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M&A Forecast 2024

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Overview

Neil Millar and John Conlan

A hangover from a Global Pandemic. Two wars. Inflation. A change of Government. An un-rated All Blacks team somehow making it to the final and then losing to a TMO. There's no doubt that 2023 was a bumpy year and it's fair to say that the M&A industry went along for the ride.

At the start of 2023, we predicted that M&A volumes would return to more normal levels and that the number of distressed deals would rise. Our view was that, with increased cost of debt, trade buyers would be competitive, but that private equity would also figure highly given how many funds had raised capital. In this, our eighth M&A Forecast, we look at how the year actually panned out and outline what we think the key themes will be in 2024.

A bumpy and grumpy ride

While we knew that the historically high deal volumes of 2021 and 2022 would subside, it was the changing nature of the deal activity in 2023 that surprised us the most. While there has been a steady flow of transaction activity throughout the year (which is demonstrably down on the last two years), there has also been a surprising amount of bumpiness in the conduct and completion of these deals. Due diligence has taken longer (in some cases months). Negotiations have often been tense or difficult. Processes have faltered, gone on hold or even combusted entirely in respect of a significant portion of the deals we have been involved in. Overall deal timeframes have blown out considerably as a result. In short, deal-making in 2023 has been hard work! But what has caused of all this turbulence?

- Buyers (in particular overseas buyers) are more cautious. Boards and investment committees are more thorough and want to see more downside protection built into deals.
- There is significant disconnect between buyer and seller expectations. The swing from a seller friendly environment to a buyer friendly one has been sudden and ferocious. It's taken most of the year to find common ground between the two camps.
- Interest rates and inflation have remained stubbornly high. This has added to the buyer/seller expectation gap.

Many have speculated that the impending New Zealand election was partially responsible for the slow down, as buyers waited to see what flavour of government would emerge. Our view is that the election did not have a significant impact. While the uncertainty caused many businesses to express caution, our experience is that buyers did not factor the election into their decision making. Domestic buyers appeared more focused on the macroeconomic issues referred to above. In our opinion, international buyers are barely aware of the differences in policy between right and left in New Zealand. Compared to other parts of the world, the distinction does not seem that great.

Global trends reflected here

The New Zealand experience has reflected global trends in 2023 where there has been a dramatic drop in overall M&A activity. The international economic climate has been strange by any standards as dealmakers face conflicting signals such as rising interest rates but an inverted bond market and accelerated redundancies alongside continuing competition for talent. Inflation has slowed, but still persists in many jurisdictions. The expected recession never actually arrived, but that didn't stop executives from focusing on cost reduction and defensive strategies. The result of these mixed signals has been commentators noting:

- That buyers still want to get deals done. This is consistent with our soundings here in New Zealand, with PE in particular acknowledging that turbulent times create great opportunities.
- Despite that, deals have struggled to get across the line, perhaps because of the continuing expectation gap. One commentator points out the persisting sentiment that no one wants to sell at the perceived bottom of the cycle.
- Importantly, that no one thinks that the era of M&A has come to an end, with the prevailing view being that this has just been a pause.

It wasn't all bad news though, with a number of high profile deals being transacted in 2023. Examples include Entain's selection as the preferred partner to TAB NZ for a 25-year strategic arrangement, Fonterra on the sale of its dairy subsidiary Soprole, Pinnacle Corporation and the Specialised Group's sale to Qube Holdings, Global Forest Partners sale of a major forest to Ontario Teachers Pension Plan, and Australasian bus transport operator, Kinetic's, major financing deal with the New Zealand Green Investment Fund to further decarbonise the country's public transport network.

> "The banks remained patient throughout 2023 but there is still a gloomy outlook for many businesses that have been affected by the post-COVID macroeconomic conditions."

Still no wave of distress

With the exception of some isolated deals falling out of situations where the banks had no choice but to pull the trigger, the good news was that we have not yet seen the tidal wave of distressed M&A that has been much predicted. The banks remained patient throughout 2023, but there is still a gloomy outlook for many businesses that have been affected by the post-COVID macroeconomic conditions. Advisers continue to gear up for distressed dealmaking and increased bank activity in December and January suggests that they will be busy in 2024. Buying these kinds of businesses is not for the faint hearted. Distressed M&A is a technical and specialist area. There are traps and fishhooks for the uninitiated. Our article on page 19 sets out the main areas to consider when looking at these kinds of deals. The key message is to get expert advice to avoid a nasty surprise down the line.

