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IT'S PUBLIC

KWM M&A INSIGHTS | NOVEMBER 2025

Imitation Food In An Imitation Kitchen by Laura Oczosty

WELCOME TO THE THIRD EDITION OF IT'S PUBLIC IN 2025

Your essential guide to Australian public M&A from KWM.

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WHAT'S INSIDE?

Kicking off this edition, Mark Vanderneut, Will Heath and Genovieve Lajeunesse unpack the *Mayne Pharma v Cosette* decision - a sharp reminder that material adverse change (MAC) clauses are rarely a simple escape route. Their analysis in '*The Mayne point is, you can't walk away that easily (or can you?)*', underscores why surgical precision in drafting remains the only real cure for buyer's remorse.

Turning to regulatory reform, Will Heath and Nicola Charlston flag that '*Change is coming: shareholder approval requirements under ASX Listing Rules*'. They explore how the proposed shift in shareholder approval thresholds from the ASX public consultation paper could reshape dealmaking dynamics. We are seeking your views on the consultation paper, so please get back to us before submissions close on 15 December.

For our *It's Public* podcast, Daniel Natale sits down with David Friedlander, Jennifer Cheung and Rob Kelly to discuss the landmark $14 billion Brickworks–Soul Patts merger - a deal that ended more than half a century of cross-ownership and shows that it is possible to find valuation common ground on scrip-for-scrip transactions, with capital markets willing to support deals. In addition to the deal being one of this year's largest transactions, it has a number of unique features including (for the M&A boffins amongst you) a double-scheme top-hat!

We then bring you highlights from this year's M&A Conference - from Goldman Sachs' Stephan Feldgoise on the global M&A resurgence, to Nicola Charlston's panel on merger reform and FIRB scrutiny. The sessions offered timely perspectives on the trends redefining public and cross-border M&A in Australia and beyond.

Lizzie Knight takes us '*Back to the future: the re-emergence of the golden share*', charting the global return of government intervention in strategic assets - from U.S. Steel to Austal. Her piece explores how these arrangements blur the lines between policy, sovereignty and capital markets, and why boards must balance control with efficiency in this new landscape.

Rounding out this edition, Daniel Natale and Jennifer Cheung tackle one of the most pressing questions for dealmakers today in '*Doing deals in wobbly markets: who bears the risk of time?*'. As volatility, regulatory scrutiny and buyer's remorse collide, they explore how courts are testing the limits of contractual 'outs' – from MAC clauses to reverse break fees – and what those decisions reveal about where risk truly lies when completion drags.

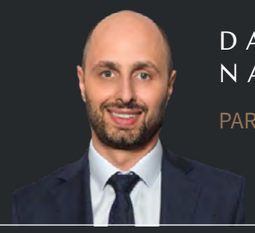
We hope you enjoy this edition and that it helps you stay ahead of the issues shaping the future of public M&A.

MEET THE EDITORS

WILL HEATH
PARTNER

ANTONELLA PACITTI
PARTNER

NICOLA CHARLSTON
PARTNER



DANIEL NATALE
PARTNER

DAVID FRIEDLANDER
CHAIR

DAVID ELIAKIM
PARTNER

IN THIS EDITION

THE MAYNE POINT IS, YOU CAN'T WALK AWAY THAT EASILY (OR CAN YOU?)

If you needed a reminder that material adverse change (MAC) clauses are often more bark than bite, the Supreme Court of New South Wales just prescribed one.

In the Mayne Pharma Group Limited (**Mayne Pharma**)/Cosette Pharmaceuticals, Inc. (**Cosette**) scheme stoush,[1] Black J found that Cosette hasn't proved that a MAC had occurred - meaning Cosette's attempt to walk away from the deal flatlined. The message to dealmakers is equal parts familiar and pointed: if you want a MAC clause that works when you need it, you must draft it like you mean it. Vague hopes will not cure a bad case of buyer's remorse.

WHAT HAPPENED (AND WHY IT MATTERS FOR DEAL CERTAINTY)

Mayne Pharma and Cosette inked a scheme of arrangement at A$7.40 per share, with a MAC condition and a FIRB condition (more on the FIRB condition below). The MAC trigger was essentially set as a decline of at least A$10.76m of "Maintainable EBITDA (earnings before interest, tax, depreciation, and amortisation)" over 12 months. Soon after the scheme booklet was released, Cosette claimed the patient was declining - pointing to trading softness, an April earnings update, and a United States Food and Drug Administration "Untitled Letter" on the promotion of a key Mayne Pharma product - then purported to walk. Mayne Pharma pressed on, announced the purported termination, and secured overwhelming shareholder approval to proceed with the scheme. The Court was asked the hard question: had the sky really fallen by at least A$10.76m of "Maintainable EBITDA" over 12 months?

The Court's answer was no. Its reasoning is relevant for every public M&A deal:

- Missing a forecast is not itself an adverse change; it's only evidence of one. Evidence still needs to isolate cause and effect.
- "Reasonably expected" captures real-world impacts that have occurred even if the full commercial pain hasn't yet been felt - but a risk that something might go wrong is not enough.

