CLAYTON UTZ

M&A DEAL TRENDS AND DEVELOPMENTS

2012 EDITION

THE REAL DEAL

THE REAL DEAL

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Against the backdrop of a volatile global economy, 2011 was certainly not the bumper year for M&A activity that had been predicted. While M&A activity levels were healthy in Australia in comparison to other countries, they were patchy and were far from the overall volume and value of deals that were witnessed at the height of the market in 2007.

During the year we undertook a detailed analysis of public company mergers & acquisitions announced throughout 2011, with a deal value exceeding A$50 million. This report is the product of that analysis and seeks to provide readers with a more detailed assessment of the deal structures and trends which we saw in the market during the period. In order to identify significant trends and developments we have also made comparisons to deal activity in 2010. For further details of our survey methodology please refer to Section 12.

We hope that our report provides readers with some valuable insight into the dynamics of the M&A market in Australia during the period of review and how major developments will inform the nature of M&A transactions in the coming year.

In order to facilitate our detailed analysis, we have created a proprietary intelligence tool – a deal database containing comprehensive information on the structure of each of the surveyed deals and tactics adopted by both targets and acquirers. Importantly, this database will be an invaluable reference tool in advising Clayton Utz clients on future transactions.

This report could not have been produced without the significant contributions made by senior associates **Adam Foreman** and **Jasmine Sprange**, special counsel **Stephen Magee** and lawyer **Stephanie Bragg**.

We welcome the opportunity to discuss our findings with you further. If you have any questions about the content of this report, please contact us.

CLAYTON UTZ

2011

WHAT WERE THE TOP TRENDS IN 2011? OUR SURVEY RESULTS PROVIDE US WITH UNRIVALLED INSIGHT INTO THE TRENDS AND DEVELOPMENTS THAT SHAPED THE AUSTRALIAN M&A MARKET IN 2011. WHILE THE DETAIL OF THAT INSIGHT FOLLOWS, THE KEY TRENDS WE OBSERVED IN 2011 ARE:

MATERIAL INCREASE IN PUBLIC M&A ACTIVITY: There were 23% more deals above $50m announced in 2011 than in 2010, although the average deal size was smaller in 2011 than in 2010.

FOREIGN BIDDERS OUTSTRIPPED DOMESTIC BIDDERS BOTH IN TERMS OF DEAL VALUE AND DEAL NUMBER: Foreign bidders accounted for 64% of deals and 77% of deal value in 2011. While this can in part be attributed to the attractiveness of Australian energy and resources assets, which accounted for more than 50% of the foreign deals, foreign bidders featured in a number of other industries, including healthcare, real estate, IT and food and agriculture.

ENERGY AND RESOURCES DEALS DOMINATED BOTH FOREIGN AND DOMESTIC DEALS: Deals in the energy and resources sector represented more than 50% of all deals by number and almost 60% of all deals by value.

BEAR HUGS REDUCE THE NUMBER OF HOSTILE BIDS: 75% of all deals were announced with an initial target board recommendation. Hostile approaches were still common, but they occurred by way of a bear hug proposal rather than an outright hostile bid. 29% of all deals in 2011 commenced with a bear hug.

CASH IS KING: 61% of deals offered cash only consideration and only 22% of deals offered scrip only consideration.

MOST BIDDERS STARTED WITH A PRE-BID STAKE: 73% of deals in 2011 saw the bidder start with a pre-bid stake, and the majority of those stakes were pre-existing stakes rather than stakes acquired in anticipation of the deal.

JOINT BIDS INVOLVING EXISTING SHAREHOLDERS OF THE TARGET BECAME INCREASINGLY POPULAR: 12% of deals, including some of 2011's largest deals, involved joint bids either by existing target shareholders, or by a third party with an existing shareholder.

BIDDERS SOUGHT TO PROTECT THEMSELVES FROM UNCERTAINTY WITH A HIGH DEGREE OF CONDITIONALITY: Even though many bidders managed to secure a target recommendation, bidders still sought to protect themselves from the uncertain economic environment and volatile markets with a broad range of conditions.

REGULATORY INTERVENTION FEATURED IN SOME SIGNIFICANT TRANSACTIONS: In 2011, FIRB blocked the proposed merger between ASX and SGX, AMP successfully completed its merger with AXA APH following the ACCC's blocking of NAB's competing bid, and Foxtel's acquisition of Austar was significantly delayed while the ACCC considered whether to give clearance.

WHAT WILL THE TOP TRENDS BE IN 2012? PREDICTING THE FUTURE AT A TIME WHEN GLOBAL MARKETS REMAIN VOLATILE, AND THE IMPACT OF THE EURO ZONE DEBT CRISIS IS YET TO BE PLAYED OUT, IS NOT AN EASY TASK. HOWEVER, BASED ON THE RESULTS OF OUR 2011 SURVEY, WE EXPECT TO SEE THE FOLLOWING TRENDS EITHER EMERGE OR STRENGTHEN IN 2012:

TARGET RECOMMENDATIONS STILL A HIGHLY VALUED PRIZE: In a volatile market, bidders will desire certainty, due diligence and a headstart over potential competitors, all of which need a target board recommendation. The means by which bidders achieve that recommendation have changed however and a recommended deal no longer equates to a friendly deal.

ENERGY AND RESOURCES DEALS WILL CONTINUE TO DOMINATE: The trend will continue from 2011 with a majority of the deals involving foreign bidders.

GREATER SHAREHOLDER ACTIVISM ARISING OUT OF SHORT-TERM OR RELATIVE VIEWS ON VALUE: The rise in shareholder activism that we have seen emerge in recent times, both in an M&A context as well as in a broader governance context, is likely to gain further momentum in 2012.

SHAREHOLDERS PREPARED TO ACCEPT LOWER PREMIUMS: As fund managers struggle to meet their own internal benchmarks due to the volatility and unpredictability of markets, there are likely to be shareholders who would prefer to cash out of particular investments at a reasonable trading premium, even if that premium does not reflect the fundamental value of the company. Where M&A opportunities arise for such companies, there will be a

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tension between the factors which drive the investment decisions of those investors and the target directors' fiduciary obligations.

PRIVATE EQUITY TO BE INCREASINGLY ACTIVE IN THE PUBLIC M&A ARENA:

This was a trend which emerged over the latter half of 2011 with a surplus of committed funds burning a hole in the collective pockets of the private equity players active in this market. Provided the fall-out from Europe does not have the same effect on the availability of debt funding for private equity deals that the 2008 financial crisis had (we recognise that is a big proviso!), there is every reason to believe that private equity players will target underperforming or undervalued public companies with continued vigour in 2012.

BEAR HUG PROPOSALS WILL CONTINUE TO BE USED IN PLACE OF, OR AT LEAST AS A PRECURSOR TO, THE HOSTILE TAKEOVER:

2011 has shown that bear hug proposals have been a successful tactic for pressuring target boards to engage with a bidder who would not have otherwise been welcomed by the target board. Bear hug proposals naturally follow the first three trends we have predicted: where there is a gap between trading valuations and fundamental value, bidders will seek to use shareholders to pressure target boards to engage with them. This tactic is likely to be increasingly used by private equity, who generally can't proceed with a deal unless they undertake due diligence.

INCREASING NUMBERS OF STRATEGIC DOMESTIC MERGERS AND SCRIP BIDS: If the equity markets stabilise so that boards feel confident of the stability of the relative trading valuations of their company and their competitors, we will probably see strategic mergers taking place between competitors in the Australian market which are likely to have a heavy scrip component to the consideration. This will be driven by the need of Australian companies to take steps to demonstrate opportunities for growth. Many of these mergers will have a difficult regulatory path to navigate, particularly with the ACCC.

MINORITY TAKE-OUTS: 2011 saw a significant number of deals where bidders had a pre-existing stake (not acquired in anticipation of the bid). 2012 is likely to see a continued trend in this direction. If equity markets stabilise around current levels, and there are limited opportunities for growth, major strategic shareholders may consider it is a good time to be taking the company private to allow them to pursue initiatives for growth without the pressure from shareholders driven by the need for short-term returns. Similar factors are also likely to cause other strategic bidders to team up with major shareholders to take companies private.

THE NEW ACCC?: With a new Chairman on board and the recent Federal Court Metcash decision against the ACCC, we may find that the ACCC reviews its processes, but this is likely to lead to changes at the margins rather than fundamental changes. In some cases, this may lead to lengthier timetables for a decision as the Commission performs the "real world" assessment required by the Federal Court and gathers evidence to support its position. The ACCC timeframes for complex reviews are short by international standards but we do not expect the ACCC to feel overly pressured to move quickly. The ACCC is likely to take the time it needs and will not be deterred by the risk of litigation when making its decisions.

INCREASED REGULATORY FOCUS ON MARKET INTEGRITY: If bidders continue to seek to transfer risks associated with the volatile markets and uncertain economic environment to target shareholders by the use of broad conditions, we expect that ASIC and the Takeovers Panel may try to limit the circumstances in which bidders can rely on those conditions to terminate a deal in order to ensure market integrity.

CERTAINTY OF FUNDS IMPORTANT: In a volatile market bidders will continue to avoid the risk of launching a proposal without certainty of funds that will see them through the transaction period, including any anticipated regulatory delays. Targets will also look to this certainty as well as regulators for reasons of market integrity.

TEST YOURSELF!

Before you take our in-depth journey through the M&A trends and developments of 2011, why don't you test how much you already know:

1. True or false: 2011 saw the total value of M&A deals increase from 2010?
SECTION 2

2. Which foreign country produced the most M&A deals in 2011?
SECTION 3

3. Everyone knows that energy and resources were the hot M&A tickets in 2011, but what sector was the next most popular?
SECTION 3

4. Were there more hostile bids or more bear hug proposals leading to announced transactions in 2011?
SECTION 3

5. Which was the least popular form of bid funding in 2011 – an equity capital raising or a debt capital raising? (Hint: you may need a magnifying glass to spot the difference!)
SECTION 4

6. True or false: Bidders pay a higher premium if they secure a target board's recommendation on the initial announcement of a deal rather than later in the process?
SECTION 4

7. As the Euro zone sailed into troubled waters in the second half of 2011, one type of bid condition doubled in popularity. What was it?
SECTION 5

8. Are you better off with a pre-bid stake of more or less than 50%?
SECTION 6

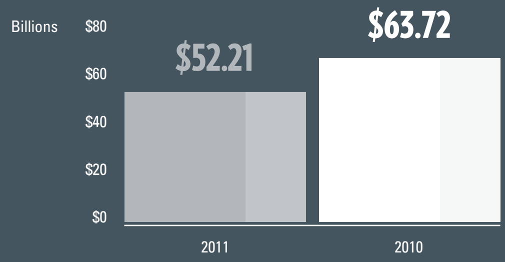
9. As usual, the overwhelming majority of agreed deals (75%) had target break fees. However, bidder break fees are also starting to become common. What percentage of 2011 deals had break fees payable to targets? 12%, 36% or 57% (ie. a bidder break fee)?
SECTION 7

10. What percentage of targets who agree to pay a break fee succeed in having their liability capped by the break fee? 36%, 52% or 79%?
SECTION 8

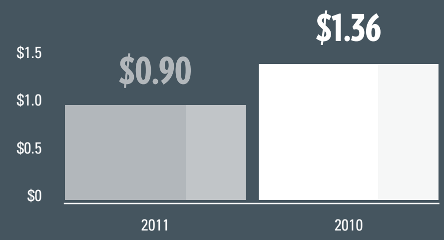
11. How many public M&A deals were refused foreign investment approval in 2011?
SECTION 9

THERE WERE 59 ANNOUNCED DEALS SURVEYED IN 2011 WITH TRANSACTION VALUES OVER $50M

Total Deal Value



Average Deal Value

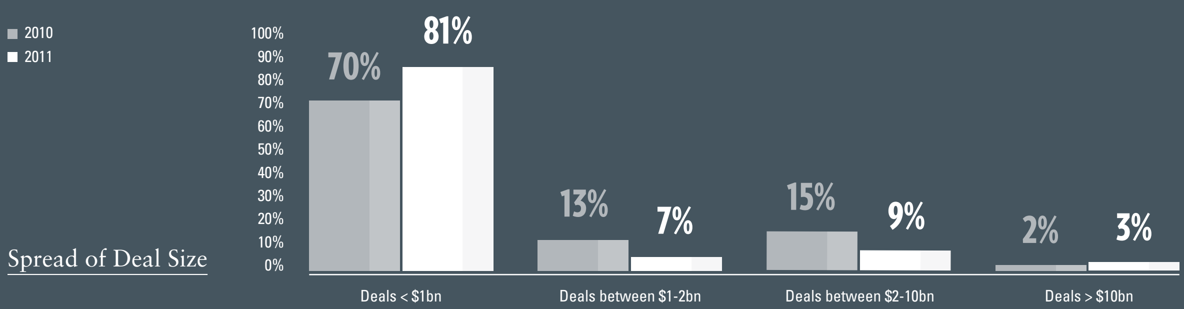


INCREASE IN PUBLIC M&A ACTIVITY IN 2011 - ALTHOUGH AVERAGE DEAL SIZE WAS LOWER THAN IN 2010

This represents a 23% increase over the number of announced deals in the same category for 2010 and reflects the increased level of activity in the Australian public M&A market.

The increase in activity is likely a result of a number of factors, including both the need for boards to find productive ways of deploying excess capital following a period of relative conservatism in the wake of the global financial crisis and the opportunities available to acquire assets at attractive prices. And of course, there was the foreign demand for commodities which drove a significant proportion of the activity in the market.

While the number of announced deals increased in 2011, the total value of those announced deals in 2011 was $52.2 billion, which is less than the value of the deals announced in 2010. The average size of the deals surveyed in 2011, which is $900 million, is also less than the average for 2010.



Spread of Deal Size

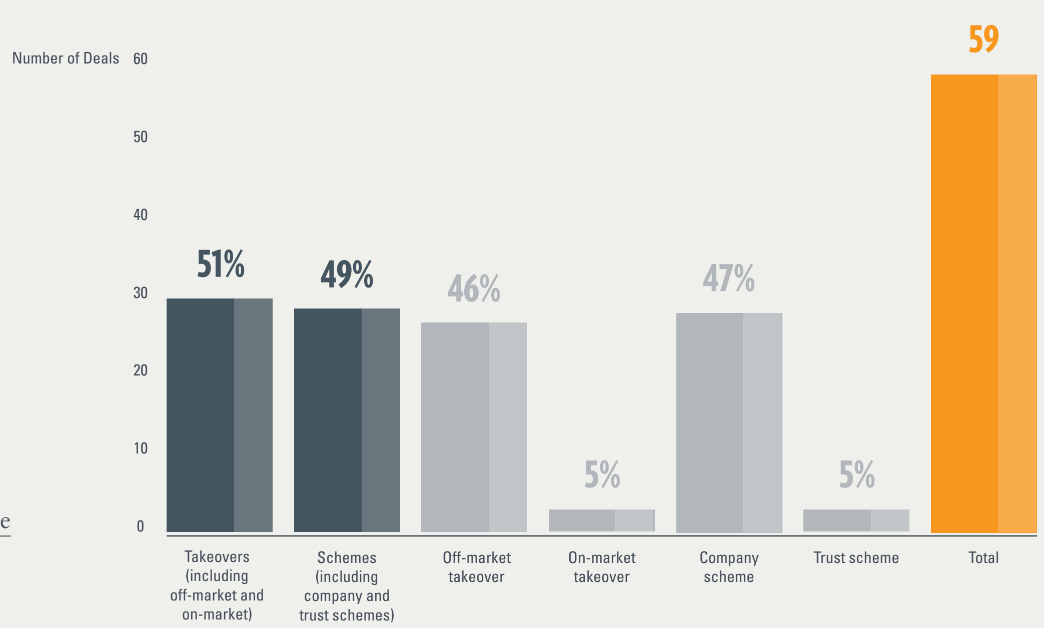
This is a result of the distribution of the size of announced deals. More of the deals announced in 2011 had transaction values less than $1 billion, and in 2010 there was almost twice the number of deals compared to 2011 which had transaction values of between $1 billion and $10 billion.

3. STRUCTURE AND EXECUTION OF DEALS

3.1 DEAL STRUCTURE

The two main transaction structures available to a bidder wishing to acquire all the shares in a listed Australian company are a takeover bid and a scheme of arrangement. Takeovers are a contractual based offer by the bidder to acquire shares in a target, the terms of which are regulated by the Corporations Act. A court-approved scheme of arrangement between a target and its shareholders usually provides for the transfer of the shares in the target to the bidder.

Bidders often ask their advisers whether a takeover or scheme of arrangement is the preferred structure. 2011 saw just as many takeovers as schemes of arrangement, continuing the trend we saw in 2010. So the question will continue to be asked by bidders, and the answer is still that it depends on the particular circumstances of the transaction.



Deal structure

Moving from a takeover to a scheme

It is often the case that a scheme is the preferred structure but that an off-market takeover is used because the agreement of the target to proceed with a scheme is not forthcoming. We saw a good example of this in 2011 when SABMiller put an unsolicited scheme proposal to Foster's which was not supported by the Foster's board, following which SABMiller announced a hostile off-market takeover. Shortly before SABMiller would have been required to proceed with the bid under the two month limit set by the Corporations Act, Foster's and SABMiller agreed on a scheme proposal.

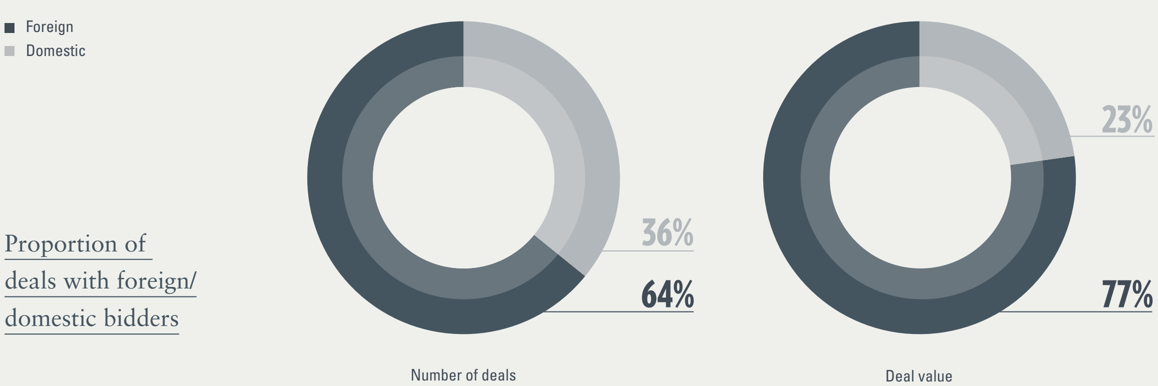
However, because the bid was not subject to a condition which was triggered by the agreement to propose a scheme, SABMiller needed to obtain relief from ASIC to allow it to avoid the obligation under the Corporations Act to still proceed with its bid. The relief it was granted was conditional upon SABMiller proceeding with the bid in the event that the scheme proposal was not implemented by a particular date or was otherwise amended.

3.1A WHO'S BUYING?

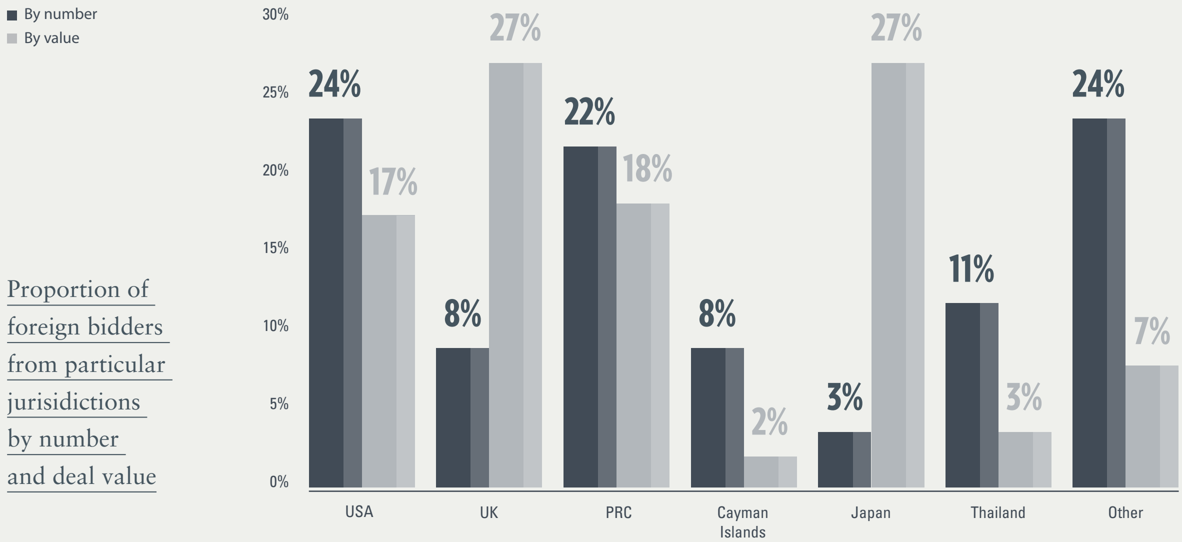
BIDS FROM FOREIGN INVESTORS ACCOUNT FOR 77% OF 2011 DEAL VALUE

The wave of foreign investment continued in 2011, despite the appreciation of the Australian dollar during the year. The six largest deals in 2011 all involved foreign bidders and, as a result, over 77% of the 2011 deals (by value) were by foreign-owned bidders. Foreign bidders also accounted for a significant proportion (64%) of the number of deals in 2011.

