northern Star Resources' $6.4 billion scheme offer for Saracen Minerals. Typically, the larger the deal, the more likely the deal will be announced with an initial target recommendation. Schemes come with the strongest form of target endorsement, perhaps explaining why all 4 mega deals in 2020 were structured as schemes.

While not announced in 2020, one of the largest Australian mergers in the past decade closed in July 2020: the long-standing $16.63 billion Vodafone Hutchison Australia Limited and TPG Telecom Limited scheme.

Bidding wars

In a competing bid situation, the first mover to announce, ideally with board backing, will usually have a strategic advantage. Any potential second mover—or, in Cardinal Resources' case, third or fourth movers — will need to factor in offer price and conditionality, as well as timetable, dictated by the first mover. In 2020, there were 4 targets which were subject to multiple bids: Cardinal Resources Ltd, Infigen Energy Ltd, OptiComm Ltd and Vitalharvest Freehold Trust.

Shandong Gold Mining Co Ltd were second movers in the Cardinal Resources bidding war, but overcame that disadvantage by being first to approach the target, generating widespread shareholder support and having the flexibility to increase its offer price. The same might be said for Iberdrola Renewables Australia Pty Ltd's success in the Infigen Energy bidding war, even if Iberdrola did need some 11 supplementary bidders statements to get there.

Deal in focus: TPG Telecom and Vodafone Hutchison Australia merger

First announced in August 2018 and stalled by opposition by the Australian Competition and Consumer Commission, in July 2020, Vodafone Hutchison Australia Limited (**VHA**) successfully merged with TPG Telecom Limited (**TPG**).

The merger structure was complex and involved VHA acquiring the ASX listed TPG by scheme of arrangement, while at the same time ending the listing of TPG on ASX and consideration to be paid by way of VHA obtaining an initial listing on ASX and issuing new, listed shares to the TPG shareholders. While this structure is not particularly unique, it is quite rare. The transaction also allowed for a kind of completion adjustment on close, which is not typical for schemes, and more commonly seen in private treaty transactions. The parties also executed a voting agreement guaranteeing TPG directors to make up the VHA board composition for 3 years from implementation (despite VHA holding a controlling interest of 50.1%). Lastly, approval by the Foreign Investment Review Board took close to 18 months to obtain and was highly conditional.

The deal was led by Norton Rose Fulbright's Corporate Partners John Elliott and Jeremy Wickens and was awarded "Best M&A Deal" from Finance Asia in its annual Australia and New Zealand Achievement Awards in November 2020 and also "M&A Deal of the Year" at the Australiasian Law Awards in June 2021.

"This merger was unique in that it was both one of the longest running transactions in Australian corporate history, and one that had to be completed remotely during the COVID-19 pandemic. We congratulate TPG Telecom for completing such a significant transaction, and would also like to thank the full team for completing a deal that will herald a new era for Australian telecommunications."

John Elliott and Jeremy Wickens, Partners – Norton Rose Fulbright

Deal in focus: Cardinal Resources bidding war

From March 2020 to January 2021, a bidding war played out for Cardinal Resources, a listed exploration and development company with gold projects in Ghana, West Africa. The primary players in the bidding war were Russian miner Nordgold and Chinese state-owned Shandong Gold. After months of back and forth between the 2 bidders, as well as 2 other bidders emerging, Shandong Gold eventually prevailed.

16 March 2020	Nordgold submits a Non-Binding Indicative and Conditional Proposal to acquire all of Cardinal's shares at **A$0.45** per share
19 June 2020	Shandong enters into Bid Implementation Agreement with Cardinal to acquire 100% of Cardinal for **A$0.60** per share
July – November 2020	A bidding war ensues between Nordgold and Shandong. Both issue bidders statements, supplementary statements and raise their respective offer prices to **A$1.00**
	Shandong, followed by Nordgold, announce that their offers of **A$1.00** are best and final in the absence of a higher competing offer. This sets off numerous Takeovers Panel applications, primarily concerned with whether Shandong is able to raise its offer in light of Nordgold's offer, as it is unclear if Nordgold's matching offer constitutes a higher competing offer
24 November 2020	Engineers & Planners Co Ltd (EPC) makes a Conditional All Cash Off-Market Offer at **A$1.05** per share
	Shandong immediately matches the offer
11 December 2020	Nordgold increases its offer price to **A$1.05**
24 December 2020	Dongshan announces its intention to make an Off-Market Takeover Offer at **A$1.20** per share
	Shandong raises its offer to **A$1.07**
	Nordgold confirms the close of its offer on the previous day, saying it cannot justify matching Shandong's offer
31 December 2020	EPC announces that it will not proceed with its proposed offer
12 January 2021	Shandong announces that it now holds 82.56% in Cardinal
Shandong announces that it holds 82.56% in Cardinal	Shandong acquires more than 90% and begins compulsory acquisition of the remaining Cardinal shares

Before the Takeovers Panel

The Cardinal Resources bidding war resulted in several Takeovers Panel applications, largely revolving around Shandong stating on 19 October 2020 that its offer price of A$1.00 per share was its "best and final in the absence of a higher competing offer". Market participants are typically required to adhere to last and final statements under the Panel's truth in takeovers policy.

The Panel received multiple applications seeking to allow Shandong Gold to increase its price notwithstanding its last and final statement after Nordgold exactly matched Shandong's $1 offer price. Orders were sought that Shandong Gold should be permitted to increase its price on the basis the "impasse" gave rise to unacceptable circumstances and that Nordgold was effectively "snookering Shandong" by matching the offer, instead of offering, say, $1.01 per share.

The Panel did not accept these arguments, saying that it was open to Shandong to frame its last and final statement differently, that the statement was definitive and given voluntarily, and that parties adhering to their last and final statements is a fundamental principle of an efficient, competitive and informed market.

It will be interesting to see whether makers of last and final statements begin to add 'matching or higher' to their phraseology in future.