THE MAC THAT WASN'T: QUANTIFIED THRESHOLDS NEED REAL EVIDENCE

The parties agreed a quantitative threshold - A$10.76m of "Maintainable EBITDA." Cosette's problem was not ambition; it was attribution. The Court was not persuaded that the specific events pleaded, alone or in combination, were doing the causal heavy lifting needed to cross the line.

When a MAC is pegged to a financial metric, you must show the difference is driven by the alleged changes - not background noise, general economic headwinds or self-inflicted wounds. If you cannot run the counterfactual cleanly, do not expect the Court to do it for you.

A MISSED ARGUMENT: WAS THE MAC VOID FOR UNCERTAINTY?

There is a drafting wrinkle here that did not get argued but should sharpen pens across the market. The MAC definition in the scheme implementation deed purported to pick up events occurring before signing, yet the operative condition required the MAC to "occur" after signing (up to the second Court date). Layer in a "Maintainable EBITDA" test without a fixed baseline or an explicit "but-for" counterfactual, and you have got ambiguity doing laps around precision.

If you want a condition that actually conditions, be clear on:

- the measurement period and the effective date window; and
- the metric and its baseline.

Otherwise, your MAC will wheeze when asked to run.

1. *In the matter of Mayne Pharma Group Limited* [2025] NSWSC 1204.

IS THE VOTE GETTING STALE AND THE CLOCK RUNNING DOWN?

Mayne Pharma has had shareholder approval in the bag for 4 months now, but notwithstanding the Court's favourable ruling at the time of writing this article, the FIRB condition remains unsatisfied. As the end date of 20 November approaches, Cossette has notified Mayne Pharma of its intention to appeal the MAC decision and FIRB has indicated it won't approve the deal. The deal has all of the ingredients for "stale vote" concerns. You can only keep the patient on life support for so long.

PRACTICAL TAKEAWAYS: MACS NEED SURGICAL PRECISION

Precision pays. If the goal is a credible termination right rather than a negotiating prop, draft for diagnosis, not vibes.

- Specify the quantitative metric, the measurement window, and the "but-for" world. If you cannot model it, you cannot litigate it.
- Resist "kitchen sink" approach to exclusions. If the mere "pendency of the scheme" (like in the Mayne Pharma scheme) is excluded without surgical limits, don't be surprised when your MAC clause collapses under its own weight.
- Tie process to remedy. If a party sues for specific performance or injunctive relief or has to delay the timetable while resolving a purported termination, consider including in the transaction documents an automatic extension to the end date to let the Court process do its job – do not force a race to expiry.
- Align timing. If you intend to capture pre-signing issues discovered post-signing, say so in the operative condition, not just the definition.
- Be realistic about evidentiary burden. A quantified MAC is a high jump with a tape-measure, not a limbo with a vibe-check.

WALK AWAY RIGHTS AND FIRB

At the time of writing this article, the Treasurer's preliminary view is that the deal "would be contrary to the national interest, on the grounds that it would negatively impact the Australian economy and community". This follows reports in the press that Cosette had apparently re-evaluated its plans and intends to close the manufacturing site in Adelaide, with the result that the South Australian government asked FIRB to block the deal.

Taking an axe to the deal isn't the Treasurer's only option. FIRB could use its scalpel and approve the deal on the condition that the Adelaide facility remain open. FIRB is no stranger to conditions – almost every deal in recent years includes conditions. Under the transaction documents, Cosette is bound to act reasonably in considering whether to accept that condition.

A bidder significantly changing its investment thesis part way through an announced deal (and in seeming silence in the scheme booklet) is almost unheard of. As our colleagues Daniel Natale and Jennifer Cheung explain in this edition in '*Doing deals in wobbly markets: who bears the risk of time?*', we're seeing target companies give further thought to bidder obligations around satisfying FIRB and other regulatory conditions, end dates and reverse break fee triggers.

BOTTOM LINE

This decision will not spark a wave of successful MAC terminations. It will, however, embolden targets to keep calm and carry on when buyers wave the MAC flag without clean causation and quantification.

For bidders, if you want the parachute to open, pack it properly at signing. Otherwise, when you pull the cord, expect confetti. The FIRB condition conundrum remains a more pernicious pathosis – let's see what the next few weeks bring.

CHANGE IS COMING: SHAREHOLDER APPROVAL REQUIREMENTS UNDER ASX LISTING RULES

On 20 October 2025, ASX released its public consultation on shareholder approval requirements under the ASX Listing Rules. The ASX is seeking submissions on the issues by 15 December 2025. We intend to make a submission and - whether you are a listed entity director, officer, executive, shareholder, adviser or market participant - we would be delighted to hear your thoughts.

WHAT'S CHANGING?

ASX acknowledges that the calls for change to the Listing Rules arose from James Hardie's acquisition of AZEK. A number of institutional and activist investors criticised the deal. As we described in the last edition of *It's Public*, complaints were made not only against James Hardie, but also about ASX and the scope of the ASX Listing Rules.