The foreign bidders came from a range of countries, with the United States being home to the largest number of foreign bidders, followed closely by China.



Proportion of deals with foreign/domestic bidders



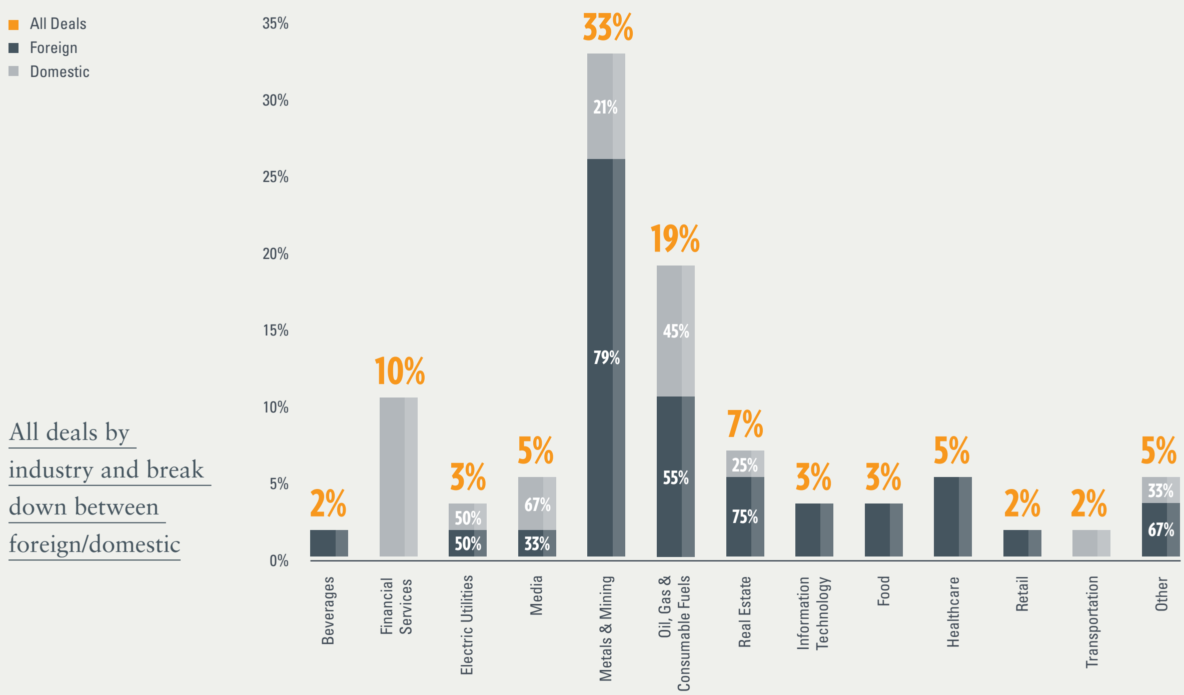
Proportion of foreign bidders from particular jurisidictions by number and deal value

3.1B WHAT ARE THEY BUYING?

FOREIGN INVESTMENT WAS ACTIVE ACROSS A BROAD RANGE OF INDUSTRIES, BUT DOMINANT IN THE ENERGY & RESOURCES SECTORS

The energy and resources sectors continued to dominate Australian M&A in 2011. Over 50% of 2011 deals were in the metals & mining or oil & gas industries, with deals in the financial services sector coming a distant third, accounting for 10% of the 2011 deals.

While foreign investment continues to be dominant in the energy and resources sectors, foreign bidders were active in a number of other industry sectors in 2011, with transactions in 18 different sectors. In contrast, domestic bidders only engaged in transactions in 10 industry sectors. However, all of the deals in the financial services sector involved domestic bidders. The lack of foreign bidder activity in this sector is likely to reflect the fact that many overseas financial services companies remain focused on restructuring their existing business portfolio following the financial crisis and the regulatory changes which have been implemented as a consequence, as well as the implications of the current Euro zone debt crisis.



All deals by industry and break down between foreign/domestic

3.2 TARGET INVOLVEMENT / RESPONSE

BEAR HUG PROPOSALS TOOK THE PLACE OF HOSTILE TAKEOVERS IN 2011

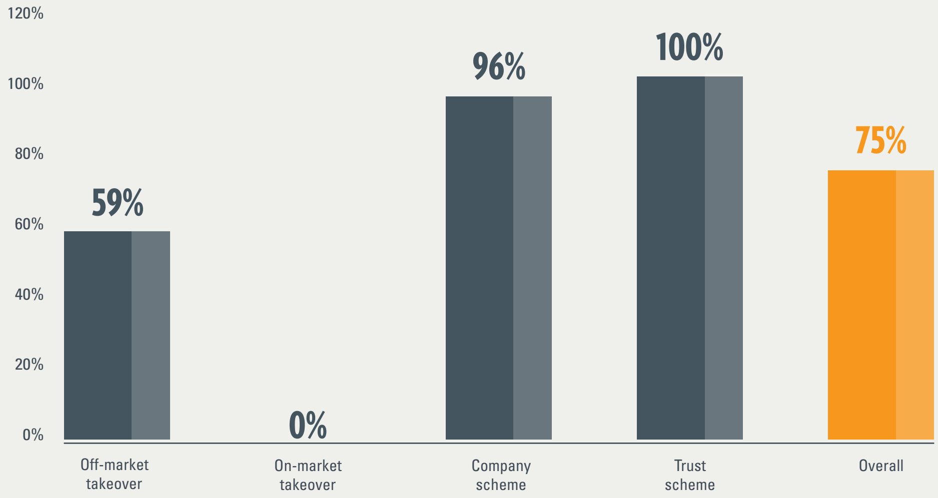
While takeovers and schemes of arrangement were equally popular in 2011, there was no change in the desire of bidders to proceed with a recommended transaction from the time of announcement. 75% of all deals, including 54% of takeovers, were announced with an initial target recommendation, with a further 29% of takeovers obtaining a recommendation before they closed.

The desire for an initial recommendation reflects a number of factors: the desire for greater deal certainty in volatile markets, the need for access to due diligence (whether due to conservatism of the boards of bidders or the business model of private equity investors) and the need for a board recommendation to achieve 100% ownership, especially where there is a significant retail shareholder base.

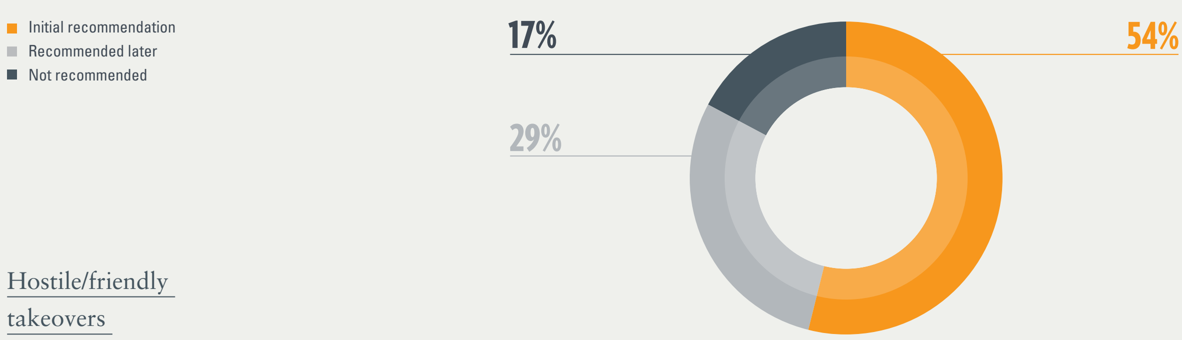
An initial recommendation also has a significant influence on the ultimate success of a deal – 85% of deals which were initially recommended completed successfully.

It is also becoming more common for target boards to make more than one recommendation in respect of shareholders with different objectives, reflecting volatile markets or a concern on the part of target boards that shareholders may be selling out at the bottom of the market or for less than the fundamental or long term value of the company. In the Seven Group bid to acquire the minorities in National Hire, the independent board committee of National Hire initially recommended that shareholders who wished to sell in the foreseeable future should accept the offer, whereas shareholders who wanted to retain their exposure to the company's businesses and the potential upside that might flow from them should not accept the offer. Similar recommendations were given by the boards of Aevum and Gladstone Pacific Nickel in relation to the bids they responded to during 2010.

Proportion of deals with initial recommendation



Hostile/friendly takeovers



29% OF SURVEYED DEALS IN 2011 COMMENCED WITH A BEAR HUG APPROACH

Bear hug or virtual bid proposals continued to be a prominent feature in the market. These proposals start with an unsolicited proposal being made to the target. That unsolicited proposal is subsequently made public (either by the bidder or the target) before any transaction is actually announced. Given the high proportion of deals which are initially recommended when announced, it appears that bidders are preferring to use a bear hug proposal to force a recommendation at the outset, rather than commencing with a hostile takeover.

29% of all deals in 2011, including some of the largest deals for the year, commenced with a bear hug approach which was made public (Peabody bid for Macarthur Coal, SABMiller bid for Foster's and Rio Tinto and Mitsubishi's bid for Coal & Allied Industries). In addition to the deals that were included in our survey, there were a number of bear hug proposals announced which did not result in a deal. However, for those bear hug proposals which did lead to an announced transaction, 75% of those which had completed by the end of 2011 were successful.

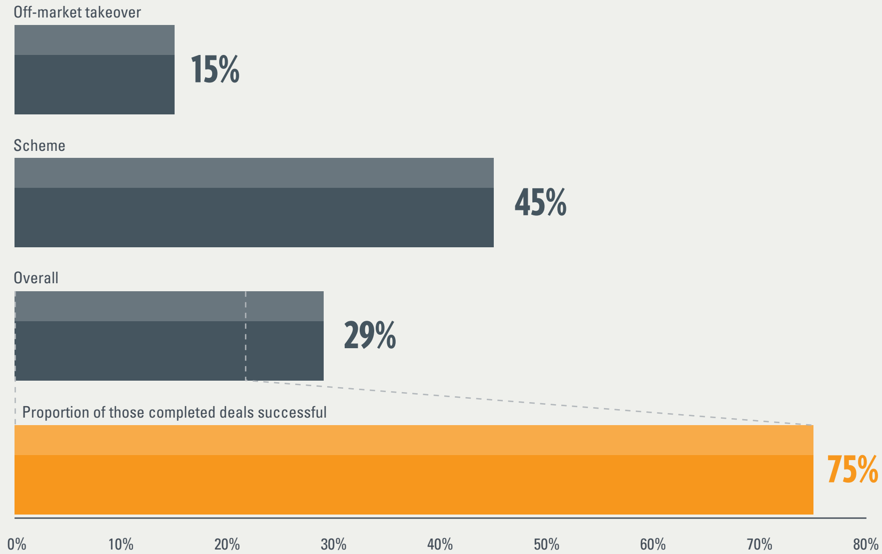
Bear hugs are driven by the bidder's desire for target co-operation – particularly those bidders who wish to use a scheme of arrangement or who need to gain access to due diligence before committing to a deal. 45% of the scheme transactions in 2011 started with a bear hug proposal. This tactic is also commonly used where a bidder suspects it will not be welcomed with open arms by the target, requiring the bidder to use other strategies to put pressure on the target to let it in the door. In particular, the bear hug is used to bring the proposal to the attention of target shareholders in the hope that shareholders will pressure the board to negotiate with the bidder.

While the increasing prevalence of such tactics has seen some in this market advocate the need for a "put up or shut up rule" (such as exists in the UK), the general sentiment in the market supports the view of the Australian Takeovers Panel that there is no pressing need for such a rule in Australia. This is despite the fact that the UK Takeovers Panel in 2011 tightened its rules further to reduce the period of time that a target can be exposed to a virtual bid without any actual bid eventuating.

NO PRESSING NEED FOR "PUT UP OR SHUT UP" RULE IN AUSTRALIA

While there does appear to be an increasing propensity for shareholder activism where a target board rejects a bear hug proposal, there does not seem to be any evidence that boards of Australian targets are constrained in running the business of the company in its usual course or are otherwise being held hostage by the existence of a rejected virtual bid. The Takeovers Panel's "Frustrating Action" policy allows targets to press ahead with initiatives which might otherwise appear to frustrate a virtual bid. Complying with this policy enables the boards of Australian targets to carry on business as usual as well as implement important strategic objectives, thus obviating the need for any new rules.

Proportion of deals initiated by 'bear-hug' approach and proportion of those which successfully complete



3.3 COMPLETION AND COMPETING OFFERS

Conventional wisdom is that it was much harder in 2011 to get deals over the line. In fact, our survey reveals that this sentiment perhaps relates more to deals which did not even make it to the starting line (ie. weren't even publicly announced).

Of the deals which were announced in 2011 and had completed by the end of 2011, 83% completed successfully, with schemes and takeovers having the same success rate.

While deal structure itself was not determinative of success in 2011, our survey demonstrates that a target recommendation is a prize well worth seeking for two reasons:

86% OF DEALS COMPLETED SUCCESSFULLY

> Firstly, a recommendation significantly improves the likelihood of success of a deal. 86% of recommended deals completed successfully, whereas only 50% of deals which did not receive a recommendation completed successfully.

> Secondly, a recommendation will generally reduce the period of time taken to complete a transaction. The only off-market takeover which succeeded without a target recommendation (the bid for EDT Trust) took 65 days longer to complete than those that were recommended. Apart from this exception, there is little variation between the time taken to successfully complete a recommended takeover and a scheme.

Blocking stakes

The higher the level of shareholder participation at scheme meetings, the larger the shareholding that is needed to block a scheme proposal at the shareholder vote.

Our survey reveals that there were strong levels of shareholder participation in schemes of arrangement. The average shareholder turn-out for scheme meetings was 65%.

With a 65% turn-out at the scheme meetings, a 16.3% stake would be required to defeat the scheme of arrangement. This is significantly higher than the 10% stake needed to prevent a takeover bidder acquiring 100% of the target.

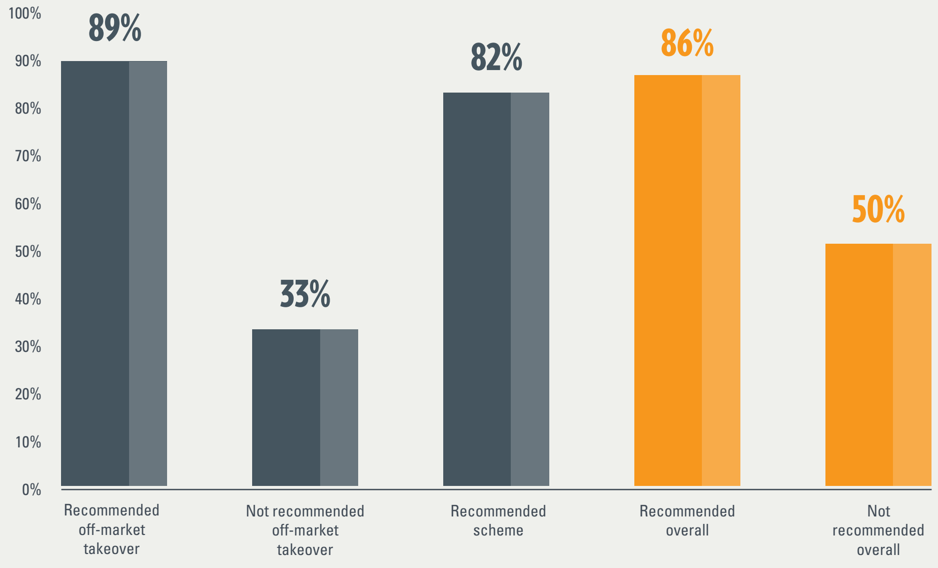
There were a variety of reasons why 17% of completed deals were unsuccessful in 2011. Three deals failed because of failure to satisfy a minimum acceptance condition or achieve sufficient shareholder votes on the scheme. Only one deal failed as a result of a regulatory condition not being satisfied (and that was an unusual case, where the failed bid was conditional on ASIC not granting relief to a competing bidder). The remaining deals failed for reasons including:

> inability to secure funding,

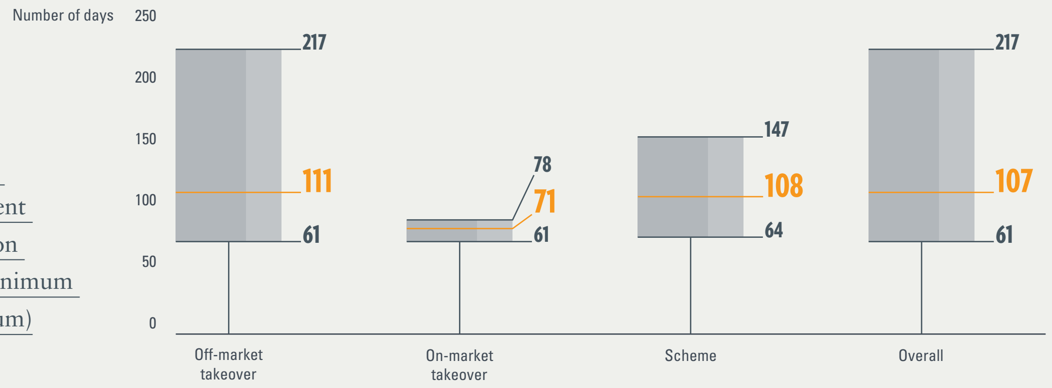
> change of recommendation of the target board following an independent expert's opinion that the transaction was not fair and reasonable or in the best interests of target shareholders; and

> termination following a proposed change in law triggering a material adverse change condition.

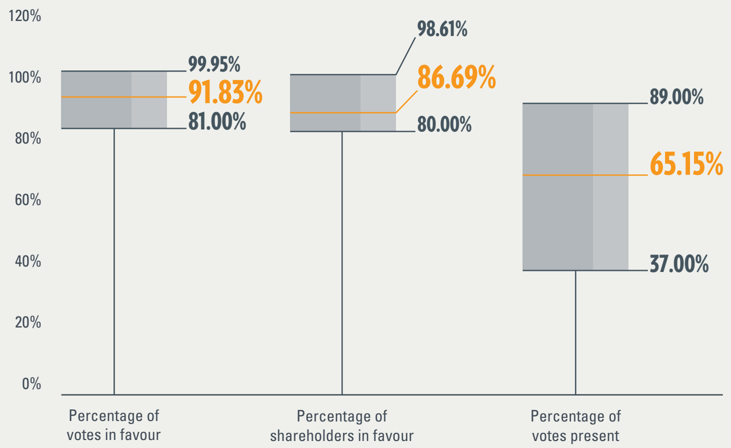
Proportion of completed deals which are successful by structure and recommendation



Period from announcement to completion (average, minimum and maximum)



Voting at scheme meetings (average, minimum and maximum)



4. CONSIDERATION

4.1 NATURE OF CONSIDERATION OFFERED

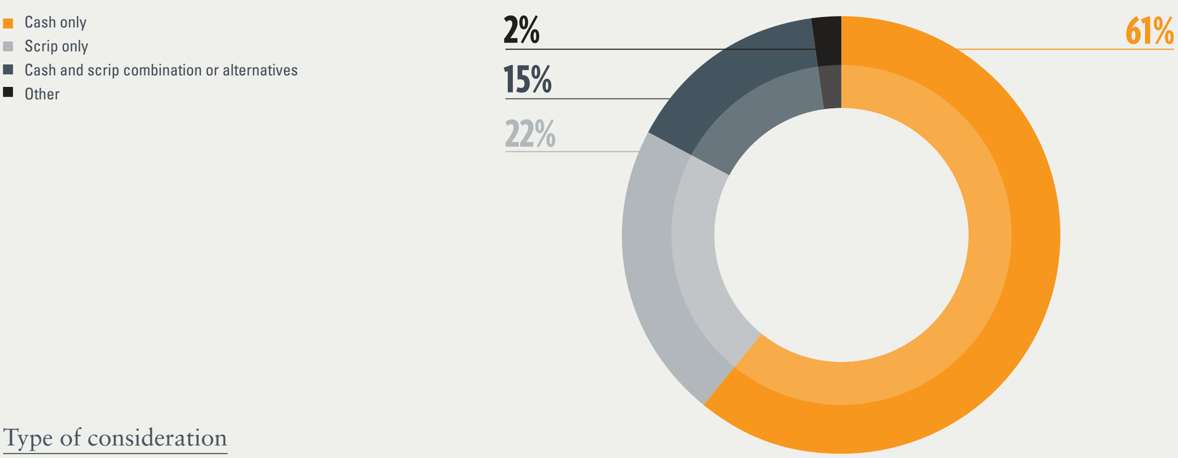
CHOICE OF CASH AND SCRIP FORMS OF CONSIDERATION

CASH WAS IN THE ASCENDANCY DURING 2011

61% of deals offered cash only consideration and a further 12% offered a full cash alternative as well as scrip. This is an increase on 2010, where only 50% of deals offered cash only consideration. Only 22% of deals in 2011 offered scrip only consideration.

The preference for cash was more pronounced in foreign bids, of which 82% were cash only offers. This is likely a result of the additional issues those bidders face in making a liquid market for the scrip readily available to Australian target securityholders, educating those investors about the bidder and complying with the applicable disclosure requirements.

