DIRECTIONS IN PUBLIC MERGERS & ACQUISITIONS 2018

MinterEllison

Welcome to the fifth edition of MinterEllison's Directions in Public Mergers & Acquisitions report, part of our annual Deals Trilogy.

We are pleased to present our observations on trends in public mergers and acquisitions (M&A) in FY18 and our predictions for FY19. These are based on our analysis of ASX market data for the financial year ended 30 June 2018. Consistent with our approach last year, the threshold we set for inclusion in this report is announced deals with a value of $A50 million or more.

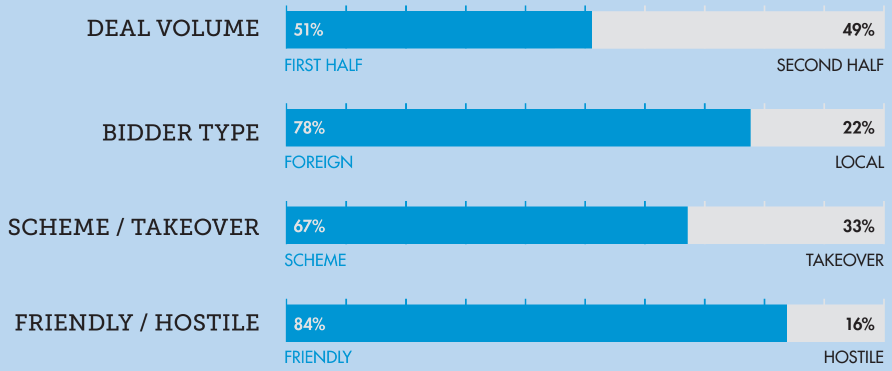
37 deals met this threshold in FY18. The majority of activity was in the mid-market, which we define as deals valued between $A50 million and $A500 million. 23 of the 37 deals in our sample qualified as mid-market. By contrast, there were only 7 'mega deals', which we define as deals valued at more than $A1 billion.

Our report:

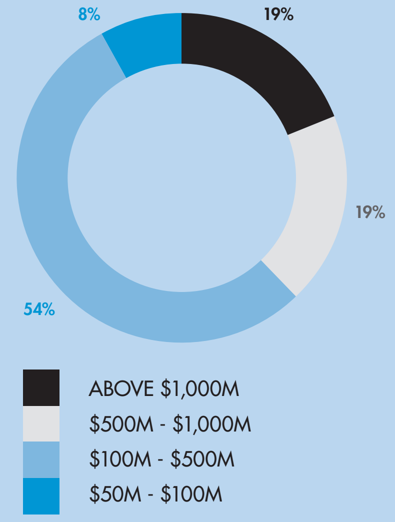
- identifies 8 key M&A trends in FY18;
- discusses the role played by key Australian regulators;
- makes 7 predictions for FY19;
  and provides a list of sectors to watch.

MinterEllison played a central role advising on many of the M&A transactions profiled in this report. We trust that our report provides some interesting perspectives and is a useful resource for you.