ASX sought initial confidential feedback on potential changes to the Listing Rules before publishing its public consultation paper. That initial feedback frames not only the scope of ASX's public consultation but also drives initial suggestions by ASX for reform.

In summary, ASX has identified four potential areas for change.

- First, ASX has stated it would have 'no objection' to imposing a shareholder approval requirement on an ASX-listed bidder which is issuing 25% or more of its ordinary equity capital under a scrip-for-scrip scheme or takeover. Currently, an ASX listed bidder can issue up to 100% of its ordinary securities (as at the date of announcement of the transaction) under a scrip-for-scrip scheme or takeover under exceptions 6 and 7 in ASX Listing Rule 7.2. This exception has essentially been in place since the 1996 Listing Rules Simplification. It was subject to refinement (in relation to reverse takeovers) in 2017, which put the 100% 'cap' on the exception. Based on confidential feedback from institutional investors, ASX now seems amenable to accept 25% to bring the Listing Rules broadly in line with international counterparts. The move towards international alignment will need to recognise that a stricter shareholder approval requirement may make ASX-listed bidders offering scrip in a competitive auction less attractive, as we recently argued.

- The second and third potential areas for change relate to changes to listing status. ASX is considering introducing a potential new requirement that a dual listed company should seek shareholder approval if it wishes to change its admission status to be an ASX Foreign Exempt Listing. Similarly, ASX is considering introducing a potential new requirement that a dual listed company should seek shareholder approval to delist from ASX even if it will continue to maintain its foreign listing elsewhere. These changes may impact the attractiveness of ASX as a listing location for some foreign companies.
- The final area for potential change noted by ASX is Listing Rule 11. Certain activist and institutional shareholders have pushed ASX for a new requirement for shareholder approval 'of any significant acquisition whether or not it involves an issue of securities, or potentially for any significant transaction whether it is an acquisition or disposal.' Their argument is essentially for a re-writing of Listing Rule 11. ASX's position, outlined in the public consultation paper, is that it does not propose to change Listing Rule 11 because it considers the 25% 'cap' change in Listing Rule 7 sufficient.

WHAT'S NEXT?

We would be delighted to hear your views on the potential changes to the Listing Rules before 15 December. It will be important that ASX's public consultation receives feedback from a broad range of stakeholders including listed entities, Boards and management, shareholders, advisers and other market participants. So, the question is for you: are the Listing Rules broken and, if so, how should they be fixed?

BRICKWORKS AND SOUL PATTS: UNDERNEATH THE 'TOP-HAT'

KWM PODCASTS

In this episode of 'It's Public', host Daniel Natale speaks with M&A specialists David Friedlander, Rob Kelly and Jennifer Cheung about the landmark 2025 merger between Washington H. Soul Pattinson & Co. (Soul Patts) and Brickworks Limited (Brickworks).

KWM advised on the transaction, which unwound Australia's longest-standing cross-shareholding and transformed the nation's second-oldest listed company into a $14 billion diversified investment house.

David Friedlander sets the scene, outlining how the cross-shareholding - established in 1969 as a defence against hostile takeovers - endured for more than five decades despite criticism for limiting transparency and shareholder value. After several failed attempts to dismantle it, the two companies finally agreed to unwind the structure in 2025, with full shareholder approval.

Jennifer Cheung explains how an innovative 'top hat' structure was used, which involved the creation of a newly capitalised holding company that issued shares to both sets of shareholders.

Rob Kelly then delves $1.4 billion capital raising that supported the merger, which was unusual for occurring before the deal's announcement and at nil discount to the prevailing share price. He then draws parallels with the 2023 Allkem/Livent top-hat merger.

Finally, the discussion turns to the broader regulatory context. The team considers how the current ASX Listing Rules consultation on shareholder approval requirements could pave the way for more transactions of this kind.

The transcript below has been edited for brevity and clarity. You can listen to the full conversation via KWM's podcast channels on Apple and Spotify.

Download the podcast here

Daniel Natale: Hello and welcome to 'It's Public', your source for public M&A and market insights. I'm joined today by KWM Chair David Friedlander, Partner Rob Kelly and Special Counsel Jennifer Cheung. In this episode, we're discussing the landmark Brickworks/Soul Patts merger, which transformed Australia's second-oldest listed company into a $14 billion diversified investment house.

This was a unique deal - it unwound Australia's longest-standing cross-shareholding, between two companies whose relationship dates back over 60 years, and it was executed through an innovative 'top-hat' structure requiring approval by two sets of shareholders. To our knowledge, this is the first time that's happened between two Australian companies.

Jennifer Cheung: We're unpacking a deal that ended more than half a century of cross-ownership between Brickworks and Soul Patts - the last surviving relic of the pre-Corporations Act era. We'll start with the history, then move to the June 2025 merger announcement, the top-hat structure and $1.4 billion capital raising and finally compare it to the Allkem/Livent deal and the current ASX Listing Rules consultation.

Daniel Natale: Dave, you've been involved with Brickworks for a long time — can you give us the history?

David Friedlander: What's interesting is that the cross-shareholding was the last one still in existence. It had been in place since 1969, with both companies once holding more than 40% of the other. It was originally intended to provide stability and defend against hostile takeovers, but over time critics argued it suppressed transparency and shareholder value.

