

What do successful outbound M&A strategies and processes look like?

Successful M&A for Chinese OFDI



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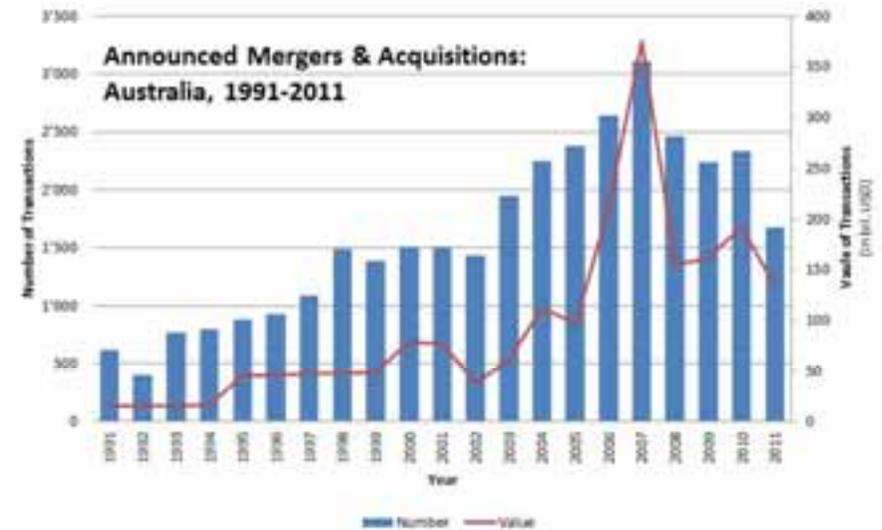
Chair Public Securities Group

Overview

1. Main options for acquiring Australian assets
2. Primary legislative rules
3. Due diligence
4. Key issues in Australian M&A
 1. Confidentiality
 2. Building a stake
 3. Agreements in recommended bids
 4. Break fees – especially PRC approvals
 5. Conditions
5. FIRB process
6. What do successful outbound M&A strategies and processes look like?
 1. What are best practice internal processes?
 2. What should be avoided?
 3. What should be done?

Overview of Australian M&A market

- Despite the current global economic concerns M&A activity is still strong in Asia Pacific with a cautiously optimistic outlook for 2012.
- According to Thomson Reuters M&A league tables for 2011, M&A activity in Australia increased 11.9% to US\$173 billion from US\$154.7 billion the year before. Cross border activity reached US\$86.5 billion, which showed an increase of 9.9% from last year.
- The Australian market performed extremely well in the first half of the year. In fact, M&A activity rose to almost on par with pre GFC levels before concerns about European Debt reined the market in again.
- Expect that in 2012 Australian M&A activity will still be largely driven by resources.



Going Global

China is the
5th largest
overseas
investing
nation.

2010 ODI
USD68
billion

16,000
companies in 178
countries

2011 ODI
USD50
billion

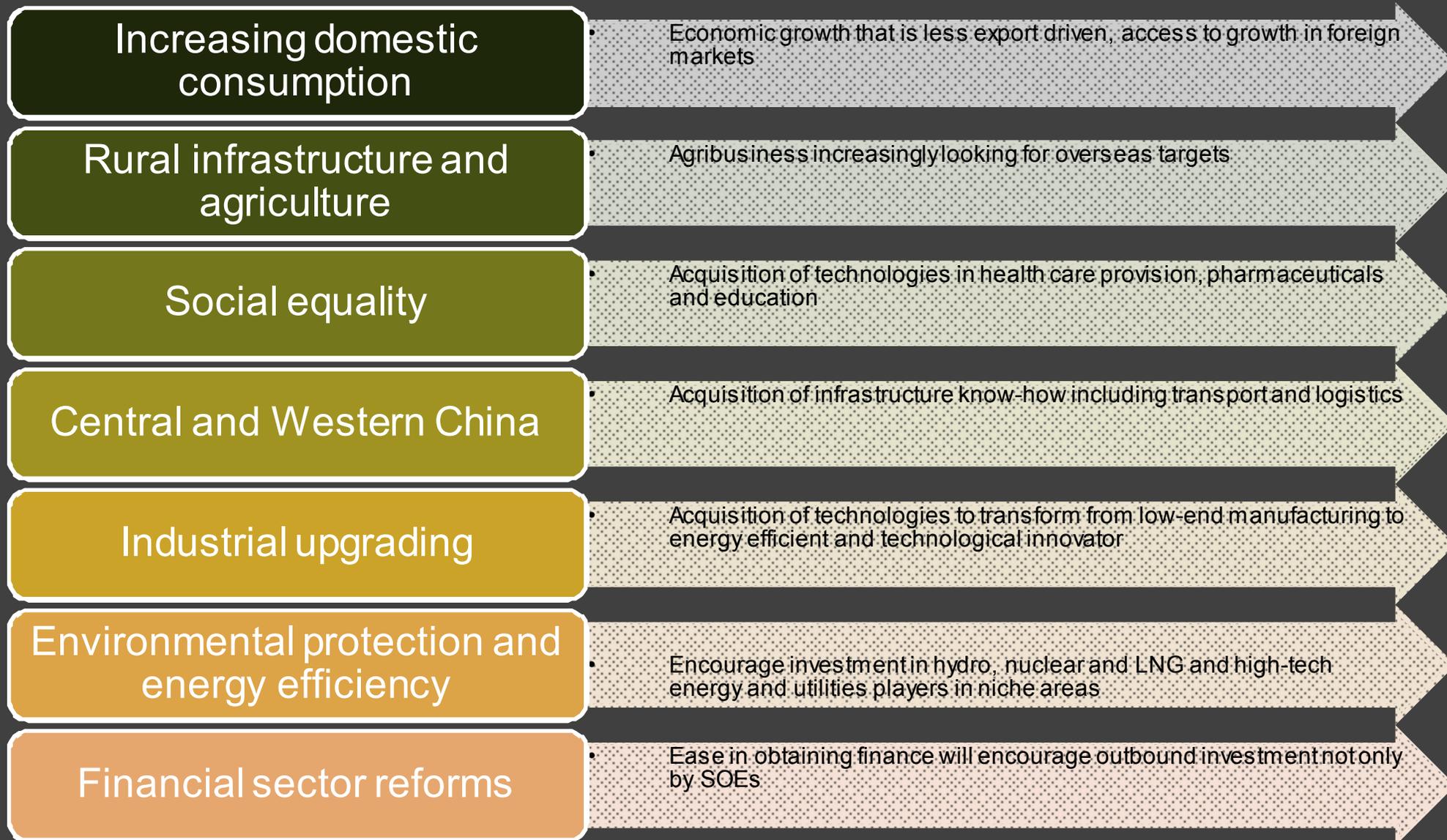
(non-financial
sector)

Accelerate
promoting
overseas
investment
during 2011-
2015

China's
OFDI 2011 –
2015
USD560
million

Ministry of Commerce, 5 January 2012

The 12th Five Year Plan – inclusive growth



Buy up big, china urged

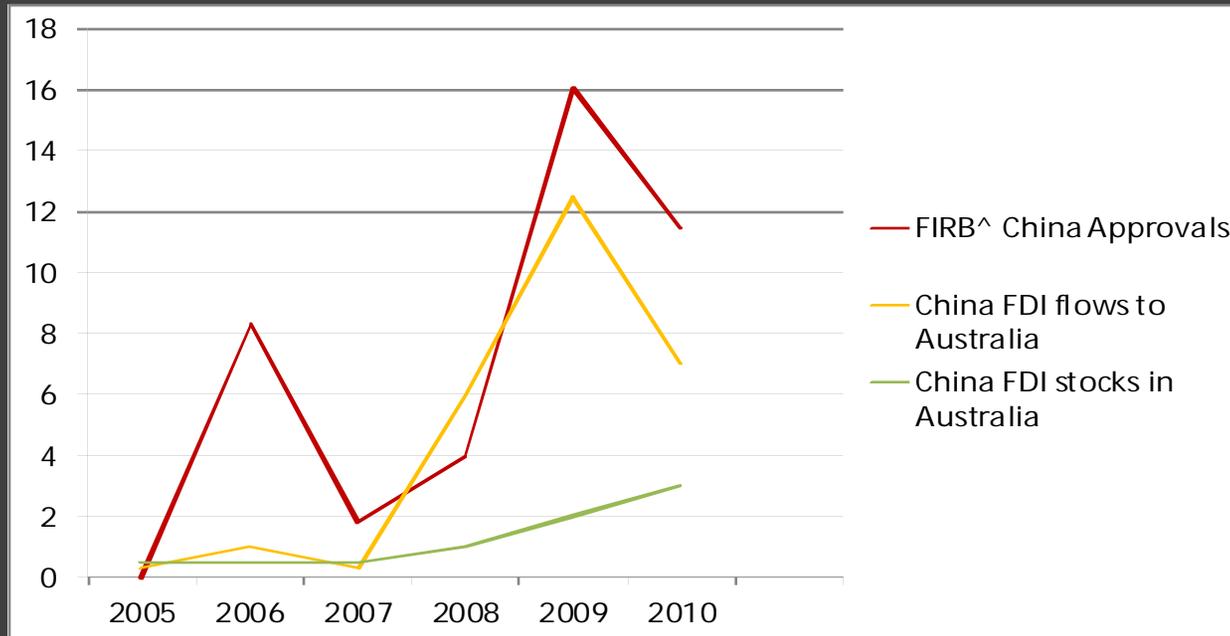
- The head of China's largest bank Jian Jianqing, Chief Executive of Industrial and Commercial Bank of China, has called for increased foreign investment to secure vital natural resources - in order to avoid the "resource bottlenecks" that are hurting China's economy.
- Mr Jian urged better management of the Chinese investment projects abroad through enhanced legal and policy frameworks.
 - The government should provide better support to privately-owned firms' investing, ... The state-owned enterprises should be held accountable for their investment decisions from the perspective of shareholders.'
- Beijing has tightened up on OFDI processes, NDRC is applying a more robust due diligence test. Chinese businesses need to demonstrate the commercial feasibility of the project and good cost management.



Table of recent Chinese OFDI M&A deals in Australia

Date	Acquirer (SOEs)	Target (Type)	Commodity	Value A\$	Proposed Equity %	Approval
Feb '12	Yancoal	Gloucester Coal (Public)	Coal	8b	merger	Yes
Dec '11	Arrow Energy (PetroChina/Shell)	Bow Energy Ltd (Public)	Gas	535m	100%	Yes
Oct '11	Sichuan Hanlong Group	Sundance Resources Ltd (Public)	Iron ore	1.65b	100%	Delayed
Oct '11	China Minmetals	Anvil Mining (Public ASX & TSX)	Copper	1.3b	100%	Yes
Oct '11	COFCO via Tully	Proserpine Sugar (Private)	Sugar	120m	100%	Yes
Sep '11	Yancoal	Premier Coal (from Wesfarmers)	Coal	300m	100%	Yes
Sep '11	Northwest Nonferrous Aust Mining	Meridian Minerals Ltd (Public)	Metals	68m	100%	Yes
Aug '11	Bright Food	Manassen Foods (Private)	Food	530m	75%	Yes
July '11	Yancoal	Syntech Resources (Private)	Coal	202.5m	100%	Yes
May '11	COFOC	Tully Sugar (Private)	Sugar	136m	100%	Yes
Apr '11	China Minmetals	Equinox Minerals Ltd (Public)	Various	6.5b	100%	Yes
Mar '11	Northwest Nonferrous Aust Mining	Synergy Metals Ltd (Public)	Minerals	12.6m	placement	Yes
Feb '11	Yancoal	Ashton Coal Joint Venture (IMC)	Coal	250m	90%	Yes

Chinese (% of Australian total) OFDI to Australia



Chinese OFDI to Australia (% of Australian total)

- Australia is now the single largest destination for Chinese OFDI. FIRB approved more than \$60 billion worth of Chinese OFDI mostly in natural resources as of late last year.
- A total of \$US34 billion was invested in Australia between January 2005 and December 2010. *The Economist* intelligence unit also ranked Australia as the largest Chinese foreign direct investment destination outside of Asia.