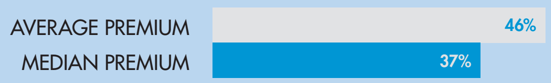
FY18 AT A GLANCE



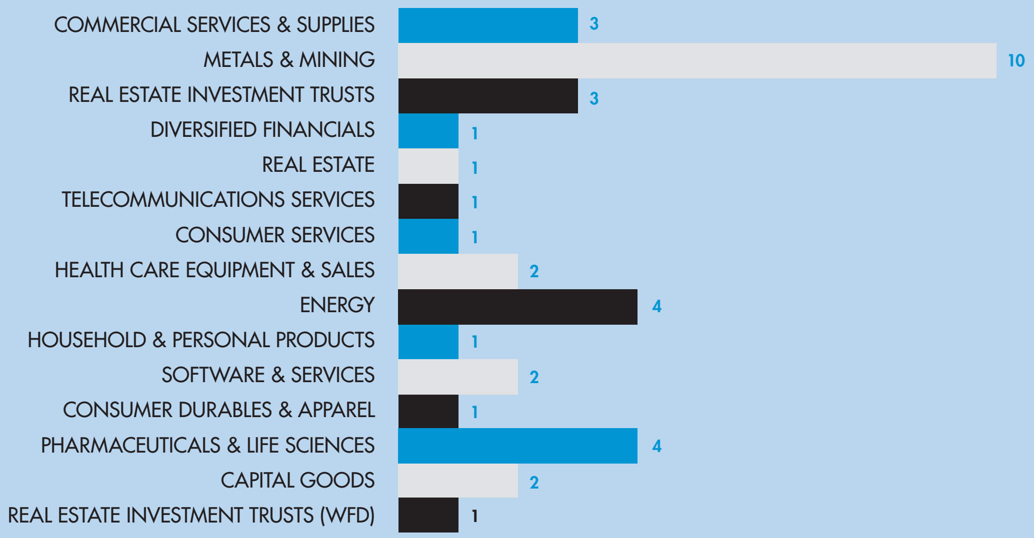
DEAL VOLUME



PREMIUM TRENDS



DEAL BY INDUSTRY



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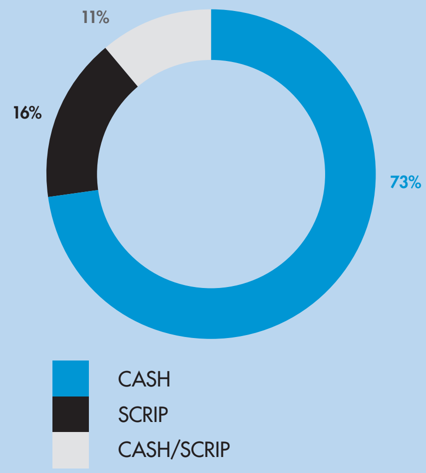

KEY M&A TRENDS IN FY18

1

Bidders are prepared to swing hard for strategic assets

Local and international markets have been volatile and impacted by geopolitical uncertainty for nearly a decade. Nonetheless, many companies in mature industries pursued M&A strategies in FY18 to 'buy growth'. These involved identifying the right target and paying a healthy premium to access new regions, products or know-how.

EXAMPLE:

CDH Investments and China Grand Pharmaceutical and Healthcare Holdings move to acquire Sirtex Medical Limited

China has one of the world's highest incidence of liver cancer. However, prevailing treatments have limited effectiveness, and Chinese patients have few treatment options. Our clients CDH Investments (CDH) and China Grand Pharmaceutical and Healthcare Holdings (CGP) saw significant potential to commercialise Sirtex Medical Limited's liver cancer radiation therapy in China.

When CDH and CGP approached Sirtex in May 2018, its board had already endorsed a $28 per share offer from the US-based Varian Medical Systems. Sirtex shareholders were days away from holding a meeting to grant approval. To secure this strategic asset and displace the Sirtex board's recommendation, CDH and CGP were prepared to pay $33.60 per share. This represented a compelling 112.9 per cent premium to the undisturbed three-month volume weighted average price of Sirtex shares before Varian's offer was first announced in January 2018. It also represented a premium of 20 per cent on Varian's offer price.

As an additional incentive, CDH and CGP agreed to pay Sirtex a potential $220 million reverse break fee if the deal was not completed due to the failure of any regulatory conditions. This is the highest reverse break fee seen in the Australian market, being approximately 10 times the Sirtex break fee. The bidders agreed to pay it upfront as security, in case it became payable, or as part-payment of the $1.9 billion purchase price if the deal was completed. They also agreed to deposit the balance of the purchase price ahead of the scheme meeting, as opposed to the conventional approach of paying the full purchase price just before the implementation date. The deal successfully completed in September 2018.

2

Auctions for control are on the rise

The number of auctions for control grew notably in FY18, reversing the trend from the previous year. This is likely the result of highly motivated acquirers appreciating the strategic value of potential targets – and employing aggressive tactics to win:

Offering substantial premiums: Mitsui & Co. won the auction for control of Australian Worldwide Exploration (AWE) by considerably upping the ante following two competing proposals – one from our client China Energy Reserve and Chemical Group, the other from Mineral Resources. Mitsui's winning offer price of $0.95 per share was 30 per cent above the initial offer price that opened the auction, and 15 per cent above the second offer recommended by the AWE board.