Takeovers on the rise

With equity market valuations in freefall in 2023, take-private activity significantly increased throughout the year and we are currently involved in a number of these transactions, including advising Volpara Health Technologies (an AI-powered health technology company) on its Scheme of Arrangement to be acquired by South Korea-based, Lunit.

2023 firmly established the use of Schemes of Arrangement (Schemes) as the preferred structure for taking businesses private. The knock-on effect of this is that we see much less hostile activity on this side of the Tasman than our Australian counterparts (because Schemes require full board cooperation to be successful). This has seen boards being willing to knock back deals where they feel the target business has been undervalued. See our article on page 11, which investigates this trend in more detail.

Private equity is warming up

We have seen a slow build up of private equity activity throughout the year. A number of New Zealand Private Equity and Venture Capital funds raised money in 2022 and 2023 so there continues to be capital that is in need of a home. We assisted Pencarrow Private Equity to acquire agricultural consumables business Shoof and NZ Equity Partners as they continue to build out the CMSL Business through acquisitions. We advised Next Capital on the acquisition of a majority stake in Jucy Group, and Waterman Capital on its agreement to sell the Fusion5 business to Australian private equity firm BGH Capital. We also helped new fund, World's Edge, to acquire stakes in KarmaCola, and Clean Collective. Activity has built throughout 2023 as sellers and the funds have slowly moved to the middle ground on pricing expectations. PE has been keen to acquire the right businesses for a reasonable price. They have the same levels of caution as trade buyers, but they are more nimble and more willing to execute deals once the decision to invest has been made. See our private equity article on page 11 and our article on SME capital raising on page 10 which take a closer look at PE activity in 2023 and beyond from the fund side and the owner side.

International buyers are still interested in New Zealand

We saw a number of large, global players invest in New Zealand in 2023 – Entain, Dai-ichi Life, Bertelsmann, Pinnacle Corporation, Ontario Teachers Pension Plan, and Inchcape acquired New Zealand assets in deals we were involved with. International investors still see New Zealand as an attractive place to place capital. Our world-beating technology, healthcare and financial services sectors remain attractive, and we continue to produce privately held companies that are of sufficient scale to interest them.

Deal terms have shifted

It is clear that we are now in a buyers' market. Valuations have come under greater scrutiny with downside protection being baked into many deals that we advised on in 2023. We have seen regular use of earn-outs to bridge pricing expectations – which essentially challenge sellers to deliver on forecasts to achieve desired prices. We have also seen greater use of material adverse change (MAC) clauses which reflect buyer concern in unpredictable times. Buyers are more focused than ever on downside protections, with fulsome warranty and indemnity regimes being required, often backed by warranty and indemnity insurance. None of these trends are new. They are simply part of a cycle which currently leans towards buyers' interests.

The year ahead

Our view is that deal activity will strengthen in 2024, as buyers come to terms with the new normal and sellers begin to re-set their expectations. We expect PE to be very active in 2024 and are already engaged on a number of live transactions for our PE clients. International buyers will continue to arrive at our shores as more world class private businesses come to the market. In the public markets, take private activity will continue to build in 2024.

But we expect that deal terms will continue to favour buyers, with downside protection continuing to be a focus. Buyers will want comprehensive warranty and indemnity packages to underpin their offers. They will also want to see a way out if circumstances deteriorate and so we expect MACs to remain prevalent. Earn-out mechanisms will continue to be used to bridge pricing expectations.

Distressed M&A activity will likely tick up this year. The banks have been patient but can only hang on for so long and recent increased activity suggests that patience may be coming to an end. We think we will see consolidation in sectors such as construction, retail, food and beverage and hospitality as the big players mop up their smaller competitors whose lack of scale has proved too hard to manage in the headwinds.

We hope there will be continued interest in direct investing from our Kiwisaver providers. In recent years, some existing firms (such as Simplicity, Booster and Milford Asset Management) have dipped their toes in this market. Our article on page 15 explores the ins and outs of Kiwisaver schemes investing in private companies and makes the case for an increase in participation.

Buyer remorse

After two frantic years of materially increased activity, it is perhaps obvious to note that we are already seeing an increase in post-transaction claims. With competitive, time-pressured processes and high prices, comes buyer remorse, and we are already acting on numerous warranty and indemnity claims and post-completion adjustment and price mechanism disputes. We expect this trend to continue throughout the year. Pricing mechanisms in particular, are complex in nature and are played out at the intersection of accounting concepts and legal drafting. It is vital to make sure that the right experts are involved in the construction of these mechanisms. If they are not, disputes will follow and we are already seeing that play out. See page 23 for our article on how to appropriately manage transaction risk.