Corrs M&A Year in Review – 2011

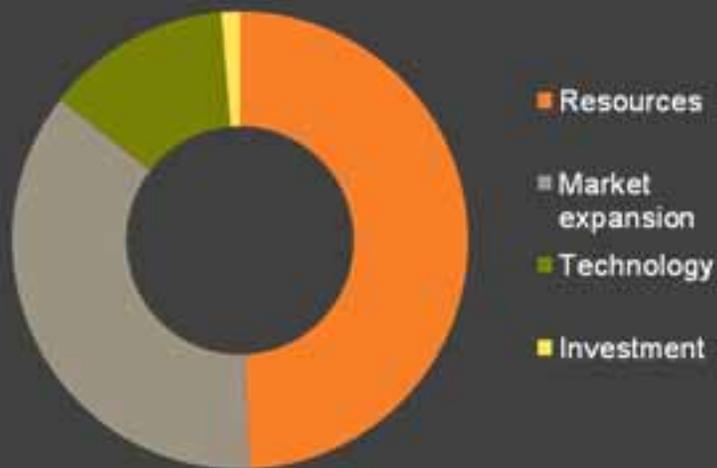
- The Corrs' M&A team analysed a deal sample comprising 61 schemes and takeover bids over \$25 million announced in 2011 involving Australian targets.
- The review highlighted the following key features about Chinese investors:
 - only invested in the energy and resources sectors;
 - the largest foreign investor into the energy and resources sectors (24% of all foreign investors);
 - compared to other foreign investors, paid the largest average premiums (53%) (the average premium was 42%);
 - preferred to offer cash rather than scrip as consideration;
 - no preference for bids (50%) over schemes (50%);
 - only involved in one 'mega deal' over \$1 billion (Sundance Resources); and
 - all deals were successful (subject to Sundance which is still ongoing).



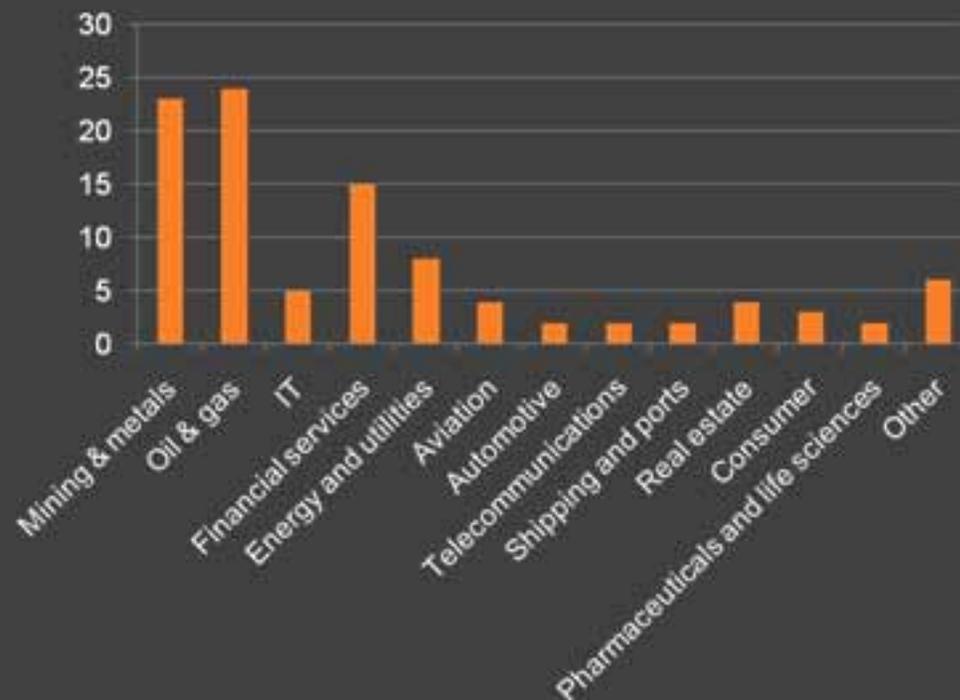
SECTION 1: MAIN OPTIONS FOR ACQUIRING AUSTRALIAN ASSETS

Previous investment

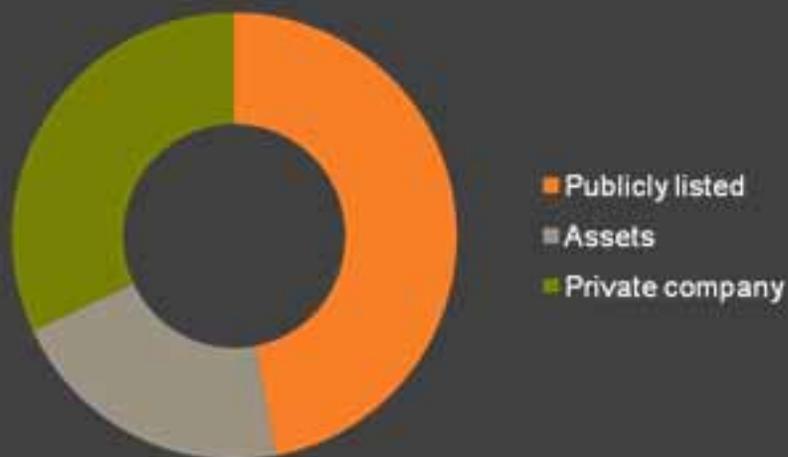
Motivation for investment



Deals by industry

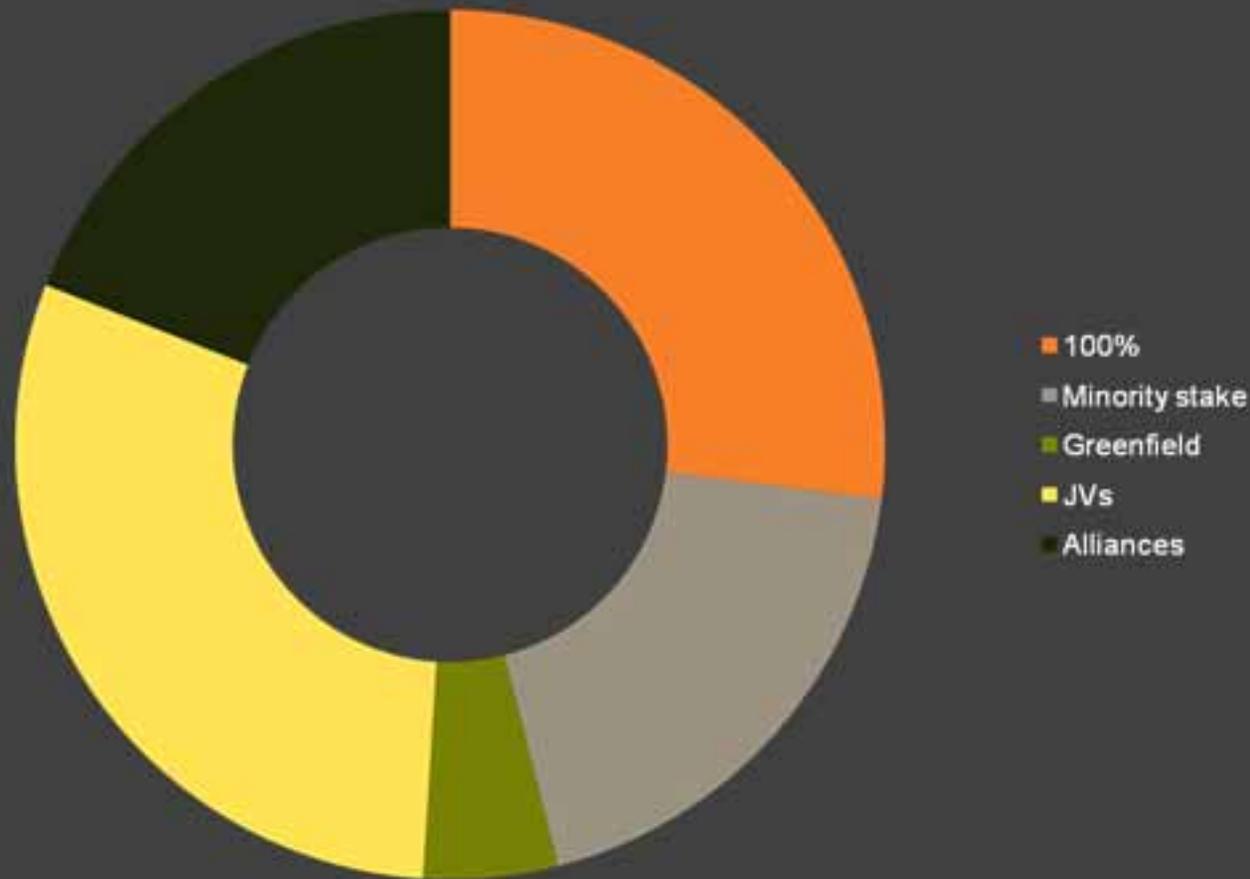


Purchase type



Source: Economic Intelligence Unit, December 2010

Crossing the river by feeling stones – the changing nature of outbound investment



Source: Economic Intelligence Unit, December 2010

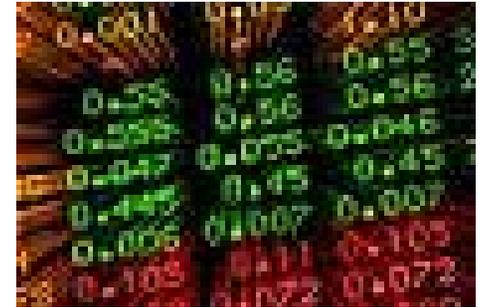
Acquisition of public companies

- A public offer (takeover bid) is the most common way of obtaining control of a listed public company.
- Recommended takeovers can also be carried out by:
 - Scheme.
 - Establishing a dual listed company (DLC) structure.



Takeover bids

- Corporations Act prohibits the acquisition of an interest resulting in any person's voting power entity increasing to more than 20.
 - Voting power is broad - includes control by persons or their associates.
- Key exceptions:
 - Acquisitions under a formal takeover bid in which all shareholders can participate.
 - Schemes.
 - Acquisitions with the approval of a majority of the shareholders who are not parties to the transaction.
 - Acquisitions of no more than 3% of voting power every six months (creep rule).
 - Downstream acquisitions.

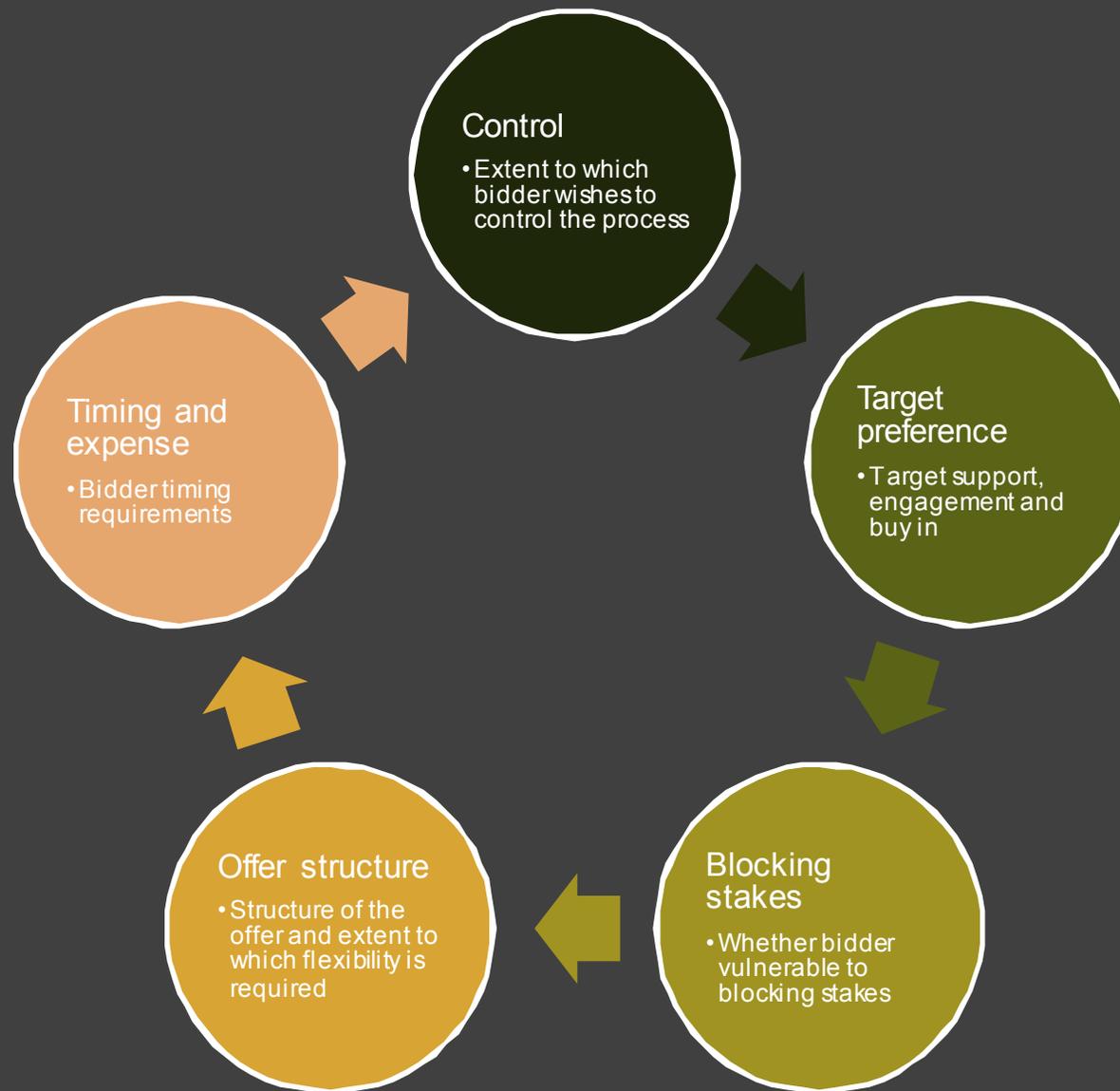


Schemes

- Requires the proposal to be approved by the target shareholders and the court.
- Must be passed by at least 75% of the votes cast and by a majority in number of shareholders. If approved by the court, the scheme is binding on all shareholders.
- The advantages of a scheme over a takeover bid include:
 - almost unlimited flexibility in structuring a takeover or merger;
 - the certainty of obtaining 100% of shares on a specified date, provided the requisite majority and the court approve the scheme.
- However:
 - a scheme gives the target control of the process and timing;
 - more difficult to adjust the terms of the offer quickly (for example, by increasing the bid price or extending the offer period).