Guaranteeing certainty: A higher price is illusory if it cannot be delivered to target shareholders. Therefore, boards are also becoming more interested in comparing the relative execution certainty of competing offers. This requires them to assess funding capacity, the level of conditionality and the likely timing for satisfying conditions. A higher price alone may not be enough to succeed in an auction for control, especially where a currently recommended offer is largely unconditional and close to completion.

The trend in increased auctions for control is extending into FY19. MinterEllison is advising Hometown Australia, which is seeking control of residential park developer Gateway Lifestyle Group. The group was subject to an indicative, non-binding proposal from Brookfield Property Group. Ultimately our client's proposal was recommended.

KEY M&A TRENDS IN FY18

3

Bidders are increasingly prepared to go hostile

Hostile takeovers were prominent in FY18, continuing a trend from the previous year. They occurred despite obvious execution risks, including no access to due diligence beyond publicly available information on the target; the prospect of competing bids, and the lack of bidder deal protections that are an established feature of friendly deals.

Overall, hostile bidders are showing an increased willingness to opportunistically bypass boards and put offers directly to target shareholders that are at an attractive premium to the prevailing market price. This approach is more common where bidders have a longstanding pre-existing stake in the target or are otherwise very familiar with its business, reducing due diligence risks.

Hostile bidders may wish to circumvent target boards because their respective views on value (and on an appropriate premium for control) may be too far apart. Such engagement can be seen as futile and time-consuming. It also signals to the target board that a hostile bid may follow, giving it valuable time to start preparing a defence.

In FY18, the Australian Securities and Investments Commission (ASIC), began to clamp down on hostile bidders that issue self-serving public critiques of independent experts' reports commissioned by targets (see page 9 for more information).

MIXED SUCCESS OF HOSTILE BIDS IN FY18

SUCCESSFUL

Eastern Field Developments' bid for Finders Resources:
The company had achieved 96 per cent control as at 25 September 2018; however, this bid is ongoing as a result of Eastern Field Developments seeking judicial review of a decision by the Takeovers Panel.

Taurus Funds Management's bid for Realm Resources:
Taurus had to increase its offer price from $0.90 to $1.00 per share. Ultimately, it undertook to pay an extra $0.35 cents to accepting shareholders as a result of Takeovers Panel proceedings. Realm successfully sought a declaration of unacceptable circumstances on the basis that Taurus' bid was coercive.

Eramet's bid for our client Mineral Deposits Limited:
Mineral Deposits secured a unilateral 20 per cent price increase from Eramet, although the higher offer was still below the independent expert's valuation range.

DEFEATED

Our client China Energy Reserve and Chemical Group's bid for AWE:
The bid was defeated by two subsequent superior friendly proposals – first from Mineral Resources and then Mitsui & Co.

NextDC's bid for Asia Pacific Data Centre Group:
The bid was defeated by a subsequent superior friendly proposal from 360 Capital Group.

Capitol Health Holdings' bid for Integral Diagnostics:
Integral Diagnostics successfully defended itself and the bid lapsed.

New tactics in defending hostile bids

Integral Diagnostics (Integral) recommended that its shareholders reject a hostile takeover offer from Capitol Health Holdings (Capitol) to merge the two medical diagnostics and imaging companies. As part of its response, Integral announced that two of its executive directors had informed the board they would resign if Capitol acquired 50 per cent or more of Integral. The directors were also employed as senior radiologists and one was the chair of Integral's National Clinical Leadership Committee.

This novel defence tactic will be highly effective when a target relies heavily on specialist employees whose departure would reduce the target's attractiveness. This is particularly relevant to listed health and other professional services companies that depend on human capital and know-how.

It will also be more effective when an offer contains a scrip component. This is because shareholders will be indirectly exposed to the target company if they accept – and the relevant employee's departure would reduce the attractiveness of accepting the offer and having an investment in the merged entity.

4

Foreign bidders continue to dominate

The appetite for foreign investment in Australia remains strong. This is despite our relatively complex foreign investment regime. A reduction in Chinese bidders was more than compensated by new inbound investment from other jurisdictions.