The new government has settled nerves

After 40 days of speculation, the new coalition Government was finally announced in late November. One consequence of the historic three way tie-up of National, ACT and NZ First, is a well telegraphed and detailed policy schedule. This has 'calmed the horses' for businesses who can now go and execute their strategies with some confidence. While we did not think that the pre-election uncertainty prevented dealmaking in 2023, we do think that this post-election certainty will create a bigger stock of marketable businesses with a clear strategy and some certainty about the environment that they will be operating in. We think this will translate to more dealmaking in general terms, in particular by trade buyers who find it easier to sit out of the market when conditions do not suit them.

The rise of AI

Global commentators are identifying the explosive arrival of AI as a key trend for 2024. Clearly, companies with an AI focus or developing AI technology are, and will continue to be, hot property for dealmakers.

We think this will be generally reflected in New Zealand with a continued focus on our ever-impressive technology sector. New Zealand technology businesses will continue to be attractive to international investors for the foreseeable future. Kiwi ingenuity is internationally recognised and we already have clients buying and selling in this space.

AI has been much talked about as a tool for use in the M&A process. Our experience of legal AI tools in the M&A context is that they have some way to go before becoming truly useful. Due diligence tools currently consume more time than they save and often result in unusable work product. However, the rate of AI development means that we fully expect that a workable solution will be available in short order. So watch this space.

However, commentators also report that AI is already being used extensively by dealmakers to source deals, build use cases and models, analyse key metrics and develop Information memorandums. We expect to see more visible use of AI in these situations throughout the year.

Sustainable finance

We hope to see more use of sustainable finance products in M&A funding in 2024 as global use of these products ticks up. The New Zealand experience to date has seen these structures put into investments post-acquisition (with more normal lending used to fund the actual deal). Our article on page 8 explores the relevant considerations in more detail.

Hot sectors

As in previous years, the sectors which drove the most activity in 2023 were technology, healthcare and financial services. We expect this trend to continue.

Healthcare

Financial Services

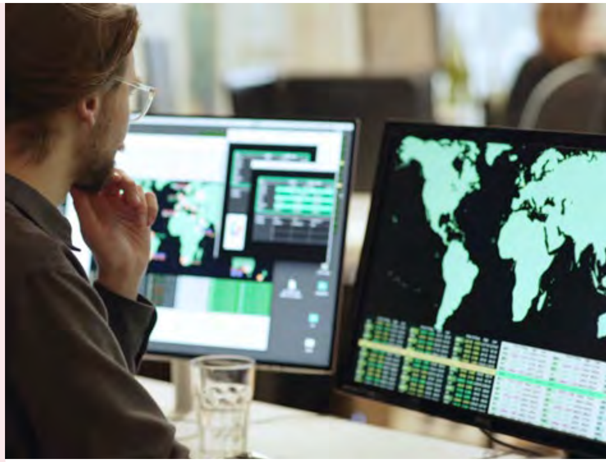
Technology

New Zealand continues to be renowned for its hi-tech leaders and more and more international investors are appearing on our shores in search of the technology that our No 8 wire DNA produces. With more and more capital being funnelled into the growing New Zealand venture capital industry, we expect this to be a long-term trend.

In 2023, we assisted ANZ to acquire Wellington-based data analytics business, DOT Loves Data Limited.

Healthcare remains a globally popular investment class and New Zealand continues to pump out world class healthcare businesses. We advised Volpara Health Technologies, on its sale (by scheme of arrangement) to Lunit, and are currently assisting a PE client on its exit from a large New Zealand healthcare provider.

There has been a lot of activity in the financial services space, including the above mentioned DOT Loves Data acquisition. We see this continuing in 2024, with several financial services deals already being talked about in the market.



Strap in

With so much uncertainty continuing to surround the global economy, we think that this year will be another rocky one.

There is money to invest, and deals will get done. But the year will be a bumpy one so strap in and enjoy the ride!

M&A trends

A breakdown by numbers

Private equity

Based on traditional holding cycles of three to five years, there are at least 105 New Zealand businesses that are held by PE funds (both local and offshore) and which may be ready for divestment.