Scheme v takeover



Scheme v takeover

Issue	Scheme	Takeover
Control of process	Target controls the process, subject to terms of implementation agreement	Bidder has and retains initiative at all stages
Target cooperation	Essential	Not essential
Court approval	First to order scheme meetings Second to approve scheme	Not required
Ultimate % of ownership	All or nothing	All or nothing, but bidder has option to accept a lesser %
Threshold for 100% ownership	Generally a lower threshold – passed by a majority in number of shareholders present and voting, holding 75% of votes cast	Compulsory acquisition if “relevant interest” in 90% of each class of security, having acquired 75% of securities bid for
Vulnerability to blocking stake	Generally medium (increases as bidder’s stake diminishes eligible voting pool)	With 90% condition – high With 50% condition – low
Offer flexibility	Flexible can include reduction/return of capital, demerger and asset acquisition	Limited can only bid for securities
Tactical flexibility	Normally not possible to vary terms quickly to meet rival bid	Flexibility to increase offer price and waive/modify conditions
Timing	Varies – unlikely to be less than three months Closing date certain	Varies – unlikely to be less than three months
Payment of consideration	At one time. May take security over target assets at implementation.	Usually spread over time, commencing before security available over target assets

Associates & Association

- A number of key provisions treat people “associated” with the key player as forming part of primary group.
- The provisions are widely drawn and include any person who is acting in concert.
- Includes someone who proposes to enter into, an agreement for the purpose of controlling or influencing the composition of the designated body's board or the conduct of the designated body's affairs.

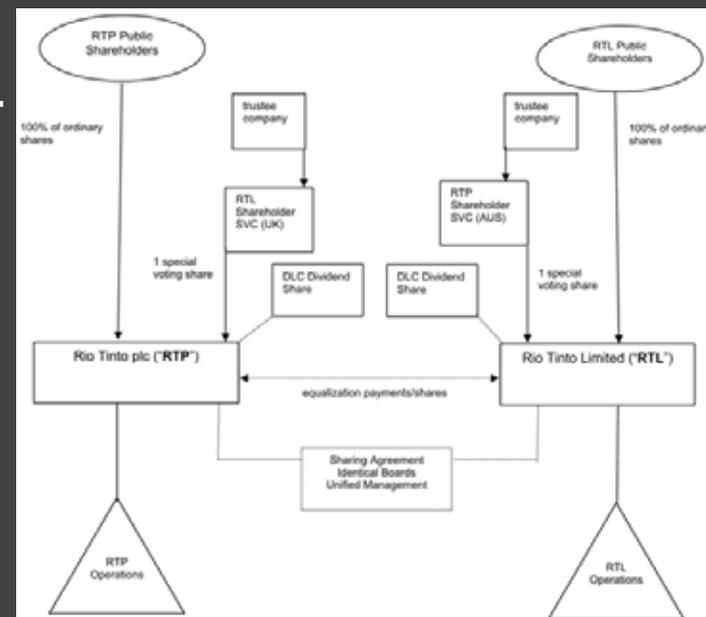


How it is applied

- **"relevant agreement"** includes an oral understanding whether or not having legal force.
- Can give rise to unacceptable circumstances due to the effect on the control or potential control and the breaches of the Corporations Act.
- The provisions apply when there is a proposal that both parties are aware of and committed to.
- **Indicia of association:**
 - **Structural links** – things like common directors, advisers and agents;
 - **Common investments and dealings** – Sequential purchasing of shares by the associated parties. The attendances at meetings and involvement in company affairs by the connected parties;
 - **Uncommercial dealings** – uncommercial agreements and transfers of funds between the associated parties.

Dual Listed Company (DLC)

- The continuation of two separately listed companies, which agree to conduct their businesses as if they were a single economic entity.
- Australian DLCs have not involved any substantial inter-company transfer of assets or the introduction of intermediate holding companies.
- Companies maintain their own distinct shareholders - an economic merger between the companies through:
 - reciprocal cross-guarantees.;
 - appointment of identical boards;
 - agreements providing for joint voting by both sets of shareholders on some major issues;
 - if necessary, equalisation of dividends or distributions. DLCs of this kind require ongoing compliance with two different legal, accounting and tax regimes, and may only be effective in the longer term if the entities involved are of a similar size and have compatible asset profiles.



Acquisitions by private treaty

- Account for a large proportion of the M&A activity in the Australian market.
- Objectives in a sale process will differ depending on whether you are buying or selling.
- Can be conducted through an open or closed tender, direct negotiation, a dual track process or a derivative of these methods.
- A standard sale process involving multiple potential bidders and usually involves two stages:
 - the distribution of limited information (usually via an Information Memorandum) to interested Bidders with an invitation to submit an indicative bid
 - the short listing of Bidders, and the release of further information to such Bidders by allowing them to undertake detailed due diligence leading to the submission of final and binding offers in conjunction with the negotiation and finalisation of relevant sale agreements.
- No standard procedure for running a private treaty sale.
- Moulded to suit the specific circumstances of the sale or acquisition.
 - But there are a number of standard steps that should be followed to ensure that the process runs smoothly and any unnecessary setbacks are avoided to ensure that an organisation's objectives are met.



Best practice and steps to ensure that the process runs smoothly in negotiated M&A

- Naive to assume that both parties are working toward the complete mutual satisfaction of all parties concerned, especially when the dollar amounts involved become large. But it is also naive to assume that everyone is a business mercenary out for his own particular self-interest to the exclusion or sacrifice of the other party.
- There is a “good faith” aspect to any large-ticket sale process that forms the foundation of any solid business transaction.



The basic difference between buying and selling

- The buyer is looking for future value to be derived from the purchase. Toward this end, the buyer is looking to purchase the maximum amount of company for lowest possible price.
- The seller wants to sell for the highest possible price combined with the fewest number of future entanglements.
- Buyers and sellers in a strategic merger are looking for a lasting partnership relationship that benefits both buyer, seller, and their respective shareholders.
- Tips:
 - well thought through letter of intent
 - preparing to buy and sell
 - right team
 - maintain secrecy
 - get the due diligence right (see later discussion)

Share or business sale

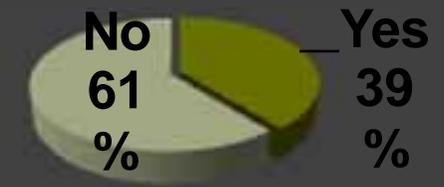
- One of the most important structural decisions is whether the sale should be implemented through a sale of the shares or its assets.
- The main differences between a share sale or asset (business) sale are outlined below:

Share sale	Business sale
Simpler - acquire shares in the Target	Purchaser only acquires agreed assets and liabilities of Target
All Target's liabilities automatically pass to Purchaser	All assets individually transferred
No novation or assignment of contracts (but beware of 'change of control' termination provisions)	Purchaser only assumes responsibility for specified liabilities
Employee/union consultation generally less cumbersome	Third party consents required
Warranties and indemnities may be more extensive because of the potential to inherit 'hidden liabilities'	Employees need to be "transferred"

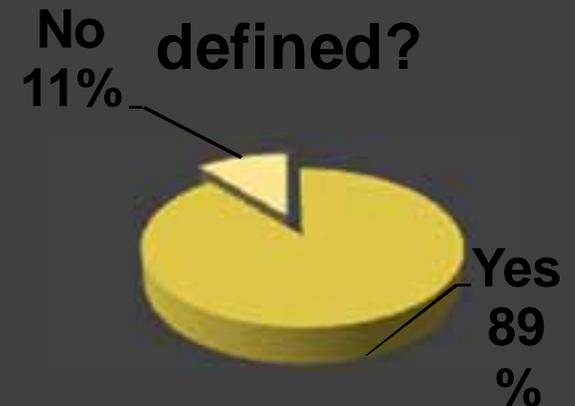
Key principles in a contract for sale

- Conditions precedent:
 - A MAC or material adverse change condition is a way to allocate risk where there is a gap between signing and completion
 - Buyer gets a remedy if the target suffers a MAC in this period
 - This is usually a pre-completion termination right
 - Successfully invoking this right is difficult, but in practice the ability to invoke a MAC gives the buyer leverage to delay or renegotiate the deal
- Other CPs:
 - Regulatory

Includes a MAC CP?



Is "MAC" defined?



Carve-outs from MAC?*



Carve-outs



Hold backs, adjustments and earn outs

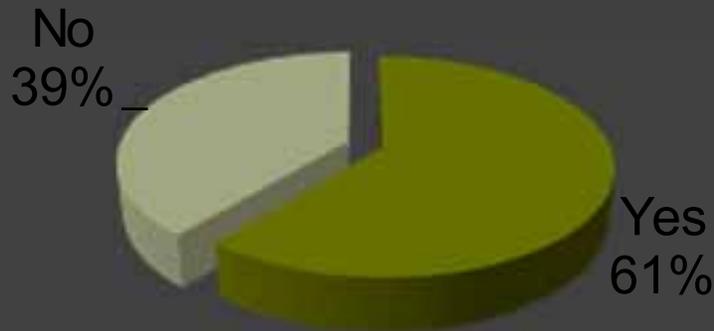
Purchase price
earn-outs? Yes
22%



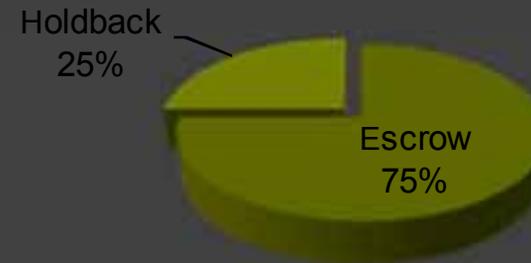
Agreement provide
for support? Yes
17%



Post-completion
purchase price
adjustments? No
39%

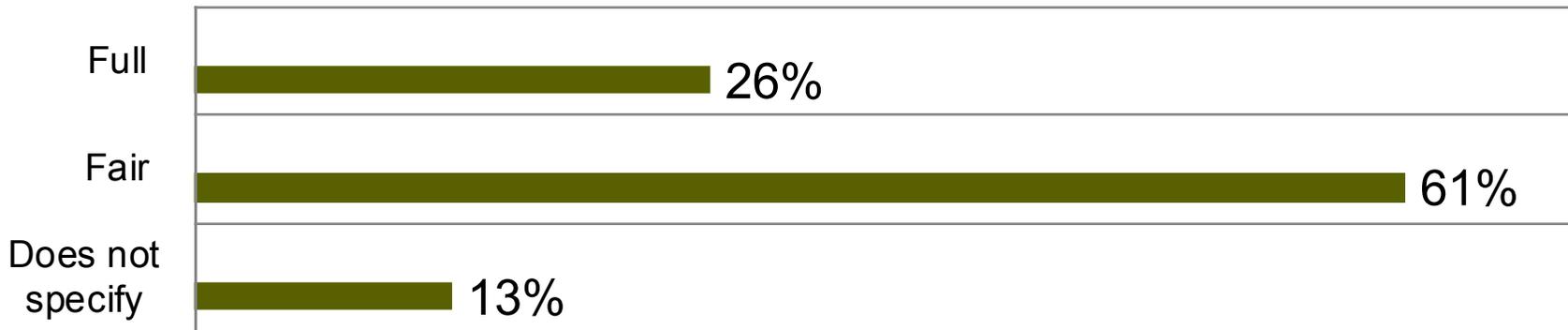


Type of support



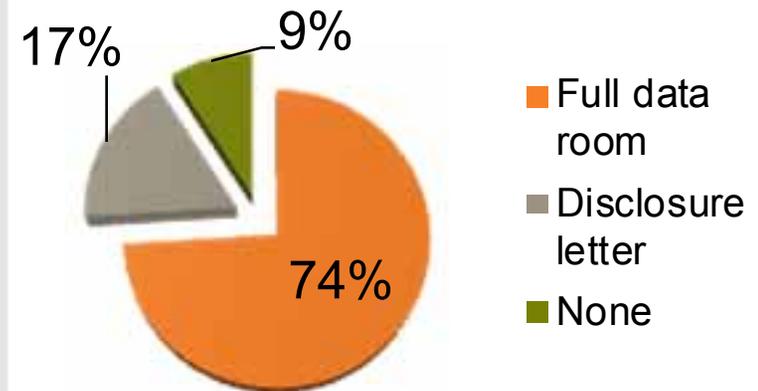
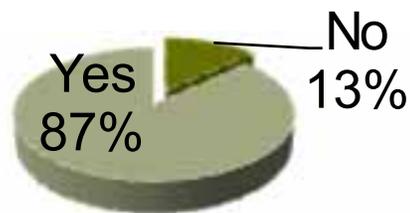
Warranties