United States: US bidders made up the vast majority of foreign bidders in FY18. US businesses continue to see relatively little sovereign risk in Australia. They also appreciate the strategic positioning of Australian businesses in the Asia-Pacific region. This trend has been bolstered by US-based private equity firms acquiring Australian companies.

Canada: All Canadian inbound deals in our FY18 sample were in the mining and resources sector. This is unsurprising given the relatively high dependence of the Australian and Canadian economies on resources activity. Several Australian and Canadian junior miners merged, as they sought to consolidate into larger, pure resource ventures. For example, Altona Mining and Copper Mountain merged to focus on copper production, and Cobalt One and First Cobalt Corp merged to focus on cobalt production.

Japan: The appetite of Japanese companies to use M&A activity to diversify into foreign markets is likely being driven by pressure from shareholders to achieve higher returns on equity and growth following the introduction of Japan's Corporate Governance Code in 2015. Another factor is the combined effect of low interest rates, low population growth and a declining market of domestic consumers. Examples include:

PERSOL Holdings' acquisition of Programmed Maintenance Services by scheme of arrangement.

Mitsui & Co.'s acquisition of AWE by takeover bid.

LIFULL Co.'s current proposal to acquire Mitula Group Ltd by scheme of arrangement.

5

Private equity interest is surging ahead

Private equity was a driving force in Australian public M&A in FY18 across a wide range of industries. Deals announced by private equity bidders accounted for 17.5 per cent of the total deal value in our sample (or 36.5 per cent if Unibail Rodamco SE's acquisition of Westfield is removed as a $21 billion outlier). Many private equity firms are looking to acquire strategic assets – including intellectual property (IP) – with untapped potential. In addition to the example of Sirtex, Oaktree Capital acquired Billabong to combine its brand portfolio with Oaktree's portfolio of action sports brands, including Quiksilver and Roxy. Oaktree has stated that it sees strategic value in this combination, despite different brand identities (Billabong is stronger in the US, whereas Quiksilver and Roxy perform better in Europe and maintain a strong snow sports presence in addition to surfing).

Private equity also submitted many indicative proposals that failed to mature into formal offers. Some target boards decline to respond to an indicative proposal from private equity or will reject it outright. Alternatively, the target board may grant due diligence access but no agreement is subsequently reached. BGH Capital's proposal to acquire Healthscope was rejected by the Healthscope board, which didn't grant access to due diligence. Harbour Energy's proposal to acquire Santos was rejected by the Santos board after it granted access to due diligence. Bain Capital's non-binding indicative proposal for our client BWX, announced in May 2018, also failed to develop into a formal proposal, after an extensive due diligence period.

The high level of private equity interest in ASX-listed companies should continue into FY19. This is partly because debt funding remains cheap and private equity funds are actively seeking assets in which to invest their capital. We expect private equity firms to continue driving high interest in healthcare and aged care services and utilities and energy industries, particularly where companies appear to be materially undervalued or poorly performing.

BIDDER	TARGET	DEAL VALUE	METHOD	STATUS
CDH Investments and China Grand Pharmaceutical and Healthcare Holdings	Sirtex Medical Ltd	$1.93bn	Scheme	Successful
360 Capital Group	Asia Pacific Data Centre Group	$224m	Takeover	Successful
KKR	Pepper Group Ltd	$675m	Scheme	Successful
CITIC Capital	Trilogy International Ltd	$210m	Scheme	Successful
Oaktree Capital Management	Billabong International Ltd	$198m	Scheme	Successful
Taurus Funds Management	Realm Resources	$229m	Takeover	Successful
Lone Star Funds	Sino Gas & Energy Holdings Ltd	$529m	Scheme	Successful
Blackstone Group	Investa Office Fund Ltd	$3.16bn	Scheme	Ongoing

KEY M&A TRENDS IN FY18

6

Shareholder activism continues to impact deals

Shareholder activism is now an embedded risk that can fundamentally impact the direction of public M&A transactions. Boards need to think ahead, be flexible when responding to activist intervention and be prepared to adapt transaction terms. Some examples of shareholder activism in response to publicly announced M&A transactions in FY18 include:

Institutional investors applying pressure on bidders to increase their offer – Ryder Capital and Adam Smith Asset Management held approximately 15.35 per cent of the shares in Billabong. Critical of Oaktree Capital's offer price to acquire Billabong, both refused to publicly state how they would vote in the lead-up to the scheme meeting. Oaktree Capital ultimately increased its offer price from $1.00 to $1.05 per share on the morning of the scheme meeting.