Target industries

The top 4 industries for deal making in 2020 were Metals & Mining, Diversified Financials, Software & Services and Utilities – respectively accounting for 25%, 18% and equal 13% by number of deals. Metals & Mining is always a top deal making sector in Australia. However, the prominence of Software & Services may reflect the winners from COVID-19: those companies benefitting from the lifestyle changes and fast-tracked technologies that have emerged from the lockdowns and other responses to the pandemic.

Metals & Mining:

After a pandemic-affected Q1, metals and mining deals activity surged in Q4 2020, to finish the year with 10 deals (25%) worth $11.1 billion (with the 4 bids for Cardinal Resources somewhat skewing these figures). At $6.4 billion, Northern Star Resources' scheme acquisition of Saracen Mineral Holdings was the second largest of all Australian deals in 2020, as well as being one of the largest deals in the sector globally. Metals and mining deal activity is expected to remain strong in 2021, driven by high gold prices, a possible global economic recovery (driving potential deals in copper, nickel and zinc) and a return to record iron ore prices, buoyed by high demand yet low supply in the Chinese market.

Diversified Financials:

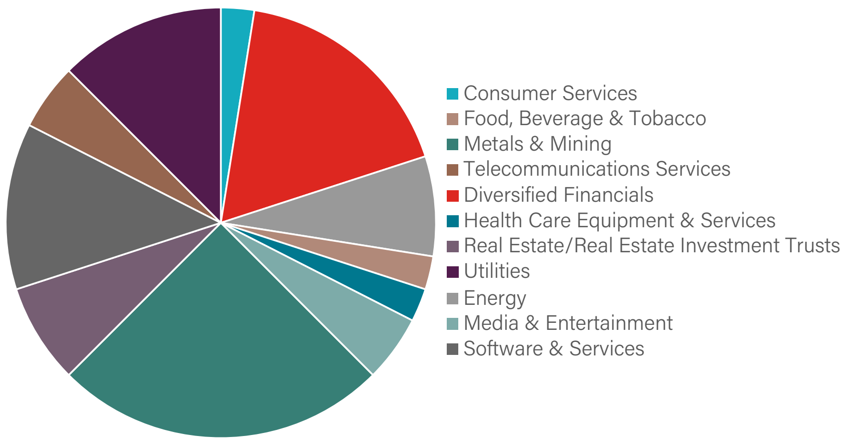
This sector has seen increased activity (taking up 18% of all deals for 2020) as entities seek to invest in diversified financial companies offering non-traditional loans and creative client solutions in a post-pandemic world. An example is Hub24's acquisition of Xplore Wealth at a 203% premium, rationalised by the bidder as delivering significant scale and market leadership in non-custody platforms. With alternative credit offerings seemingly only increasing in popularity, this sector is likely to continue to see solid levels of activity.

Software & Services:

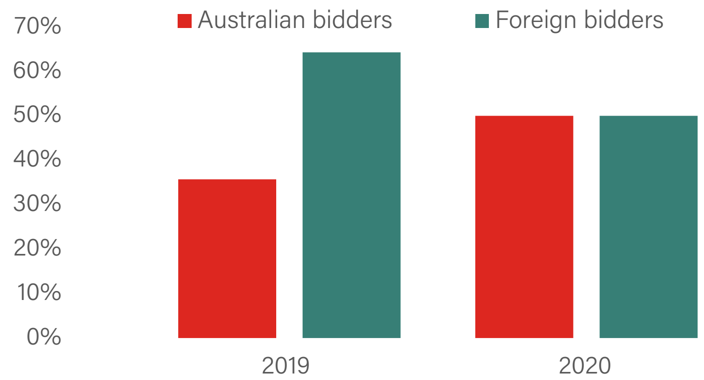
Investment in the software and services industry has accelerated, accounting for 13% of all deals, as the trends emerging from the pandemic response have become clearer. Deals have focused on targets with online platforms, such as slick consumer interfaces that minimise abandoned online shopping baskets. Examples include HCL Australia Services' $158 million acquisition of DWS Limited, primarily for its technology, consulting and services offerings and Damstra Holdings' acquisition of innovative software developer Vault Intelligence, primarily to increase its options for client interactivity. Other fintech targets have included those with new global payment platforms, readily accessible software solutions and improved cloud storage and data protection measures.

Utilities:

During 2020, 13% of deals were in the utilities industry, with all but one deal being related to Australia's energy market. Australia's largest renewable energy generator, Infigen Energy, was sought after by 2 foreign bidders after reporting a profit loss of 91.5% during FY2020 following COVID-19's impact on electricity prices. The company ultimately fell into the hands of Spanish owned Iberdrola following a friendly bid (and 11 iterations of a bidder's statement), which trumped the unsolicited bid from Singapore owned UAC Energy.



Foreign players



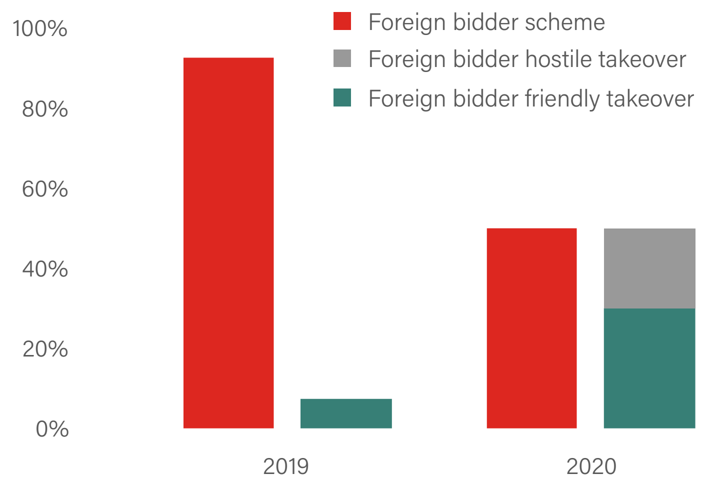
Foreign bidders accounted for exactly half of all bids in 2020, down from 64% in 2019. Despite this decline, foreign bidders made up $20 billion of the $30.4 billion total deal value for 2020 (66%). That said, almost half of the $20 billion that foreign bidders were prepared to invest was contributed by Coca-Cola European Partners plc's $9.6 billion offer for Coca-Cola Amatil Ltd.