105
Investments ready

M&A deals by the numbers

Source: MergerMarkets, 01/01/2023 – 30/11/2023

116
Deals

43
Domestic

73
Cross border

5
Public

111
Private

Snapshot of sector deal activity

Where five or more deals have occurred

Source: MergerMarkets, 01/01/2023 – 30/11/2023

Computer software
19 deals

Services (other)
15 deals

Medical
12 deals

Financial Services
8 deals

Industrial products and services
6 deals

Energy
6 deals

Leisure
6 deals

Consumer: Retail
5 deals

Consumer: Foods
5 deals

Commerce Commission merger activity

Source: NZ Commerce Commission
Merger Stats Table 01/07/22 – 30/06/23

9
Merger clearances*

0
Declined

0
Withdrawn

5
Statement of issues given

0
Section 47 investigation

*Unconditional clearance + clearance with divestment undertaking

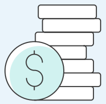
Sustainable finance in M&A

Allison Hancock

What is sustainable finance?

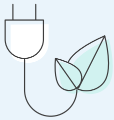
In Q3 2023, lenders closed USD71 billion (NZD115 billion) in global sustainable loan financings (according to data published by Refinitiv LPC), with sustainable loan structures making up about 11.5% of the total global issuances for that quarter. While this is down globally on previous quarters, sustainable finance is now a permanent feature of loan markets, and often forms part of conversations borrowers are having with their lenders.

There are two main categories of sustainable finance available to borrowers. Green loans (sometimes referred to as "use of proceeds loans") are loans made available exclusively to finance or refinance, in whole or in part, new, and or, existing eligible "green projects". Sustainability-linked loans are loans where the pricing varies depending on whether the borrower achieves predetermined sustainability performance objectives. In other words, the borrower is incentivised to improve its sustainability performance by receiving more favourable pricing than it would if it doesn't achieve those performance objectives. Sustainability-linked loans can be used for any purpose. They are not limited to being used for green projects and are therefore generally available to a wider segment of the market. Failing to meet the sustainability objectives will not result in an event of default.