Seller's level of disclosure to limit claim



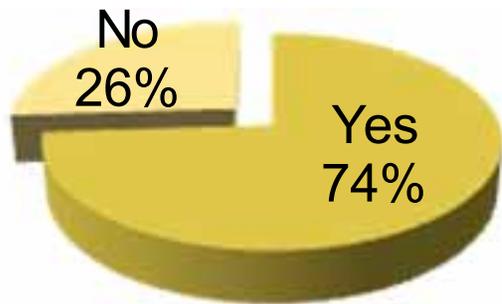
Scope of disclosure against warranties

Disclosure accuracy



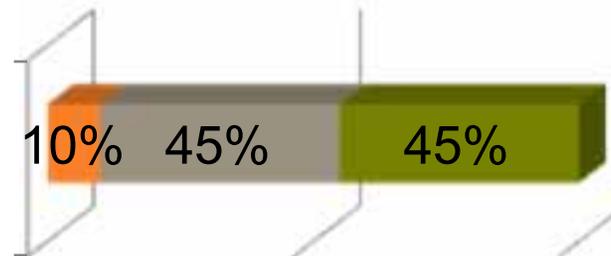
Indemnity

Seller provides indemnity to support warranties?

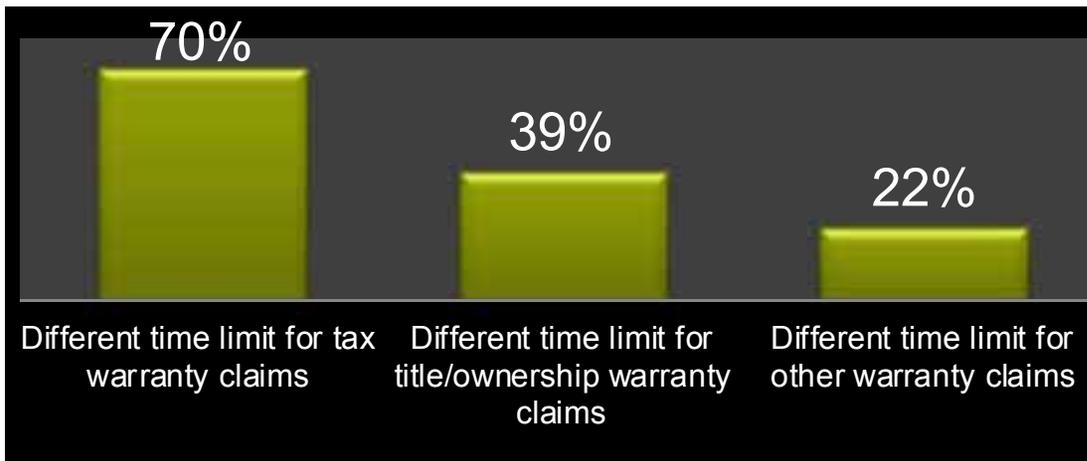


General warranties

Agreement includes a time limit for warranty claims?

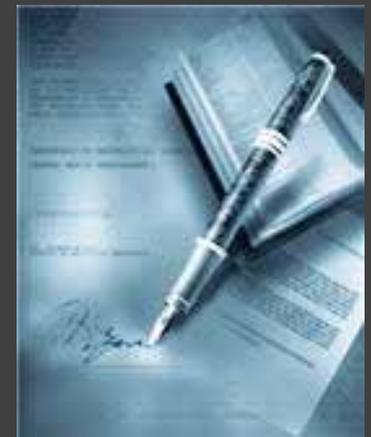


- ≤ 12 months
- > 12 - 18 months
- > 18 - 24 months

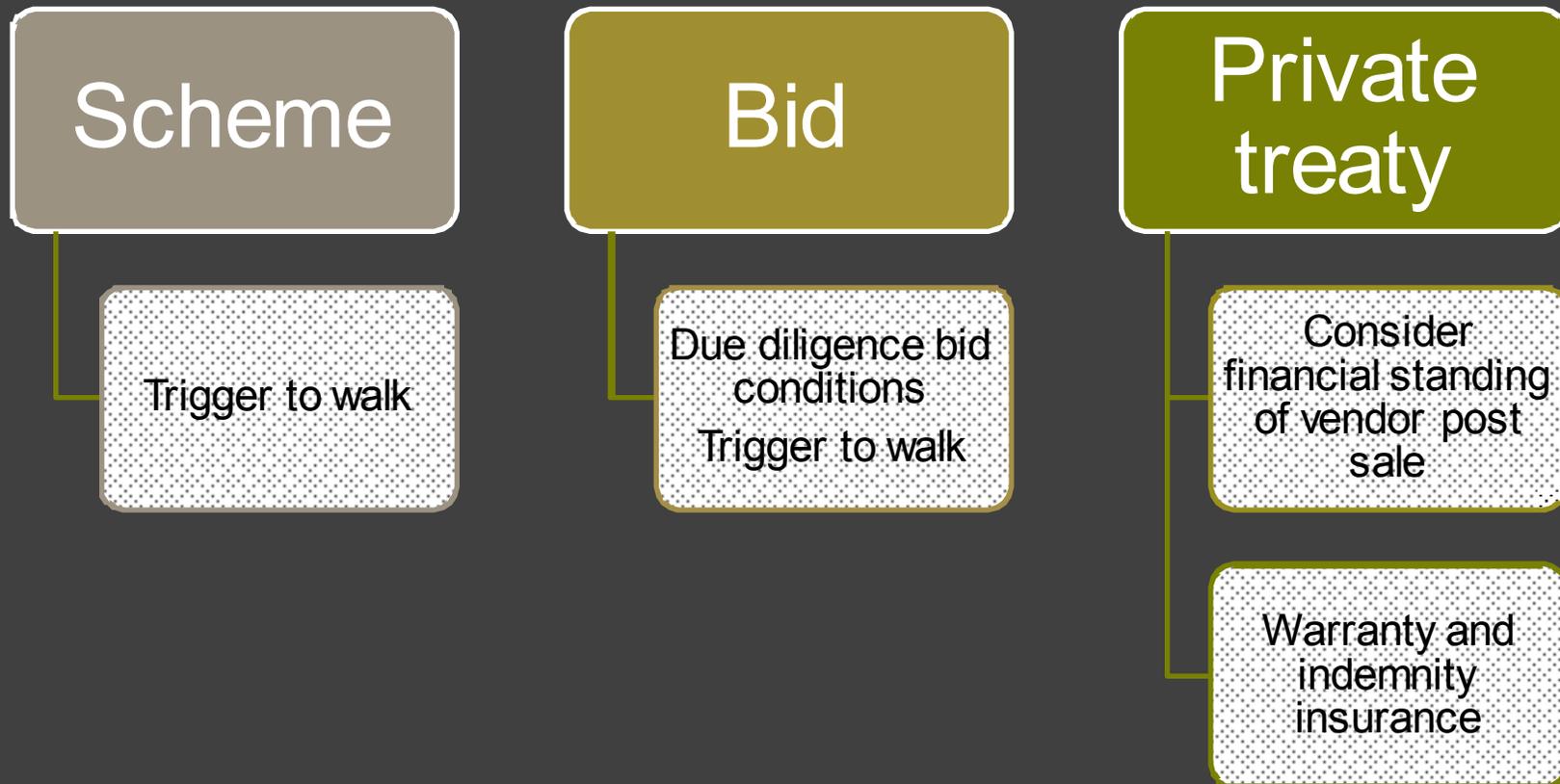


Joint ventures and alliances

- **The Strategic Alliance or Alliance Strategy**
 - Any situation where two or more businesses implement a strategy together
 - Could be a shared marketing strategy, a referral relationship or an affiliate program
 - Typically fairly informal, they can be as simple as swapping customer lists, or sharing under utilised resources
- **The Joint Venture (JV)**
 - More formal arrangement created to undertake a specific business transaction or project.
 - May involve a separate entity (or company) to carry out the implementation and operation of the project.
 - Joint venture usually involve detailed legal documentation to spell out the objectives of the venture and what each party will contribute including capital, technical support, and services.
 - The documentation will also cover things such as management rights, how profit and/or losses are split, rules about restrictions, dispute mechanisms and exit strategies.



The role of warranties and indemnities



SECTION 2: LEGISLATIVE RULES

Key thresholds

Threshold	Requirement	Test
5%	Substantial holding notification	“relevant interests”, “associates”
10%	Approvals re: material assets	“relevant interests”, “associates”
15%	FIRB approval	“interests”, FATA “voting power” and “potential voting power”, FATA “associates”
20%	Takeovers threshold	“relevant interests”, “voting power”
80%	Scrip for scrip CGT roll over relief	“owner”
90%	Compulsory acquisition	“relevant interests”, “acquired”, “full beneficial interests”, “voting power”



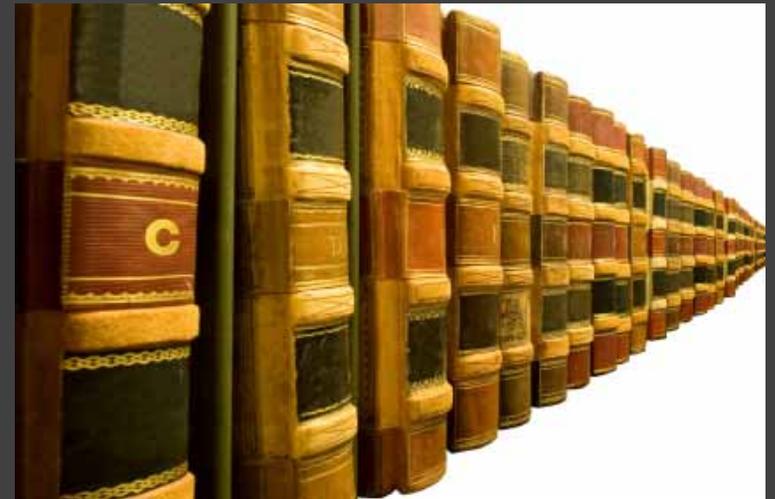
Corporations Act

- The Corporations Act:
 - Chapter 6 (takeovers);
 - Chapter 6A (compulsory acquisitions);
 - Chapter 6C (shareholding disclosure requirements) and Chapter 6CA (continuous disclosure);
 - Part 7.10 (insider trading and other conduct relating to securities);
 - Part 2D.1, (duties and powers of directors); and
 - Chapter 6D (fundraising, relevant for scrip bids) and Part 7.9 (for scrip bids by managed investment schemes).
- Breach can lead to civil and criminal liability and a wide range of sanctions and orders like:
 - cancel or declare voidable an agreement or offer;
 - restrain the exercise of voting or other rights attached to securities; and
 - require the disposal of securities.



Other regulation

- **The Australian Stock Exchange Limited (ASX) Listing Rules and Operating Rules and the ASIC Market Integrity Rules.**
- **The Foreign Acquisitions and Takeovers Act 1975 (Cth) (FATA).**
 - If the bidder is non-resident, or is controlled by non-residents, it must usually obtain prior approval from the Federal Treasurer through the Foreign Investment Review Board (FIRB).
- **The Competition and Consumer Act 2010 (Cth) (CCA).**
 - Replaced the Trade Practices Act 1974 from 1 January 2011. Acquisitions that would (or are likely to) have the effect of substantially lessening competition in a market are prohibited.



Other legislation for example, legislation dealing with banks, media and insurance ownership and the transfer of interests in sensitive sectors.