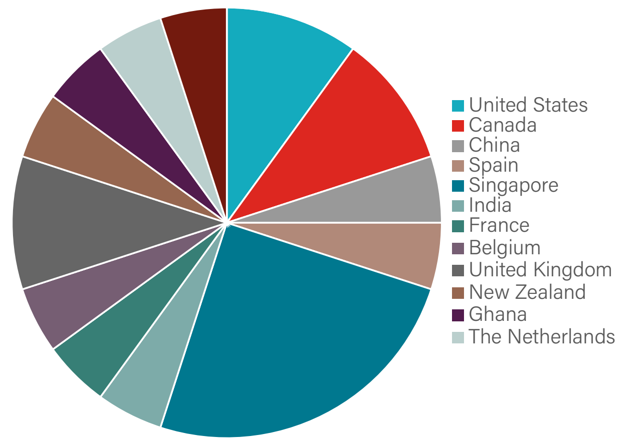
Unlike in 2019, when foreign bidders overwhelmingly preferred the scheme structure (93%), in 2020, foreign bidders were just as likely to structure their bid as a scheme as they were a takeover, with an equal 50% of bids structured in either way. In 2019, only 7% of foreign deals proceeded by way of a takeover bid.

Of all completed foreign bids, 63% succeeded whereas 11% and 26% respectively were withdrawn or failed altogether. In contrast, in 2019, 78% of foreign bids were successful, 18% were withdrawn and 4% failed. The fall in successful foreign bids is attributable to the numbers of foreign bidder participants in the 4 competitive bids, where only one could be successful per target.

In 2020, the highest number of bids originated from Singapore, which accounted for a quarter of foreign bids, with equal second being awarded among 3 countries, the United Kingdom, the United States and Canada (each accounting for 10% of foreign bids). This was in contrast to 2019, where North America was responsible for 14 bids, more than half of all foreign bids. In that year there were 7 bids (26%) each from Canada and the United States.

In 2020, Coca-Cola European Partners plc's $9.6 billion scheme acquisition of Coca-Cola Amatil Ltd and Nordgold's unsuccessful $526 million bid for Cardinal Resources saw the United Kingdom have the strongest appetite for foreign investment by value.





Consideration

Cash is still king

58% of deals announced in 2020 offered shareholders cash as the only form of consideration, down from 69% in 2019.

20% of the deals offered scrip as the only form of consideration, up from 17% in 2019.

23% of deals offered an election for either cash or scrip or combination of cash and scrip, up from 14% in 2019.

One of the key advantages of deal making with listed entities is being able to offer scrip as consideration. Although most investors are more likely to accept a cash offer during times of market volatility to liquidate their investment, an offer of scrip reflects the reality that business performance can shift over time, something that was particularly important throughout 2020 when market volatility and uncertainty was considerably high. This is likely one of the reasons behind the decrease in cash and increase in scrip as the sole form of consideration in 2020.

Deal in focus: Village Roadshow – variable consideration

The Village Roadshow deal is a relevant example of innovative consideration mechanisms. In January 2020, Village Roadshow started the year in high demand with competing bids from Pacific Equity Partners and BGH Capital reaching as high as $4.00 per share, reflecting Village Roadshow's relatively strong financial position prior to the pandemic. However, by 19 March 2020, Village Roadshow's share price had dropped to $0.86, amidst prolonged shutdowns of cinemas and theme parks, as well as state border closures, resulting in the initial offers being aborted. As the national economic outlook improved, BGH Capital proposed 2 parallel schemes for $2.10 and $2.20 per share respectively, with each structure being conditional on "an uplift event" (or "performance milestones"). The contingent scheme offerings are summarised below:

- Scheme A: $0.07 per share "uplift" payable -> if company's cinemas were open for 5 business days and no significant changes to the expected movie slate for the remainder of the FY2021
- Scheme B: $0.05 per share "uplift" payable -> if no border control measures were imposed by the Queensland Government prohibiting entry from NSW and VIC during certain periods

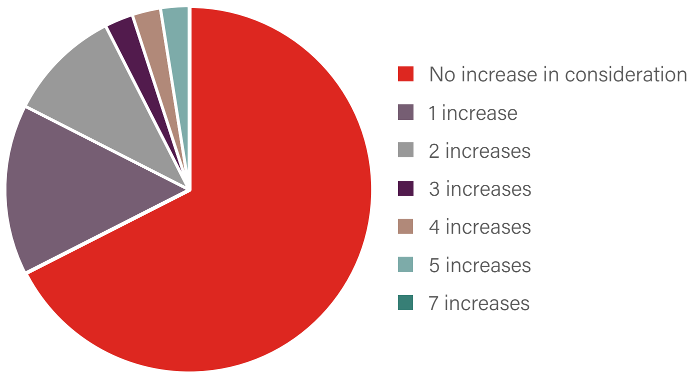
Variable consideration and earn-outs

Throughout 2020, earn-outs and variable or contingent consideration conditions became more common in public markets deals. These mechanisms are usually seen as protective measures to allow investors to offset any loss in value as a result of the volatility of the market.

These mechanisms allow the price for an acquisition to be dependent on the future performance of the target company or the success of the merger. Having part of the consideration payable only if a certain event occurs enables the bidder to ensure that the consideration ultimately paid actually reflects the pre-transaction expectations of the target.