The overall preference for cash is likely due to a combination of factors including market volatility resulting from the uncertainty in Europe, the discount at which prospective bidders' shares have been trading, the reluctance of target boards to form a view on the value of scrip offered when recommending a deal, the extent to which Australian companies had recapitalised by equity raisings in 2009 and 2010 and the number of foreign bids for Australian assets.



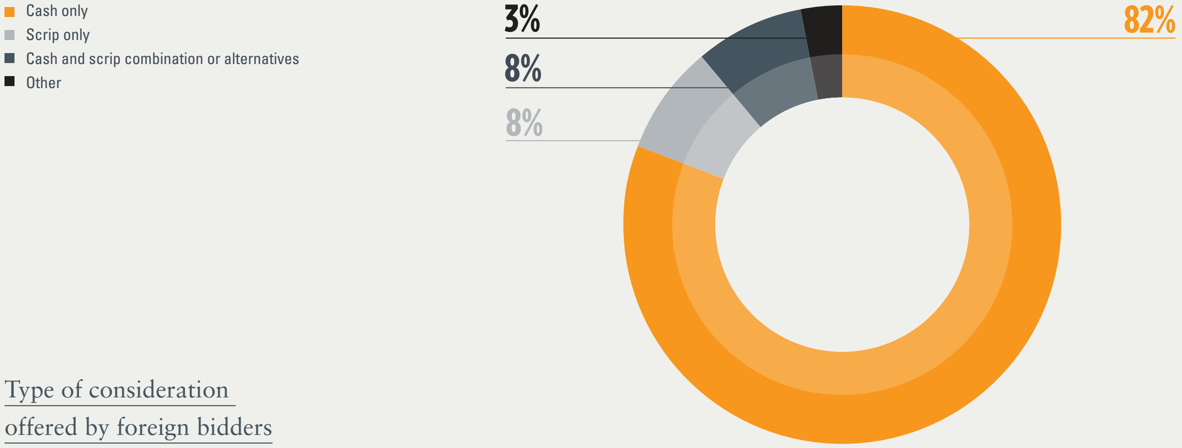
Type of consideration

PROPORTION OF DEALS OFFERING CASH ONLY WAS HIGHER IN 2011 THAN 2010

The potential difference between the relative worth of scrip and cash consideration in the current market was highlighted in Santos's successful scheme acquisition of Eastern Star Gas (ESG).

While the independent expert found that the scheme of arrangement under which Santos scrip was offered was in the best interests of shareholders, it concluded that the separate acquisition by Santos of TRUenergy's 4% stake in ESG for cash (not Santos scrip) disadvantaged all other shareholders (who were to receive scrip under the scheme). The reasoning was that TRUenergy would receive the certainty of cash consideration and a higher price, while the Santos share price had fallen since the date of announcement of the transaction. As a result the independent expert found that the acquisition from TRUenergy for cash was neither fair nor reasonable.

Because the economic effect of this on shareholders was not material in the context of the overall deal, the vote was still carried in respect of the acquisition from TRUenergy as well as the scheme itself. The example also highlights the value for target securityholders of the scrip downside protections discussed on the following page.



Type of consideration offered by foreign bidders

SCRIP DOWNSIDE PROTECTION

Where scrip was offered by bidders, scrip downside protection mechanisms were not common during 2011, although there were a small number of examples.

Only one out of the 13 scrip only deals and three out of all 23 scrip deals included protections against bidder share price falls by way of a floating exchange ratio based on a particular trading period after the deal was announced. These floating exchange ratio mechanisms give shareholders more bidder shares to compensate for share price falls over the relevant period. The other scrip transactions offered shareholders a fixed number of bidder shares for each target share, giving the target shareholder the risk of falls, but equally the benefit of rises, in the trading price of bidder shares.

In each of the cases where a floating exchange ratio was used it was not subject to any floors or ceilings which would cap the number of shares the bidder is obliged to issue or the implied value which target shareholders receive. Targets will obviously resist any attempt to cap the level of downside protection. However, it might be acceptable to cap the level of downside protection if the target is given a right to terminate the transaction in the event that the value of the bidder scrip falls below the floor at which the protection is capped.

A different mechanism for providing downside protection is the current all scrip merger between Gloucester and Yanzhou Coal. Here Yancoal is offering Gloucester shareholders Yancoal shares which will become quoted on ASX as part of the transaction. However, because these Yancoal's shares have not yet traded on ASX, Yancoal is also offering Gloucester shareholders additional compensation if these shares trade below a sustained level. This protection will be provided to Gloucester shareholders through the issue of a further class of shares called "contingent value rights shares".

Litigation claim securities

Another good example of how bespoke securities can be used to ensure that target securityholders do not miss out on contingent value attributable to their securities that a bidder is not prepared to pay for at the outset is provided by the novel litigation right securities issued by the bidder for Centrebet International. These securities were designed to deliver to target securityholders a proportion of any proceeds later received by Centrebet International following the resolution of GST litigation which was on foot at completion of the deal.

3 OUT OF 23 SCRIP DEALS HAD A FLOATING SCRIP EXCHANGE RATIO

Use of unlisted/stub-equity scrip

While most scrip bids offered listed securities as consideration, there were several deals offering scrip consideration in the form of stub-equity or unlisted equity in an ultimate holding vehicle of the target. For example, the consortium bidder in ConnectEast offered scrip consideration in an unlisted registered managed investment scheme as well as all cash. The cash consideration was within the valuation range of the independent expert, whereas the scrip consideration was valued by the expert at a materially lower range due in part to minority interests, fees and limited liquidity. While the cash consideration was recommended by the target board, the board made no recommendation in respect of the scrip consideration. Ultimately the designated minimum number of elections to receive scrip consideration was not achieved and so no scrip was ever issued under this deal. Another example is CHAMP's bid for oOH!media, where CHAMP offered part stub-equity consideration as well as a full cash alternative. While not common, stub equity as a form of consideration can be useful where there are particular shareholders who are identified as wanting to retain exposure to the target who are comfortable holding scrip as a minority in an unlisted entity.

OTHER MEANS OF DELIVERING CASH CONSIDERATION TO SHAREHOLDERS AS PART OF TRANSACTION

SPECIAL DIVIDENDS WERE DECLARED IN 10% OF ALL DEALS

There were a number of deals announced in 2011 where targets proposed to declare special dividends or undertake reductions of capital in connection with a takeover as a means of delivering additional cash to target securityholders as part of the takeover.

Both types of distribution can assist the bidder by providing part of the cash consideration to target securityholders and reducing the bidder's own funding requirements (assuming that the bidder does not fund the distribution). Dividends can also be a useful means of providing additional value to some target securityholders if the target has surplus franking credits available to be distributed which the bidder may be willing to forgo if they are worth more in the hands of target securityholders than in the hands of the bidder (because, for example, the bidder is foreign).

A special dividend was declared in connection with 10% of all deals in 2011 and interestingly, in each case the bidder was foreign. The target also funded the dividend in the vast majority of cases. Capital reductions were proposed in connection with only two deals. In all cases, the tax treatment of the distribution is important and is usually the subject of an ATO ruling (see graph on following page).

4. CONSIDERATION

Deals where consideration included special dividend

TAX TREATMENT OF DIVIDENDS/CAPITAL REDUCTIONS

The difference in tax treatment of different forms of consideration was highlighted in offers made subject to obtaining a favourable tax ruling.

Depending upon the shareholder base, consideration in the form of capital (either a capital reduction or consideration for the securities) may be more attractive to shareholders than dividends given concessional tax rates on capital gains for resident individuals, trusts and superfunds and zero tax rates for non-residents where the target is not land-rich. However, in certain circumstances, all or part of a capital reduction that is paid by a target in substitution for a dividend may be treated by the ATO as a dividend that is both taxable as income and unfrankable by the target.

An example of a capital reduction being proposed to deliver part of the cash consideration was SABMiller's bid for Foster's Group, where part of the $5.40 cash consideration was originally to be funded by Foster's through a capital return subject to a tax ruling. The $5.40 consideration in that deal initially comprised of $5.10 consideration under a scheme of arrangement and up to a $0.30 capital return by Foster's. However, the amount of the capital return was subject to obtaining a tax ruling that it would not be treated as a dividend for Australian income tax purposes. When the parties were unsuccessful in securing that ruling to their satisfaction, shareholders were provided with $5.40 from SABMiller under the scheme and the proposed capital return was withdrawn.

Dividends declared in connection with a deal are taxed as income in the hands of the securityholders and are generally frankable by the target. However, if a dividend is characterised as forming part of the consideration received by the securityholders for their securities, then it is possible that certain securityholders could be in effect double-taxed on the distribution (double taxation will arise only to the extent a capital loss would be made if the distribution did not form part of the consideration received for the securities).

Whether or not a distribution is determined to form part of the consideration received by the securityholders for their securities depends upon the connectedness of the distribution and the acquisition of the securities.

Of the special dividends declared in connection with deals in 2011, the tax treatment varied, with some found to form part of the consideration and some not. For example, special dividends paid by CPI Group and SunRice (both of these deals were too small to be included in our survey) were each included in the consideration received by securityholders for CGT purposes. By contrast, the RP Data special dividend of $0.05 was not treated as CGT disposal proceeds for scheme participants. The fact that the bidder funds the dividend is one common reason for concluding that a dividend is so connected with the acquisition that it should form part of the consideration.

THE TAX TREATMENT OF THE DISTRIBUTION IS IMPORTANT

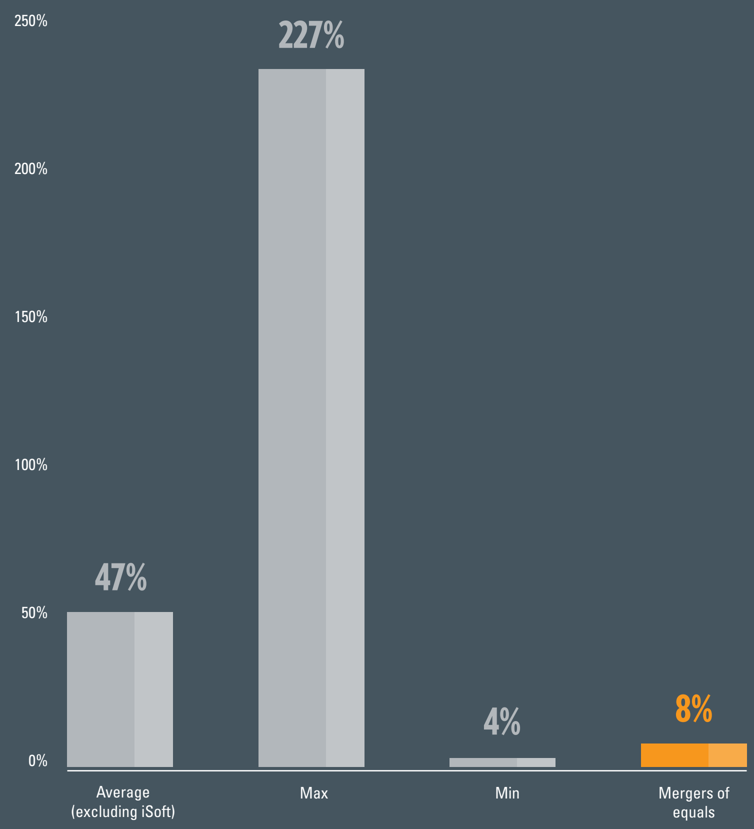
It is interesting to note in this context that, in the merger between Gloucester Coal and Yanzhou Coal, it is proposed that Gloucester securityholders receive both a special dividend and a capital return. Further, in contrast to the Foster's proposed capital return which was interconditional with the scheme (and would not proceed unless the scheme also proceeded), the Gloucester capital return and special dividend are not technically conditional upon the merger, however a record date for these entitlements will only be announced after the Court's approval of the scheme. While this may not affect the determination of whether or not the capital return is treated as a dividend, it may assist in obtaining a ruling that the special dividend does not form part of the consideration received for the target shares, and the potential double taxation issues described above might thereby be avoided. Each party in the Yancoal merger is entitled to terminate where a favourable tax ruling is not obtained in this respect.

4.2 PREMIUM FOR CONTROL

The average premium for surveyed deals in 2011 (excluding mergers of equals) was high at 51%. The highest premium paid was for iSoft Group Limited at 227%. If this outlier is removed, the average was still 47%. The substantial average had two causes:

- many of the targeted stocks were trading at a discount due to the generally depressed market sentiment which prevailed for most of the year; and
- the high premia being commanded for energy and resources companies.

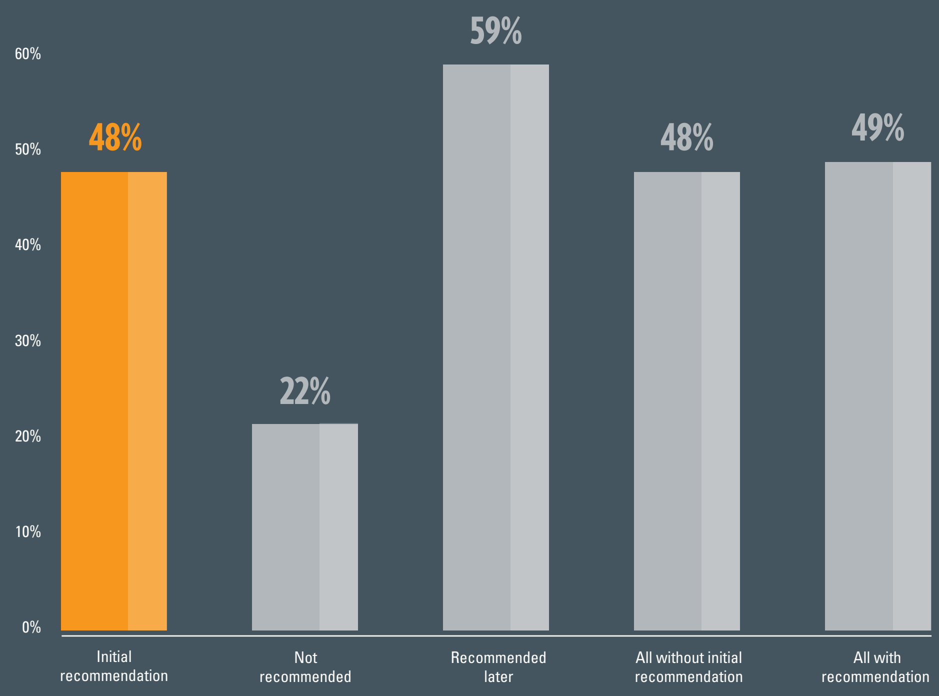
Basic statistics on deal premia



AVERAGE PREMIUM IN 2011 HIGH AT 51%

AVERAGE PREMIUM ALMOST 10% HIGHER IN SUCCESSFUL DEALS

Average premium offered for different recommendations



The statistics also show a positive correlation between the size of the premium and both a recommendation from the target board and the success of the transaction. The average premium offered in the five deals which were not recommended was 22% whereas the average premium in the 44 recommended deals was 49%. The average premium paid in successful transactions was almost 10% higher than that paid in unsuccessful deals.

Interestingly, our survey also suggests that a higher average premium was paid to secure a recommendation in deals which did not have an initial recommendation – that is, the economic cost of getting a recommendation after announcement was higher (although note this average is inflated by the premium of 99% paid for National Hire Group).

4.3 CHANGES IN CONSIDERATION

15% of surveyed deals that were announced and completed in 2011 involved an increase in the size of consideration following the initial announcement of the transaction; in those cases the average of the increase was 16%. There was a range of reasons for increasing the price following initial announcement including to gain the support of shareholders, whether by accepting an offer or voting in favour of a scheme, to secure a target board recommendation or to match a competing offer.

TARGETS EXTRACT PRICE INCREASE IN RETURN FOR RECOMMENDATION

Of the 17 transactions announced following a bear hug approach, 59% were announced at a higher price than the price at which the bear hug approach was made, one deal was announced at a slightly lower price and 35% were announced at the same price. Each announced deal following a bear hug had an initial recommendation in all cases, except Macarthur Coal where PEAM later increased the consideration by 5% to secure a recommendation. The average increase in price between the bear hug approach and the announced deal was 7% and in each of those cases the reason for the increase was to obtain the target's agreement to propose a scheme.

15% PROPORTION OF DEALS WHERE INITIAL CONSIDERATION INCREASED

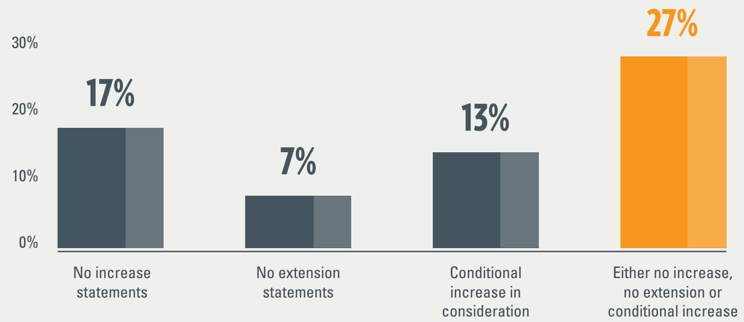
16% AVERAGE LEVEL OF INCREASE

47% AVERAGE INITIAL PREMIUM FOR THOSE DEALS

4.4 NO INCREASE, NO EXTENSION STATEMENTS AND CONDITIONAL INCREASES

Despite the large premia offered in most of the surveyed deals, binding no increase, no extension and/or conditional increase statements were made by bidders in 27% of the takeovers surveyed, with a view to further encouraging shareholders to accept the offer.

Statements to encourage acceptances in takeovers



EXAMPLES HIGHLIGHT FLEXIBILITY OF AN ANNOUNCED CONDITIONAL INCREASE

Seven's bid for the minorities' shares in National Hire was one such case. Seven had approximately 66% of the shares in National Hire and launched a takeover offer for the remaining shares. Seven initially offered a base offer price of $3, to increase to $3.60 if it reached the compulsory acquisition threshold by the end of the offer period. The independent expert opined that the offer was not fair but reasonable and gave a valuation range of $3.66 - $4.30. Seven:

- subsequently increased both tiers of the offer such that the base offer price was $3.35 and would increase to $3.75 if it reached that same threshold by the end of the automatically extended offer period;
- declared that it would not increase the offer price above $3.75;
- extended the offer period; and
- stated that it intended to delist National Hire from ASX.

Increasing the two-tiered offer price secured an unqualified recommendation from two of the three independent directors, and ultimately sufficient acceptances to allow Seven proceed to compulsory acquisition.

A similar two-tiered offer strategy has been adopted in a number of other deals including Rio Tinto's bid for Riversdale Mining.

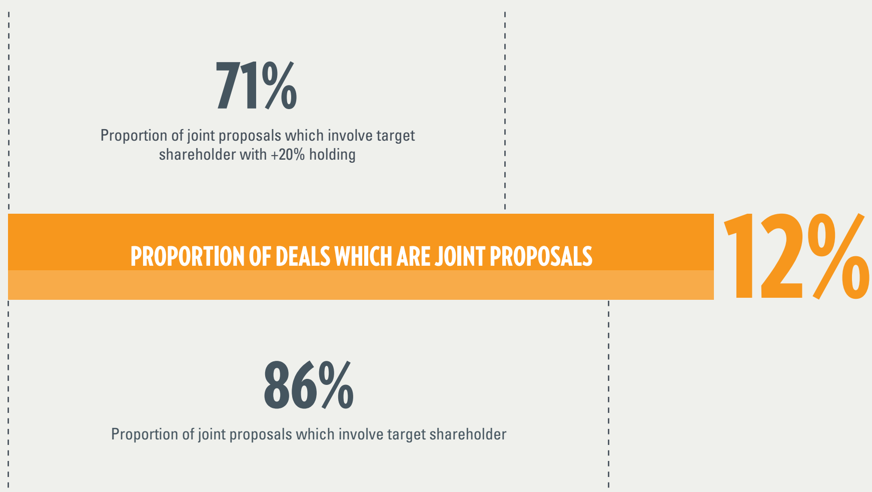
These cases highlight the flexibility of an announced conditional increase over a no increase or no extension statement. If a no extension or no increase statement does not achieve the desired result, a bidder can be left with limited options to pursue the deal (consider APA's bid for Qantas in 2007 where insufficient acceptances were received by the no extension date).

It is also interesting to note that no increase statements were made in connection with two schemes of arrangement in 2011. ASIC has confirmed that its "truth in takeovers" policy applies equally in the context of schemes and takeovers.

4.5 JOINT PROPOSALS

Multiple parties increasingly combined to put joint proposals to targets in 2011, following the success of AMP's acquisition of AXA Asia Pacific Holdings and the Goodman Consortium acquisition of ING Industrial Fund, which both completed in 2011. Joint proposals accounted for 12% of all surveyed deals in 2011 compared with 4% in 2010.

Joint Proposals



Joint proposals range in what they seek to achieve. Some are structured as simple joint ownership proposals for the target, while others are structured as target acquisitions by one party and then on-sales of certain target assets to another party.

Examples of joint proposals announced in 2011 included:

- the Liberty/Foxtel proposal in respect of AUSTAR (in which Liberty holds an existing 54% shareholding);
- the Horizon Consortium proposal in respect of ConnectEast (in which Horizon had a 35% interest);
- the Peabody/Arcelor Mittal proposal in respect of Macarthur Coal (in which Arcelor Mittal had an existing 16% shareholding);
- the Santos/TRUenergy proposal in respect of Eastern Star Gas (in which Santos had an existing 19.99% shareholding and TRUenergy had an existing 4% shareholding);
- the Rio Tinto and Mitsubishi Development proposal in respect of Coal & Allied (in which Rio and Mitsubishi had 76% and 10% shareholdings respectively).