Boards need to plan ahead, and must be flexible when responding to activist intervention.

Institutional investors applying pressure on bidders to abandon their offer – BESIX claimed that increasing its holding in Watpac Ltd from 28.1 per cent to 64.1 per cent via a scheme of arrangement would generate long-term value for shareholders. It pledged to provide access to other construction segments and opportunities to diversify, as well as enhanced technical capabilities. Sandon Capital, a Sydney-based activist investment firm that held a 3 per cent stake in Watpac, publicly campaigned against the proposal. It stated that it was unclear how BESIX would add value as it already had nominee directors on the Watpac board who were duty bound to add value for shareholders, and that the offer price materially undervalued Watpac. Ultimately, the scheme failed to achieve the requisite level of shareholder support.

Industry competitors looking to torpedo publicly announced deals because they perceive a strategic threat – Fortescue Metals Group acquired 15 per cent of the shares of Atlas Iron and obtained an economic interest in 4.9 per cent of Atlas Iron's shares via cash-settled swaps. It did so about one month before a scheme meeting to approve Mineral Resources' proposed acquisition of Atlas Iron under a scheme of arrangement. Fortescue immediately issued a public statement that it did not intend to support the proposed scheme on its terms at that time (but reserved the right to do so). Fortescue appears to have strategically positioned itself to gain access to Atlas Iron's port capacity at Port Hedland in Western Australia.

7

Schemes still favoured for friendly deals

Friendly transactions represented 84 per cent (31 of 37) of our sample, and of these, 77 per cent (24 of 31) were structured as schemes of arrangement. This trend is unsurprising because schemes offer certainty. If the target shareholders and the court approve a scheme, 100 per cent control will pass to the acquirer by a fixed date. On the other hand, if the scheme fails, the target's current ownership structure continues. Schemes also require a lower shareholder approval threshold to achieve full control, compared to the 90 per cent compulsory acquisition threshold for a takeover bid.

The benefits of schemes are especially attractive to private equity acquirers. In our sample, seven out of eight deals involving private equity bidders were structured as schemes. We expect private equity bidders will continue to prefer schemes as a method of structuring an acquisition, provided of course that a recommendation can be secured from the target board.

KEY M&A TRENDS IN FY18

8 CASH REMAINS KING

Cash consideration continued to reign supreme in FY18, accounting for 73 per cent of bids in our sample. A likely contributing factor is the continuing low cost of debt funding due to historically low interest rates. In addition, hostile bidders looking to make strategic acquisitions that were undervalued did not offer their own scrip as consideration. Instead, they offered cash at a healthy premium to a depressed share price to motivate shareholders to sell. For their part, foreign bidders recognised that shareholders of an ASX-listed target much prefer to receive cash than scrip from a foreign bidder. This is the case even if that scrip is listed on a well-known, reputable foreign securities exchange.

Several schemes contained novel and interesting features, highlighting the structuring flexibility that schemes offer.

NOTEWORTHY SCHEMES IN FY18

'Last-minute' increase in scheme consideration

When Oaktree Capital sought to acquire Billabong by scheme of arrangement, its decision to raise its offer from $1.00 to $1.05 per share represented the first case of a bidder increasing its offer price immediately before the scheme meeting, without delaying the meeting itself. The meeting was not adjourned and Oaktree had not gained prior approval from ASIC or the court.

The court ultimately held that although the proposed amendment was substantial, it was permissible for the court to exercise its powers to amend the terms of the scheme to increase the consideration. First, the amendment involved a clearly defined increase in the amount of cash consideration being offered to Billabong shareholders. This change was so readily understandable that it was difficult to see what further disclosure (if any) was necessary. Second, 78.8 per cent of the votes cast in favour of the scheme were directed proxy votes lodged before Oaktree increased the offer price. On this basis, the scheme would have otherwise succeeded even at the original (lower) offer price.