There were various challenges - in 1990, Ron Brierley's Guinness Peat tried to dismantle it, and in 2010 there was an activist attempt to unwind it, but the Federal Court found the structure wasn't unfair. Then, in 2025, the stars aligned, and both companies decided the time was right. They put it to shareholders and received approval from both sides to collapse the cross-shareholding.

Rob Kelly: And just to add, the structure was allowed to persist because it was grandfathered under section 259D of the Corporations Act. It wouldn't be permitted today, but it was legal because of that exemption.

Daniel Natale: Thanks, Dave and Rob. Jen, can you take us through the deal itself and why it was so unique?

Jennifer Cheung: Sure. On 2 June 2025, the parties announced a $14 billion merger via a binding combination deed. The deal used a top-hat structure - a newly capitalised holding company (**'TopCo'**) issued shares to both sets of shareholders: one TopCo share per Soul Patts share, and 0.82 TopCo shares per Brickworks share, implying a 10% premium.

The rationale was to enhance scale, obtain operational efficiencies and improve liquidity - but the key driver was the removal of the cross-shareholding, which had long been seen as a drag on value. The market's response was overwhelmingly positive - both share prices rose after announcement, and the combined group's market cap today is about $14.4 billion.

Daniel Natale: Rob, another fascinating aspect was the capital raising. How did that play out and why was it so unique?

Rob Kelly: TopCo undertook a $1.4 billion capital raising to support the merger and strengthen the balance sheet. That's a big number, but what really set it apart was the structure. Usually, capital raisings occur at announcement and at a discount to the bidders prevailing share price, but here, TopCo was unlisted at the time and the raising was done at nil discount to the prevailing Soul Patts price.

Institutional investors essentially backed the deal before it was implemented, signing up on long-dated settlement terms (up to nine months out). While it was thought that some inventive structuring would be needed to raise the full amount, the market response so overwhelmingly positive that the entire $1.4 billion was raised through placement arrangements in just over a month after the announcement.

Daniel Natale: It shows that it is possible, with the right deals between strategics, to find common ground on scrip-for-scrip transactions and that capital markets are open and willing to support good deals. Rob, you mentioned Allkem/Livent earlier — how does that compare?

Rob Kelly: Both deals used a top-hat structure. In the 2023 Allkem/Livent merger, which we acted on, the two companies created a new entity that acquired both Allkem (an Australian company, who KWM acted) and Livent (a Delaware company). The key difference is that Brickworks and Soul Patts were both Australian and ASX-listed, making this the first time (to our knowledge) that two ASX-listed companies have combined under a new ASX-listed entity.

Daniel Natale: Given the ASX's consultation on shareholder approval thresholds, we might start seeing more of these deals. Jen, what's changing there?

Jennifer Cheung: ASX released its public consultation on 20 October, proposing to lower the threshold for scrip-for-scrip transactions from 100% to 25%. This means listed bidders will need shareholder approval if they issue 25% or more of their stock in a public deal. The rationale for this is to balance investor protection with market efficiency, and it's likely influenced by recent high-profile transactions, including James Hardie's acquisition of AZEK.

David Friedlander: There are differing views on whether this is a good development, but whatever your view, what's clear is that it's possible to execute complex mergers with approval from both sides. Our work on both Brickworks and Allkem/Livent has really proven that.

Daniel Natale: Before we wrap up - one key takeaway each?

David Friedlander: For me, it's the history. The Millner family has been at the centre of this story for generations. Someone needs to write a book.

Jennifer Cheung: The novelty of the deal. It's the first top-hat between two Australian companies and the first involving such a large capital raising by an unlisted entity. It shows how the market is willing to back the right deal.

Rob Kelly: I echo that. It highlights how adaptable the market can be. Things are changing so quickly at the moment – the ASX consultation shows that even fundamental frameworks are being reconsidered - but ultimately when you have a compelling story in strategic M&A, you can find a way at the right time and the right price.

Daniel Natale: Thanks Dave, Rob and Jen for joining me for such an interesting and thought-provoking podcast.

HIGHLIGHTS FROM THE 2025 M&A CONFERENCE

Now in its eighth year, the M&A Conference has cemented its position as Australia's premier forum for top dealmakers. It brings together leading voices from across the local and international M&A community to share insights on market dynamics, deal activity and the regulatory developments shaping the road ahead. We were delighted to once again co-host the M&A Conference and, for those of you who missed out on it or would like a refresher, catch up on this year's keynote sessions below.

1. Global M&A insights with Stephan Feldgoise, Global Head of M&A, Goldman Sachs

In conversation with AFR Chanticleer's James Thomson and KWM's David Friedlander, Stephan Feldgoise shared his perspective on the state of global M&A as capital markets reopen and deal activity accelerates.

Feldgoise drew parallels to the record-breaking period of 2021, noting that 'capital markets are wide open' once again, with activity across public and private markets nearing all-time highs. The discussion explored the resurgence of cross-border transactions, the rise of sponsor-backed deals and how boards are responding to shareholder activism and shifting US political dynamics.