Joint bidders who control in aggregate more than 20% of the shares in the target still have flexibility to pursue such joint proposals under the Corporations Act, subject to obtaining ASIC relief or obtaining target shareholder approval. The price of obtaining ASIC relief may be that the joint bidders who each hold substantial stakes have to accept a competing offer that they are not prepared to match. This is obviously an important factor in deciding whether to instead seek shareholder approval.

Structuring considerations (where, for example, shareholders in a target combine to make a jointly sponsored bid in order to ultimately divide up the target's assets between them) will continue to support the popularity of the scheme of arrangement as an alternative transaction structure to the takeover bid (five of the seven joint proposals in 2011 were structured as schemes), schemes will also be utilised if the proposal involves a major shareholder which is treated differently to the others (see below).

JOINT PROPOSALS ACCOUNTED FOR 12% OF DEALS IN 2011

4.6 EQUAL TREATMENT

In broad terms, under a takeover bid, a bidder must offer the same consideration to each shareholder and is generally restricted from offering one shareholder a collateral benefit that is not offered to all other shareholders. These rules do not strictly apply to schemes of arrangement proposed by a company under the Corporations Act. While ASIC will always closely consider such principles of equality in connection with its review of a scheme proposal, there is more scope to pursue such arrangements in conjunction with a scheme but generally only after:

- fully disclosing the arrangements to all shareholders whose shares are to be acquired under the scheme, so that they vote on the scheme on a fully informed basis;
- excluding from the shareholders who are entitled to vote on the scheme any shareholders who are to benefit from such arrangements; and
- possibly dividing these different shareholders into separate classes who will each vote on the scheme in their own class.

A good example of these principles being applied by ASIC is the acquisition by scheme of iSoft Group Limited by Computer Sciences Corporation. As part of the transaction, the bidder provided funding to the target to pay out, before maturity, convertible notes held by a significant shareholder at their full face value. ASIC formed the view that the payment in full could amount to a collateral benefit and indicated that it would seek to intervene and oppose the scheme unless the expert provided a valuation of the notes to be disclosed in the scheme booklet and the noteholders voted on the scheme as a separate class. ASIC decided not to oppose the scheme only after the target made the suggested disclosures and proposed that the noteholders vote separately.

DEALS DEMONSTRATE POTENTIAL FLEXIBILITY OF SCHEMES TO OFFER DIFFERENT CONSIDERATION

4.7 FUNDING OF CASH CONSIDERATION

MAJORITY OF CASH DEALS FUNDED FROM EXISTING RESOURCES

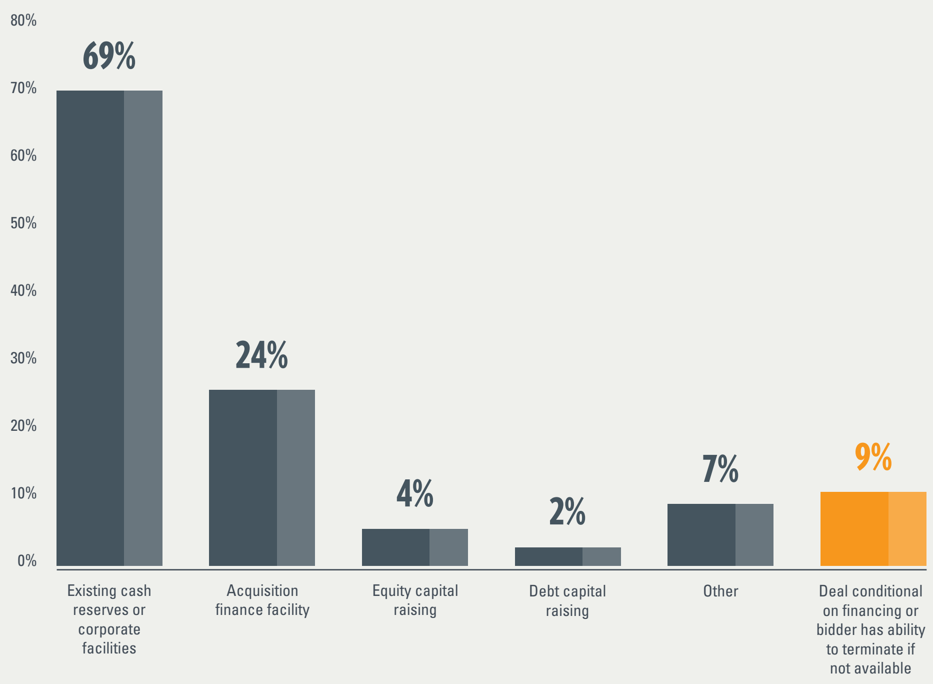
In early 2011, it looked as though banks were at last starting to adopt a more relaxed approach to debt financing for public M&A transactions, both in respect of pricing and terms. As the year progressed however, the effects of the Euro zone debt crisis, and the continuing uncertainty regarding the prospects, timing and implications of any resolution of that crisis, translated into a greater reluctance by banks to provide debt funding for acquisitions.

76% of deals in 2011 had cash consideration, and of those deals, only 24% were funded by acquisition facilities entered into specifically for the purposes of that deal. The overwhelming majority of cash deals (69%) were funded by existing cash reserves or existing general purpose facilities.

Reflecting the reduced demand for equity capital raisings in 2011 as well as the high number of foreign bidders, only two deals were financed by an equity capital raising. This is hardly a surprising result, given the volatility in the markets and the need for certainty of funding, particularly if the bidder wants to secure the recommendation of the target board.

Very few deals were announced conditional on financing. This reflects the high proportion of deals funded by existing sources and the desire for certainty, particularly where a target recommendation is sought. Only one deal (Eden Petroleum's bid for Amadeus Energy) during 2011 did not complete because of a failure to obtain financing.

Funding of cash consideration



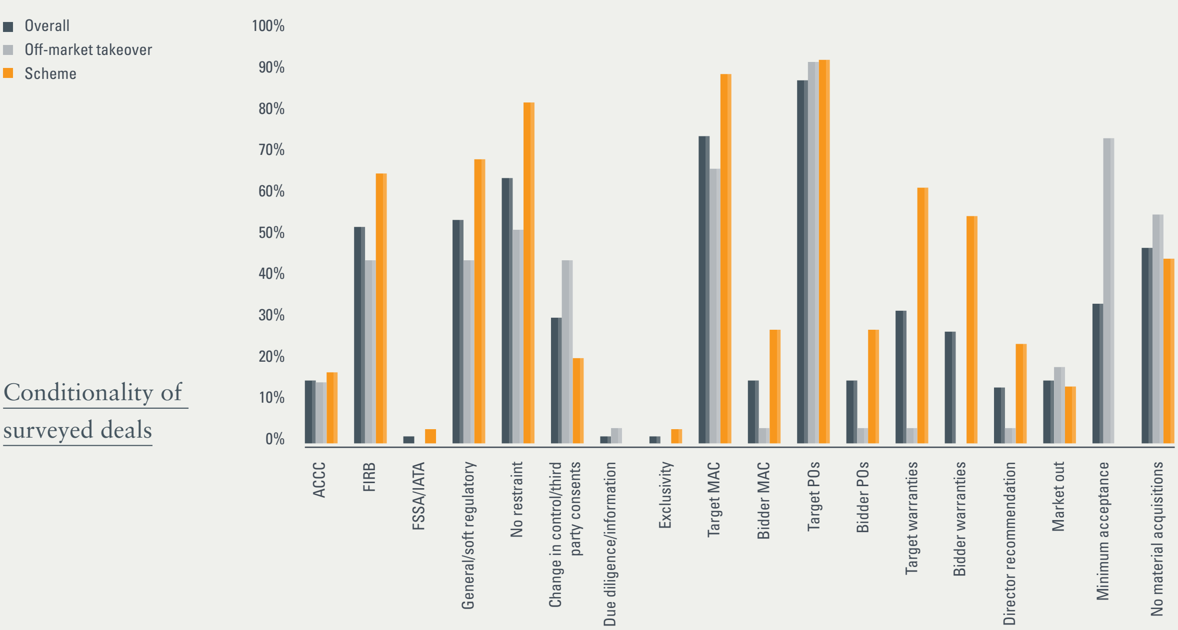
5. CONDITIONALITY

5.1 HIGH LEVEL OF CONDITIONALITY

As financial markets remained volatile in 2011, we continued to see highly conditional takeovers and schemes.

Our survey showed that a range of "optional" conditions such as material adverse change (MAC), due diligence conditions and change in control conditions were used by bidders to reduce risk. In addition, detailed conditions designed at ensuring the debt position of the target does not deteriorate, and force majeure conditions which refer to events as broadly defined as "disruptions to global financial markets", were also used.

Notably, 75% of surveyed transactions included a Target MAC as a condition.



Conditionality of surveyed deals

5.2 MARKET-OUTS

Growing economic uncertainty in the second half of 2011 caused a significant jump in the use of "market-outs" – conditions that equity or other markets (such as specific commodity prices) do not fall in value by more than a threshold amount.

The percentage of transactions which included a market-out doubled in the second half of the year. 21% of deals announced in the second half of 2011 included a market-out condition, compared with 10% of transactions in the first half of the year.

5.3 REGULATORY CONDITIONS AND FOREIGN BIDS

Commentators during 2011 often expressed the view that high levels of foreign investment conditionality undermined the success of foreign bids in Australia. In fact, while the proposed merger between the Australian Securities Exchange and the Singapore Exchange was rejected by the Australian Treasurer in 2011, none of the surveyed bids announced in 2011 with a foreign investment approval condition failed to obtain that approval.

Foreign bidders should therefore not be deterred by any perceived regulatory risk from making a bid for an Australian company. Of course, in assessing any approach by a bidder, target boards will take into account the level of conditionality attaching to any proposal by a foreign bidder, but the recent experience of foreign bidders suggests that the requirement for regulatory approvals can be managed to a successful outcome.

5.4 MINIMUM ACCEPTANCE CONDITIONS

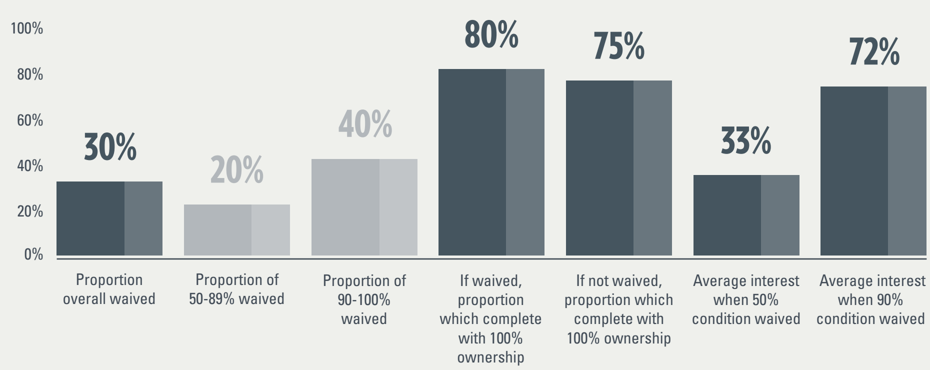
Market practice in relation to minimum acceptance condition levels in bids remains relatively evenly split between 90% thresholds (which is typically the threshold that permits a bidder to move to compulsorily acquire any outstanding minorities), and 50.1% (which is the threshold for a simple change in boardroom control).

ONLY 30% OF MINIMUM ACCEPTANCE CONDITIONS WERE WAIVED

In 2011, 74% of surveyed off-market takeovers had a minimum acceptance condition. Of those deals, 50% had a threshold of 50%-89%, and 50% had minimum acceptance conditions with a threshold of 90%-100%.

While it is common to advise bidders that any minimum acceptance condition will likely need to be waived before it is satisfied in order to reach the relevant threshold, we saw that in 2011 only 30% of the minimum acceptance conditions in off-market takeovers were waived. The survey also showed that in the significant majority of cases where the condition was waived the bidder ended up acquiring 100% of the target. Bidders waited an average period of 79 days before waiving the condition.

Waiver of minimum acceptance condition in off-market takeovers



Although 2011 saw an overall trend towards increased conditionality, this is unlikely to mean that more bidders choose 90% minimum acceptance thresholds in 2012. Despite the fact that the 90% threshold is a more cautious position for bidders to take, the minimum acceptance condition threshold is a relatively blunt tool to address the risks associated with the macroeconomic events that drove increased conditionality in 2011.

5.5 WIDER SCOPE OF EVENTS CAPTURED BY 2011 MAC CLAUSES

As noted above, material adverse change conditions (MACs) continued to be common market practice. 78% of deals allowed a bidder to walk-away because of a Target MAC. Target MACs are key for bidders who want a walk away right as protection against macroeconomic and company specific events that could affect the target during the bid period. Bidder MACs are predominantly found in schemes involving scrip consideration, as targets seek to protect the value of the consideration being offered to their shareholders.

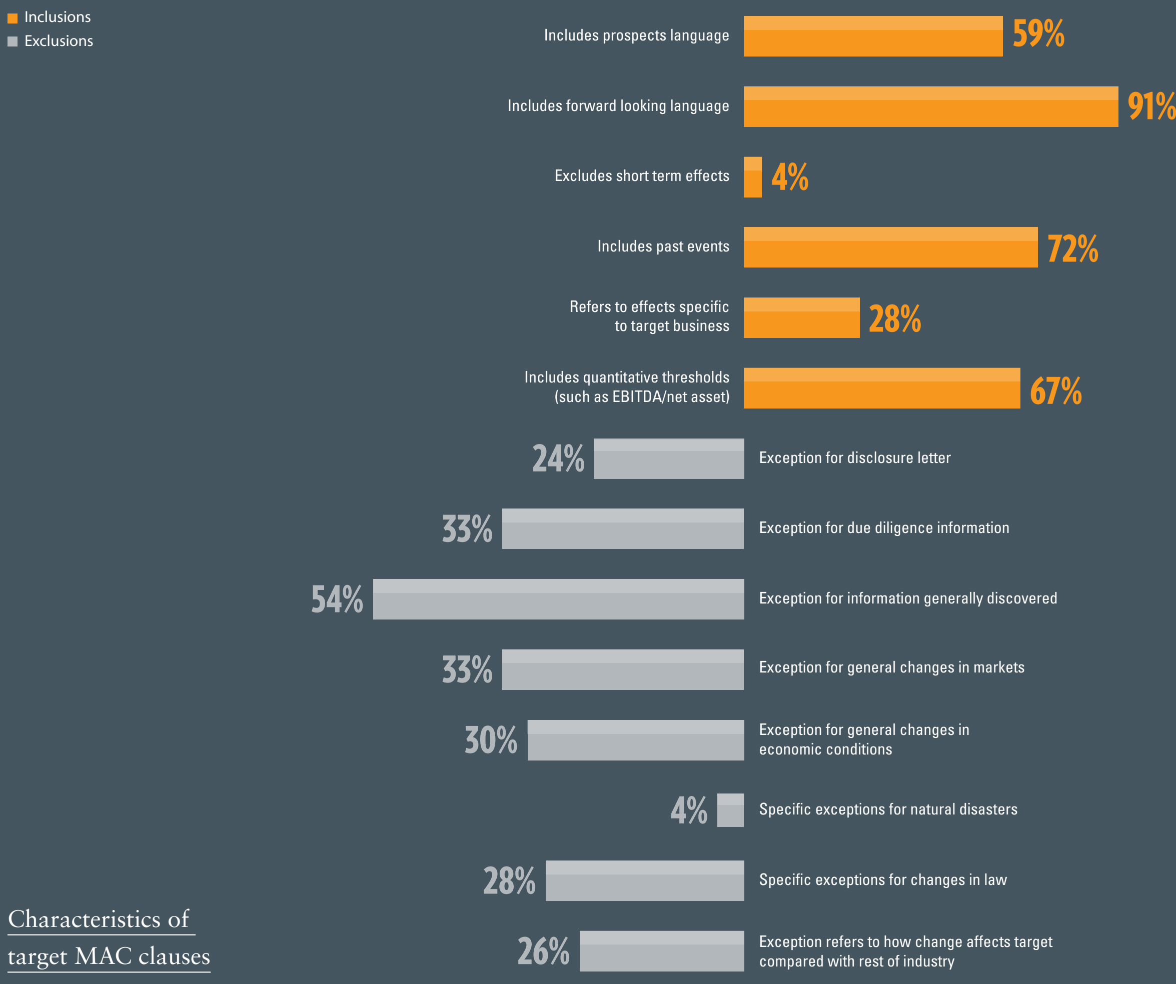
DIFFERENCES IN DRAFTING OF MACS DEMONSTRATE THEIR CAREFUL NEGOTIATION

One of the most heavily debated issues in any agreed transaction is the scope of the Target MAC clause. Target MACs are increasingly being drafted in broad terms, with the majority of Target MAC triggers in 2011 including forward looking effects, past events that become known to the bidder and events affecting the prospects of a target. However, specific quantative thresholds such as EBITDA or net asset measures are also being used. Without more specific thresholds such as these, establishing a "material adverse effect" is a high threshold for a bidder to achieve. For their part, targets are typically concerned to limit the scope of the MAC to ensure that the bidder doesn't get a "free option" over the target because the MAC is easily triggered, and that the business is not restricted from operating in the ordinary course because of a restrictive MAC.

Targets were equally concerned to minimise the exposure of their shareholders to market and economic volatility. A significant number of bidders were required to accept this volatility risk and did not have protection through the Target MAC condition for events that occurred as a result of market or macroeconomic factors. In 2011, 30% of Target MACs had an exception for general changes in economic conditions and 33% had an exception for general changes in market conditions.

Although it is generally considered difficult to demonstrate a breach of a MAC, the scheme agreement implementation for the Centrebet scheme was terminated for a breach of the agreed MAC resulting from a proposed change in law. Luckily for the bidder, the MAC was not one of the 28% surveyed which included an exception for changes in law.

78% OF DEALS ALLOWED A BIDDER TO WALK AWAY BECAUSE OF A TARGET MAC



Characteristics of target MAC clauses

5.6 TARGET BOARDS SUCCESSFULLY NEGOTIATE LOWER CONDITIONALITY IN AGREED DEALS

Bidders who switched tactics from a hostile bid to an agreed transaction have had to significantly renegotiate their conditions. SABMiller's initial takeover bid for Foster's contained stringent conditions relating to change of control, market-outs and the conduct of Foster's business; these were all absent in the subsequent (and successful) scheme of arrangement between the parties. Similarly, when PEAM secured a recommendation from the Macarthur Coal board after having launched a hostile bid, it agreed, as part of the deal to secure the recommendation, not to rely upon any of its conditions in respect of information previously disclosed to PEAM and not to rely on the MAC in respect of movements in coal prices.

Our experience is that target boards are becoming increasingly concerned to lower the level of conditionality attached to a recommended offer. This is due to their desire to deliver certainty to target shareholders following 2011's volatile market.

5.7 DUE DILIGENCE CONDITIONS USED BY BIDDERS TO PRESSURE TARGETS INTO PROVIDING ACCESS TO INFORMATION

Bidders are increasingly unwilling (and often unable, due to the terms of their debt funding) to bid for a target solely on the basis of publicly available information. Due diligence, or some other form of access to target information, is a key issue for bidders, and is required either to meet their financiers' requirements or to satisfy other stakeholders (including the bidder's own shareholders) as to the appropriateness of the offer value. Satisfying these information requirements without the full co-operation of the target is very challenging for a bidder.

One way of addressing this issue is a due diligence condition that makes the bid conditional upon the target providing the bidder with due diligence information.

ONLY ONE OUT OF NINE HOSTILE OFF-MARKET TAKEOVERS INCLUDED A DUE DILIGENCE CONDITION

However, such a condition must be worded in such a way that its satisfaction is not dependent upon the bidder's opinion, or within the bidder's sole control. The bidder cannot, for example, have a condition that the target provides the bidder with due diligence information to the bidder's satisfaction. In addition, the effectiveness of a general condition requiring that the bidder be provided with access to due diligence information is hampered by the fact that there is typically no obligation on the target to comply with such a condition. As a result of the high proportion of recommended deals, where the target will usually allow due diligence as part of the negotiations, and the limitations on the effectiveness of due diligence conditions, such conditions have not commonly been used in takeovers in recent times.

It may be that such conditions will make a comeback; the APA bid for Hastings Diversified Utilities Fund in late 2011 included bid conditions which were specifically drafted to objectively address the key issues on which APA required due diligence confirmation. APA included conditions which required the target to make public announcements of specified information in relation to the terms of its funding arrangements, the impact of change of control clauses on key contracts, and the progress of the target against key contractual milestones.

A similar condition was used by New Hope Corporation in its 2011 bid for Northern Energy Corporation, but New Hope Corporation refused to disclose the requested information in its target's statement. The Takeovers Panel found that New Hope Corporation was justified in doing so because the due diligence information sought by the bidder in that case was not material to shareholders' decision in relation to the offer.