This case suggests that in certain circumstances, bidders now have greater flexibility to make last-minute price increases without delaying the scheme timetable. However, ASIC has recently publicly commented that it does not support this approach – ASIC's stated preference is for the parties to notify ASIC first before publicly amending terms ahead of the scheme meeting, even if it is a simple increase to the cash amount being offered.

Obtaining warranty and indemnity insurance

Pacific Equity Partners obtained the benefit of warranty and indemnity insurance as part of its acquisition of LifeHealthcare by scheme of arrangement, which is uncommon in public M&A transactions. Under the scheme implementation agreement, LifeHealthcare gave the acquirer both conventional 'target' scheme warranties, and target 'business' or 'operational' type warranties. This second category of warranties were more extensive than those usually seen in public M&A transactions. It appears that private equity and foreign acquirers are increasingly looking to import this feature into public M&A transactions in Australia.

Shareholders given rare opportunity to receive shares in foreign acquirer

LIFULL Co's proposed acquisition of Mitula Group was unique as target shareholders were given the opportunity to elect to receive shares in the Japanese company. This occurred despite the general recognition by foreign bidders that 'cash is king'. The terms included a share exchange ratio adjustment to protect Mitula shareholders from falls in the value of LIFULL shares, and in the Yen–Australian dollar exchange rate prior to completion. This mechanism also allowed Mitula shareholders to retain limited amounts of any net increase in the value of LIFULL shares before completion.

Using proportional schemes

BESIX proposed a proportional scheme in which it would acquire only 50 per cent of the Watpac shares it did not own to increase its shareholding from 28.1 per cent to 64.1 per cent. Proportional schemes are relatively uncommon given that acquirers usually seek full ownership. In this instance, BESIX considered that it would gain a sufficient position in Watpac to direct strategy to achieve long-term value. Ultimately this scheme was unsuccessful (for more information see page 6).

Metals and mining

This sector led the way (as predicted last year), accounting for 10 deals out of our sample of 37. Companies pursued M&A activity as a direct way to acquire proven resources assets, rather than engage in riskier and more expensive exploration activity. Examples included:

- Moly Mines' takeover of Queensland Mining Corporation
- Oz Minerals' takeover of Avanco Resources
- Mineral Resources' proposed acquisition of Atlas Iron (subsequently withdrawn following Fortescue Metals Group's intervention).

Several junior mining companies joined forces to pursue larger, pure resource plays. Private equity also sought to invest in small and mid-cap companies where liquidity was tight or non-existent. By entering at bargain prices, private equity saw opportunities to maximise profit upon exit, such as when projects were commissioned. A good example is Taurus Funds Management's proposal to acquire Realm Resources, which now looks likely to succeed. Before the offer, Realm Resources' shares had not been traded since July 2017. Taurus ultimately offered a very modest premium of 9.8 per cent.

INDUSTRY HOT SPOTS

Real estate investment trusts

Local and foreign bidders drove M&A activity in this area. Mega deals included Unibail-Rodamco's record-breaking $21 billion acquisition of Westfield, and Blackstone's $3 billion proposed scheme for Investa Office Fund. Data centres are also being seen as high-value alternative real estate investments given the growing importance of cloud-based storage.

Medical

Activity in health care and adjacent industries was driven by private equity companies looking for strategic acquisitions of defensive assets for predictable cashflows. Companies also pursued 'bolt-on' acquisitions of companies holding strategic IP and know-how, particularly relating to cancer treatment. Examples included US pharmaceutical company Merck Sharp & Dohme's acquisition of cancer immunotherapy firm Viralytics and the attempt by radiation oncology treatment and software maker Varian to acquire Sirtex.

INDUSTRY COLD SPOTS

Telecommunications

Following significant consolidation of the domestic industry in recent years, the Australian Competition and Consumer Commission (ACCC) has stated that it will closely review any further M&A activity in this sector. This appears to have contributed to an ongoing downturn (noting, however, that TPG and Vodafone have recently announced an intention to merge).

Consumer durables and apparel

Confidence in the Australian retail sector was dented by several high profile collapses in FY17, including Oroton, Herringbone, Rhodes & Beckett and Maggie T. Amazon's growing profile in the Australian market and its plans to release private-label products may have also dampened M&A activity.