Regulation of public takeovers



- has primary responsibility, can modify the provisions of Chapter 6 and grant exemptions from strict compliance. ASIC issues regulatory guides, giving guidance on when it will grant exemptions and modifications.



- small full-time executive and part-time members drawn from merchant banks, law firms and the business community.
- key features include:
 - it is the main forum for resolving takeover disputes.
 - has broad statutory powers
 - can make declarations of "unacceptable circumstances" and wide-ranging consequential orders
 - decides appeals from ASIC's decisions on modifications and exemptions concerning takeovers
 - its decisions are subject to judicial review by the courts

The regulatory authorities

Australian Securities and Investments Commission (ASIC)

ASIC administers the Corporations Act 2001 (Cth), which is the main legislation governing company law, including public takeovers.



Takeovers Panel (Panel)

The Panel resolves takeovers' disputes and decides appeals from decisions of the Australian Securities and Investments Commission.



Foreign Investment Review Board (FIRB)

FIRB examines proposals by foreign interests to undertake direct investment in Australia and makes recommendations to the government on whether those proposals are suitable for approval under the government's policy.



Australian Competition and Consumer Commission (ACCC)

The ACCC promotes competition and fair trade in the market place to benefit consumers, business and the community. It also regulates national infrastructure services.



SECTION 3: DUE DILIGENCE

Due diligence

- Should be a standard step in any sale and purchase.
- Usually involves:
 - developing and adopting a formal set of policies and procedures ;
 - reviewing and setting materiality thresholds;
 - establishing commercial, financial, tax and legal teams to examine each aspect;
 - preparing and settling the Due Diligence Questionnaire.
- Proper planning is a critical component of a successful sale program and helps to ensure timetables are met and the maximum price is achieved.
- Use of a 'black box'.
- Enquiries are usually much more extensive on recommended transactions than on hostile bids.
 - This is one of the main advantages of a recommended bid. A target can require potential bidders wishing to undertake due diligence to agree to a standstill, so that the target can run a competitive "sale" process.
 - The Panel has recently held a potential bidder to a 12-month standstill, which the Panel considered to be commercially justifiable and consistent with market practice.



Bidder due diligence

- Due diligence is more than a financial check:
 - it is a critical period in which the buyer should comprehensively and exhaustively take stock of the target company's operations, business track record, undisclosed liabilities, and resources—especially its human capital.
- Shrewd buyers use this period to establish governance and control and prepare for a new era of business in which the two firms will work in unison.
- Can identify problem areas with the Target or a potential transaction and ensure that they are dealt with either prior to the transaction completing or in the sale documentation.
- If problems cannot be dealt with prior to the execution of documentation, Bidder has the option of:
 - reducing the purchase price they are willing to pay for the Target
 - pulling out of the transaction altogether.
- Advisers will usually prepare exceptions based due diligence reports:
 - reports are usually compiled upon completion of the review of the data room;
 - separate reports are usually prepared for commercial, financial, tax and legal issues.



Due diligence – target at key areas of risk and concern

Issues	Considerations
Tenements	Identify and confirm rights under exploration licences and mining leases, compliance with conditions and rehabilitation obligations. Identify and consider competing and conflicting tenements which may impact on operations or expansion.
Property	Identify and confirm real property rights and interests. Identify potential native title issues.
Environmental and other approvals	Identify and confirm all necessary approvals are in place and have been issued on reasonable terms and conditions.
Material contracts	Identify any termination provisions which may be triggered by proposed transaction.
Infrastructure	Consider access to key infrastructure, potential constraints and rights of third parties to access.
Employment and OH&S	Identify any payments/benefits payable on change of control. Identify potential industrial relations issues which may restrict any future restructure.
Finance	Identify any review event which may be triggered by transaction and prepayment provisions
Litigation	Identify any material litigation to which the target is subject and which may impact materially on target or the operation of its assets

Due diligence in hostile bids

- The extent varies because:
 - the bidder can be prevented by insider trading laws from building a pre-bid stake if it obtains price-sensitive information that is not generally available.
 - enquiries can alert the target or the market to the possibility of a bid, resulting in either:
 - an increase in the share price;
 - the target implementing defensive measures.
- The Panel has considered bid conditions that require the target to provide, or allow confirmation of, certain information.
 - These types of conditions are not necessarily unacceptable, but the Panel will not usually interfere with the target's directors' decision as to whether to provide the information.



Due diligence from the public record

Public domain

- ASIC records include:
 - constitutional documents;
 - audited financial statements;
 - annual reports including capital structure;
 - office holders.

Listed companies

- Information is available from ASX, including:
 - substantial holding notices – holders 5% or more;
 - 20 largest shareholders.
- Target announcements - all material price sensitive information known to the target (apart from confidential information, of certain types, that a reasonable person would not expect to be disclosed).

Company registers

- Can inspect the registers giving details of:
 - members (registered holders, rather than beneficial owners);
 - holders of options over unissued shares;
 - debenture holders;
 - tracing notice information beneficial owners:
 - provided in response to notices issued by the relevant listed entity or ASIC.
 - can obtain copies, but (other than for tracing notice information) must make an application stating its purpose.
- Not frequently used.



SECTION 4: ISSUES

Confidentiality

- Insider trading laws - may prevent a potential bidder communicating its intentions.
- ASX Listing Rule 3.1 imposes a general obligation on listed companies to keep the market properly informed.
 - Any information that a reasonable person would expect to have a material effect on the price or value of its securities (such as receipt of a notice of intention to make a bid), must be provided immediately to ASX
 - Does not apply if all of the following are satisfied:
 - A reasonable person would not expect the information to be disclosed.
 - The information is confidential and ASX has not decided that the information has ceased to be confidential.
 - One or more of the following applies:
 - it would be a breach of law to disclose the information;
 - the information concerns an incomplete proposal or negotiation;
 - the information consists of matters of supposition or is insufficiently definite to warrant disclosure;
 - the information is generated for internal management purposes; or
 - the information is a trade secret.
- In general, incomplete M&A negotiations do not require notification to ASX while they remain confidential.
 - Media comment or speculation and a share price movement, is likely to prompt an ASX query.
 - ASIC can issue infringement notices (imposing a fine of A\$100,000 for larger companies) if it believes an entity has not complied with its continuous disclosure obligations.
 - In one case, ASIC issued a notice to a target that delayed an announcement for half a day after a merger proposal leaked.



Building a stake

- Undertakings by key shareholders to accept the offer (pre-bid acceptance agreements).
 - These agreements may increase the bidder's voting power for the purposes of the 20% threshold prohibition.
 - Even an informal agreement to acquire shares breaches the 20% threshold prohibition.
 - If acquiring more than 5% must give notice of its holding to the target and ASX within two business days. Subsequent changes of 1% or more must also be notified.

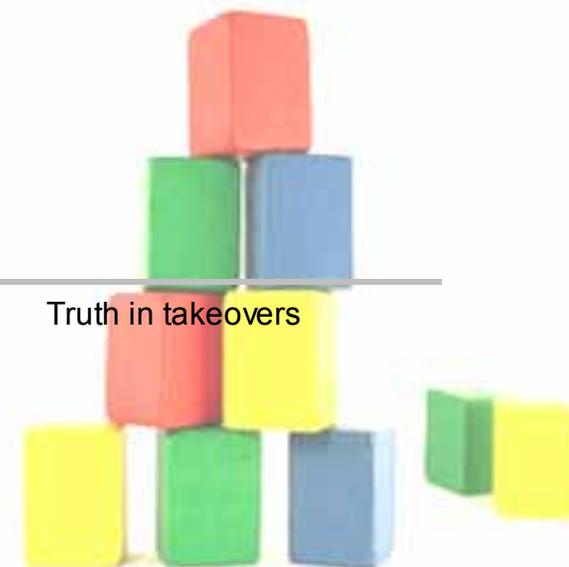


Pre-bid acceptance agreement

- If, as a result of a pre-bid acceptance agreement, the bidder's voting power in the target is 5% or more, disclosure is required, and a copy of the agreement must be provided with the notice.
- Cannot acquire more than 20% of the target's shares before announcing a bid.
 - Shareholdings (and other interests giving control over voting or disposal of the target's securities) held by the bidder's associates must be aggregated
- Bidders sometimes enters into a pre-bid acceptance agreement as to 19.9% of shares held by a key shareholder, leaving that shareholder free to deal with the remainder of its holding as it sees fit.
- A foreign bidder cannot generally acquire more than 15% of the shares in an Australian target without FIRB approval.
 - Agreements to acquire up to 20% of the shares, subject to FIRB approval as a condition precedent, are permitted.

Stake building and pre-bid agreements

Mechanism	Substantial shareholder notice	20% takeover threshold	Scheme	Takeover
Purchase of shares	Required if $\geq 5\%$	Applies	Separate class	Minimum bid price rule
Call option over shares	Required if $\geq 5\%$	Applies	Separate class – unlikely if equal treatment of shareholder rights Discounted votes – depends on terms	Minimum bid price rule
Voting agreement or proxies (scheme)/ pre-bid acceptance agreement (bid)	Required if $\geq 5\%$	Applies	Separate class – unlikely if equal treatment of shareholder rights Discounted votes – depends on terms	Minimum bid price rule
Statement of intention to vote in favour (scheme)/ accept (bid) (subject to no superior offer emerging)	Not required, if no understanding etc	Not required, if no understanding etc	Truth in takeovers	Truth in takeovers



Agreements in recommended bids

- A merger agreement for a scheme is likely to include:
 - parties' obligations to effect the merger;
 - conditions, warranties or indemnities;
 - conduct of business;
 - access to information, announcement and exclusivity.
- Increasingly common in recommended takeover bids.



Deal protection

- A target board may agree to enter into either:
 - a no-shop agreement, where the target agrees with the bidder not to solicit another offer for a specified period;
 - a no-talk agreement, which prohibits the target from negotiating with another bidder, even if that bidder's approach is unsolicited.
- The Panel considers no-talk agreements to be more anti-competitive than no-shop agreements, and that such agreements must contain a fiduciary carve out to allow the target's directors to discharge their fiduciary and other duties.
- Obligations to notify details of competing approaches may also need to be subject to a fiduciary out.
- Even with a fiduciary out, the period of restraint under a no-talk agreement must still be limited and reasonable.

Break fees

- Break fees are common in takeover bids and schemes.
 - agreed by targets (often to induce competing bids) or by both the bidder and the target in the case of schemes, but break fees have also been agreed by major shareholders.
- Lock-up devices (including break fees) will be unacceptable if they have a substantial:
 - anti-competitive effect against current or potential bidders; or
 - coercive effect on the target's shareholders.
 - 1% or less of equity value is generally not unacceptable in the absence of other factors (such as coercive triggers). Where a break fee is given by a shareholder, the 1% cap is calculated on the value of the shares held by the shareholder.
 - other relevant factors include:
 - whether agreed after a transparent public process to elicit proposals;
 - whether less than the bid premium; and
 - the cost, effort or risk involved in making the proposal.
- Usually disclosed when the transaction is announced.
- Target adviser success fees may be analogous to break fees and may be subject to similar constraints.
- PRC approvals there have been some examples of break fees based on failure to obtain PRC consents eg:
 - Jinchuan Group Limited's R9.1 billion acquisition of Metorex Limited agreed to pay R182 million if Jinchuan did not obtain the approval of the Scheme by the NDRC, SASAC, MOFCOM (including MOFCOM approval of the Scheme under the competition laws of China) and SAFE.



Funding

Funding certainty

- A bidder that publicly proposes a takeover bid commits an offence (subject to limited defences) if it is reckless as to whether it will be able to perform its obligations on acceptance.
- A bidder must at all relevant times have a reasonable basis to expect that it will have sufficient funding arrangements in place to satisfy acceptance under the bid.

Timing for payment

- No later than one month after the offer is accepted or becomes unconditional and not more than 21 days after the offer closes.
- In a scheme must place funds with the target company in a trust account before the implementation.

Disclosure

- Ultimate source of funding.
- Amount available for drawdown.
- Conditions precedent and status.
- Material terms, including unusual events of default.