5.8 NARROWER INTERPRETATION OF CONDITIONS

Under the Corporations Act, a bidder can't make a takeover bid conditional on the bidder's state of mind or its subjective judgement, because this would allow the bidder to effectively walk away from an offer at its discretion, with a negative impact on market integrity. In addition, bid conditions can't be so broad as to make the bid illusory. Accordingly, bid conditions in a takeover must be both objective and reasonable. In a scheme, the conditions don't have to be objective, but must be reasonable.

REGULATORS FOCUS ON THE SCOPE OF CONDITIONS

The increasing focus of target boards on bid certainty in an uncertain economic environment is resulting in a trend towards more objective scheme conditions. This is also being felt at a regulatory level, with the Takeovers Panel adopting a narrower interpretation of objective conditions in takeovers and schemes in relation to the range of circumstances that can trigger the condition.

The UK Takeovers Panel has adopted an even harsher approach, only permitting objective conditions which do not inappropriately transfer risk of unknown events from the bidder to target shareholders. Australia is still a long way from that position but it is evident that this is becoming an issue of interest for the Australian regulators.

Parties therefore need to proceed with caution when including subjective conditions in schemes, or relying on broadly drafted conditions in either a scheme or a takeover, as the flexibility in their interpretation is likely to reduce.

NGM Resources Limited

When al-Qaida raided a town in Niger (about 150 km from where NGM Resources had mining facilities), Paladin Resources invoked two defeating conditions in its bid for NGM – a force majeure clause and a MAC.

The MAC condition was that "no change occurs … which has or could reasonably be expected to have a materially adverse effect on the assets, liabilities, financial position, performance, profitability or prospects of NGM". The Takeovers Panel concluded that Paladin had not proved the requisite "material adverse effect".

The Panel held that Paladin could not establish that the events relied on had a material adverse effect on NGM Resources. This was the first time since 1982 that a bidder's purported reliance on a MAC condition has been challenged in Australia.

When negotiating MAC conditions, it is critical to include objective tests that can easily be measured, as there is a real risk that broadly defined conditions in a scheme or takeover will be interpreted narrowly by the Panel.

6. PRE-DEAL ARRANGEMENTS

6.1 MAJORITY OF BIDDERS HAVE AN INITIAL STAKE IN THE TARGET

The desire for greater deal certainty in the volatile market conditions which existed in 2011 is strongly evidenced by the overwhelming trend in favour of bidders starting an M&A deal with an initial stake in the target.

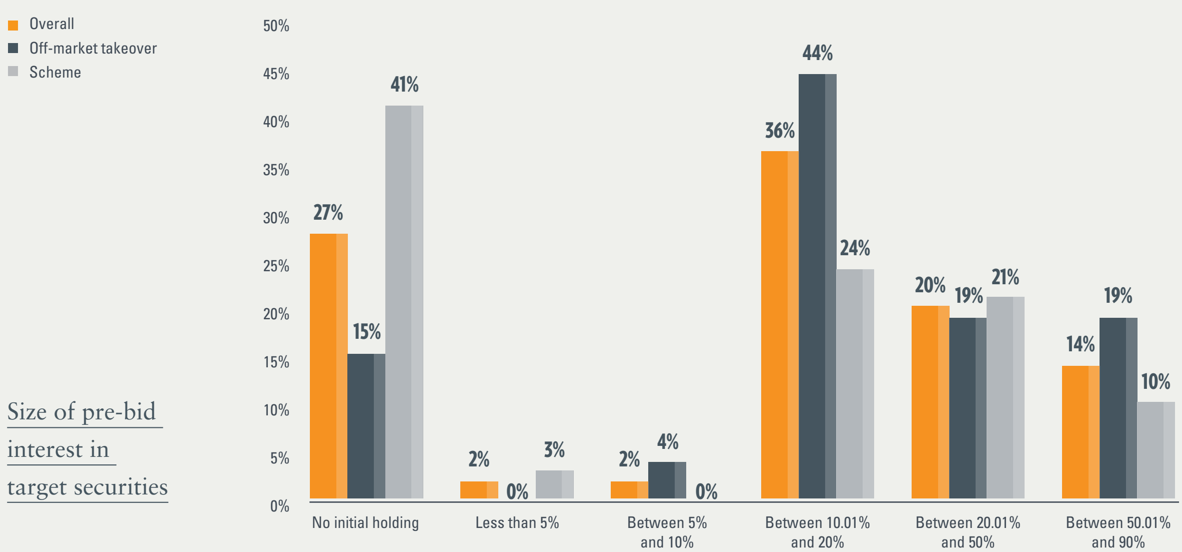
BIDDERS HAD SOME FORM OF PRE-BID STAKE IN 73% OF DEALS

In 2011, only 27% of deals saw the bidder start the process without any stake in the target.

However, the statistics do vary between schemes and off-market takeovers.

In 41% of schemes the bidder did not have an initial stake, compared to only 15% of off-market takeovers. This is due to the fact that, in a scheme, shares held by the bidder are effectively taken out of play: the bidder cannot vote on the scheme with the main body of shareholders.

In off-market takeovers, the most common initial stake was between 10.01% and 20%; 44% of off-market takeovers in 2011 had an initial stake of this size. This was due to the bidder looking to acquire as large a stake as is commercially feasible under the 20% takeovers threshold that applies in Australia.



Size of pre-bid interest in target securities

The high proportion of deals that were launched with an initial stake is evidence of what many in the markets in 2011 observed anecdotally: in order for a bidder to proceed with an acquisition, the risks needed to be mitigated as much as possible, and an initial stake in the target was a key plank in achieving that objective.

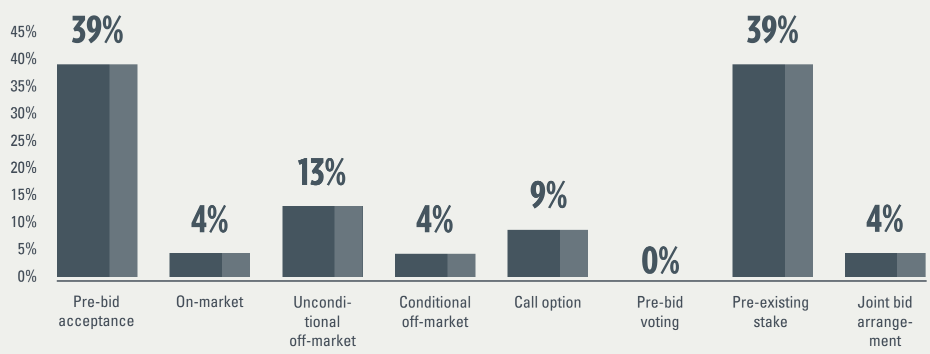
6.2 FORM OF INITIAL STAKE

The most common form of a bidder's initial stake in the target was a pre-existing stake that was not acquired as part of any pre-bid arrangements. In 2011, this type of initial stake was already in place before the bid was announced in 39% of off-market takeovers and 65% of schemes.

Stakes acquired by bidders in anticipation of making a bid took different forms, depending on whether the bid was structured as a scheme or a takeover.

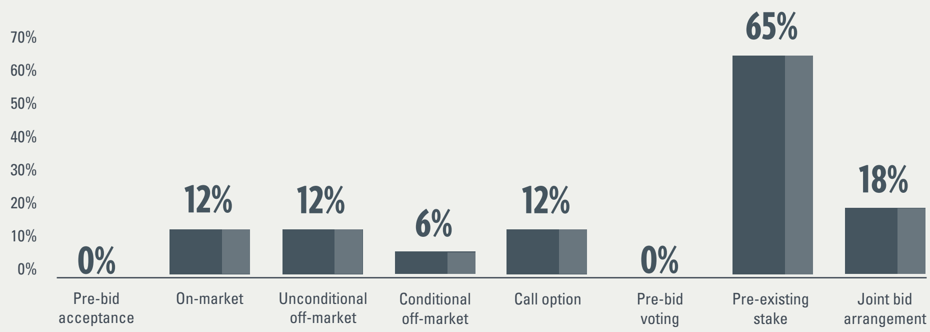
In the case of takeovers, the most common form of pre-bid stake was an acceptance agreement, where the target shareholder agrees to accept the takeover bid in certain defined circumstances.

Pre-bids for off-market takeovers



For schemes, there was no clearly preferred structure and there was a fairly even use of outright on-market acquisitions, unconditional off-market acquisitions, and call option agreements. 14% of schemes were supported by voting intention statements in support of the transaction provided by target shareholders.

Pre-scheme arrangements



Interestingly, there was only one disclosed pre-bid stake acquired by way of equity derivatives. SABMiller acquired an economic interest in less than 5% of Foster's through cash-settled equity derivatives prior to announcing its hostile takeover bid.

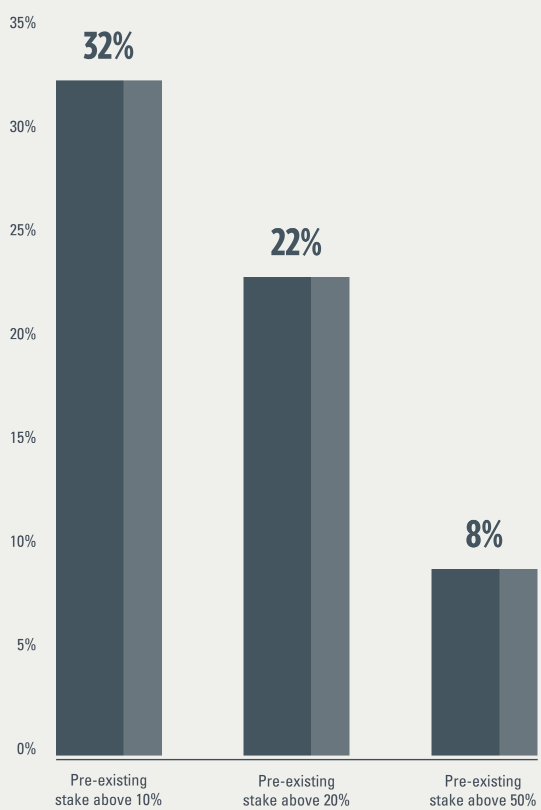
During the global financial crisis of 2008, relatively complex pre-bid agreements were developed that included structured agreements designed to share the upside from any competing offer between the bidder and the shareholder. However, such arrangements were rare in 2011, with only 11% of acceptance agreements, option agreements or sale agreements including such provisions.

6.3 MINORITY TAKEOUTS

Minority takeouts by major shareholders are common when market valuations are low: major shareholders decide that it is a good time to increase their exposure and take the company private, so that they can drive further growth in a private environment.

Minority takeouts were a key feature of the 2011 public M&A market. Seven Group Holdings' bid for the minorities in National Hire Group was one prominent example. 22% of transactions were initiated by bidders with a pre-existing stake over 20%, and 8% of deals were initiated by bidders with a pre-existing stake of above 50%.

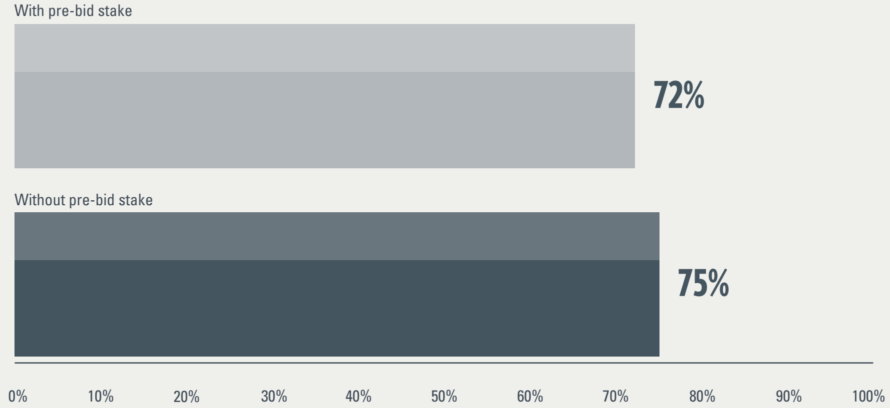
Proportion of all deals where bidder has significant pre-exisiting stake



6.4 IMPACT OF INITIAL STAKE ON TRANSACTION SUCCESS

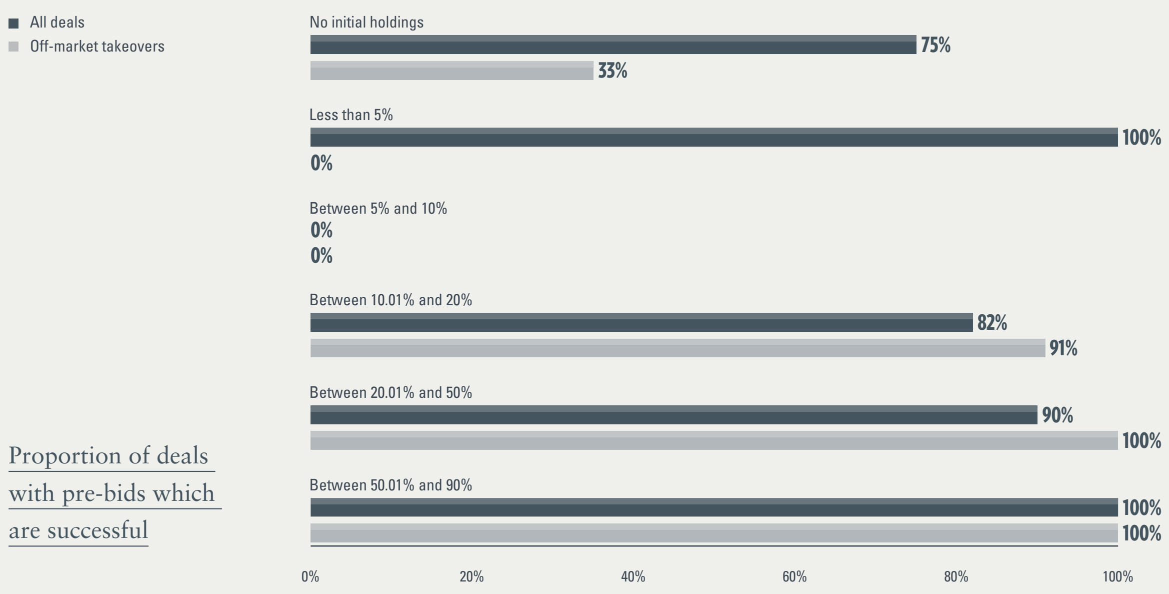
Despite the importance of pre-bid stakes in demonstrating shareholder support for the transaction and in building momentum for a deal, our survey demonstrates that in 2011 the existence of a pre-bid stake had no effect on a bidder's chances of getting an initial recommendation from the target board.

Proportion of deals which have initial recommendation



The effect of an initial stake on the success of the transaction depends on the size of the initial stake itself. With no initial holding, the likelihood of a transaction successfully completing in 2011 was 75%. With a pre-bid stake of between 10.01% and 20% the likelihood of success increased to 82%, and climbed to 90% for those 2011 deals with stakes between 20.01% and 50%.

Proportion of deals with pre-bids which are successful



7. DEAL PROTECTIONS INCLUDING BREAK FEES AND EXCLUSIVITY

In 2010, the Takeovers Panel considered deal protection mechanisms for the first time in several years. In the Ross Human Directions case, it found that specific mechanics of the exclusivity provisions agreed to between the bidder and target constituted unacceptable circumstances due to their effect on the market for competition for control of the target. While a number of the impugned features in that case were not common market practice, in 2011 we saw bidders and targets put renewed focus on ensuring that their proposed exclusivity arrangements complied with the principles behind this decision and the Panel's general policy.

DEAL PROTECTION MECHANISMS TO SURVIVE IN AUSTRALIA DESPITE CHANGES IN THE UK

In September 2011, the UK Takeovers Panel introduced provisions which prohibit break fees (except where agreed with a "white knight" or following a formal sale process) and exclusivity arrangements.

The factors which led to the introduction of the new rules in the UK do not appear to be present in the Australian market and there is no suggestion by the Australian regulators that we should adopt the radical position of the UK Panel in this regard.

Our 2011 survey supports our view that the issues which gave rise to the reform in the UK are not necessarily evident in the Australia market. Deal protection mechanisms often reflect the outcome of extensive negotiations and are not automatically agreed to just because a deal is recommended. There is also a variety of forms that such exclusivity provisions can take, again reflecting the outcome of extensive negotiation to arrive at the protections most relevant in the particular circumstances of the transaction.

There can be no doubt, however, that what becomes market practice in the UK following the introduction of these new rules will inevitably influence market practice in Australia. While it may not lead to similar regulatory intervention in Australia, targets may well feel less inclined to accept break fees and exclusivity arrangements as a matter of course, and their bargaining power in relation to these arrangements is likely to be bolstered.

7.1 BREAK FEES

75% of agreed deals in 2011 included a break fee payable by the target.

The Takeovers Panel guidance is that break fees should not exceed 1% of deal value. This 1% is effectively seen not as a ceiling but as the appropriate level for a break fee. 81% of deals (including some of the largest deals of the year, SABMiller / Foster's and PEAM / Macarthur) with a target break fee had a break fee at or around 1% of deal value.

Our survey reveals that the triggers for payment of target break fees, as well as the exceptions to the requirement to pay the break fee, are diverse and there was no consistent formulation of these triggers and exceptions. This reflects the fact that there is no generally accepted formulation for such arrangements and that they are usually the subject of extensive negotiation.

Break fees were much less common in transactions where the bidder had a pre-existing stake above 20% before initial announcement of the transaction. Only 44% of such transactions provided for the payment of a target break fee.

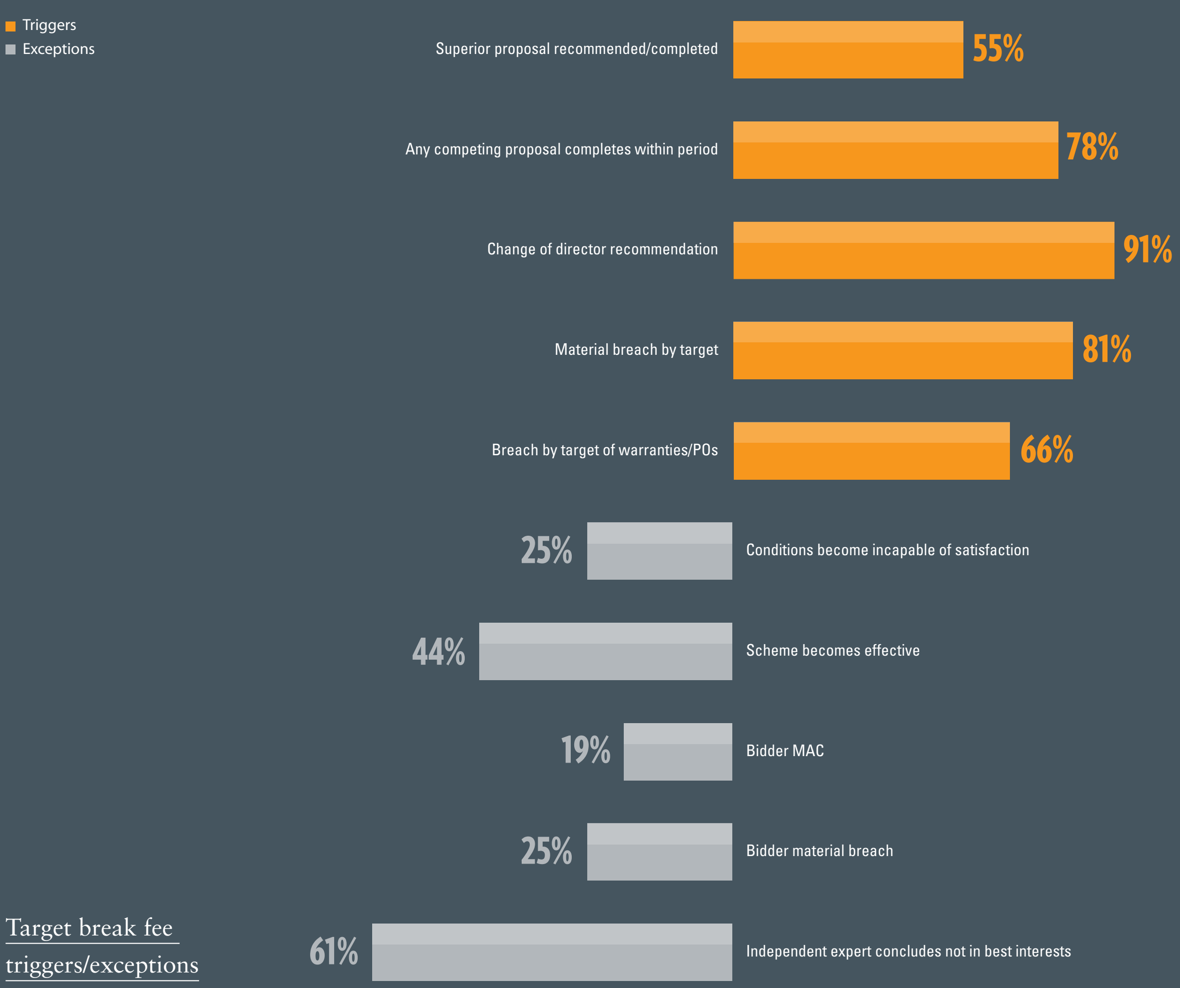
NOT ALL TARGETS AGREE TO BREAK FEES IN RECOMMENDED DEALS

7. DEAL PROTECTIONS INCLUDING BREAK FEES AND EXCLUSIVITY

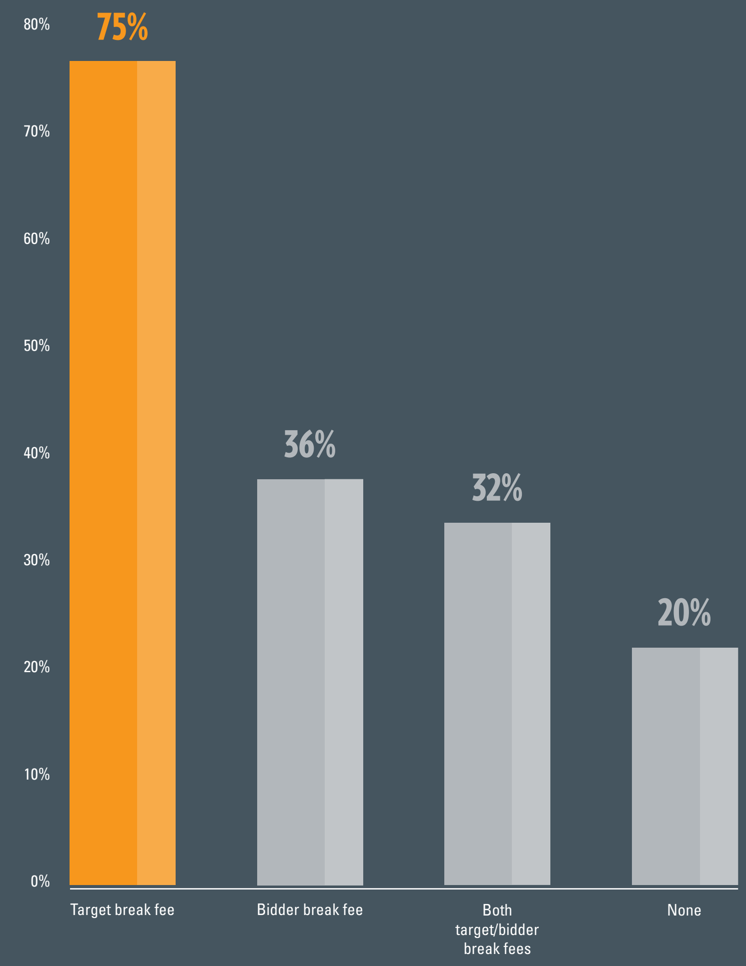
REVERSE BREAK FEES ARE AN INCREASINGLY COMMON FEATURE OF AUSTRALIAN DEALS

An interesting development in 2011 was the increasing use of reverse break fees, namely break fees payable by bidders. 36% of deals included break fees payable by bidders, and there were even two deals where a break fee was payable by the bidder even though there was no break fee payable by the target. The amount of the bidder break fee generally mirrored the amount of the target break fee – there were only three deals where the target break fee was greater than the bidder break fee.