> 'Inside the M&A departments across the street, and certainly at Goldman Sachs, activity levels are running at near all-time highs.'
>
> Stephan Feldgoise, Global Head of M&A, Goldman Sachs

Watch the session here

2. Merger reform, FIRB and the shifting landscape of public M&A

KWM Partner Nicola Charlston joined Chris Blane (Allens) and Kam Jamshidi (Herbert Smith Freehills Kramer) to unpack how Australia's merger reforms and foreign investment regime are reshaping public M&A.

Moderated by AFR Chanticleer's Anthony Macdonald and James Thomson, the panel discussed how greater scrutiny from the ACCC and FIRB is influencing deal strategy, timing and execution. With foreign investment rules tightening, early regulatory engagement and robust compliance planning are now critical for bidders seeking certainty in competitive processes.

Watch the session here

BACK TO THE FUTURE: THE RE-EMERGENCE OF THE GOLDEN SHARE

And like Marty McFly – golden shares are back conferring on governments rights about strategic matters, including the identity of future owners.

Golden shares emerged prominently in the 1980s and 1990s during the wave of privatisations across Europe, particularly in the United Kingdom. As the economic integration and market liberalisation within the European Union progressed – golden shares came under increasing legal scrutiny with the European Court of Justice (ECJ) repeatedly finding national golden shares to be incompatible with the free movement of capital.

SWORD

However, the loud signalling of the arrangements by the Trump Administration in the Nippon Steel-U.S. Steel case heralded the return of the golden share and government stakes in companies as a vehicle of industrial revival.

Nippon Steel's 18-month struggle for its US$14.9 billion acquisition of US Steel came with a national security agreement inked with the Trump administration, granting the US Government the authority to name a board member as well as a non-economic golden share, held personally by President Trump (which passes to the Treasury and Commerce Departments as representatives of the US Government after the President leaves office).

According to announcements from the US Securities and Exchange Commission (SEC), the golden share does not entitle the US Government to block the sale of the company to a third party, but grants veto power over business decisions at U.S. Steel including:

- Changing U.S. Steel's name, moving its headquarters from Pittsburgh, relocating the company outside the US.
- Closing, idling, selling production locations through to 2035, and U.S. Steel's Granite City Works through to 2027.
- Cutting the base salary of employees through to 2030.
- Reducing, waiving or a delaying the timeline set out for US$10.8 billion in capital investment.
- Acquiring any business in the US that competes with U.S. Steel or its suppliers.

Less than a month later, in an escalation of the reprisal of industrial policy, US listed MP Materials announced its 'transformational Public-Private Partnership' with the Department of Defence (DoD) under which DoD agreed to purchase US$400 million of a newly-created series of the company's preferred stock convertible into shares and a warrant permitting it to purchase additional shares. As a result of the investment, DoD is positioned to become MP Materials' largest shareholder, holding 15% of MP Materials on an as-converted and as-exercised basis. The partnership also included a loan and 10-year agreement establishing a floor price of US$110 per kilogram for MP Materials' products stockpiled or sold.

So, in a golden age and before making investments in capital markets, policy makers should ask themselves:

1. Does the industry require support the capital markets |cannot provide?
2. What government tool will have the greatest likelihood of success at the most reasonable cost?
3. Should the state intervene in capital markets or provide incentives?

A BARGAINING CHIP

Bidders can use the promise of a golden share to secure an acquisition.

The golden share offered by EP Group in December 2024 to secure its takeover of Royal Mail gives the UK Government special approval rights over significant changes to the company's ownership, tax residency, place of headquarters and ensures the postal service remains in the UK. Covalis Capital offered the UK Government - as part of its £5bn bid for Thames Water – a retaining a seat on the board and a golden share giving certain rights to protect the provider of water and sewage services.

However, all that glitters is not gold. If golden shares become a regular bargaining chip for approval there could be costs to an efficient market and lower takeover premiums to enable bidders keep something in reserve.

In addition, questions about how these arrangements work in practice and can be enforced need to be considered. How would a government compel investment to a promised amount, especially if the buyer finds itself in a fragile economic position? A golden share may give a government substantial strategic control for no outlay, but governments may find some promises hard to enforce in a soft economy.

A CAPITAL SHIELD

A self-imposed golden share can benefit targets too. The Austal arrangements cleverly flip the narrative from the interventionist sword of the State asserting its control to a capital shield.

Austal is Australia's global shipbuilder and defence prime contractor designing, constructing and sustaining some of the world's most advanced commercial and defence vessels. It's the country's largest defence exporter, first ASX-listed shipbuilder and is the only foreign-owned prime contractor designing, constructing and sustaining ships for the US Navy.

Under the Strategic Shipbuilding Agreement finalised with the Commonwealth, a newly created special purpose vehicle and Austal subsidiary, 'Austal Defence Shipbuilding Australia', will be appointed as the Commonwealth's strategic shipbuilder for Tier 2 surface combatants at Henderson, Western Australia. Under the arrangements, the Commonwealth will be issued a single sovereign share in Austal Defence Shipbuilding Australia. While Austal will have day-to-day management control of Austal Defence Shipbuilding Australia and will derive all economic rewards and bear the economic risks of controlling it, the Commonwealth will have information and veto rights and in limited circumstances an ability to give directions.