Debt funding - some key considerations



Conditions precedent

- Consistency with bid conditions or conditions to Scheme Implementation Agreement
- Consider any potential inadvertent “interconditionality”, including timing of PRC regulatory approvals
- Consider any conditions about evidence of title and timing for obtaining that evidence



Loan document

- Consider standard form loan documentation, e.g. APLMA
- Minimise any unusual or onerous terms
- Consider events of default, triggers for repayment
- Consider ongoing financing of operations post Completion



Flow of funds

- Step out flow of funds
- Consider timing for commencement of flow of funds (i.e. all conditions satisfied)
- Consider any timing requirements for conversion of RMB to other currencies (i.e. in tranches)

Bid conditions

- Vary greatly, can be quite detailed and restrictive - common conditions include that:
 - acceptances in relation to usually either 50%, 80% (roll over relief) or 90% (90% is required for compulsory acquisition).
 - This condition is often waived before the bidder reaches 50%.
 - prescribed occurrences - relation to major capital matters - s652C(1) or (2)
 - As a condition precedent:
 - the bidder receives the approval of the Australian Treasurer under the FATA.
 - the bidder having obtained all required approvals under the PRC laws including the NDRC, SASAC, the China Securities Regulatory Commission, the MOFCOM and the SASAC
 - no material adverse change occurs, is announced or otherwise becomes public in respect of the target.
 - Approvals or consents:
 - Sichuan-based trading company Hanlong made \$1.4 billion takeover bid for Sundance conditional on receiving a mining convention in Cameroon and a mine permit in the Congo
 - there are no material acquisitions, disposals or transactions by the target.
- Cannot depend on the bidder's opinion, belief or other state of mind, or on the happening of an event that is within the sole control of, or is a direct result of action by, the bidder.
- Maximum acceptance conditions (for example, providing that the offer terminates if acceptances reach a certain level) are prohibited.



Chinese regulatory approvals (General)

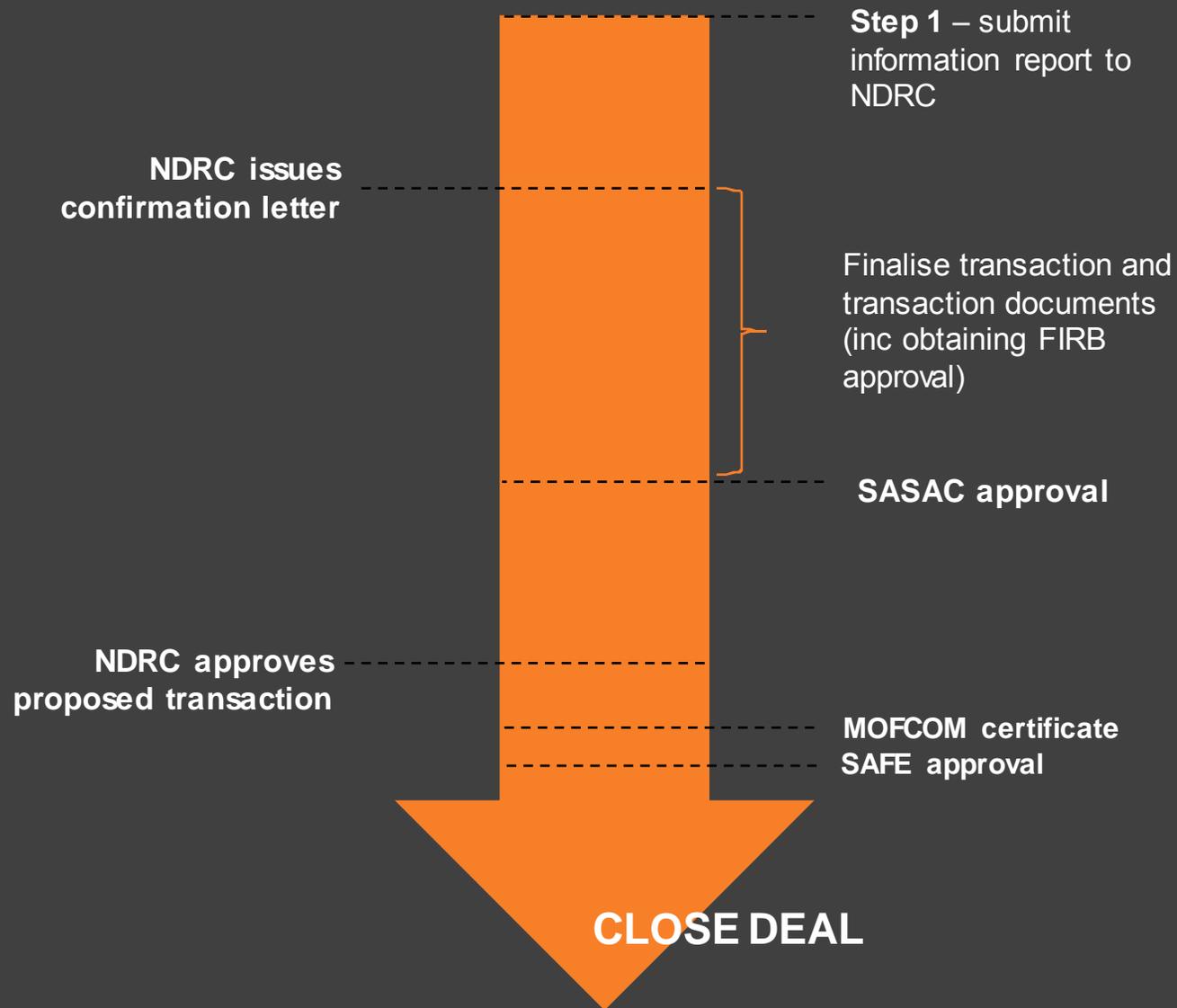
Authority	Investment thresholds	Required documents
NDRC Co. must obtain NDRC approval before any definitive binding agreements are executed.	Central level: a) \geq USD 300m in resource sector (if \geq USD 200m, also to be approved by State Council); b) \geq USD 100m in other sectors (if \geq USD 50m, also to be approved by State Council); or c) Non-diplomatic countries	Project application report, including: a) Board resolution b) Letter of Intent for financing issued by the bank. c) Executed letter of intent or the framework. d) Information report (overseas bid or purchase projects).
	Provincial level: a) $<$ USD 300m in resources sector b) $<$ USD 100m in other sections	
MOFCOM	Central level: a) Non-diplomatic countries or defined countries b) $>$ USD 100m investment c) Multi countries d) Involving the establishment of special purpose vehicles	a) Application form b) Business license of the enterprise c) By law of the overseas enterprise and the relevant agreement or contract d) Approval or filing document issues by the relevant state department e) Pre-report on Overseas Merge or Acquisition, if required.
	Provincial level: a) USD 10m $<$ investment amount $<$ USD 100m b) Resources sector c) Requiring fund-raising from domestic market	
SAFE	Co. wishing to change capitals from RMB to foreign currencies and inject capitals into the outbound investments	a) Application form b) Explanation on sources of foreign exchange funds. c) Approval document issued by the competent overseas administrative department

Chinese regulatory approvals

Specific Industries



PRC regulatory approvals – an overview



SECTION 5: AUSTRALIA'S FOREIGN INVESTMENT RULES

FIRB

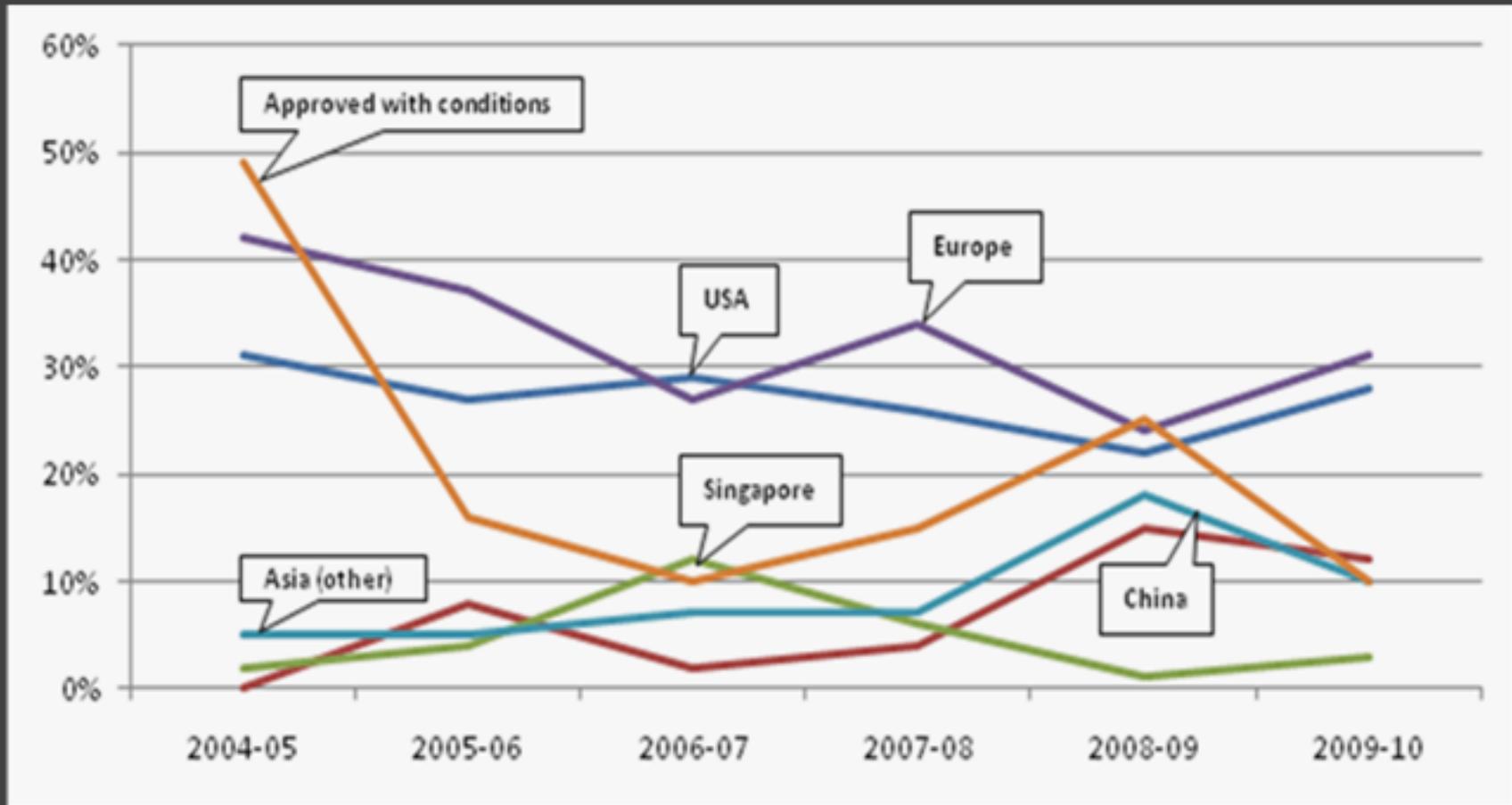
- Treasurer is advised by Foreign Investment Review Board.
- General test is whether the proposed investment is 'contrary to the national interest'.
- Transactions that require review include:
 - acquisition of substantial interest in shares or business valued > \$231 million;
 - acquisition of any interest in Australian urban land (which may include an interest in mining tenements);
 - direct investment by foreign governments (irrespective of amount):
 - proposals from foreign governments or their related entities operating on a fully arms length and commercial basis are less likely to raise national interest concerns.
- The national interest test has broad interpretation and is at the Treasurer's decision.
- The Treasurer has declared six principles to determine national interest for SWFs and SOEs.