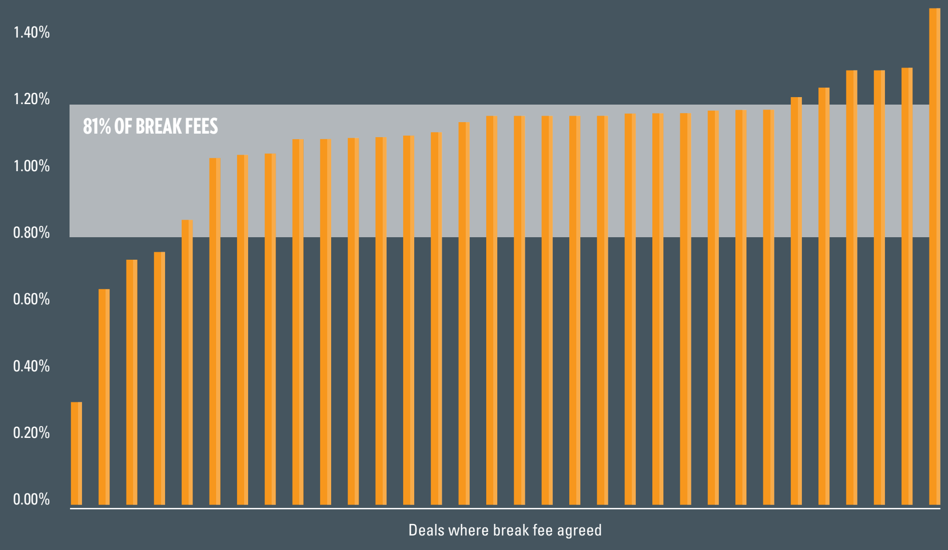
This is a symptom of the times. The uncertainty inherent in volatile markets leads to bidders needing the protection of a greater range of conditions (see Section 5.1) and in return targets are seeking some form of financial protection as compensation if a deal does not proceed.



Target break fee triggers/exceptions



Proportion of agreed deals where break fee payable



Target break fee size as percentage of transaction value

7.2 EXCLUSIVITY PROVISIONS

EXCLUSIVITY PROVISIONS WERE STANDARD MARKET PRACTICE IN 2011

In 2011, exclusivity provisions such as no shop, no talk and notification and matching rights for competing proposals were more common than break fees. 89% of recommended deals had a no shop restriction and 86% of recommended deals had a no talk restriction. 93% of agreed deals included an obligation on the target to notify the bidder of a competing proposal but only 79% of deals gave the bidder an express right to match the competing proposal before the target was permitted to terminate its arrangements with the bidder.

Where a target break fee is agreed to, breach of exclusivity provisions by the target is usually remedied by the bidder being able to terminate the arrangements and be paid the break fee. For those deals where exclusivity provisions were agreed to without break fees, bidders would need to rely on being able to establish loss sufficient to recover contractual damages

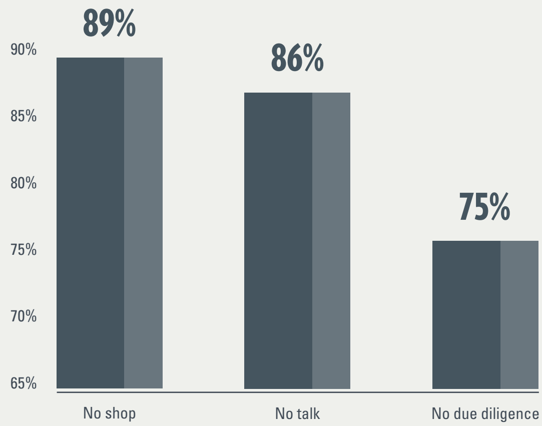
There is no established market standard for the terms of these provisions. As with the triggers and exceptions to the payment of break fees, there was again a range of exceptions to the restrictions. 40% of deals provided for an exception to the exclusivity provisions based on a general fiduciary exception rather than the need for a competing proposal reasonably expected to lead to a superior proposal.

Despite the decision of the Takeovers Panel in Ross Human Directions, it is clear that some bidders are still insisting on provisions which the Panel found were unacceptable in that case. For example, 29% of agreed deals allowed a matching right for a longer period than the maximum period of three days considered reasonable by the Panel and 13% of agreed deals imposed a requirement that, before any party could be given access to due diligence, it needed to enter into a confidentiality agreement on substantially the same terms as that which the first bidder had entered into.

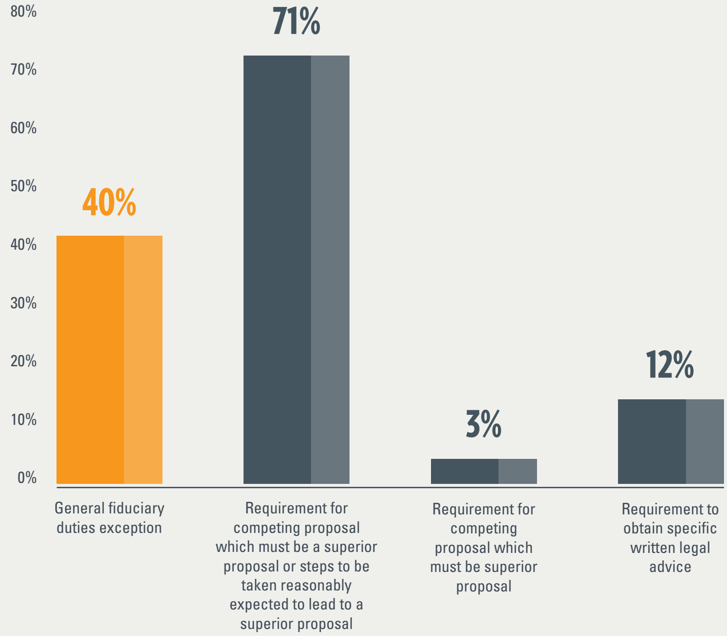
There were also a number of examples where mutual exclusivity arrangements had been agreed. Under these arrangements the bidder as well as the target is subject to no shop, no talk and no due diligence restrictions. This occurs most often in transactions which are characterised as a merger of equals. Some examples include the mergers of Endeavour Mining and Amadeus Resources, Shadforth Financial Group and Snowball Group and Gloucester Coal and Yanzhou Coal.

GENERAL FIDUCIARY OUT TO RECOMMENDATION IS STILL NOT MARKET STANDARD

Exclusivity in agreed deals



Fiduciary exception to no talk/no due diligence restriction



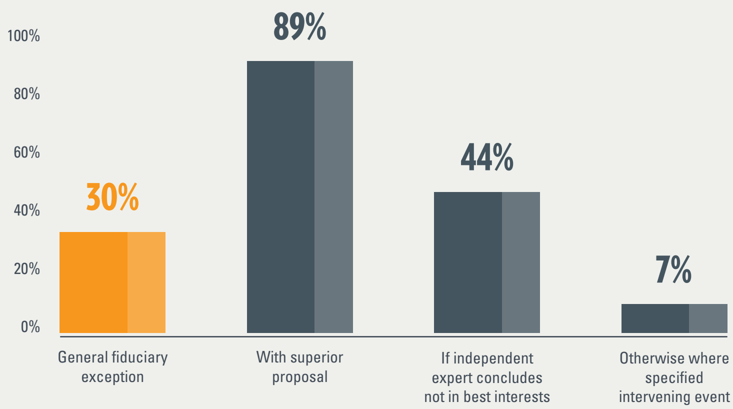
7.3 CHANGE IN TARGET DIRECTORS' RECOMMENDATION

In 79% of agreed deals, target directors could only change their recommendation in limited circumstances. The most common (89%) was where there was a superior proposal. In past years, there has been a trend for target directors to seek a general fiduciary duty carve-out to their obligation to recommend a transaction to their shareholders. While this trend was still evident in 2011, it is clear this is not yet market standard and is still subject to negotiation between bidder and target. Only 30% of agreed deals included a general fiduciary duty carve-out to the target directors' obligation to recommend the transaction.

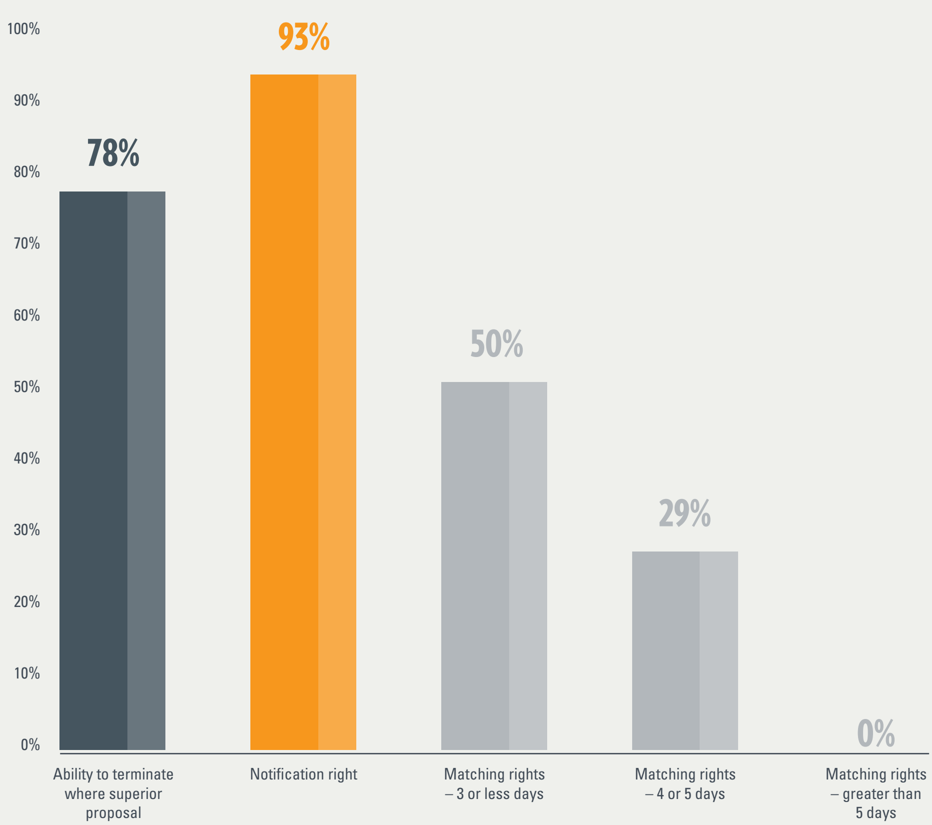
7. DEAL PROTECTIONS INCLUDING BREAK FEES AND EXCLUSIVITY

Before target directors can change their recommendation due to a superior proposal, it is now standard practice for the target to be obliged to notify the bidder of the existence of a superior proposal. However, while 93% of transactions included this notification right, only 79% of transactions gave the bidder a right to match the superior proposal before the target directors could change their recommendation or terminate the transaction.

Reasons for changing recommendation where change permitted in limited circumstances



Notification and matching rights



NOTIFICATION RIGHTS FOR A SUPERIOR PROPOSAL WERE STANDARD MARKET PRACTICE IN 2011

7.4 BOARD DECISIONS

Most implementation agreements provide that determinations of the target in relation to exclusivity are to be made by the board or an independent board committee (where relevant) without specifying what majority of members is required. However, it is interesting to note that one surveyed deal in 2011 stipulated that a determination that a competing proposal is a superior proposal, which was required to permit any director to change their recommendation, needed to be unanimous. This stipulation follows the unusual requirement in the implementation agreement for AMP and AXA SA's acquisition of AXA APH that the independent board committee make similar determinations, to trigger the exception to the no talk, no due diligence and recommendation obligations, by a prescribed majority which must comprise the Chairman as well as a majority of the other members of the committee.

The negotiation of these requirements is particularly important where there is the possibility of a split recommendation with different directors reaching different conclusions becomes more likely as evidenced by the recent examples of such recommendations (such as the response of National Hire to Seven's bid).

Similarly, it is common for the implementation agreements to provide that the break fee is payable and a termination right arises for the bidder where any target director changes their recommendation. However, the Commonwealth Bank's implementation agreement with Count Financial provided that the trigger was either that a Board majority or the Chairman changed the required recommendation. The agreement between AMP, AXA SA and AXA APH provided that the same prescribed majority needed to change their recommendation.

8. DAMAGES AND LIABILITY

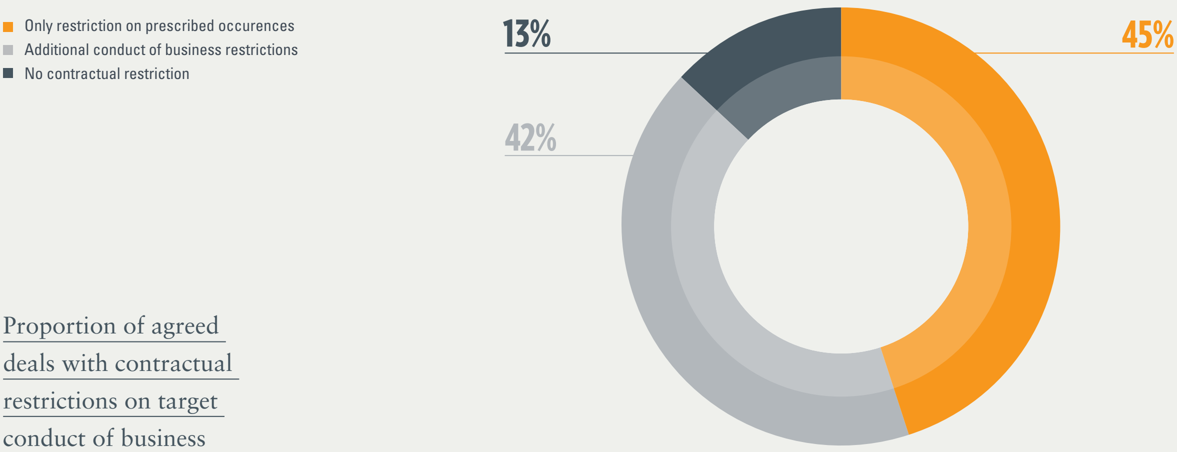
8.1 CONDUCT OF BUSINESS AND ACCESS TO TARGET BUSINESS

RESTRICTIONS ON CONDUCT OF BUSINESS AND ACCESS TO INFORMATION CONTINUE TO BE IMPORTANT TO BIDDERS

Bidders often seek restrictions on how a target can conduct its business during the bid period whether through conditions such as prescribed occurrence and MAC conditions or target undertakings.

Where an implementation agreement is agreed, the target will often be subject to restrictions in the conduct of its business. In 2011, 87% of implementation agreements included such restrictions, with many extending beyond simple undertakings not to allow a prescribed occurrence to occur and to conduct the business in the ordinary course.

Implementation agreements were also used by bidders to get access to target information, even before there was certainty that the deal would complete. 60% of implementation agreements gave the bidder the specific right to access target information and/or personnel for integration purposes before the scheme became effective or the takeover completed.



Proportion of agreed deals with contractual restrictions on target conduct of business

8.2 TERMINATION RIGHTS

Termination rights are a feature of scheme implementation agreements rather than takeover bids. That's because, once a takeover is proposed by a bidder, the bidder is obliged by law to proceed with the takeover and make the offer available to shareholders.

Termination rights can also theoretically be triggered in a scheme by events or occurrences that turn on the bidder's or target's opinion or a subjective rather than an objective test. This isn't the case for takeover bids because subjective conditions are specifically excluded by law.

In schemes, the extent of subjective triggers is often limited through negotiations between target and bidder. There is also the risk that any termination right which turns solely on the opinion of a party to the scheme may be challenged through the Takeovers Panel as unacceptable circumstances, perhaps on the basis that the subjective termination right is contrary to the principle that the transaction should take place in an efficient, competitive and informed market.

For example, a condition precedent in the scheme implementation agreement between BC Iron (target) and Regent Pacific (bidder) was the approval of Regent Pacific's own shareholders. Regent Pacific had an associated termination right that enabled it to terminate the transaction if its board publicly changed or withdrew its recommendation that its own shareholders approve the acquisition of BC Iron. The bidder was precluded by the Takeovers Panel from relying on this termination right because the right was not disclosed to the market – the summary of the implementation agreement that had been disclosed did not include this right.

This Panel decision highlights the importance of clear disclosure of termination rights as well as conditions precedent and other key deal terms at the time of announcement. The Panel was keen to ensure that the market is not subsequently informed that the proposal was in fact less favourable than was announced.

Interestingly, in the proposed Gloucester/Yanzhou Coal merger announcement in late 2011 there is a mutual termination right (but not a condition precedent) if an unresolved dispute arises as to the relative values ascribed to Yancoal and Gloucester during the parties' respective due diligence.

36 %

PROPORTION OF DEALS WITH TARGET BREAK FEE WHERE LIABILITY LIMITED TO THAT FEE

NO LONGER UNCOMMON TO CAP LIABILITY AT BREAK FEE BUT EXCEPTIONS ARE INCREASINGLY NEGOTIATED

17 %

PROPORTION OF THOSE DEALS WITH EXCEPTION TO THE CAP

8.3 SCOPE OF LIABILITY

An increasingly common feature of implementation agreements is a provision capping the target's liability for breach: a third of all deals in 2011 which included a target break fee also limited the target's liability for damages for breach to the break fee. Such a cap is important to the target because it may be less than the overall damages it would be liable to pay if it breached the agreement.

SOME AGREEMENTS NOW SEEK TO MAKE THE BIDDER LIABLE FOR TARGET SHAREHOLDER LOSSES

An important issue is whether the target is entitled to cap liability for all breaches of the implementation agreement at this amount, or whether there are exceptions such as wilful breach by a target or breach by a target of its exclusivity obligations to the bidder. The bidder may also similarly seek to cap its liability if it is required to pay a break fee. Again the question will be whether all breaches are capped at this amount or whether there are exceptions to the cap such as wilful breach of the agreement by the bidder.

A bidder does not have any direct liability to target shareholders under a scheme of arrangement before the time that the scheme becomes effective. Rather, a scheme bidder will primarily be liable to the target under the scheme implementation agreement. As a result, a target shareholder may find it very difficult to sue the bidder unless, for example, there has been misleading or deceptive conduct by the bidder in its involvement in the scheme. In the Eastern Star Gas scheme of arrangement the target sought to make the bidder liable to shareholders in broadly the same way that a bidder would be liable to shareholders under a takeover bid if the bid did not proceed on the same terms and conditions as announced.

The Eastern Star Gas and Aston Resources transactions were the only surveyed schemes with an implementation agreement which sought to make the bidder contractually liable for losses suffered by target securityholders in the event that the transaction did not proceed.

9. REGULATORY ISSUES

9.1 FIRB

Foreign investment in Australia is largely governed by the Foreign Acquisitions and Takeovers Act 1975 (FATA).