Increases in consideration

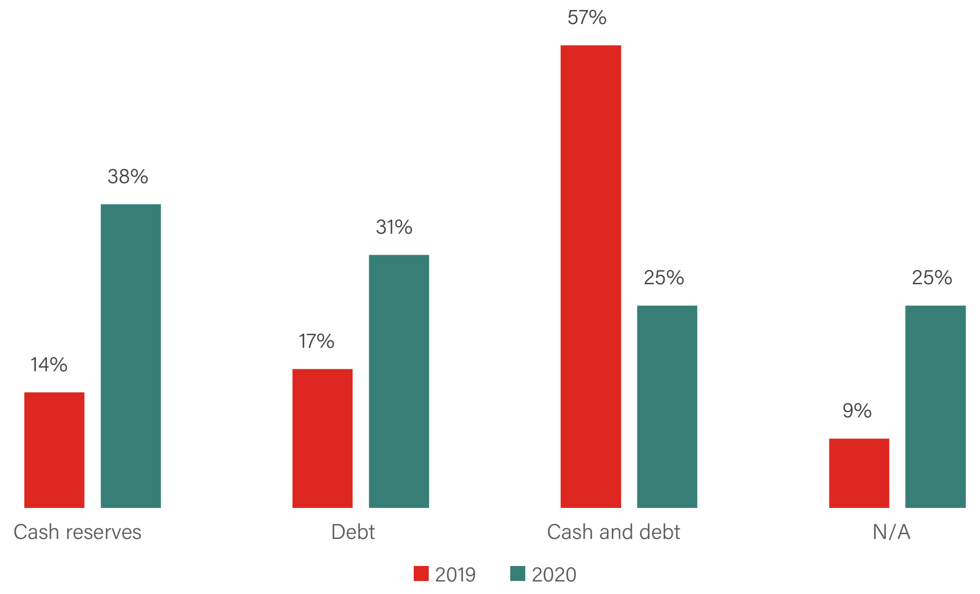
33% of bidders increased the cash consideration offered to target shareholders once or more times. It was more common for consideration to be increased once or twice, although Macquarie Agricultural Fund – Crop Australia 2 has upped its consideration an astonishing 7 times in its fight to acquire Vitalharvest Freehold Trust. That scheme proposal has been ongoing since November 2020, with several delays in the timetable and 3 supplementary scheme booklets



Source of funding

Where the bidder offered target shareholders some or all of the deal consideration in cash, 38% intended to use their cash reserves, 31% relied on debt alone and 25% used a combination of both cash reserves and debt to finance their proposed acquisition. (The funding arrangements of 6% of deals were not available)

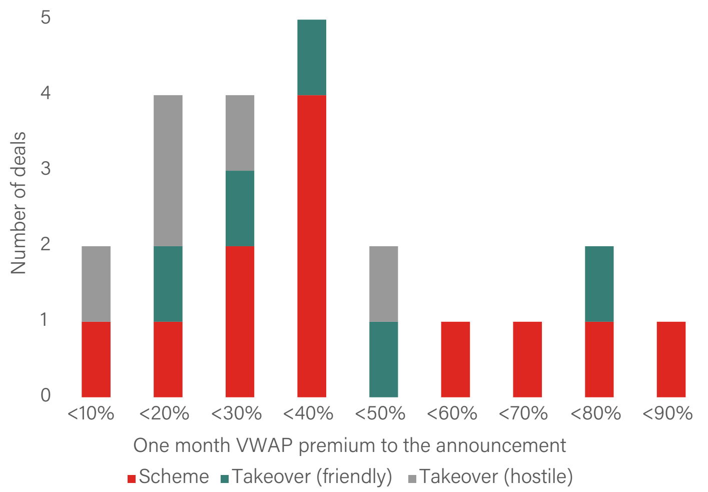
The rise in debt funding may be surprising for those expecting bidders to take a conservative response to pandemic uncertainty by managing their balance sheets and avoiding the risk of overleveraging during a volatile market. However, for many bidders this risk was outweighed by the appeal of enduring low interest rates, which dipped even lower in response to the pandemic.



Premiums

2020 did not demonstrate a particular trend in deal premiums being offered, nor a particular method for quoting premiums that was more likely to lead to success. However, last year more than ever, bidders were likely to focus on the particular circumstances of the target in determining the premium offered, especially given how many targets' share prices were depressed by the impacts of COVID-19.

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 volume weighted average price (**VWAP**) up to the date of an announcement of a bid, and the other being the premium to a target's share price the trading day prior to an announcement.



34%
average
5-84%
range
One month VWAP premium to the announcement

28%
average
3-72%
range
Premium to share price the trading day prior to the announcement

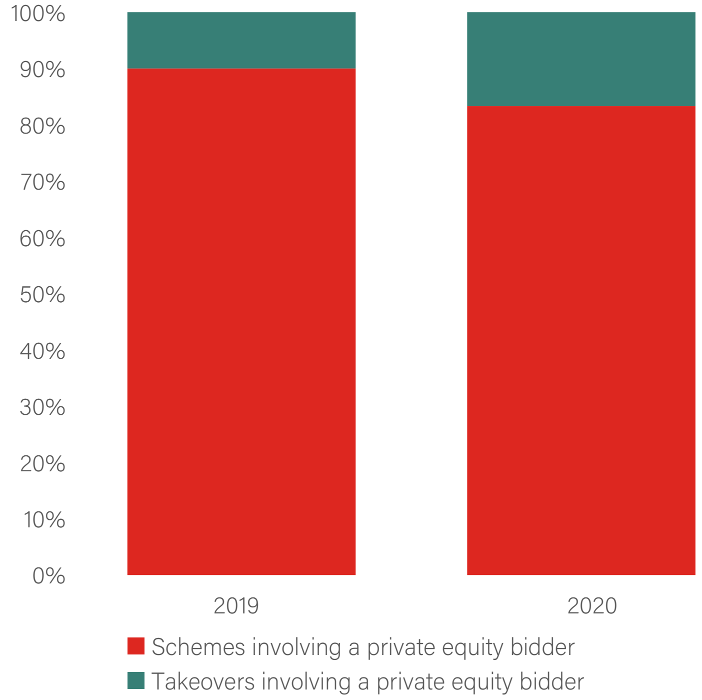
One month VWAP premiums typically ranged between 5% and 84%, with one outlier of 199% offered to shareholders of Xplore Wealth Ltd by bidder Hub24 Ltd (this outlier is excluded from the above averages and ranges). Of those bidders offering a one month VWAP premium, 35% offered shareholders a premium of 40% or more. Premiums offered to a target's closing trading price a day prior to an announcement typically ranged between 3% and 72%, with Hub24 Ltd's bid premium an outlier again at 203%. 40% of all bidders offered a premium of 40% or more to the closing price on the day prior to announcement.