FIRB – Australian foreign investment framework

Issues	Considerations
National security	The extent to which the investment affects Australia's ability to protect its strategic and national interests
Competition	Whether the investment affects diversity in ownership and competition within Australian or global industries
Australian Government Policies	The extent to which the investment is consistent with the Government's policies objectives and the impact the investment may have on Government revenues
Impact on the economy and the community	A range of factors including the nature of funding of the investment, Australian participation in the target enterprise following investment and the interests of employees, creditors and other stakeholders
Character of the investor	The extent to the which the foreign investor operates on a transparent and commercial basis and is subject to adequate and transparent regulation

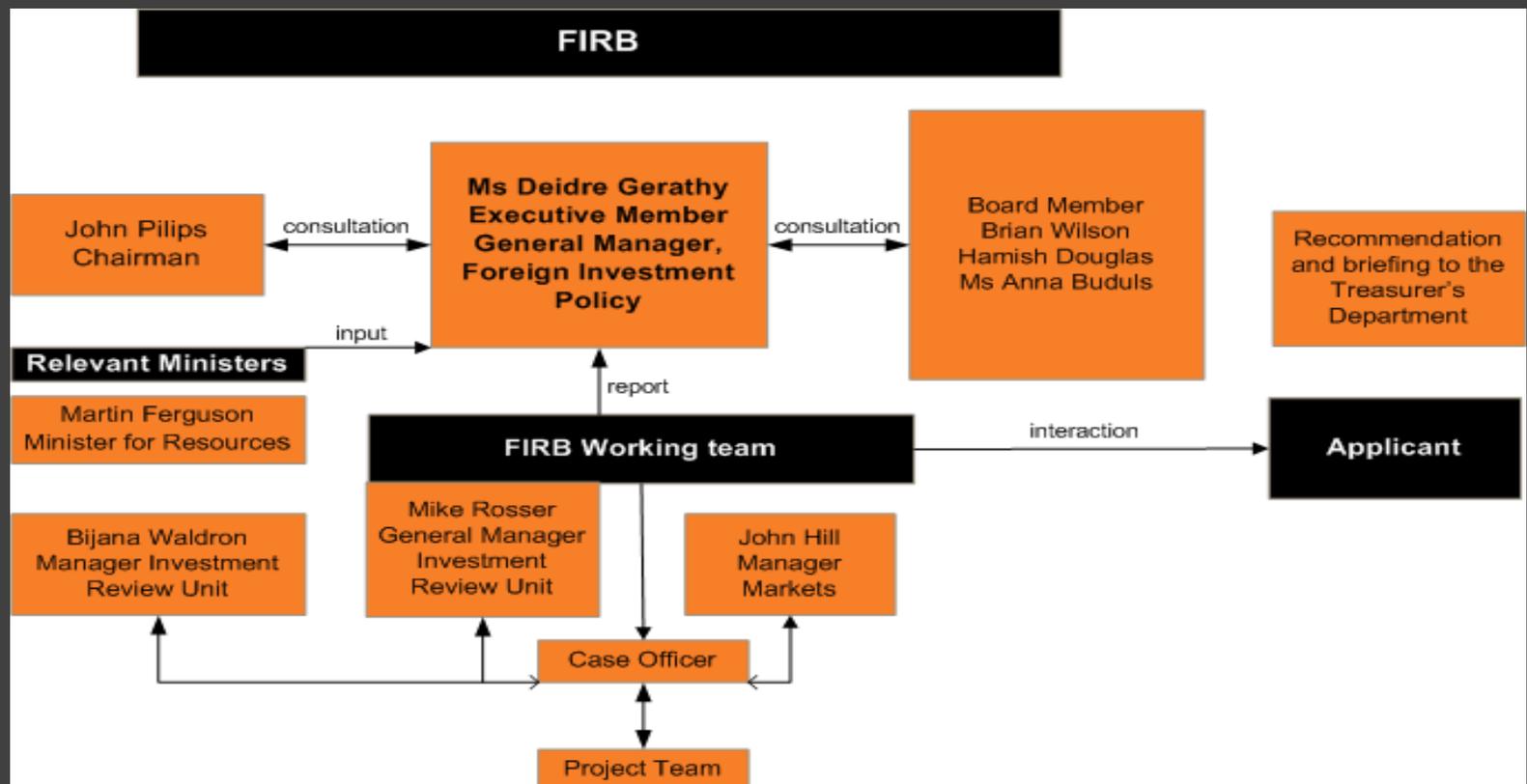


FIRB applicants by origin



FIRBs internal process – eg resource sector

Majority of an applicant's interaction is likely to be with the FIRB working team, with Executive Member joining key meetings



- Foreign investment policy is administered by the Treasurer who is advised by FIRB
 - FIRB is an advisory rather than a statutory body
- FIRB has two main functions in relation to foreign investment proposals:
 - examine investment proposals by foreign interests and, against the background of the Government policy, make recommendations
 - give guidance, where required, to foreign investors so that their proposals can conform with Government policy

The FIRB process – for applicants

FIRB Advice
 Early consultation with FIRB
 Executive may occur. Advice about conformity with guidelines/policy may be given

Confidentiality
 All material provided in strict confidence. Access to third parties barred except where provider's consent is first obtained

The Proposal
 Submissions of Proposal to FIRB or its Executive

Proposal referred to relevant section within the Foreign Investment Review Branch of the Treasury handling case work to prepare the first draft of the report

Where appropriate, consultation with Commonwealth and State Governments Statutory agencies

The Report
 Following evaluation by the FIRB Executive, a report is prepared which contains comments, conclusions and recommendations

Depending on type of application, the following occurs

Approval
 Decisions taken by the Executive Member, Branch or Section Head on certain proposals under delegated responsibility

FIRB considers 'significant proposals'

'Less Significant' cases not covered by delegation forwarded by Executive Member to Treasurer or Assistant-Treasurer for approval/rejection

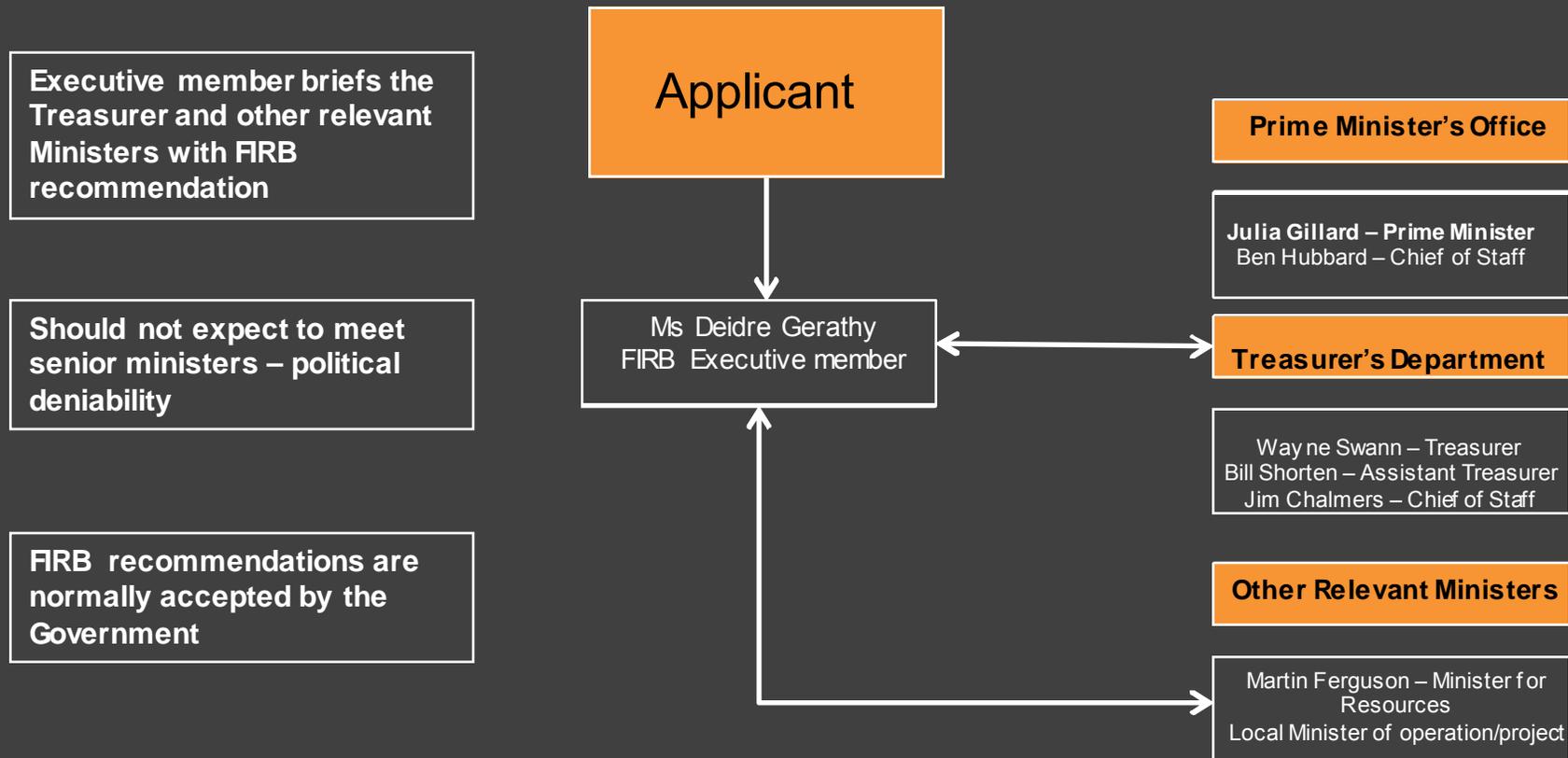
Recommendation forwarded to Treasurer or Assistant Treasurer for **approval/rejection**

No formal appeal mechanism

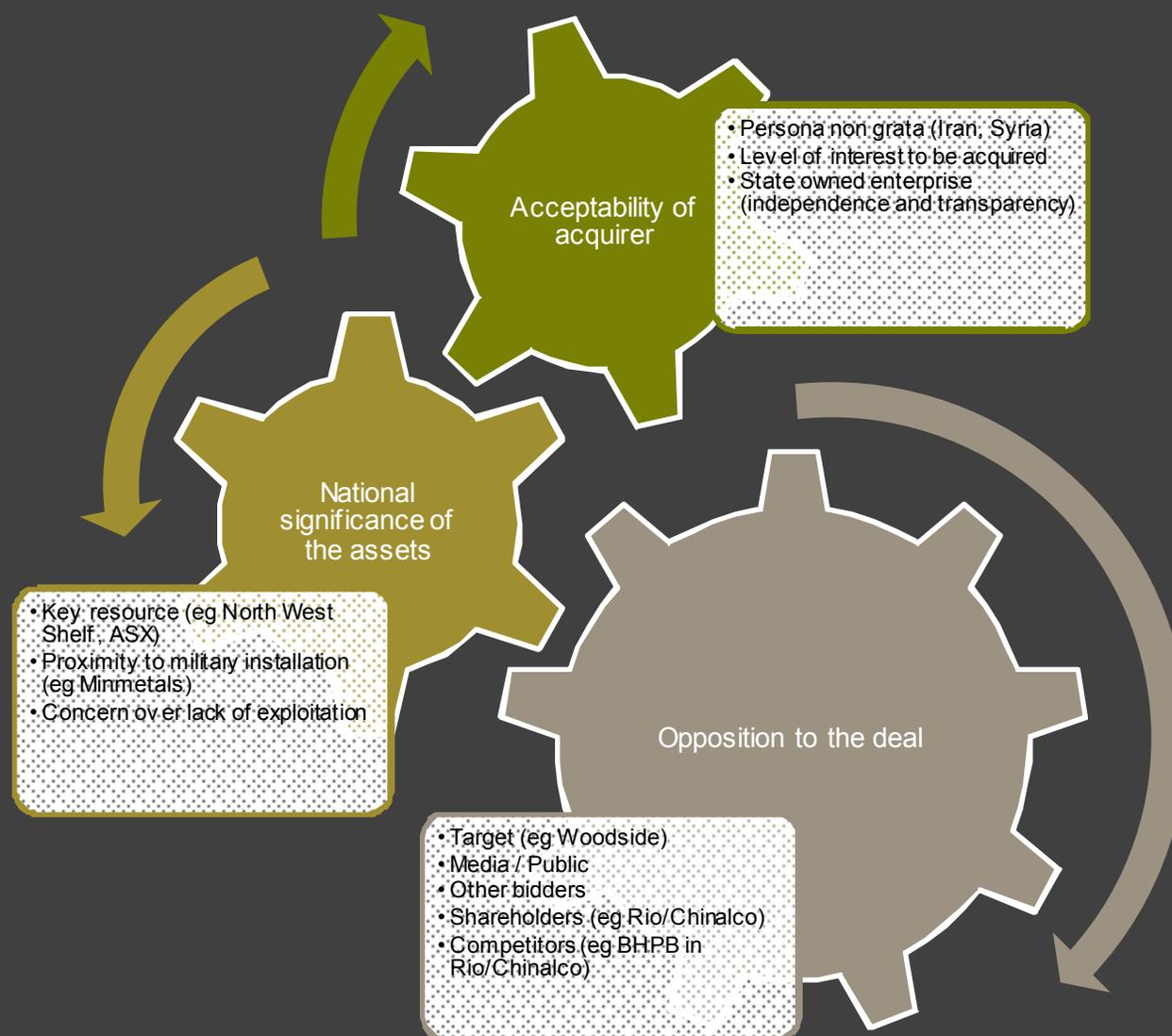
Parties notified of decision (Reasons need not be given)