In addition, the Commonwealth will be granted a call option over Austal's shares in Austal Defence Shipbuilding Australia. This can be exercised where a third party acquires control of Austal Limited or acquires all or a substantial part of Austal's business or assets, or where a third party acquires an interest (including a synthetic interest) in more than 20% of Austal limited, subject to Commonwealth consent and acceptances under a takeover bid that remain conditional.

South Korea's Hanwha made its first approach to Austal in 2023 and since then has made three more non-binding approaches. In March 2025, Hanwha acquired a 9.9% stake (along with a further 9.9% as a cash settled return swap) in Austal, stating it had 'no intention of submitting a control proposal, or making a takeover bid for the company, at this time', but noted it would obtain foreign investment approval to acquire up to 19.99%.

THE GOLDEN TICKET – A PERFECT PUZZLE

It is trite to reflect that maximising efficiency in accessing capital markets to pursue opportunities is an objective for Australian companies. However, in this new world order, boards must also grapple with the need to do what they can to ensure a company's capital structure does not impact on its ability to transact in Australia or elsewhere.

Any changes to capital structure for geopolitical resilience in Australia will need to be a careful exercise. A balance must be struck between the need for new capital or growth projects against the risk that 'golden share' or similar structures may create friction for future liquidity and value maximisation (potentially nixing the possibility of a takeover premium and with that effectively put a cap on share price performance).

In developing these capital arrangements, boards will need to be cognisant of their statutory and fiduciary duties (which are stricter than the US in some respects), and ensuring an efficient, competitive and informed market for control, as well as the Takeovers Panel's frustrating action guidance.

Additionally, arrangements that seek to create differential rights in a listed entity's shares or securities may struggle to satisfy ASX's ongoing listing requirements, which generally outlaw dual-class structures (although that is under current consideration).

A careful and finely balanced approach, which deeply considers the imperative of any change, will be critical to securing the necessary stakeholder support.

DOING DEALS IN WOBBLY MARKETS: WHO BEARS THE RISK OF TIME?

When markets are moving beneath your feet, deal certainty becomes the currency that matters most (well that, and the price!).

When markets are moving beneath your feet, deal certainty becomes the currency that matters most (well that, and the price!).

In public M&A, certainty runs both ways. Targets want bidders who will close, and bidders need targets to pave a clear path to completion through well-defined implementation obligations and tight exclusivity provisions. In wobbly markets, execution risk compounds.

Regulatory friction is a principal culprit. In the current deal environment, M&A transactions are facing heightened regulatory scrutiny (both domestically and offshore) and timetables are lengthening in step. The ACCC's imminent move to a mandatory merger clearance regime is the most salient example of this. As timelines extend, so does the window for macro shocks, earnings volatility and plain old buyer's remorse to develop. In this context, bidders with post-signing changes of heart are increasingly probing how far legal levers can be pulled to reset, re-price or retreat.

In recent memory, there are two prominent examples in the Australian public M&A market of bidders getting cold feet and testing these levers in the courtroom – Perpetual in its attempt to resile from its acquisition of Pendal and Cosette on its pending acquisition of Mayne Pharma (covered earlier in this edition). In the Pendal case, the Court made clear that a bidder cannot treat a reverse break fee as an option fee to walk away from a binding scheme implementation agreement, absent a clear contractual right to do so. Likewise, in the Mayne Pharma decision (which is currently under appeal), the bidder's attempt to invoke a material adverse change (**MAC**) to escape the deal failed on the facts and the drafting. The message is straightforward: courts will not permit bidders to use generic legal 'outs' to avoid performance, without an express right to do so and clear facts to rely on.

That does not mean the search for exit ramps is over.