Australian public M&A deal trends report – 2020

Private equity involvement

Even though 2020 was a challenging and unpredictable year for investment, private equity bidders remained active and made use of low interest rates to make robust investment decisions. 15% of all bids for the 2020 calendar year involved private equity bidders, a slight decline from the previous year (19%) but an encouraging sign that there remains private equity interest in Australian public companies.

Private equity bidders were particularly active in sectors which were hit the hardest by COVID-19. An example of this being private equity player BHG's bid for Village Roadshow, owner of many cinemas and theme parks, an industry still trying to bounce back following strict pandemic response restrictions. For a more in-depth look into BHG's bid for Village Roadshow, see page 12.

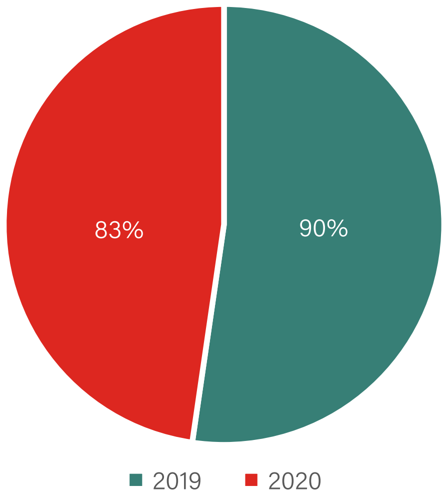


Australian public M&A deal trends report – 2020

Conditionality

MAC clauses

83% of 2020 deals included a material adverse change (**MAC**) condition, a slight decrease from 90% in 2019. A material adverse change condition allows the bidder to terminate its offer if the target is affected by a material adverse change (or effect) after the announcement of the transaction. The details of what constitutes a MAC are often heavily negotiated and after a year of rapid change to how businesses' operate, market conditions and ensuing uncertainty, the increased reliance on such clauses was to be expected.



Reliance

Following the initial disruption from the pandemic, targets which were privy to deals during April and May of 2020 were most vulnerable to the uncertainty and as a result bidders sought to rely on MAC conditions regarding a material reduction in EBITDA or net assets and/or net profits or increase in net indebtedness. For instance, LNG9's takeover bid for Liquefied Natural Gas was withdrawn over alleged breaches of MAC conditions following the target financials being impacted by the pandemic's disruptions.

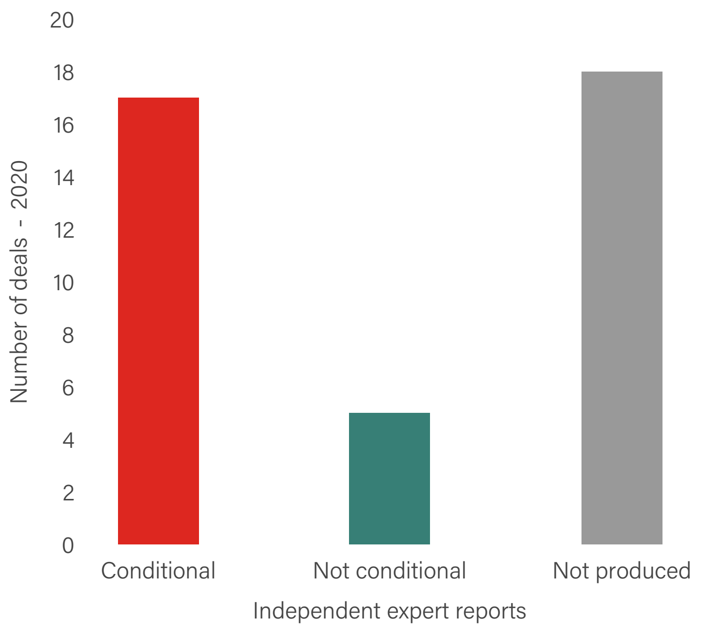
Covid carve outs

We would have expected parties to immediately begin specifically carving out COVID-19 or pandemics generally from events that would qualify as MACs. However, only 4 deals in 2020 carved out COVID-19 or pandemics from triggering MAC conditions. It may be that parties considered it unnecessary to carve out COVID-19, because it had already emerged and could not constitute a 'change', or that any further impacts from COVID-19 were covered by the usual carve outs.

The MAC condition in the Village Roadshow scheme was particularly interesting, in that it carved out general COVID-19 impacts but included a specific MAC trigger for venue closures resulting from COVID-19 related government directions. For a more in-depth look into BHG's bid for Village Roadshow, see page 12.

Independent experts' reports

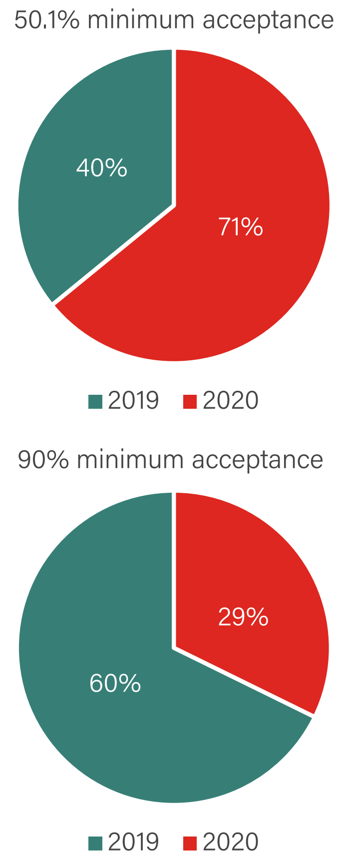
The role of an independent expert is typically to opine on whether a deal is in the best interests of target shareholders. Just over 50% of deal documentation annexed an independent expert report. Unsurprisingly, all but one of these deals were schemes. This reflects market practice, where independent experts' reports are almost always included in scheme booklets. Only one friendly takeover contemplated an expert's report. Its findings were not a condition to the deal proceeding. Most schemes include a condition that the expert not depart from its conclusions up until the morning of the second court date (when the scheme would otherwise be unconditional). However, 4 deals which were light on conditions did not condition the deal in this way.