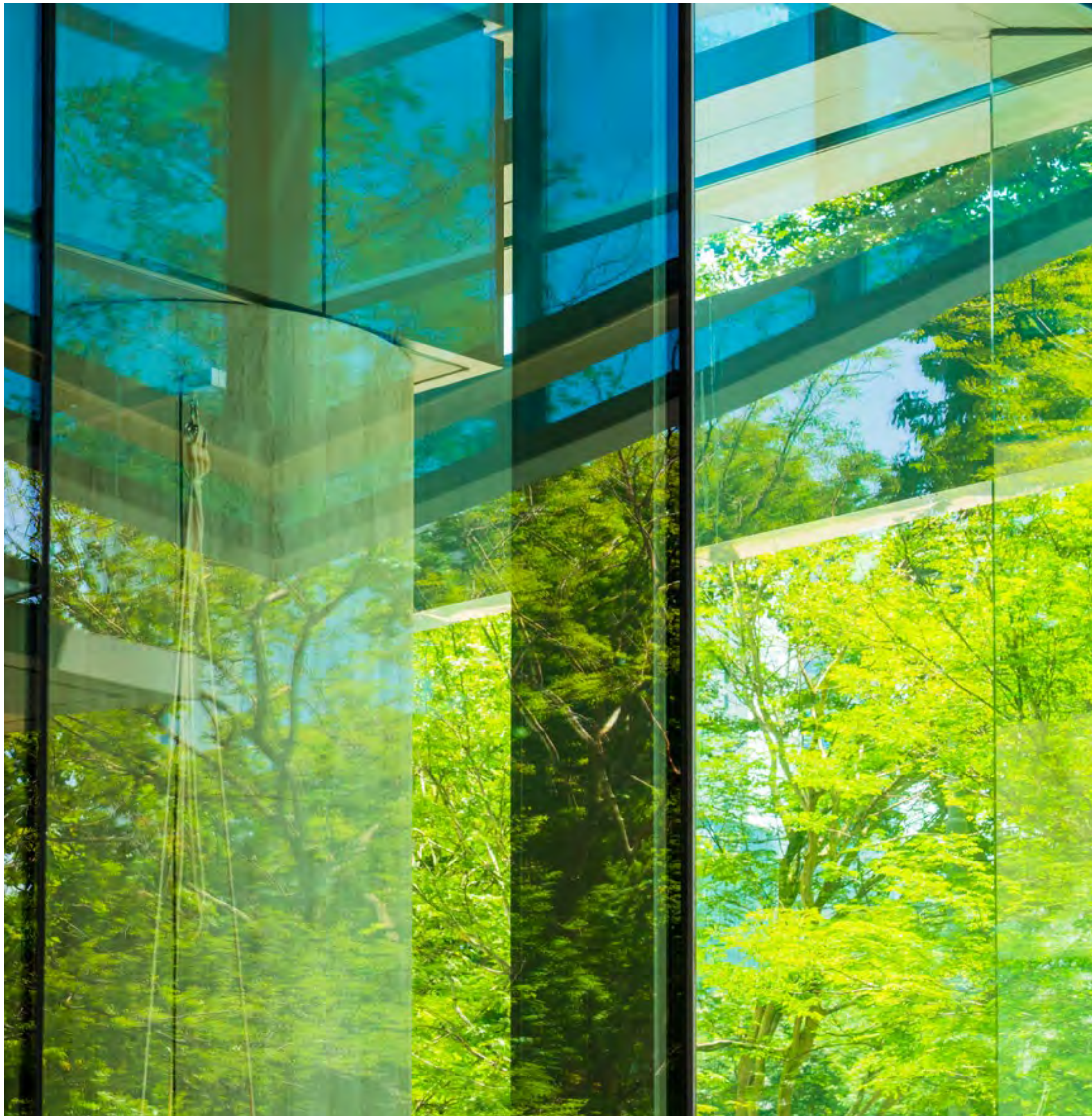
Green loan

Available exclusively to finance or refinance, in whole or in part, new, and or, existing eligible "green projects".



Sustainability-linked loan

The pricing varies depending on whether the borrower achieves predetermined sustainability performance objectives.



How can sustainable finance be used in M&A?

It is possible to use either a sustainability-linked loan or a green loan to fund an acquisition. A green loan can be used to fund eligible green projects by the target. Alternatively, a sustainability-linked loan can be used where the sponsor has sufficient information about the target to agree performance targets with its lenders.

In practice, given the usual tight timelines surrounding an acquisition, and level of due diligence required to set meaningful and ambitious targets, it is much more common for the acquisition to be funded through a traditional debt structure and converted to sustainable finance down the track.

Advantages of using sustainable finance

Sustainable finance structures can provide additional access to capital as well as pricing benefits. However, over and above these benefits, a commitment to sustainability is becoming important for businesses who want to maintain a positive reputation within the public eye and is also becoming more of a key focus for stakeholders and investors. By using a green loan or a sustainability-linked loan, a borrower can demonstrate a commitment to improving its business's sustainability performance and be held accountable while also obtaining the favourable economic benefits mentioned above.

Challenges with sustainable finance

Green loans tend to be the domain of certain sectors that are predisposed to having green projects to finance. Examples of these are energy, buildings and transport. A green loan cannot be used where green projects cannot be identified.

As mentioned, sustainability-linked loans can be used for any purpose, including working capital. However, determining an appropriate set of Key Performance Indicators (or KPIs) and Sustainability Performance Targets (or SPTs) takes time, money, and access to information. This can prove challenging in the context of an acquisition. To appropriately calculate benchmarks for KPIs, in-depth due diligence on a target company is needed, a process that is labour intensive, time consuming and in some cases difficult to access. It is important that appropriate benchmarks are set as if they are too conservative the change may not be meaningful, and a company can be at risk of being accused of green-washing.

The costs associated with entering into, and satisfying the ongoing requirements of a sustainability-linked loan, can be disadvantageous in a smaller market such as New Zealand. When entering into a transaction, there are two main contributors to heightened cost. There is the direct cost of extra due diligence and the indirect cost of a prolonged transaction due to both the negotiation of an appropriate sustainability-linked loan framework with the lender and the time needed to complete the extra due diligence. Small savings on margins may be outweighed these costs.

Common New Zealand approach

Given the difficulties highlighted, it has been more common in New Zealand to complete the acquisition and then, where appropriate, consider refinancing to a sustainability-linked loan down the track. This diminishes a lot of the time pressure on the borrower to fully understand the ESG (environmental, social and governance) position of the target, and once an acquisition is completed, the borrower has far easier access to management and information to more accurately assess the risk attached to entering into a sustainability-linked loan.

A shift in focus for SME capital raising

Rodney Craig

In the past few years, with low interest rates and expansionary monetary policy settings, high growth SMEs have found it relatively easy to attract equity capital to fund their growth plans. However, the recent surge in interest rates and operating costs, and the corresponding decrease in valuations have changed this picture.