FATA allows the Australian Treasurer to block investment proposals if they are contrary to Australia's national interest. As an alternative, the Treasurer may allow a proposal to proceed subject to conditions.

When making such decisions, the Treasurer considers advice from the Foreign Investment Review Board (FIRB). FIRB assesses foreign investment proposals by reference to the Treasurer's published policy (summarised below).

If one thing became clear about the FATA process in 2011, it is that the old days, where the approval process was sometimes considered to be a formality, are gone.

The controversial rejection of the merger between the Australian Securities Exchange and the Singapore Exchange demonstrated to foreign M&A participants that a FATA strategy is critical to the preparatory stages of any material Australian acquisition (refer to page 55).

National Interest Considerations

- National security Does the proposal affect Australia's ability to protect its strategic and security interests?
- Competition Broad consideration of the competitive effect of the proposal, in addition to any ACCC review. Focus is on the impact of the proposal on the global market for commodities, and other global industries in which Australia is a key participant.
- Other Australian Government Policies (including tax) What is the revenue impact of the proposal for the Australian Government? Is it consistent with key Government policy objectives?

> Impact on the Economy and the Community What impact will the proposal (and any planned restructuring) have on the Australian economy and local jobs?

> Character of the Investor Does the investor operate on a transparent commercial basis, and is it subject to adequate regulatory supervision? Additional considerations apply to foreign governments and their related entities such as sovereign wealth funds.

Other issues in the foreign investment arena in 2011 included a Senate inquiry into foreign acquisitions of rural land, and related political commentary around issues such as food security.

The Senate inquiry was a response to claims that foreign investors were buying up inordinately large amounts of Australian agricultural land. The inquiry eventually concluded that these fears were misplaced (with the support of independent statistical analysis).

Despite the uncertainty created by these issues, foreign acquirers can be comforted by the fact that an overwhelming majority of public M&A transactions that seek FATA approval are in fact approved. All of the 31 surveyed transactions which sought FATA approval in 2011 and included a relevant condition in the deal, other than the ASX-SGX decision discussed above, were approved. The imposition of conditions on an approval is also rare, and in 2011 only one public M&A transaction – SABMiller's acquisition of Foster's – was subject to conditions. The conditions related to maintaining management of Foster's in Australia, not relocating existing brewing facilities offshore, and continuing to invest in Foster's Australian brand portfolio.

ASX/ SGX decision – key lessons for foreign acquirers

> "National interest" is an extremely broad concept. The list of considerations that can/ will be taken into account by FIRB is not limited to those set out in the Policy. An application needs to address all key issues relevant to the particular proposal, not just those issues that are articulated in the Policy as areas of concern.

> Benefits are critical. Rather than simply asserting that the proposal is not contrary to the national interest, a foreign investor needs to sell the benefits of the proposal for Australia's national interest. This is particularly important where these benefits are being relied upon to offset some possible detriments to the national interest.

> If the target performs a critically important role in the Australian economy, any proposed acquisition of that target will attract additional scrutiny and have an even higher bar to satisfy in order to avoid rejection.

- For major M&A transactions affecting critical sectors, the process between FIRB and a foreign acquirer is an iterative one. Early and continued engagement with key stakeholders is essential to the process – the application process is no longer simply "lodge and wait".
- The political climate is influential. FIRB is an advisory board to the Australian Government and its members have extensive commercial (and M&A) experience. However, the final decision is made by the Australian Treasurer, having regard to the Government's broader policy objectives.

9.2 ACCC

The Australian Competition and Consumer Commission (ACCC) is the body responsible for considering whether a particular acquisition will have the effect of substantially lessening competition.

ACCC'S REVIEW OF SURVEYED DEALS IN 2011

In 2011, only 15% of the surveyed deals included an ACCC condition. Informal clearance was obtained from the ACCC in each of those transactions which completed in 2011.

The only surveyed deal where the ACCC issued a statement of issues was Foxtel's proposed acquisition of Austar United Communications. The ACCC's review of that transaction commenced on 26 May 2011 and, after requesting further information from the merger parties, the ACCC suspended its timetable for review at the request of Foxtel on 28 November 2011 to allow it to make further submissions.

NEW CHAIRMAN, NEW FOCUS?

ONLY 15% OF DEALS INCLUDED AN ACCC CONDITION

Rod Sims took over from Graeme Samuel as Chairman of the ACCC in August 2011.

In confirming the ACCC's commitment to ensuring mergers do not bring a substantial lessening of competition, Mr Sims has stated that the ACCC will cast "a more critical eye" over acquisitions of minority stakes which fall short of control, given the potential for minority shareholdings to affect the ability of the acquirer to influence or control the target and incentives to compete.

The ACCC's scrutiny of local and regional markets in the context of retail grocery and liquor acquisitions also looks set to be expanded to local market acquisitions in other sectors.

Above all, when deciding to oppose acquisitions it considers will substantially lessen competition in a market, the ACCC will not be deterred by the prospect of becoming embroiled in more litigation.

METCASH DECISION: HOW WILL IT AFFECT MERGER REVIEWS?

In November 2011, the Full Federal Court dismissed an appeal by the ACCC in relation to its attempt to block Metcash's acquisition of Franklins supermarkets.

While the ACCC failed in its appeal, we doubt the decision heralds a major change in how the ACCC will, in practice, go about its task of peering into the crystal ball in merger cases.

The most significant issue in the appeal was what burden of proof the ACCC must meet in assessing the competitive effect of a merger and identifying the counterfactual against which that assessment is to be conducted:

- must the ACCC show that a substantial lessening of competition from the merger is "more probable than not", or merely a "real chance"?
- does the ACCC bear an onus to prove what the future state of the market would look like, even without the acquisition, on a "more probable than not" basis?

The majority of the Full Court decided that this question did not need to be resolved. It instead accepted that, even if the test is whether a substantial lessening in competition is a "real chance" if the merger proceeds (as contended by the ACCC), the ACCC had failed to establish such a "real chance" would arise on the facts.

This decision of course leaves open the issue of the degree of evidence the ACCC must gather in order to block a merger on the basis that there is a potential alternative bidder. The ACCC has publicly indicated it will continue to assess the likely competitive effect of an acquisition on the basis of a "real chance" test, given the strong judicial support for the view that "likely" means a "real chance".

What is clear from the Metcash decision is that the ACCC must nevertheless undertake a "real world" assessment based on matters that are commercially relevant and meaningful. The identification of a potential alternative bidder cannot be based on mere possibilities.

OTHER MATTERS OF INTEREST

AMP LIMITED ACQUISITION OF AXA ASIA PACIFIC HOLDINGS

In mid-2011, on the back of its dealings with the ACCC which ultimately saw the ACCC block NAB's initially proposed acquisition, AMP (advised by Clayton Utz) closed its deal to acquire AXA APH. This was the first time in Australia that two competing financial planning sector mergers were considered by the ACCC at the same time, with one being approved and the other being blocked in favour of the status quo or the competing acquirer.

The ACCC blocked NAB on the basis of AXA's development of its own financial investment platform and the acquisition's potential to thereby diminish incentives to compete for retail investment platforms by investors with complex financial needs.

The ACCC found that an independent AXA or an AMP-owned AXA would continue to promote innovation in this sector, as opposed to a NAB-owned AXA.

CBA ACQUISITION OF COUNT FINANCIAL

The ACCC's close scrutiny of CBA's acquisition of Count Financial in November 2011 is another indication that the ACCC is keeping a close eye on the financial services sector.

Following extensive market inquiries with participants in the financial planning, mortgage broking, banking, superannuation and insurance sectors, the ACCC was ultimately satisfied that the acquisition would not substantially lessen competition in any market. This was on the basis that the presence of bigger and more significant providers would continue to be a constraint on CBA's market power.

ORIGIN ENERGY'S ACQUISITION OF ASSETS SOLD IN NSW ENERGY PRIVATISATION

2011 also saw Origin Energy successful in its request for ACCC merger clearance for the potential acquisition of a number of asset combinations as part of the New South Wales Energy Privatisation.

Following extensive inquiries and consideration of the potential horizontal and vertical competitive effects in retail and wholesale electricity markets, the ACCC concluded that the potential acquisitions were unlikely to result in a substantial lessening of competition, despite the high market shares that would result.

10. THE TAKEOVERS REGULATORS

10.1 BACKGROUND

The three key enforcers of Australian takeovers law are ASIC, the Takeovers Panel and the courts.

ASIC is the corporate regulator, responsible for policing the law and, where necessary, modifying the law as it applies to both individual takeovers and takeovers in general. Because of its policing function, ASIC's policy and interpretations of the law (called "Regulatory Guides") are almost treated as de facto statements of law by takeovers planners.

ASIC cannot impose sanctions for breaches of the law. Rather, it can act against alleged breaches by commencing enforcement proceedings before either the Takeovers Panel or the courts.

The Takeovers Panel is a tribunal which has a wide brief to enforce the policy underlying the law. This means that the Panel can make orders against conduct that, although legal, is "unacceptable". Although ASIC has the power to bring proceedings in the Panel, most applications are made by private parties (such as bidders, target companies and target shareholders).

The Panel also issues "Guidance Notes". These are statements of how the Panel views the acceptability (or otherwise) of various market practices. "Guidance Notes" are not law, but do provide useful rules of thumb when planning takeovers or takeover defences.

The courts have a dual role in takeovers. They can rule on alleged breaches of the law governing takeover bids. They also have a specialist supervisory role in relation to schemes of arrangement.

10.2 ASIC IN 2011

ASIC WAS ACTIVE IN TAKEOVERS POLICY IN 2011

2011 marked the return of ASIC to the field of takeovers policy formation.

ASIC released a number of new and heavily revised policies that are directly relevant to mergers and acquisitions:

> amended guidance on ensuring the independence of experts who prepare reports for bidders or targets;

> amended guidance on the content of those experts' reports, with particular emphasis on reports which conclude that a bid is "not fair but reasonable" (an increasingly common conclusion in the aftermath of the financial crisis);

> new guidance on disclosure requirements for offers of securities (which extends to all scrip bids and, in part, to cash bids);

> a proposal to revise and update its existing policy on downstream acquisitions (ie. the takeover of a listed Australian company by the acquisition of a shareholder which holds more than 20% of the company);

> guidance on the use of non-IFRS financials in takeover documents (typically, in pro-forma financial information for the proposed merged entity);

> a major revision of its policy on member approval of control transactions (under item 7 of section 611 of the Corporations Act), with particular emphasis on the need for detailed disclosure to members before they vote.

NEW GUIDANCE ON DISCLOSURE REQUIREMENTS FOR OFFERS OF SECURITIES

In ASIC's view, this policy applies equally to disclosure documents in takeover bids and schemes of arrangement with a scrip consideration component and, in part, to all takeover disclosure documents. The key points in the new policy relevant to takeover documents are:

> "Clear, concise and effective": although there has long been a statutory requirement for securities offer documents to be "clear, concise and effective", there has been a lack of clarity about what it actually means. ASIC's new policy contains detailed tools that will help to produce a clear, concise and effective prospectus. These range from guidance on language (short sentences, active rather than passive voice, etc) to structural issues (present information in logical order, voluntarily lodge information with ASIC so that it can be incorporated by reference, etc). This is the only part of the policy which ASIC expects to be followed in all takeover disclosure documents – the other points are only relevant to scrip takeovers.

> "Investment overview": the first substantive section of a prospectus should contain an investment overview for retail investors that highlights key information about the issuer and the offer in a balanced way, and gives cross-references to more detailed information.

- <u>Business model:</u> a prospectus should explain the issuer's business model, or, in ASIC's terms, "how you propose to make money and generate income or capital growth for investors (or otherwise achieve your objectives)".
- <u>Risks:</u> a prospectus should explain the risks associated with the issuer (including the risks to the business model), the securities being offered and the offer itself. This is not a cookie-cutter exercise – the identification and treatment of risks must be tailored to the business and the offer, and relevant to the prospective investors.

UPDATE TO GUIDANCE ON SHAREHOLDER-APPROVED ACQUISITIONS

ASIC updated its guidance on the exception in the Corporations Act to the 20% takeovers prohibition for shareholder-approved acquisitions. The key points to note in the revised guidance are that:

- ASIC has clarified the timing for providing disclosure documents to ASIC and shareholders to correspond to its guidance in relation to schemes of arrangement, which is that ASIC should have 14 days to review the draft materials and shareholders should have 10 days notice of new information before voting on the acquisition;
- the guidance emphasises the circumstances in which a fresh approval may be required due to a material change in circumstances or delay in completing the acquisition and sets out specific guidance in relation to convertible securities;
- ASIC applies additional pressure on directors to commission an independent expert's report rather than preparing their own report, noting that this is not standard market practice and that only in exceptional circumstances will a resolution be valid without an expert's report;
- in relation to pre-meeting agreements which lock-up more than 20% of the securities in reliance upon an specific exception in the Corporations Act which applies to such agreements, ASIC warns that it may ask that the Takeovers Panel declare the arrangements to be unacceptable if the parties do not intend, or take steps, to seek shareholder approval, picking up on the Takeovers Panel's comments in a decision involving oOh!media Group last year.

REVISED GUIDANCE ON DOWNSTREAM ACQUISITIONS

The Corporations Act contains an exemption to the prohibition on acquiring an interest in more than 20% of an Australian company listed on the ASX where the interest in the (downstream) Australian company is acquired as a result of the person acquiring shares in an upstream company listed on the ASX or on a foreign exchange approved by ASIC.

ASIC has published guidance on two key matters relating to downstream acquisitions:

- where the exception is available, in what circumstances ASIC will seek a declaration from the Takeovers Panel to prevent reliance on the exception (at least without satisfying other conditions); and
- where the exception is not available (because, for example, the upstream acquisition is not of listed securities on an approved exchange), in what circumstances ASIC will grant relief to permit the acquisition of the downstream interest and the conditions of that relief.

The current policy is over 15 years old and was subject to close scrutiny in 2010 when ACS made a takeover bid for Hochtief which held a 54% downstream interest in Leighton Holdings.

On 11 November 2011, ASIC published a draft update to its policy. The update is largely consistent with the existing policy and confirms that:

- ASIC will seek a declaration that a downstream acquisition falling within the exception is unacceptable if control of the downstream company is a significant purpose of the upstream acquisition or otherwise subverts the policy basis for relying on the exception (because, for example, although the upstream entity is listed, it is closely held or its securities are not actively traded);
- ASIC will be unlikely to grant relief where the exception does not otherwise apply if there are alternative ways of structuring the transaction without the need for relief, the upstream entity is closely held, making it practicable to negotiate to separate the downstream interest, the upstream entity is not listed and/or the regulation of the upstream entity is not reflective of the Australian takeovers regime; and
- where control of the downstream company appears to be a significant purpose of the upstream acquisition, ASIC will only grant relief subject to a condition that the acquirer make a downstream bid at a “see through” or “effective” price for the downstream securities implied by the upstream acquisition and in other circumstances may grant relief subject to standstill or voting restrictions in relation to the downstream entity.

Downstream acquisition of Extract Resources Limited by Taurus Mineral Limited

The first downstream acquisition to be granted relief since ASIC published its draft updated guidance was the proposed downstream acquisition of a shareholding in Extract Resources Limited by Taurus Mineral Limited.

On 9 December 2011, Taurus, an entity owned by CGNPC Uranium Resources Co., Ltd. and The China-African Development Fund, announced a recommended cash offer for Kalahari Minerals plc. Kalahari's key asset is its holding of 42.5% in Extract, which is listed on the ASX. Kalahari Minerals plc is listed on the Alternative Investment Market of the London Stock Exchange and the Namibian Stock Exchange – neither of which is an ASIC-approved foreign exchange for the purposes of the downstream acquisition exemption set out in the Corporations Act. Taurus applied to ASIC for relief in March 2011 and the various parties made submissions concerning the terms and conditions of this relief.

ASIC granted Taurus relief to acquire an interest of more than 20% of Extract's shares, provided that the offer by Taurus for Kalahari includes a proposal to make a downstream cash offer to Extract shareholders of $8.65 per share, subject only to a prescribed occurrences condition, if Taurus receives acceptances of the Kalahari offer in respect of more than 50%.

It is interesting to note that the downstream bid is only required if Taurus acquires interests in 50% of Kalahari. Taurus would technically acquire an interest in the downstream Extract shareholding as soon as it acquires interests in 20% of Kalahari, and both a previous decision of the Federal Court and ASIC's own draft revised guidance propose that a downstream bid should be required when the acquirer obtains interests in 20% of the upstream company.

10.3 THE TAKEOVERS PANEL

Many commentators have noted that 2011 was "The Year of Associations" for the Takeovers Panel.

It is certainly true that an inordinate number of applications to the Panel in 2011 were concerned with allegations that persons were "associates" in relation to a particular company. In basic terms, associates are people who act together to control a bloc of shares in a company, even if there is no formal legal relationship between them. Compliance issues arise when associates' interests total 5% or more (in which case, they are required to disclose their interests to the market) and 20% or more (which cannot legally be done without usually making a formal takeover bid for the company).

By their nature, allegations that persons are associates are heavily dependent upon the facts underlying the allegation. As a result, it is notoriously difficult to derive any broad principles from Panel decisions on associations.

The prevalence of association allegations should not, however, obscure the fact that the Panel handed down an important decision on the disclosure of scheme implementation agreements.

As noted in Section 8.2, BC Iron Limited [2011] ATP 6 concerned the announcement of a takeover by scheme of arrangement. The announcement included a summary of key terms of the scheme implementation agreement (SIA). One of the conditions was approval by the bidder's shareholders.

Two months later, the bidder's board decided that it could no longer recommend the scheme to its shareholders. The SIA contained a clause allowing the bidder to terminate the SIA if the bidder's directors did not recommend the scheme. On the basis of this clause, the bidder terminated the scheme. This termination clause had not been disclosed by the target when it originally announced the key terms of the SIA.

The target went to the Panel, arguing that the bidder should not be allowed to rely on the termination clause.

The target's argument was upheld by the Panel and the Panel declared that the bidder could not rely on the termination clause. Importantly for future scheme bids, the Panel took the opportunity to lay down some rules for announcements of scheme implementation agreements:

"When a scheme proposal is announced, the parties to the proposal should ensure that the announcement is either accompanied by a copy of the scheme implementation agreement or includes a summary of those provisions of the agreement necessary to ensure that, when the full agreement is published (usually in the scheme booklet), the market does not become aware that the proposal is in fact less favourable than was announced. This would include dealing in the announcement with matters such as conditions, termination rights, exclusivity provisions and break fees. Such disclosure is necessary to ensure that there is an efficient, competitive and informed market for the acquisition of control over shares in the target following the announcement."

10.4 THE COURTS AND SCHEMES

COURTS ACTIVE IN CONSIDERING SCHEME CLASSES IN 2011

2011 continued to see courts' primary involvement in M&A arising in schemes of arrangement.

Perhaps the most noticeable theme running through the various cases was the increasingly liberal attitude that the courts take to the definition of "classes" in a scheme. It is a necessary condition to court approval of a scheme takeover that the scheme be approved by each separate "class" of target shareholder.

There is no statutory definition of "class", which means that courts have had to produce their own. The "classic" statement is that a class is a group of "persons whose rights are not so dissimilar as to make it impossible for them to consult together with a view to their common interest."

BENEFITS PROVIDED OUTSIDE THE SCHEME

In recent years, much attention has been focused on the question of whether shareholders who are being offered the same price belong to the same class if some of those shareholders are also receiving additional benefits through separate arrangements with the bidder.

Schemes where this question arose in 2011 include:

- the QIAGEN bid for Cellestis, where target shareholders who were also optionholders entered into individual agreements with the bidder to sell their options to the bidder and the court held that the shareholder/optionholders were not a separate class from other shareholders;
- the Computer Sciences Corporation bid for iSoft Group, where the repayment of convertible notes held by a shareholder at above market value was considered by ASIC to be a collateral benefit requiring separate classes; and
- the merger between Whitefield and Sylvastate, where the fact that a shareholder supplied investment management services to both companies and would have its returns under those arrangements improved if the merger went ahead did not require separate classes.

These decisions demonstrate the importance of determining whether the benefit provides some type of "net benefit" or "collateral benefit". In the Cellestis and Sylvastate examples, it was successfully argued that the benefit was consistent with the value of the options/services.

SAME CLASS EVEN THOUGH CONSIDERATION CALCULATED ON DIFFERENT BASIS

The seemingly liberal attitude of the courts to defining scheme classes was taken one step further in the SABMiller bid for Foster's. There, the court held that the holders of fully-paid shares and a small group of holders of different tranches of partly-paid shares (99% of which were out of the money) were in the same class even though they would be receiving different benefits, and benefits determined by reference to different formulae, under the takeover scheme.

The fully-paids were offered the headline offer price under the takeover, while – of necessity, since they were mostly out of the money – partly-paids were offered a value that had been arrived at on an entirely different basis (based on Black-Scholes). The court held that, notwithstanding this difference, the fully-paids and the partly-paids were in the same class, because in its view, the different groups could still consult together "in circumstances where the relativities between shareholders appear to have been preserved".

It will be interesting to see what implications this decision has for the identification of scheme classes in creditors' schemes which are proposed between optionholders for the purpose of cancelling options over target shares. It is currently market practice to put in separate classes the holders of "in-the-money" and "out-of-the-money" options for the reason that the consideration paid to the first group is calculated based on the intrinsic value of the options, whereas the consideration paid to the second group is calculated based on the application of some binomial formula such as Black-Scholes.