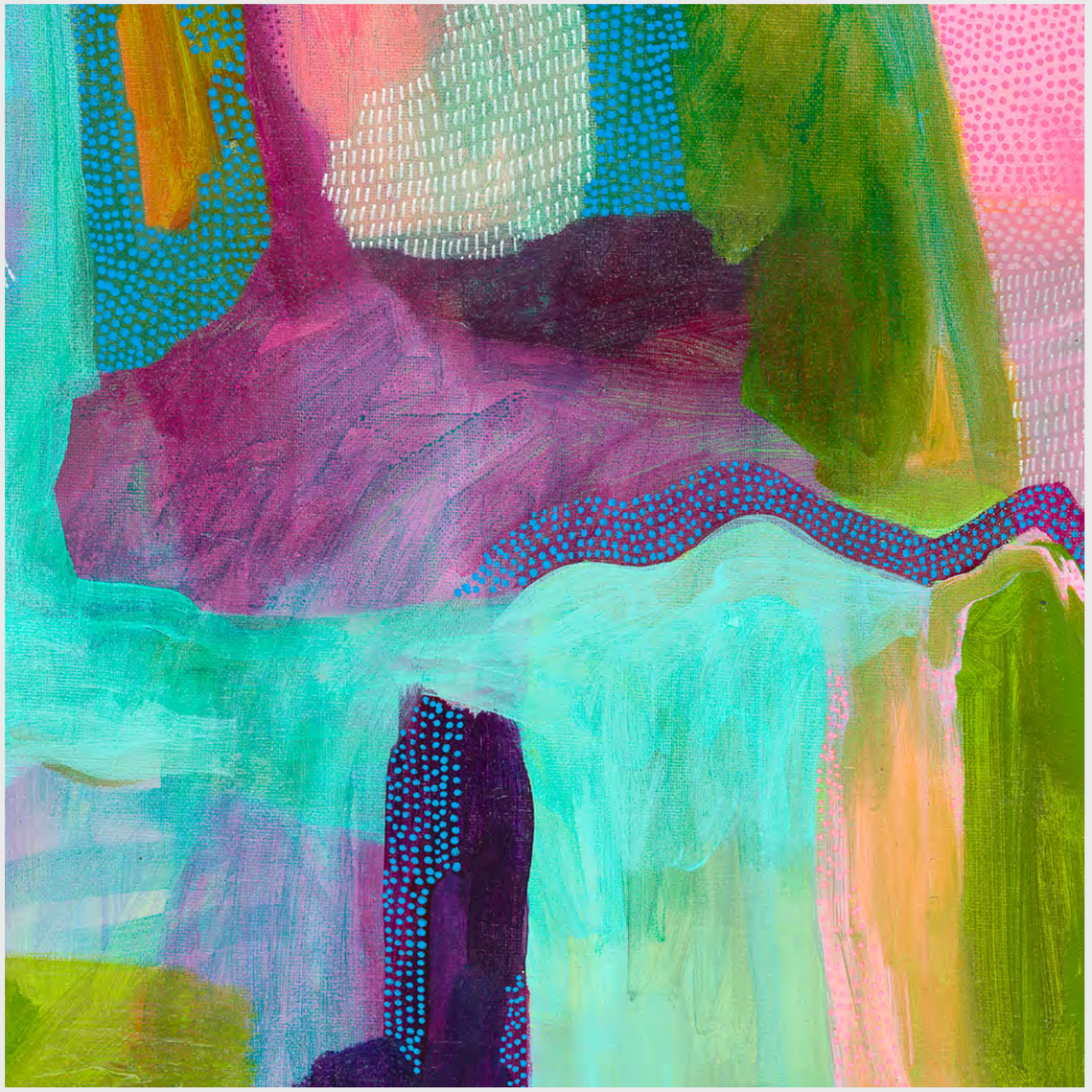
In the case of Mayne Pharma, at the time of writing, the takeover remains contingent on FIRB approval, and the end date of 20 November approaches. After that, all bets are off. What's more, FIRB have now indicated their preliminary views that approval may not be forthcoming (in large part due to Cosette's own shifting intentions concerning the target following its purported termination), and have unilaterally extended the statutory deadline to 14 November (after initially requesting a 1 December extension).

Under ordinary circumstances with two aligned, motivated parties (and shareholder approval in the bag), the next steps would be clear – agree to FIRB's extension requests, extend the end date by agreement, and pull out all stops to get the Treasurer across the line (and interestingly, the target late last week applied to the Panel requesting that it compel Cosette to do just that). But these aren't ordinary circumstances. It will be interesting to observe if Cosette loses the skirmish on the MAC clause, but ultimately wins the war.

There is some irony here. The long tail of regulatory approvals, which gives bidders time to change their minds, could very well be used as a tactic to end a deal. With MACs and conventional legal mechanisms proving unreliable as escape hatches, nervous bidders may pivot to process based strategies: leaning into extended approval cycles, resisting extensions, or insisting on hard long stop dates that become de facto options when conditions change.

For targets, these risks can be mitigated to some extent through deal protections like higher reverse break fees[1] (which we advocated for here) and ticking fees[2] linked to failed or delayed regulatory approvals. These can provide incentives for bidders to prosecute approvals promptly, and compensate targets if a deal stalls or fails for reasons within the bidder's control. Post Mayne Pharma, targets will no doubt also be scrutinising the obligations of bidders to use 'best endeavours' to prosecute conditions, and pressing for greater rights to participate in regulatory review processes.

The practical takeaway is a familiar one, but more urgent in volatile markets. Draft with specificity. If a bidder needs conditionality to address exogenous risks, say so clearly and calibrate the thresholds. If a target seeks true deal certainty, ensure that conditions (and obligations to satisfy them) are tightly defined, there are appropriate financial penalties for delay and realistic end dates for any approvals in play. In unsteady markets, the parties need to ensure that it is crystal clear in the four corners of the agreement who ultimately bears the risk of time.



1. Reverse break fees are becoming increasingly common in the Australian public M&A market and have typically hovered at around 1% of equity value (consistent with target break fees). However, since Pendal we've started to see a trend - particularly in ultra-high value deals - in the Australian market for 'supersized' reverse break fees being accepted.
2. Ticking fees see sellers and target shareholders being entitled to an extra payment if the deal goes beyond a particular timing milestone.