M&A activity in telecommunications and retail in FY18 was largely limited to reconstructions of financially troubled companies, including 'loan to own' transactions and opportunistic bidders seeking value. We think this trend will continue.

REGULATORY LANDSCAPE

Australian Securities & Investment Commission

In FY18, ASIC has clamped down on hostile bidders delivering a subjective, self-serving critique of independent expert reports commissioned by targets. This is irrespective of whether that critique comes from the hostile bidder or an ostensibly 'objective' party that the bidder engages. ASIC's concern is that if a bidder publicly expresses a view about what the target's independent expert could or should have concluded, it could mislead target shareholders. This is due to the bidder not having access to the information gained by the target's independent expert.

In addition, ASIC remains concerned about the timetabling of scheme transactions that are subject to regulatory approvals or other conditions where there is significant uncertainty. ASIC says that reasonably foreseeable delays should be factored into scheme timeframes to avoid unnecessary supplementary or piecemeal disclosures.

EXAMPLE:

Mineral Deposits

In April 2018, Mineral Deposits Limited (Mineral Deposits) was the subject on an unsolicited off-market takeover bid from its 50 per cent joint venture partner, Eramet SA (Eramet). As part of its takeover defence, Mineral Deposits engaged Grant Samuel to prepare an independent expert's report. Grant Samuel concluded that Eramet's takeover offer was 'neither fair nor reasonable'. In its Third Supplementary Bidder's Statement, Eramet criticised Grant Samuel's report, including its valuation assumptions. Following an intervention by ASIC, Eramet released a corrective disclosure effectively withdrawing and qualifying its criticism of Grant Samuel's report.

Foreign Investment Review Board

Australia's foreign investment review regime was overhauled in December 2015. This resulted in increased cost and complexity for cross-border transactions. As a result, foreign bidders are not on a level playing field with domestic bidders, because they cannot be sure of when – or if – they will receive Foreign Investment Review Board (FIRB) approval.

Since these changes, an increasing number of global foreign-to-foreign offshore transactions have been caught by Australia's foreign investment regime. This affects the timing for completion of global deals as well as the scrutiny that deals will face from Australian regulators. FIRB is increasingly working with other regulators, who now play a greater role in the consultation process (for example, the Australian Competition and Consumer Commission, Australian Taxation Office and the Critical Infrastructure Centre).

There were also many policy announcements over FY18 to tackle perceived issues with foreign investment, such as requiring mandatory open advertising periods for targets that have agricultural land interests in Australia. Australia's foreign investment regime is also being used as a tool to review tax structuring issues that concern the Australian Government, such as stapled structures, transfer pricing and related-party financing. The Government's concern has been emphasised by the additional detail companies are required to provide upfront to FIRB on the source of funds, structuring and impact on specific tax issues.

Despite these complexities, Australia's approach to foreign investment is now being seen as a model for other jurisdictions. For example, the UK is considering allowing intervention on certain foreign investments, including on national security grounds. There has been an increase in scrutiny on deals from the Committee on Foreign Investment in the United States. New Zealand recently amended its laws to prevent foreign investment in certain sectors.

Takeovers Panel

In July 2018, the Takeovers Panel provided guidance on how long a bidder must wait before making a second takeover bid for a target. The Panel says that unacceptable circumstances are likely to arise if, after making a 'no increase' price statement without clear qualification, the bidder announces another bid (or a scheme) within four months of the bid closing and offers increased consideration.

The guidance is currently limited to 'no increase statements' and not to other types of 'last and final statements', including 'no extension statements' and 'no waiver statements'. Further, it remains to be seen what will sufficiently constitute a clear qualification to the no increase statement. Bidders will need to take this latest Panel guidance into account before making any last and final statement, but particularly when making a no increase statement.

Australian Competition & Consumer Commission

The ACCC completed public reviews of 26 M&A transactions in FY18. Of these, 16 were cleared in Phase 1, without issuing a Statement of Issues (SOI). The ACCC also pre-assessed a significantly larger number of other M&A transactions, either confidentially or with targeted market inquiries. In real terms, the average period of review was 97 days for transactions where no SOI was issued, and 180 days for transactions where an SOI was issued.