In past M&A Forecasts, we discussed how angel, venture capital and private equity investors are increasingly focusing on supporting their existing portfolio companies with necessary follow-on funding. This trend makes it challenging for new companies entering the market to attract investment.

Established companies seeking follow-on investment or additional capital raising rounds are also facing hurdles. Given current economic conditions, extracting more funds from shareholders can be a tough task. We are witnessing an increasing number of situations where shareholders are not willing or able to provide follow on investments and are seeking to sell their shares to deal with their own financial challenges. These shareholders often compete with the company for funds, which can impede capital raising efforts, especially when pricing expectations are not perfectly aligned.

With the rise in interest rates and lower valuations, investors are shifting their focus towards companies that can demonstrate sustainable cash flow and profit, and not just high revenue growth. Alternatively, they are looking for businesses that can at least present a clear short to medium-term pathway to profitability. As a result, investors have more leverage and are demanding more investor-friendly investment terms – with liquidation preferences and anti-dilute protections becoming more prevalent.

These factors can sometimes mean that putting the company on the market for outright sale to a trade or financial buyer is a better option than trying to raise additional capital.

It's not all doom and gloom for SMEs though. There is still plenty of capital looking for a home, albeit slightly harder to attract and at lower valuations. So before approaching the market, companies need to ensure they have "run the ruler" over the business and have taken the necessary steps to ensure they can demonstrate a path to profitability.

It can be done – for instance, Clare Capital (Tech Insights #312) recently highlighted a trend back towards profitability among listed tech stocks – showing how quickly tech companies can go from generating significant losses in the pursuit of high revenue growth, to significant profits; often driven by higher gross margins than bricks and mortar businesses.

Looking ahead to this year, the challenging environment looks set to continue. So, companies must be prepared for lower valuations and a more challenging process and investment terms.

Of course, with the recent change in government, companies also will need to keep a close eye on government policy changes and be agile enough to adapt their capital raising strategies accordingly.

While the landscape for SME capital raising in 2024 may seem daunting, with the right approach and adaptability, SMEs can navigate these challenges and secure the necessary capital for growth.

The continued rise of private capital

Mark Forman

With equity markets continuing to be subdued, and large corporates coming under balance sheet/earnings pressure as a result of inflation and a period of contracted demand, private capital, in all its forms, has become a dominant influence in global M&A.

New Zealand has been no exception to that, with the full spectrum of private capital investors doing deals in our market which include:

- Sovereign wealth/government affiliated funds based out of Australia, the Middle East, and Singapore in particular.
- New Zealand government, local authority and iwi organisations.
- Large global pension funds, particularly those from Canada, the United States and Australia.
- Large global infrastructure funds.
- The largest global private equity funds, together with a host of mid-market Australian and New Zealand private equity funds.
- Family offices – whether from New Zealand, Europe, the United States, Asia or elsewhere.

The relative stability of the New Zealand economy and political environment, the growing size of our population, and a historical under-investment in infrastructure in New Zealand, has meant that New Zealand has become a more and more attractive investment destination for the larger funds, which historically may have written off New Zealand as not having sufficient opportunities of scale.

More restraint being shown by investors

While there is clearly no shortage of capital available for global private capital investors, a far greater degree of discipline has been taken by private investors when considering investment decisions than was the case in 2021 and 2022. We expect that will continue into 2024.

Inflationary pressures on businesses, together with higher costs of capital for almost all investors, has meant more focus from private capital investors on the sustainability of earnings, and more scepticism around growth opportunities. That has resulted in longer processes, with a greater degree of due diligence being conducted, and more focus on deal mechanisms to provide protection for the buyers (e.g. earnouts).

While we are still seeing a focus on ESG diligence, particularly as a high level gating item as to whether a fund will consider a deal or not, there has been a subtle shift away from the operational implementation of some of the ESG measures, as companies are first seeking to shore up short term financial performance in order to comply with banking covenants and expected private capital owner returns.

Sectors of interest

New Zealand is experiencing a continued evolution of the sectors that are attracting private capital investment in New Zealand.

We expect there will be a focus from private equity investors on the healthcare, education and technology services sectors. Many New Zealand and Australian private equity funds have made highly successful investments in these sectors in recent years, and we expect that will continue to be the case. While 2023 was difficult for many pure tech companies, particularly in the venture space, AI focused companies have emerged as a success story, and the New Zealand companies that are doing AI well are attracting significant investments from offshore private capital investors.