PUBLIC M&A MARKET ON A PAGE – OCTOBER 2025[1] AN OVERVIEW OF 2025 SO FAR

1. The statistics on this page are for deals announced between 1 January 2025 and 30 September 2025 where the target is or was at the time of the transaction listed on ASX and the deal value is A$50 million or more.

NUMBER OF DEALS

40

AGGREGATE DEAL VALUE

A$42.2B

STATUS

SUCCESSFUL	UNSUCCESSFUL	WITHDRAWN	CURRENT
18	3	3	16

FEATURES

AVERAGE NUMBER OF DAYS FROM ANNOUNCEMENT TO COMPLETION[3]

98

Scheme average: 120
Takeover average: 44

SCHEMES VS. TAKEOVERS

Schemes continue to dominate with

68%

of deals being undertaken by way of a scheme

TOP SECTORS BY NUMBER OF DEALS

Metals & mining: 12

Consumer Services: 8

Software & services: 4

Financial Services: 4

3. For a takeover, completion is considered achieved once the bidder has a relevant interest of at least 90%. For a scheme, completion is considered to occur on the implementation date.

LARGEST DEALS SO FAR IN 2025

Target	Bidder	Deal value	Sector
Brickworks Limited	Washington H. Soul Pattinson and Company Limited	A$13.4 billion [2]	Construction Materials
Gold Road Resources Limited	Gruyere Holdings Pty Ltd	A$3.7 billion	Metals & Mining
Insignia Financial Ltd	Daintree BidCo Pty Ltd	A$3.3 nillion	Financial Services
Domain Holdings Australia Ltd	CoStar Group, Inc	A$2.8 billion	Software & Services
Spartan Resources Limited	Ramelius Resources Limited	A$2.4 billion	Metals & Mining
Adriatic Metals plc	Dundee Precious Metals Inc	US$1.3 billion	Metals & Mining
MAC Copper Limited	Harmony Gold (Australia) Pty Limited	A$1.6 billion	Metals & Mining
Johns Lyng Group Limited	Sherwood BidCo Pty Ltd	A$1.1 billion	Capital Goods
Infomedia Limited	McQueen BidCo Pty Ltd	A$651 million	Software & Services
Mayne Pharma Group Limited	Cosette Pharmaceuticals, Inc.	A$615 million	Pharmaceuticals, Biotechnology & Life Sciences

2. This transaction involved a merger between the target and bidder and the deal value represents the expected combined pro forma net asset value (pre-tax).

THE IT'S PUBLIC TEAM

NICOLA CHARLSTON

PARTNER
MELBOURNE

TEL +61 3 9643 4366
MOB +61 412 840 759
EMAIL nicola.charlston@au.kwm.com

DAVID FRIEDLANDER

CHAIR
SYDNEY

TEL +61 2 9296 2444
MOB +61 417 922 444
EMAIL david.friedlander@au.kwm.com

WILL HEATH

PARTNER
MELBOURNE

TEL +61 3 9643 4267
MOB +61 415 603 240
EMAIL will.heath@au.kwm.com

DANIEL NATALE

PARTNER
SYDNEY

TEL +61 2 9296 2755
MOB +61 408 869 681
EMAIL daniel.natale@au.kwm.com

ANTONELLA PACITTI

PARTNER
PERTH

TEL +61 8 9269 7094
MOB +61 409 814 215
EMAIL antonella.pacitti@au.kwm.com

DAVID ELIAKIM

PARTNER
MELBOURNE

TEL +61 2 9296 2061
MOB +61 401 156 339
EMAIL david.eliakim@au.kwm.com

MEDIA ENQUIRIES

SARAH GATES

CORPORATE AFFAIRS MANAGER
MELBOURNE

TEL +61 3 9643 5616
MOB +61 437 952 828
EMAIL sarah.gates@au.kwm.com

CLIENT ENQUIRIES

SHEREEFA GALAL

SENIOR CLIENT RELATIONSHIP MANAGER
SYDNEY

TEL +61 2 9296 3477
MOB +61 408 673 226
EMAIL shereefa.galal@au.kwm.com

CONTRIBUTORS

ROB KELLY

PARTNER
MELBOURNE

TEL +61 3 9643 4256
MOB +61 418 665 296
EMAIL robert.kelly@au.kwm.com

LIZZIE KNIGHT

PARTNER
CANBERRA

TEL +61 2 6217 6164
MOB +61 402 793 072
EMAIL lizzie.knight@au.kwm.com

GENOVIEVE LAJEUNESSE

PARTNER
MELBOURNE

TEL +61 3 9643 4175
MOB +61 427 587 309
EMAIL genovieve.lajeunesse@au.kwm.com

MARK VANDERNEUT

PARTNER
SYDNEY

TEL +61 2 9296 2318
MOB +61 400 939 451
EMAIL mark.vanderneut@au.kwm.com

JENNIFER CHEUNG

SPECIAL COUNSEL
MELBOURNE

TEL +61 2 9296 2194
MOB +61 402 941 688
EMAIL jennifer.cheung@au.kwm.com

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