This year, the ACCC made several notable changes to its review procedures. These include:

Reforms to merger clearance processes: Following reforms to the Competition and Consumer Act in late 2017, there are now two clearance mechanisms: informal clearance and authorisation. The ACCC will now decide authorisation applications, with a right of appeal to the Australian Competition Tribunal. The ACCC can consider both competition issues and public benefit arguments, the first time these have been combined under one merger process.

Increased information demands: The ACCC is increasing its use of statutory information-gathering powers. While this will help it litigate to prevent anti-competitive mergers, it adds time and uncertainty to merger review timelines. For example, the ACCC issued 89 section 155 notices in FY18, compared with 44 last year. This includes notices requiring attendance at oral examinations which enable the ACCC to question executives of the merger parties under oath.

Action against 'gun-jumping' conduct: 'Gun jumping' occurs when merger or acquisition parties are competitors and they cease to compete (or otherwise coordinate) before the transaction is complete. This year, the ACCC challenged provisions of an asset sale agreement as part of civil proceedings against Cryosite. This included a clause requiring Cryosite to refer all customer enquiries to Cell Care after signing but prior to completion. The ACCC alleges this constitutes cartel conduct, by allegedly allocating potential customers from Cryosite to Cell Care and effectively restricting the supply of Cryosite's services to new customers.

7 PREDICTIONS FOR FY19

1.

Growth by acquisition will continue:

Achieving organic growth is likely to remain difficult in many mature industries.

2.

Opportunism will remain a key driver:

Bidders will continue to move quickly to take advantage of quality targets whose share prices are depressed or languishing. Hostile bids will remain popular despite their execution risks.

3.

Private equity will continue to be a major player:

It will continue to drive bids for ASX-listed companies.

4.

Foreign outbound Japanese investment will continue:

Over the next 12 months, we believe Japanese bidders will continue their strong run in Australian public M&A deals. This activity is likely to centre on mid-market transactions, and in sectors such as robotics and IT, where Japanese companies can add value through their unique strengths.

5.

Reverse break fees will be used more often in 'friendly' deals:

These fees are potentially payable by the bidder to the target if the deal fails, We expect bidders will increasingly be prepared to agree to reverse break fees that are substantially higher than any break fee potentially payable by the target to the bidder (for example, in the event of a board changing its recommendation). Larger reverse break fees are likely to become an important negotiation mechanism, particularly where a bidder is a foreign bidder or latecomer to an auction for control.

6.

Requests for an upfront deposit will increase:

Australian targets will increasingly request an upfront deposit from overseas bidders as security for the payment by the bidder of any reverse break fee. If the deal successfully completes, the upfront deposit forms part of the purchase price.

7.

Shareholder activism will continue:

This is likely where industry competitors look to torpedo or otherwise influence deals and where institutional investors seek to extract the maximum possible price from acquirers.

SECTORS TO WATCH

Health & aged care

The ageing population is driving increased demand for services.

The industry is consolidating as businesses seek to reduce costs, drive efficiencies and reduce their regulatory burden.

Private equity will continue to look to healthcare businesses for defensive assets with steady cash flow.

Food, Beverages & Tobacco

It is likely that private equity acquirers will continue to take on complementary food and beverage products in portfolio-building exercises.

Continued Asian interest in Australian fine meats and dairy will also drive activity.

Retail

Retailers coming to terms with a rapidly changing landscape and Australian consumers' growing awareness of Amazon are likely to dampen public M&A activity in the sector.

Activity will mainly involve opportunistic bidders looking for targets in distress.

Banking & Financial services

Banks can be expected to sell or demerge non-core wealth management, superannuation and insurance assets.

Information Technology

Industry participants will look to consolidate in the software and services, and technology hardware and equipment subsectors.

Increasing consumer adoption of Internet of Things devices, and commercial use of drones and robotics is likely to spur more bolt-on acquisitions.

Telecomm

The ACCC will closely scrutinise future M&A activity in this sector due to a high level of consolidation. This will dull appetite among industry players, although private equity may continue to seek smaller defensive assets. This sector has heated up in this new financial year with the proposed merger of TPG and Vodafone. This is a multi-billion dollar transaction that would create the industry's third largest player after Telstra and Optus.

Mining & Minerals

The consolidation of junior and mid-cap companies is likely to continue.