For the larger private capital investors (including infrastructure funds, pension funds and sovereign wealth funds), there are three main areas of focus: data storage and handling, energy transition-related investments, and investment into New Zealand's infrastructure/transport needs. In the latter case, there is a continued frustration from investors around the delay in opportunities actually coming to market, and the seeming inability of central and local governments to unlock some of the investment opportunities.

With subdued share prices, we are receiving more interest from clients wanting to make approaches regarding take privates of listed entities, although the costs and uncertainty of a listed company takeover does continue to be a deterrence for many private capital investors.

Finally, New Zealand continues to be a major player in the global forestry market, and there has been significant interest from large global investors in New Zealand timber assets, which we expect to continue into the foreseeable future – much of that is related to a desire to obtain exposure to carbon markets, but the bigger driver appears to be confidence in the underlying timber assets.

The year ahead

We expect that 2024 will continue to be dominated by private capital investors in the New Zealand M&A market over public capital/corporate investors. However, with relatively high interest cost, and uncertainty around underlying business earnings, we expect that deals will continue to take longer with more disciplined investment/deal pricing.

That being said, we continue to be impressed with the creativity and boldness of New Zealand and Australian private equity investors and the investments they have made in recent years, and we believe that 2024 will present private capital investors willing to be bold with a number of attractive investment opportunities.

Will 2024 mirror the last 12 months for equity capital markets?

Isaac Stewart, Mark Stuart and Igor Drinkovic

Takeovers

In our last M&A Forecast we predicted that 2023 would see equity market valuations hit hard resulting in an increased appetite for takeover activity. With public companies expected to trade at attractive valuations in 2023, we thought that they would become the targets of private capital. That has certainly played out in 2023. Examples of Schemes of arrangement (Schemes) that have either been implemented or recommended by the board of the target – include Pushpay Holdings, MHM Automation and Volpara Health Technologies. We expect this trend to continue through at least the first half of 2024. While more aggressive bidding tactics were expected in 2023, there was never an expectation that New Zealand would adopt some of the more aggressive M&A tactics that have been adopted in Australia. That has certainly held true in 2023 and we expect that to continue into 2024. This is because Schemes are the preferred transaction structure in New Zealand for take-privates and they require agreement between the target company and a bidder – a bidder cannot launch a 'hostile' takeover using this structure. The adoption of this structure has left little room for some of the more aggressive takeover tactics seen overseas.

With Schemes becoming the preferred transaction structure, there has been some noise in the market that they fail to protect the interests of shareholders as effectively as takeover offers under the New Zealand Takeovers Code (Code). Schemes generally have a lower shareholder voting threshold to acquire a target company compared to the take private threshold in the Code. Accordingly, some believe that an offer under the Code lowers the chance of a bidder being able to opportunistically acquire a company that might be at a low point. However, this fear didn't play out in 2023.

Boards have become far more willing to reject bids they consider to be inadequate and prevent bidders from undertaking due diligence. Metro Performance Glass rejected a Non-Binding Indicative Offer (NBIO) to take-private the company via a scheme of arrangement on the basis the offer significantly undervalued Metroglass and was not in the best interests of the company and its shareholders. The board of directors of Sky Network Television similarly rejected a NBIO that was at a value range which fell short of the board's view of the fair intrinsic value of Sky, and the board of directors of EROAD rejected an NBIO which it considered materially undervalued EROAD's business. While Schemes generally do have a lower take-private threshold, they require the co-operation of the target company and the increased willingness of boards to reject inadequate offers means they have not become mechanisms to opportunistically acquire listed companies.

That said, the Takeovers Panel (Panel) has indicated that there are some areas where the regulatory regimes that apply to Code offers and Schemes could be aligned.

Will 2024 mirror the last 12 months for equity capital markets?

The Panel issued a consultation paper on 18 September 2023 titled Regulatory Alignment of Schemes and Code Offers – Application of Certain Code Rules to Schemes, where it indicated that its preferred approach is to extend some of the Code rules to Schemes. These include aligning the regulatory regimes relating to misleading and deceptive conduct, disclosure obligations, restrictions on acquisitions and dispositions by a bidder, and obligations relating to funding. However, the Panel itself considers that the takeovers market in New Zealand is currently functioning well and with target boards taking a more robust approach to rejecting inadequate offers, we think that there won't be a pressing desire from the Government to amend the laws relating to Schemes. We think the incoming Government will have its eyes on other regulatory changes.