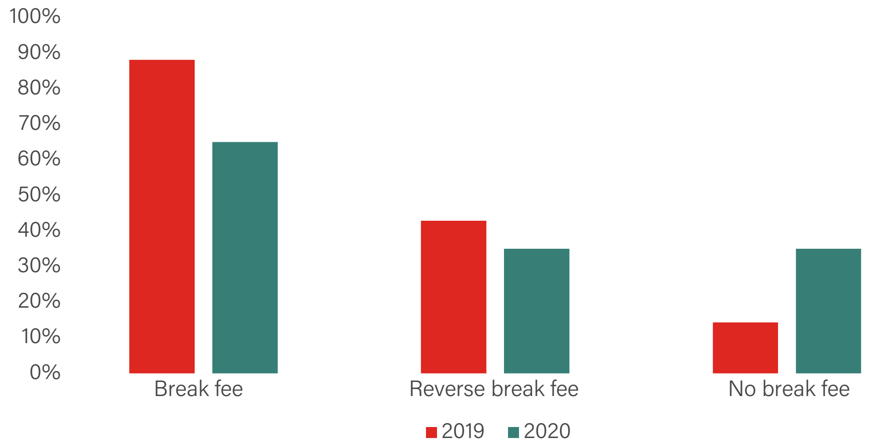
Minimum acceptance conditions in takeovers

Of the 18 takeovers announced in 2020, 78% contained a minimum acceptance condition. Of these, almost 71% applied a 50.1% 'control' threshold (in 2019 only 40% imposed this condition), while 29% of deals applied a 90% 'compulsory acquisition threshold' (a significant decrease to the 60% of bidders seeking compulsory acquisition in 2019). 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.

Schemes do not contain minimum acceptance conditions, since a typical acquisition scheme proceeds with an "all or nothing" structure, resulting in either 100% of the target being acquired or the scheme failing.



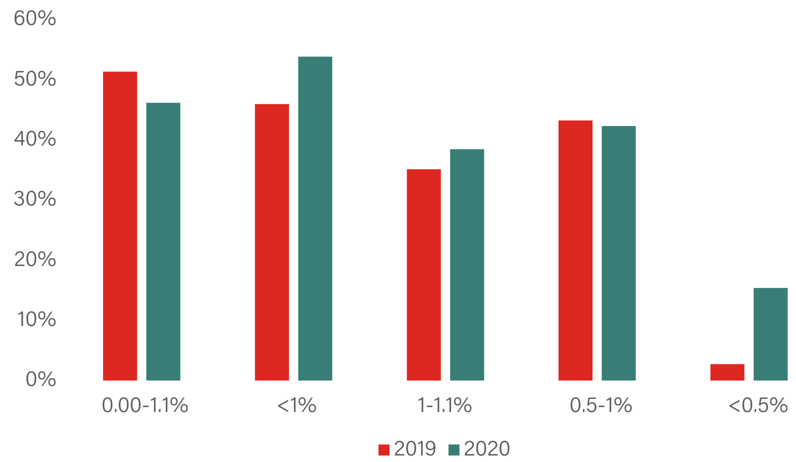
Deal protection: Break fees



Surprisingly, more deals factored in the payment of a break fee by the target in 2019 than in 2020 (88% vs 65%). Perhaps even more unexpected was the decrease in number of targets expecting a bidder to pay a break fee (a reverse break fee) if the bidder chose not to proceed (35% for 2020, down from 43% in 2019). We would have expected a surge in reverse break fees, with targets seeking to protect themselves from bidders getting cold feet from COVID-19 disruptions. However, the high proportion of hostile bids would be a factor in the decrease in reverse break fees and the presumably weaker bargaining position of some targets may account for the rest of the decrease.

In the few instances where a reverse break fee was agreed, it generally mirrored the target break fee.

Break fees more commonly featured in schemes as opposed to takeovers, with all but one scheme including a target break fee. 72% of takeovers did not include a break fee. Again, the prevalence of hostile takeovers would partly explain this.



There was no significant change in the quantum of break fees. The average break fee was 0.92% (0.97% in 2019) of the deal value and 88% of break fees were either approximately 1% (i.e. 1.01-1.09%) or less. Such break fees are in line with the guidance from the Takeovers Panel which expects break fees to not exceed 1% of the equity value of the target and therefore indicates why a majority of deals offered a break fee of this percentage. That said, 3 break fees did exceed the 1% guidance, with one deal boldly imposing a break fee of 2.77% at $70 million (being SSR Mining Inc's bid for Alacer Gold Corp). The Takeovers Panel's 1% guidance is only enforced when a break fee is challenged in the Takeovers Panel, which is less common before a fee becomes payable. So, while it is possible to agree a fee greater than 1%, the bidder will not know whether it can rely on this until the fee is actually paid.

Regulatory developments

Foreign Investment Review Board (FIRB)

The Federal Government introduced a range of unprecedented changes to Australia's foreign investment regime during 2020. Market commentators expressed surprise about the changes, typically forecasting they would have a chilling effect on foreign investment and restricting Australian companies' access to capital at a time when they most needed it.

Temporary changes - $0 threshold

The temporary $0 monetary threshold screening introduced in March 2020 in response to the COVID-19 pandemic meant that almost every foreign investment required FIRB notification. FIRB's processing deadlines for applications increased from 30 days to 6 months and were extended even longer in many cases. Non-material applications were processed very slowly during 2020. However, our experience with FIRB was that applications for material acquisitions were often processed in the usual 30 days and generally did not take longer than 2 months.

From 1 January 2021, the pre-March 2020 monetary thresholds for 'notifiable actions' and 'significant' actions were reinstated. However, the $0 screening threshold will continue to apply to the new categories of actions being 'notifiable national security actions' and 'reviewable national security actions.' This new category includes starting a 'national security business,' acquiring a 'direct interest' (generally 10% or above) in a 'national security business' or in an entity that carries on a 'national security business' and where the acquisition is acquiring an interest in 'national security land.' A 'national security business' is generally one which is involved in or connected with a 'critical infrastructure asset' (as defined in the Security of Critical Infrastructure Act 2018 (Cth) (**SOCI Act**)), telecommunications, defence or a national intelligence community (of either Australia or a foreign country), or their supply chains.