Some right to information under FOI Act

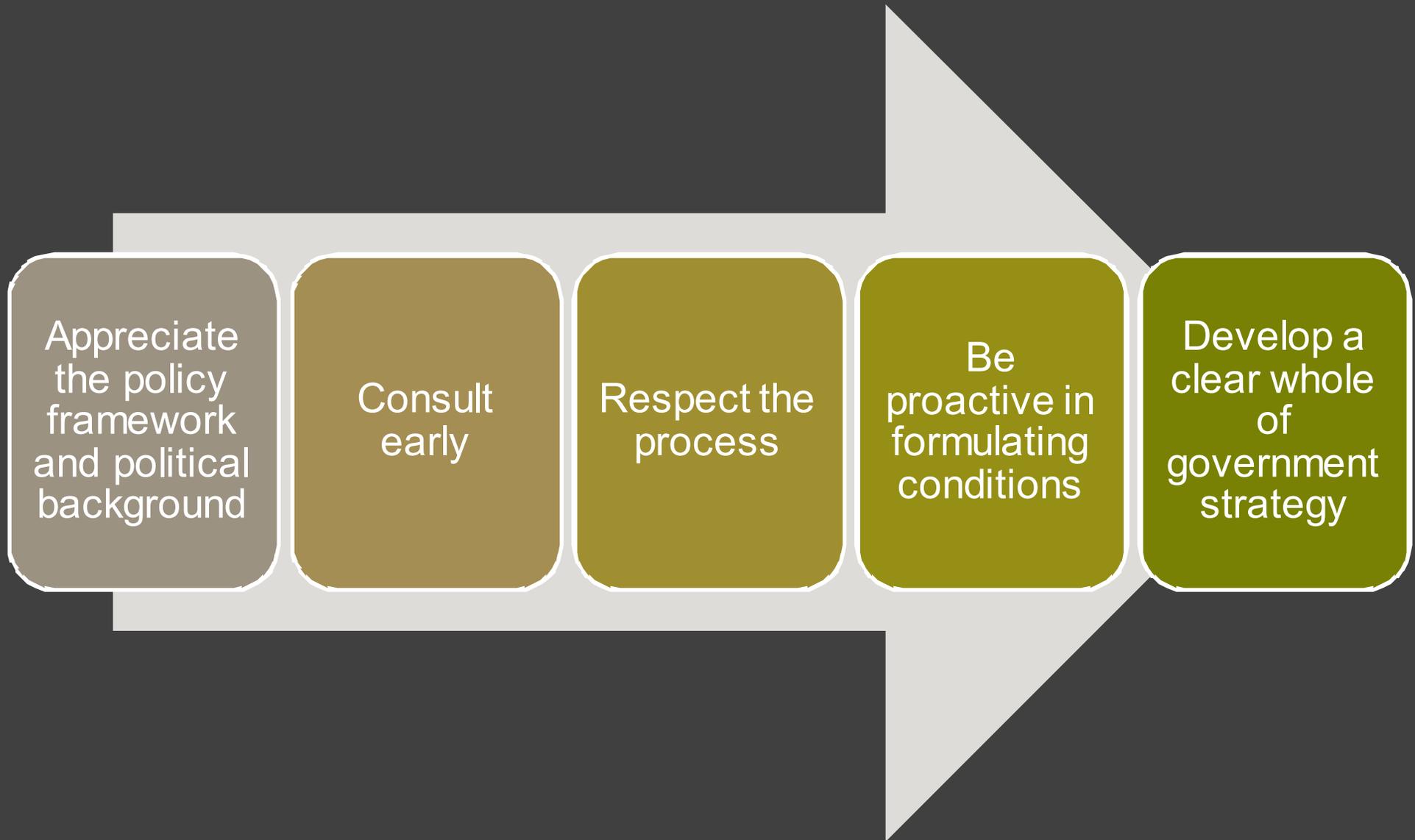
FIRB – external communication



Will FIRB be an issue – some considerations



Approaching FIRB



Key FIRB undertakings



Corporate presence

- Key management and half of directors residing in Australia
- At least of half board meetings in Australia
- Australian sales team
- Independent directors



Annual and financial reports

- Prepare in accordance with Corporations Act
- Lodge with ASIC



Contracts

- Contracts on an arm's length basis with price determined in accordance with market practice
- Support development of key projects



Industrial relations

Comply with all Australian industrial relations, OH&S laws and honour existing employee entitlements



Environment

- Comply with all environmental laws

SECTION 6: WHAT DO SUCCESSFUL OUTBOUND M&A STRATEGIES AND PROCESSES LOOK LIKE?

Introduction

Vision and strategy

- A clear vision and mandate for investment
- A well-defined strategy for value creation
- Shareholder alignment
- A clear deal structure and model for operation as outright owner, partner or minority investor

Negotiation and execution

- A clear decision making process
- Knowledge of the target and its value
- Flexibility of approach
- Knowledge of any competing bidder
- Courage to walk away - learning from your mistakes

Implementation and integration

- Early consideration and planning for post deal phase
- Work with target management to address post deal concerns
- Clear communication (internally and externally)
- Establish a plan for Day One
- Ensuring target management buy in

The role of PRC lawyer in OFDI

- Understand and help clients manage factors that may delay the approval process
- Understand and help manage the internal and external approval process
- Look for ways to deliver client a key competitive or tactical advantage
- Project management:
 - facilitates faster decision-making
 - better resource allocation
 - when undertaking M&A transactions clients are looking for much more than pure legal and regulatory expertise
 - service must be outstanding on every level
 - technical and structural advice but needs to liaise collaboratively with other advisors bringing together to provide a highly effective and user-friendly service
- Be the "trusted advisor" - provide broader strategic, tactical and commercial guidance



What are best practice internal processes?

- It is critical that the acquiring firm takes steps towards becoming a global company” before conducting cross-border M&A.
- M&A begins with a firm-level corporate strategy, and this strategy alone should guide a company’s moves throughout the deal process.
- Global studies of M&A point out that once executives dive into the transaction process, they often become so invested in the deal that they cannot pull out even when necessary. Being able to walk away is a hallmark of M&A sophistication.

Lessons from their previous successful (and not-so-successful) cross-border transactions

- Establish special M&A teams empowered to make top-down decisions, and conduct thorough due diligence.
- Establish control from the word go.
- Buy only in areas of core competency - sounder rationale than a temporary boost to the bottom line, or the pursuit of an acquisition because it looks cheap.
- Maintaining a sharp focus on strategy allows the acquiring company to stay on course, avoid internal distractions, and - most importantly - identify the right target.

What pitfalls should be avoided in various stages of the deal and post-merger process?

- Buyers that rely only on long-term strategy, without plans for quick action on integration, risk failure.
- Failure to act quickly can result in lack of control over management at the target company.
- Many processes recommended for successful outbound M&A go against established Chinese business culture.

Overcoming these challenges to ensure that buying foreign assets actually creates value

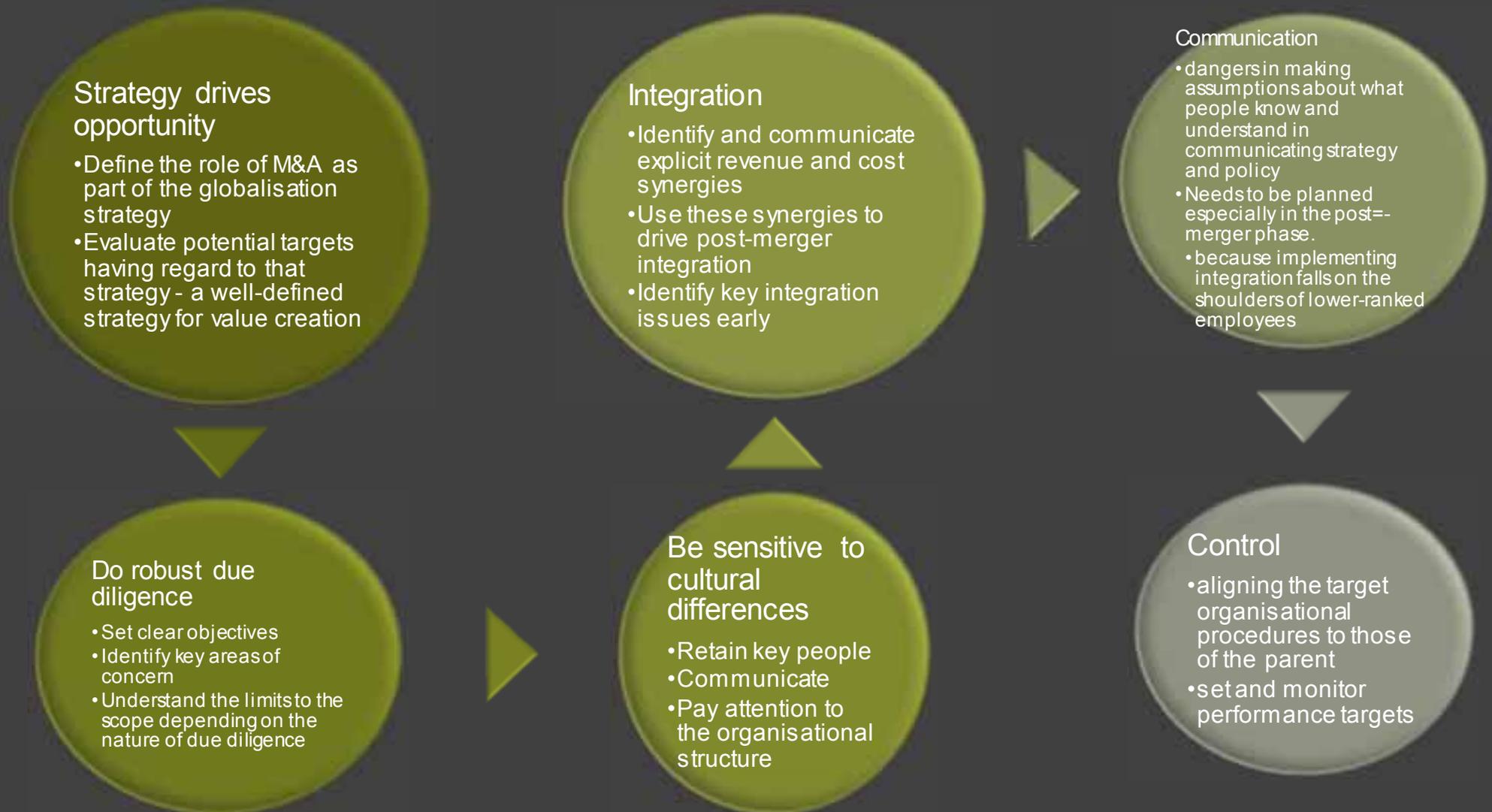
- If you have the core expertise, you know intuitively what the essence of the business is, and when the business is not going well. You have a gut sense of what's wrong: are they buying too pricey a material? Do they have the wrong processes?
- Acquirers must ensure decisions are made top-down, and quickly.
- Due diligence must involve an thorough investigation, particularly of the target's human resources.
- Communication must be open, direct and explicit.

What to do?

- M&A begins with a firm-level corporate strategy, and this strategy alone should guide a company's moves throughout the deal process
 - not dictated by market conditions or because it looks cheap
- Identify the right target
 - arduous process of finding solitary flowers amid a bed of weeds
 - establish a wide network of contacts
 - be suspicious of easy targets
- Buy in areas of core competency
 - implies a sounder rationale than a temporary boost to the bottom line
- Make decisions in a top-down fashion
 - need to be able to respond quickly if not then - may miss good opportunities or pay higher prices because cannot make decisions quickly
 - important to ensure that the people involved in planning and strategy are also in charge of implementation so that they take responsibility for its success



Conclusion



Questions or comments?



What do successful outbound M&A strategies and processes look like?

11 May 2012

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Andrew's Leadership

University of Sydney Adjunct
Faculty Member, Faculty of
Law (Equity Financing)

Law Council of Australia
Corporations Committee -
Deputy Chair (Sydney)

Australian Institute of Company
Directors Corporations
Committee

Financial Services Institute of
Australia ; Member -
Regulatory Compliance Group
and Company Reporting
Subcommittee ; Institute of
Chartered Secretaries Fellow;
Member Subject Advisory
Committee Applied Corporate
Governance Program

Andrew's papers can be accessed on the
Social Science Research Network (SSRN) at
<http://ssrn.com/author=656993>

- Andrew Lumsden cuts through the noise. First to identify the problem, then find the solution. He is known as much for his frank and practical approach as the results he achieves. An M&A, securities transactions and corporate governance specialist, he has the technical expertise to back up his track record.
- Andrew has a 20-year reputation for delivering high quality results in groundbreaking transactions. His experience includes significant resources, infrastructure and property transactions. He acted for Yanzhou Coal Mining Company in its \$3.5 billion takeover of Felix Resources, the largest successful acquisition by a Chinese company in the Australian coal sector and one of the largest completed deals in Australia in that year.
- His Chinese clients include individuals and SOEs (both provincial and central) where he has advised on a number of successful acquisitions in the resources and real estate sector.
- He has recently advised Whitehaven Coal Limited on the merger-of-equals with Aston Resources Limited, and its simultaneous acquisition of Boardwalk Resources, to create a leading independent coal producer. The merger is valued at approximately A\$5.1 billion and represents one of the largest announced coal deals in the Australian market this year.
- Andrew advises corporate clients in all aspects of mergers and acquisitions and corporate governance, as well as contested and negotiated takeovers and corporate and securities law matters.

What do successful outbound M&A strategies and processes look like?

Successful M&A for Chinese OFDI



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