PRE-SCHEME DEAL PROTECTIONS

The other common area of focus in terms of scheme classes is whether different types of pre-scheme deal protections agreed with major shareholders will put those shareholders in a separate class. There have been a number of examples over the past few years where call options, usually exercisable by the bidder once a competing bid has been announced and in some cases only if matched by the bidder, have been agreed with target shareholders without putting those shareholders in a separate class. There have also been a smaller number of examples where voting arrangements agreed between the bidder and the shareholder have not put the shareholder in a separate class (see, for example, the transactions between PTT Mining/Straits Resources and AGL/Mosaic Oil in late 2010).

In 2011, we saw a continuation of the court's approach in respect of call options (see, for example, the call option agreed with the CBA in advance of the Count Financial Ltd scheme). However, the call options which we saw agreed in connection with a takeover scheme in 2011 were still only exercisable in the event that an auction for the target emerged. The approach of the courts to a more simple call option exercisable by the bidder at any time has not been tested (although we would have thought that a similar approach would be taken). There were also no voting arrangements agreed in advance of takeover schemes in 2011, despite the precedents in earlier years. It may be that bidders are still taking a conservative approach in this respect and preferring to instead rely upon voting intention statements made publicly by shareholders to which they are then bound under ASIC's "truth in takeovers" policy (these types of statements were made by shareholders in 17% of surveyed scheme transactions).

As with the benefits discussed above, the court often takes into account whether or not a collateral benefit is given through the pre-scheme arrangement, although this factor is not necessarily determinative. The relevance of this factor will be tested by arrangements which give the shareholder some share of the upside associated with a higher offer which, unlike the position of other shareholders, will be received even if that higher offer does not complete and all shareholders do not receive that upside. Despite the apparent focus on collateral benefits, a number of agreements with this type of arrangement (including in the Count Financial example) have not led to separate classes.

11. DEAL PROFILES

Clayton Utz has one of Australia's leading M&A practices. Our team has acted on many of Australia's largest and most complex M&A transactions and has significant expertise in cross border transactions. Set out below is a selection of the significant deals our team advised on in 2011.

AMP'S ACQUISITION OF AXA

AMP Limited's acquisition of AXA Asia Pacific Holdings Limited's Australian and New Zealand businesses in early 2011, involving the acquisition by AMP of AXA APH for in excess of A$14 billion and the subsequent divestment of the Asian businesses of AXA APH to AXA SA, was the culmination of over 15 months of work.

The acquisition by AMP of AXA APH involved both the acquisition from AXA SA of its 54% holding in AXA APH and the acquisition by AMP of the remaining shares in AXA APH by scheme of arrangement.

The transaction is significant by any measure, whether it be size, structural innovations, complexity of execution, regulatory hurdles (including competition and national interest issues), its impact on the financial services sector or the contribution it has made to the development of public M&A market practice.

As noted above, AMP persuaded the ACCC to adopt a new analysis of competition in markets in the wealth management sector which knocked out the rival bidder, National Australia Bank and was the first time the ACCC has rejected any deal in Australian financial services. The analysis represented a shift from its earlier position in 2008 in respect of the Westpac/St George merger.

The structure of the transaction was also innovative in the way in which it addressed a number of public takeovers law issues, including the grant of joint bid relief by ASIC to permit AMP to agree arrangements with AXA SA to effect the acquisition of its 54% shareholding, the offer of different consideration to AXA SA and the minority shareholders (as well as sharing of upside/downside associated with AMP scrip between the joint bidders and minority shareholders) and the use of recent amendments to the CGT rollover regime to permit minority shareholders to obtain scrip-for-scrip CGT rollover relief.

Novel arrangements were also devised to "ring fence" the Australian and New Zealand and Asian businesses and describe the complex economic adjustments as between AMP and AXA SA required in separating the two financial services businesses.

Clayton Utz acted for longstanding client AMP Limited. M&A Chair Rod Halstead and Sydney based M&A Partner Jonathan Algar with Senior Associates Adam Foreman and Jasmine Sprange advised on the deal with support from Melbourne-based M&A Partner Andrew Walker.

WAH NAM'S OFF-MARKET TAKEOVER BIDS

In late 2010 HKEx-listed Wah Nam International Holdings Limited announced concurrent off-market takeover bids, through its subsidiary Wah Nam International Australia Pty Ltd, for ASX-listed companies, Brockman Resources Limited and FerrAus Limited together with Wah Nam's IPO and listing on the ASX. Its listing on the ASX in January 2011 represented the first dual listing of a HKEx-listed company on the ASX.

The bids valued Brockman at approximately A$925 million and FerrAus at approximately A$265 million. Wah Nam's IPO sought to raise A$2 million with a facility to raise an additional A$1 million in oversubscriptions.

The degree of complexity involved in ensuring compliance with the HKEx Listing Rules and ASX Listing Rules and obtaining of approvals from various regulatory bodies including the HKEx, waivers required from the ASX, relief from ASIC and FIRB approval, resulted in some challenging issues for the team advising on the matter. While ultimately the FerrAus bid did not proceed to completion, Wah Nam was successful in gaining ownership of 55.33% of Brockman shares.

More recently, in late 2011 Wah Nam launched a subsequent off-market takeover bid, through Wah Nam Australia for the remaining ordinary shares in Brockman that it did not acquire through the earlier bid and previous acquisitions. The bid valued Brockman at approximately A$456 million. At publishing date, the bid was still current and subject to conditions including FIRB approval.

Clayton Utz acted as Australian counsel to Wah Nam on the bids for Brockman and FerrAus as well as the IPO and ASX listing, and continues to act on the current bid for Brockman. A Perth-based team comprising of Corporate Partner Mark Paganin, Special Counsel Glenda Currie and Senior Associate Stephen Neale advised Wah Nam.

SINGAPORE EXCHANGE LIMITED'S PROPOSED MERGER WITH ASX LIMITED

Against the background of a profound period of structural change in the securities exchange industry, on 25 October 2010 ASX Limited and Singapore Exchange Limited announced a proposed merger of equals, by scheme of arrangement. The merger proposal would have created the world's fifth largest listed exchange group, and the second largest listing venue in Asia Pacific, and came at a time when the introduction of competition into the Australian exchange industry was imminent, and a number of its competitors globally had initiated merger consolidation.

Despite the fact that ASX and SGX were to remain separate legal and locally regulated entities, the transaction required a number of complex regulatory approvals, and attracted significant regulatory and public scrutiny because of the integral position that securities exchanges play in the operation of domestic financial markets.

Regulatory approvals from Australian authorities included the Australian Competition and Consumer Commission, the Foreign Investment Review Board, the Treasurer, as well as amending legislation to be put before the Australian Parliament. Various approvals of the Singaporean authorities were also required before the merger could proceed. Ultimately, the transaction was rejected by the Australian Treasurer under Australia's foreign investment policy on national interest grounds in April 2011.

The proposed governance of the merged entity also attracted significant scrutiny. As a securities exchange, with responsibility for enforcing its listing rules, the governance standards required from ASX-SGX were very high, and the governance aspects of the merger were renegotiated in response to regulatory and stakeholder feedback.

Clayton Utz acted for Singapore Exchange, continuing its strong track record of inbound cross border M&A transactions. M&A Chair Rod Halstead and Sydney-based M&A Partner Karen Evans-Cullen with Senior Associate Jasmine Sprange advised on the deal.

BARRICK GOLD'S ACQUISITION OF EQUINOX MINERALS

In April 2011 Canadian gold miner Barrick Gold Corporation announced that it had entered into a support agreement with Canadian copper/gold miner Equinox Minerals Limited under which Barrick would acquire all of the shares in Equinox for an aggregate amount of approximately C$7.3 billion.

Equinox was previously an Australian company but moved its incorporation to Canada in 2004 to gain access to deeper capital markets. When Equinox moved its incorporation its Australian shareholders were given the choice of receiving shares in the new Canadian holding company or "CHESS Depository Interests", units of beneficial ownership in the Canadian holding company tradeable on the Australian Securities Exchange. The existence of the CDIs and the large percentage of Equinox still held by Australian shareholders meant Barrick needed Australian lawyers in connection with its takeover bid for Equinox.

Clayton Utz created a mechanism by which CDI holders could accept Barrick's offer by instructing a nominee shareholder, a subsidiary of the ASX, to accept the offer on their behalf. Clayton Utz had extensive liaison with the ASX to ensure successful implementation of that process. Clayton Utz also worked closely with Barrick and Barrick's Canadian counsel to adapt the Canadian documentation for CDI holders. John Elliott, national head of the Mergers & Acquisitions Group, and senior associate Adrian Beerworth advised longstanding client Barrick on the deal.

12. SURVEY METHODOLOGY

12.1 SOURCES

Note that information on deals included in the Clayton Utz Survey has been drawn entirely from public documents disclosed to the market in connection with the deals.

We explain below the circumstances where we have produced further information by making calculations or assumptions based on that public information.

12.2 SURVEY METHODOLOGY

Clayton Utz conducted a detailed survey of selected deals announced during the 2011 calendar year which has been used extensively throughout this report.

A more limited survey of some specific aspects of deals announced during the 2010 calendar year and selected on the same basis is also referred to in the report.

As a general comment, we note that deal terms differ between different deals depending upon the particular circumstances of each deal and that we have exercised our own judgment in interpreting and categorising those terms for the purposes of the survey where they are not directly comparable. It is possible that different people may make different judgments in interpreting and categorising these terms, although we have been consistent in our approach.

SELECTION OF DEALS

Deals included in the survey were selected according to the following criteria:

- announced between 1 January 2011 and 31 December 2011 (inclusive) in respect of the survey of 2011 deals and between 1 January 2010 and 31 December 2010 (inclusive) in respect of the survey of 2010 deals;
- included a takeover offer, company scheme or trust scheme to acquire securities in an Australian entity to which Chapter 6 of the Corporations Act applies;
- implied a transaction value for all of the securities of the target of at least $50 million (see below regarding this calculation); and
- a binding announcement of a formal takeover offer or an announcement of an agreement to propose a scheme was made (as applicable) in respect of the deal (i.e. more than just the announcement of a non-binding proposal was made in respect of the deal).

The ASX Weekly Summary was used to identify deals to include in the survey which met the above criteria.

NOTES ABOUT THE METHODOLOGY USED FOR SPECIFIC SURVEY ITEMS

The methodology used for particular items is summarised below:

- Date of announcement: The date of initial announcement was taken to be the date a binding announcement of a formal takeover offer or an announcement of an agreement to propose a scheme was made (as applicable).
- Value of consideration: The value of the consideration, for the purposes of calculating the transaction value and consideration increases, was calculated as follows:
  - where the consideration included non-cash consideration this was valued as at the date of announcement using the same methodology as that adopted in the initial announcement and where there was no value cited in the initial announcement the value was calculated using the closing market price of the bidder scrip prior to the initial announcement (or other appropriate date to reflect the undisturbed share price) where listed and/or the FX rate on the day of announcement (as applicable);
  - where the final consideration depends upon the movements in the value of bidder scrip or a relevant FX rate, the value of the final consideration is recalculated using the value of the bidder scrip or FX rate as at the time any such adjustments are made.
- Transaction value/deal size: For consistency, the transaction value or deal size was calculated using the value of the final consideration offered per issued share or unit in the target under the proposal multiplied by the aggregate number of those securities on issue at the end of the offer period for a takeover or record date for a scheme. Where the deal was still current as at 3 January 2012, the value of the consideration offered as at that date and the number of securities on issue on that date was used in the calculation. Options and performance rights were excluded from this calculation, even if it was proposed that those securities be acquired/cancelled as part of the deal, unless the underlying shares/units were issued before the end of the offer period or record date (as applicable).
- Premium: The premium for each deal was taken to be that cited in the initial announcement of the deal unless the consideration subsequently changed in which case it was the premium cited in the announcement of the change in consideration. If no premium was cited in the relevant announcement, then the premium was calculated by reference to the closing market price of the target securities prior to the initial announcement (or other appropriate date to reflect the undisturbed share price). No premium was calculated in respect of the bid for Tully Sugar because no premium was cited in the relevant announcements and the company is unlisted so we were unable to calculate the premium using the market price of the target securities. Mergers of equals were also excluded from all premium statistics. The premium for iSoft Group Limited of 227% has been generally treated as an outlier and the only statistic for which it was included was the calculation of the overall average premium of 51%.
- Schemes/takeovers with same target/bidder: The announced takeover of Foster's by SABMiller and the agreed scheme proposed by Foster's to effect a takeover by SABMiller have been generally reviewed and included in the relevant statistics as separate deals. The only statistics for which the initial takeover has been excluded and only the later scheme included are the calculation of the total deal value and average deal value for 2011 and the overall average, minimum and maximum premium for 2011. Similarly, the two proposals from Beach Energy to acquire Impress Energy in 2010 are treated as separate deals. However, the concurrent off-market takeover and scheme to announced by Brookfield Infrastructure Partners LP to acquire Prime Infrastructure Group have been treated as the same deal since they proceeded as part of the same transaction on terms set out in the same agreement.
- Implementation agreement terms: Statistics regarding terms of agreed deals, such as break fees, termination rights etc, have been calculated as percentages/averages etc of only those deals where an implementation agreement was agreed. In cases where some terms were not disclosed in sufficient detail to be reviewed and surveyed, those deals were excluded from the statistics regarding those terms.
- Definition of successful completion: A takeover was treated as having successfully completed 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 offer. A scheme was treated as having successfully completed if the scheme became effective (or the constitutional changes became effective in the case of a trust scheme).

12.3 LIST OF DEALS INCLUDED IN THE SURVEY

2011 DEALS

	TARGET	BIDDER
1.	Abra Mining Ltd	Hunan Nonferrous Metals Corp. Ltd
2.	Adamus Resources Limited	Endeavour Mining Corporation
3.	Adelaide Energy Limited	Beach Energy Limited
4.	Amadeus Energy Ltd	Eden Petroleum Investments 2010 Inc
5.	Aragon Resources Ltd	Westgold Resources Ltd
6.	Aston Resources Limited	Whitehaven Coal Limited
7.	AUSTAR United Communications Ltd	FOXTEL
8.	Austereo Group Ltd	Southern Cross Media Group Ltd
9.	Auzex Resources Ltd	GGG Resources plc
10.	BC Iron Ltd	Regent Pacific Group Ltd
11.	Bow Energy Limited	Arrow Energy Holdings Pty Ltd
12.	Brockman Resources Limited	Wah Nam International Holdings Limited
13.	Cash Converters International Ltd	EZCORP Inc
14.	Cellestis Ltd	QIAGEN N.V.
15.	Centrebet International Limited	Sportingbet plc
16.	Chemgenex Pharmaceuticals Ltd	Cephalon Inc
17.	Coal & Allied Industries Limited	Rio Tinto Ltd and Mitsubishi Corporation
18.	ConnectEast Group	CP2 Limited and others
19.	Conquest Mining Ltd	Catalpa Resources Ltd
20.	Count Financial Ltd	Commonwealth Bank of Australia Ltd
21.	Crescent Gold Limited	Focus Minerals Ltd
22.	DKN Financial Group Limited	IOOF Holdings Limited
23.	Eastern Star Gas Ltd	Santos Ltd
24.	EDT Trust	EPN Investment Management LLC
25.	Extract Resources Ltd	Taurus Mineral Limited
26.	Flinders Mines Limited	Magnitogorsk Iron and Steel Works OJSC
27.	Fosters Group Ltd	SABMiller plc (scheme of arrangement)
28.	Fosters Group Ltd	SABMiller plc (off-market takeover)
29.	Gloucester Coal Limited	Yanzhou Coal Mining Company Limited
30.	Gold One International Ltd	BCX Gold Investment Holdings Limited
31.	Hastings Diversified Utilities Fund	APA Group
32.	Hunnu Coal Ltd	Banpu Public Company Ltd
33.	iSOFT Group Limited	Computer Sciences Corporation
34.	Jabiru Metals Ltd	Independence Group NL
35.	Macarthur Coal Limited	PEAMCoal Pty Ltd
36.	Meridian Minerals Limited	Northwest Nonferrous International Investment Company Limited
37.	Minara Resources Limited	Glencore International plc
38.	MSF Sugar Limited	Mitr Phol Sugar Corp., Ltd
39.	National Hire Group Limited	Seven Group Holdings Limited
40.	Northern Energy Corporation Ltd	New Hope Corporation Ltd
41.	Oaks Hotels and Resorts Ltd	Minor International Public Company Ltd
42.	Oaks Hotels and Resorts Ltd	Retail Food Group Ltd
43.	oOh! Media Group Limited	CHAMP Private Equity
44.	Redflex Holdings Ltd	Roadsafety Holdings Pty Ltd
45.	Rocklands Richfield Ltd	Jindal Steel & Power (Australia) Pty Ltd
46.	RP Data Ltd	CoreLogic, Inc.
47.	Shadforth Financial Group Holdings Limited	Snowball Group Limited
48.	Signature Metals Limited	LionGold Corp Ltd
49.	Souls Private Equity Ltd	Washington H Soul Pattinson & Co Ltd
50.	Stuart Petroleum Ltd	Senex Energy Ltd
51.	Sundance Resources Limited	Hanlong (Africa) Mining Investment Limited
52.	Sylvastate Limited	Whitefield Ltd
53.	Territory Resources Ltd	Exxaro Resources Ltd

54.	Territory Resources Ltd	Noble Group Limited
55.	The Rock Building Society Limited	MyState Limited
56.	Transfield Services Infrastructure Fund	Ratchaburi Electricity Generating Holding PCL
57.	Tully Sugar Limited	COFCO Corporation
58.	Valad Property Group	Blackstone Real Estate Partners
59.	White Canyon Uranium Ltd	Denison Mines Corp

2010 DEALS

	TARGET	BIDDER
1.	AWB Limited	Graincorp Limited
2.	Adtrans Group Ltd	AP Eagers Ltd
3.	Aevum Limited	Stockland Development Pty Limited (a wholly owned subsidiary of Stockland Corporation Limited) as trustee for The Retirement Living Acquisition Trust
4.	Andean Resources Ltd	Goldcorp Inc
5.	Apollo Gas Ltd	Dart Energy Ltd
6.	Avoca Resources Limited	Anatolia Minerals Development Limited
7.	AWB Limited	Agrium South Pacific Pty Ltd
8.	AXA Asia Pacific Holdings Limited	AMP Limited and AXA SA
9.	BCD Resources NL	Bendigo Mining Ltd
10.	Brockman Resources Limited	Wah Nam International Holdings Limited
11.	CBH Resources Limited	Toho Zinc Co., Ltd
12.	Centennial Coal Company Limited	Banpu Pcl
13.	Choiseul Investments Ltd	Milton Corporation Ltd
14.	Citadel Resource Group Ltd	Equinox Minerals Ltd
15.	Corporate Express Australia Ltd	Staples Inc
16.	Crane Group Ltd	Fletcher Building Ltd
17.	Dexion Ltd	GUD Holdings Ltd
18.	Dominion Mining Ltd	Kingsgate Consolidated Ltd
19.	FerrAus Ltd	Wah Nam International Holdings Ltd
20.	Forge Group Limited	Clough Limited
21.	Gloucester Coal Ltd	Noble Group Limited
22.	Healthscope Limited	Asia Pacific Healthcare Group Pty Ltd
23.	Impress Energy Ltd	Beach Energy Ltd (scheme of arrangement)
24.	Impress Energy Ltd	Beach Energy Ltd (on-market bid)
25.	ING Industrial Fund	Goodman Group
26.	Intoll Group	Canadian Pension Plan Investment Board
27.	itX Group Limited	Avnet, Inc
28.	Lihir Gold Limited	Newcrest Mining Limited
29.	Macarthur Coal Limited	New Hope Corporation Limited
30.	Macarthur Coal Limited	Peabody Energy Corporation
31.	Mantra Resources Ltd	ARMZ Uranium Holding Co.
32.	Mesa Minerals Ltd	Mineral Resources Ltd
33.	Mitchell Communication Group Ltd	Aegis Group plc
34.	Mosaic Oil NL	AGL Energy Limited
35.	North Queensland Metals Ltd	Conquest Mining Ltd
36.	North Queensland Metals Ltd	Heemskirk Consolidated Ltd
37.	Northern Energy Corporation Ltd	Arkdale Pty Ltd
38.	Prime Infrastructure Group	Brookfield Infrastructure Partners L.P.
39.	Provet Holdings Limited	Henry Schein Inc.
40.	Riversdale Mining Limited	Rio Tinto plc
41.	Ross Human Directions Ltd	Chandler Macleod Group Ltd
42.	Sphere Minerals Ltd	Xstrata Plc
43.	The MAC Services Group Limited	Oil States International Inc
44.	Tower Australia Group Ltd	Dai-ichi Life Insurance Company Ltd
45.	Tutt Bryant Group Limited	Tat Hong Holdings Ltd
46.	Wallace Absolute Return Limited	Armidale Investment Company Pty Ltd
47.	Wattyl Limited	The Valspar Corporation
48.	Westpac Office Trust	Mirvac Group
49.	Wridgways Australia Ltd	Santa Fe Moving & Relocation Services Australia Pty Ltd

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Corporate / M&A, Chambers Asia-Pacific 2012

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'THEIR ATTENTION TO DETAIL AND AVAILABILITY ARE ABSOLUTELY FANTASTIC.'

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