National security focus

The SOCI Act currently covers critical infrastructure assets in the electricity, gas, water and ports sectors, but it is due to undergo significant reform under the Security Legislation Amendment (Critical Infrastructure) Bill 2020 which, if passed, is currently set down to come into force from 22 January 2022. The new sectors captured under the proposed reforms to the SOCI Act include communications; financial services and markets; data storage or processing; water and sewerage; energy; health care and medical; higher education and research; food and grocery; space technology; defence industry relevantly transport. These changes will cast FIRB's 'notifiable' and 'reviewable' 'national security action' nets wider than ever before. The guidance from FIRB (Guidance Note 8) is already encouraging foreign players who may wish to invest in these sectors to commence engagement with FIRB where the risk exists for their actions to be deemed contrary to national security.

Call in powers

Other interesting additions to the FIRB regime include the introduction of a call-in power where the Treasurer may "call in" an action for review if it considers the action and/or the person behind it has the ability to influence an entity or an Australian business thereby posing national security concerns. A "call in" review can occur while an action is still proposed, but importantly, the Treasurer also retains the power to "call in" transactions for which approval was not sought for 10 years after an action has been taken. The Treasurer's ability to "call in" a transaction is extinguished it the action is voluntarily notified and approved by issue of a no objections notice before it is taken (subject to the last resort power explained below).

Perhaps the most controversial change under the new framework is the Treasurer's discretionary "last resort" power enabling it to reassess, in exceptional circumstances, previously approved investments made by foreign persons and ultimately resolve to "unwind" the transaction if they determine the investment risks Australia's national security.

ASX

There have been varying levels of change to ASX listing rules and guidance notes throughout 2020 and 2021. The most important amendments as they apply to takeovers and schemes are:

- **Guidance Note 8 (effective from 9 December 2020)** – changes include substantial enhancements to the materials on earnings guidance and earnings surprises. Particularly, where an entity does not have published earnings guidance on foot for the current reporting period and it is covered by sell-side analysts, ASX would recommend that the entity consider notifying the market of a potential earnings surprise if it expects there to be a 15% or greater difference between its actual or projected earnings for the period and its best estimate of the market's expectations for its earnings.
- **Guidance Note 19 (effective from 12 March 2021)** – changes in relation to requirements for listing as it applies to "performance securities", including performance shares, performance rights and performance options. In particular, the changes introduced a new defined term "arm's length control transaction securities" in section 8 to describe performance securities issued by a listed entity pursuant to a takeover bid or a merger by way of scheme that meet certain conditions and that these securities be subject to certain parts of GN 19. For example, for an issue of "performance securities" pursuant to a takeover bid or a scheme, entities will not need to comply with the general requirement to seek ASX in-principle advice that the terms of performance securities satisfy Listing Rules 6.1 and 12.5. The rationale is that oversight by ASIC, the Takeovers Panel and/or the Court are such that ASX's further regulation is not warranted.

Australian Securities and Investments Commission (ASIC)

A major change to ASIC's takeovers and schemes regulation is the prohibition of "stub equity" offers. Effective from 24 September 2020, ASIC modified the Corporations Act to prevent stub equity offers of scrip in a proprietary company being made to large numbers of retail target holders in takeover bids and schemes. Stub equity gives shareholders the option of retaining a stake in the target business by swapping their shares in the target for shares in an unlisted bid vehicle, rather than cashing out. See ASIC Regulatory Guide 9 for further guidance.

Takeovers Panel

The first quarter of 2020 was quiet in terms of deals, resulting in a considerably quiet period for the Takeovers Panel. However, as the Australian economy started to find some level of stability, 2020 became a very busy time for the Panel, particularly given the numerous matters relating to the competitive bids for Cardinal Resources. There were 28 Panel decisions (the last 3 decisions released in January 2021, although their relevant applications were lodged in 2020). The Panel has not made more decisions in a year since 2008 (29 decisions).

Five takeaways for targets

1. Don't expect reverse break fees

As we have seen in 2020 and earlier, we expect the relative absence of reverse break fees (where a break fee is mutually payable by both the target and the bidder) to continue. The increased uncertainty during the COVID-19 pandemic has seen buyers become less likely to engage in deals with reverse break fees. Targets should weigh the benefits of a reverse break fee against a bidder's need for flexibility in the current market conditions and the decreased possibility of any future bid by the bidder after paying the reverse break fee. Although a surprising trend in one sense, allowing a bidder some flexibility in the uncertain economic environment may go some way in maintaining good relations with the bidder and preserve the possibility of future opportunities together.

2. Focus on the MAC and force majeure clauses

It is important to carefully negotiate material adverse change and force majeure clauses, as we have seen a number of bidders attempt to renegotiate or walk away from deals due to the pandemic by relying on a breach of the MAC clause. The MAC conditions should expressly exclude COVID-19 triggers and we expect bidders to be increasingly comfortable with this carve-out.

3. Consider the scope of any 'conduct of business' restrictions

Surprisingly, in 2020, few bidders relied on a target's breach of the conduct of business restrictions as a trigger for termination. Nevertheless, when negotiating, targets should ensure that any 'conduct of business' restrictions still afford the target the flexibility to deal with any impacts of COVID-19 on their business without falling into breach. It also pays for target boards to have a plan to manage the business during a control transaction to ensure that its operations and profitability are not adversely affected.

4. Pay attention to conditions and termination rights

We saw an increased percentage of deals that were terminated in 2020 and deals that took longer to complete. As always, targets will be motivated to limit the ability of bidders to walk away from a deal by ensuring termination rights are tightly drafted and conditions are defined with certainty.

5. Maximise price and deal certainty

While trading prices in certain industries generally remain depressed, it pays for targets to have well thought out defence strategies in place to respond to and manage unsolicited and opportunistic bids. By offering access to due diligence, subject to reasonable standstill and confidentiality obligations, targets can maintain competitive tension and potentially drive up a bid price. In an auction context, targets will know that the offer of a board recommendation to a preferred bidder is their key card to play, given its impact on deal certainty.

Five takeaways for bidders

1. Cash is still king

Despite seeing a slight drop in cash only deals, deals are more likely to succeed when cash is offered as consideration compared to a bid that involves both cash and scrip. Both target boards and shareholders prefer deal certainty and the chance to liquidate their investment in a backdrop of market volatility. Shareholders are generally less willing to retain a stake in the business (and opt for scrip over cash) in an uncertain economic environment.

2. Time to get creative

The historically low interest rates introduced by the Reserve Bank following the onset of the coronavirus pandemic will help fuel M&A activity and a hunt for better yields.

3. Support from target share-holders is key

We expect private equity parties, both local and international, to continue to be a big player in the Australian M&A market. As economic conditions improve, we expect to see pent up demand from PE players eager deploy their cash.

4. Virtual due diligence

As the conduct of due diligence was significantly impacted by lockdowns and social distancing mandates, bidders and their advisers have had to adapt in different ways by conducting target site visits virtually and having virtual meetings with target management. As governments and companies begin to prepare for a recovery phase, it is important to engage the right advisers to navigate financials. For some industries it may be necessary to consider aspects of the "new normal" where some consumer habits are now likely here to stay and will forever impact the company financially.

5. Watch for re-normalisation

While some consumer habits may be forever changed—some may not. Some changes of behaviour may prove to have been only a temporary reaction to pandemic restrictions. In some cases, the pandemic may have merely brought forward spending that would otherwise have stretched out over a longer period, leaving a lull as life returns to normality. One example of this was the dramatic increase in Netflix subscriptions during lockdown periods in many countries, only to be followed by the significant market shock of its more recent highly disappointing results. The market is now re-assessing whether the good fortunes of the winners from the pandemic can be sustained or whether they are built on over-optimistic expectations of ongoing behaviours.

Australian public M&A deal trends report – 2020

Expectations for 2021

A bumper 2021 and beyond

Following strong M&A and market activity in the second half of 2020, the election of a new US president and the rollout of COVID-19 vaccines around the world, optimism is returning and the outlook for earnings is looking positive.

On our local shores, we expect Australian M&A activity to continue strongly into and throughout 2021 as our economic conditions and employment rates continue to improve. As at the date of reporting, 28 deals over $50 million in deal value have already been announced, 22 of which are schemes and 6 of which are "mega" deals over $1 billion in deal value. One deal to watch is of course Square's $39 billion bid for Afterpay announced on 2 August 2021.

While the industry spread for 2021 deals announced so far is showing no clear winner, we anticipate the technology sector to continue to be the major beneficiary from what was largely a devastating year for most other sectors, followed closely by the resources sector given the commodity price tailwinds and the current iron ore boom.

Although deal-making sentiment has undoubtedly returned, it will be interesting to see whether there are any market surprises for the winners from COVID-19 as the stay-at-home economy unwinds and the expected permanency of new habits taken on last year is reassessed. While the Australian economy is fortunate enough to be back to the size it was before the onset of COVID-19, key sectors are yet to recover, including tourism, international education and hospitality. Understanding the deeper effects of the COVID-19 pandemic on businesses and industries will take many years to play out.

Availability of capital

The historically low interest rates introduced by the Reserve Bank following the onset of the coronavirus pandemic will help fuel M&A activity and a hunt for better yields.

Private equity

We expect private equity parties, both local and international, to continue to be a big player in the Australian M&A market. As economic conditions improve, we expect to see pent up demand from PE players eager deploy their cash.

Consolidations

As discussed in this report, a number of sectors continue to be significantly impacted by the pandemic including the travel and hospitality industries. We expect opportunistic players to target stressed and distressed companies in these industries.

Foreign bidders

Despite border closures and the tightening of the FIRB rules, we expect strong foreign investment in Australia to continue as Australia's economic recovery, strong fundamentals and relatively successful handling of the pandemic attracts foreign players.

Refocus due diligence

Increased attention to force majeure clauses in material supply and customer contracts will ensure that deal makers understand what events will not be covered. Similar to the increased particularisation expected in MAC clauses, we expect force majeure definitions to be more all-encompassing than ever and to include specific mentioning of pandemic, thereby assuming a greater role in negotiations between parties.

The pandemic has necessitated most companies to look to new means to reduce staff cost pressures during 2020, while also being aided by government measures such as JobKeeper. How companies have responded to the challenges presented to maintaining their pre-COVID-19 employees and compliance with government temporary relief measures will be important for buyers to scrutinise to avoid inheriting any future litigious claims.

Australian public M&A deal trends report – 2020

Report methodology

Reported deals:

Norton Rose Fulbright reported on takeover bids and schemes of arrangements announced during the calendar year ended 31 December 2020, which were valued at $50 million or more. As at the date of publishing 1 deal remains current and is yet to complete (Burst Acquistion's scheme acquisition of Wameja announced in September 2020). Where an offer document has 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 2020, 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 cited 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 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 offering zero-premiums (as offered in merger-of-equals transactions) namely, the Saracen Mineral Holdings Ltd and Northern Star Resources Ltd and the Alacer Gold Corp and SSR Mining Inc schemes.

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 the scheme became effective.

Currency of information:

Unless otherwise indicated, information in relation to the deals in this report is current to 6 August 2021.

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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. Jeremy's strengths are preparing and negotiating high quality documentation for large deals. He has an eye for detail, but focusses on the commercially important points. Once engaged, Jeremy dedicates himself to achieving his client's objectives and closing the deal. He combines firm negotiation and advocacy with caring for his clients, in the sense of understanding their businesses and being cost-conscious, reliable and easy to do business with. Having worked in-house with BHP Billiton, AGL Energy, ConocoPhillips and Santos, Jeremy understands his clients need a lawyer who shares their business objectives, gets to the point and stands behind his recommendations. 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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Laura Bernhardt is an Associate based in Sydney specialising in mergers and acquisitions and business transactions, with a particular interest in public listed company takeovers and schemes of arrangements. Laura also advises on shareholder arrangements (between founders and investors), joint-venture arrangements, corporate restructures and general corporate and commercial matters. Laura's experiences extends to acting for both local and international private and publicly listed companies across a broad range of industries.

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