IPOs

Our expectation is that the market for IPOs will remain subdued in 2024.

While the market has had an opportunity to process higher interest rates, inflation and other external shocks, the consensus remains that it will be a tougher economy in 2024. Indeed, interest rates are forecast to stay higher for longer than initially expected. Therefore, it is likely that potential IPO candidates will be under earnings pressure that will impact results and pricing. While pricing pressure does not apply to direct listings, the overall market is down, and we expect this would impact appetite for listing. From a regulatory perspective, the new climate reporting regime will also add work to the IPO / listing process. Candidates will need to carefully consider the alignment of prospective climate risk and opportunity disclosures, with that of PDS and profile disclosures.

Quite apart from the legal requirements, practically, proper consideration of climate risks and opportunities will be expected by institutional investors, especially those from overseas. Indeed, recent severe climatic events have brought physical climate risks to the forefront, but equally important will be consideration of transition climate risks.

We expect greater activity in the secondary markets in 2024, as listed entities look to restructure debt, but also for those in a stronger position looking to raise capital to buy-out strained targets. For those issuers looking to restructure debt or that are otherwise distressed, we expect that NZX's revision of capital raising settings to permit accelerated non-renounceable entitlement offers (ANREOs) to be very helpful. ANREOs generally find more underwriting and sub-underwriting support (thereby having lower cost) and can be helpful where 15% placement capacity is insufficient, there is time pressure, and a large shortfall is expected. Outside of those scenarios, we would expect that placements and share purchase plans (SPPs) will retain their popularity. This is particularly as SPPs have had their per shareholder entitlement increased from $15,000 to $50,000, and the overall cap on shares issued increased from 5% to 10%.

For issuers looking to raise capital to acquire targets, given the state of the market, we would expect to see issuers using scrip as part of the consideration. Apart from conserving cash, this can also incentivise performance through the current cycle where target owners remain involved in the business.

The untapped potential of KiwiSaver funds in the M&A market

John Conlan and Lloyd Kavanagh

Every year, significant amounts are invested into KiwiSaver funds with total funds under management almost NZD100 billion. However, despite this substantial capital, only a small number of these funds have engaged in direct investment including via merger and acquisition (M&A) activity.

New Zealand's M&A market is known for its strength and vitality. Many world-class businesses have yielded substantial returns for private equity investors, showcasing the lucrative nature of this sector. However, KiwiSaver funds, despite managing billions of dollars, have largely remained on the side-lines of this vibrant market.

As of March 2023, the Reserve Bank of New Zealand) reported that a mere 0.18% of KiwiSaver funds were allocated to direct investment. By contrast, in Australia, AFSA reports that in the June 2023 quarter, for entities with more than six members, the NZD2.3 trillion in investments of entities with more than six members, was made up of 53.8% in equities (21.9% in Australian listed equities; 27.0% in international listed equities; and 4.9% in unlisted equities). Property and infrastructure accounted for a further 15.6% of total investments. Private equity makes up approximately 4% of the New Zealand Superannuation Fund's investment portfolio.

KiwiSaver providers have a broad discretion to invest KiwiSaver scheme assets, provided it is in accordance with the fundamental requirement to act in the best interests of investors and within any asset class or other limits they impose in their schemes' Statements of Investment Policy and Objectives (which are publicly available documents established and maintained for each scheme containing the scheme's investment objectives and strategies). But comparatively few are taking the step of investing in private assets.

We believe that there is a significant opportunity for KiwiSaver funds to become more active in the M&A market. The continued under-investment in private assets not only represents a missed opportunity for KiwiSaver members, who could potentially invest in local businesses and reap the associated rewards, but also for New Zealand businesses seeking access to capital. The position will become starker as KiwiSaver funds under management inevitably increases, and even more so should there be any changes to contribution rates (another area where New Zealand lags behind Australia).

"There is a significant opportunity for KiwiSaver funds to become more active in the M&A market within existing mandates. Their continued absence not only represents a missed opportunity for KiwiSaver members, but also for New Zealand businesses seeking access to capital."

By becoming more active in the M&A market, KiwiSaver funds could provide a valuable source of capital for local businesses, fostering growth and innovation within the New Zealand economy. At the same time, KiwiSaver members with the appropriate risk appetite could benefit from the potential high returns of M&A activity.

While there are valid reasons for the cautious approach of KiwiSaver funds, we think it is worth exploring how these funds can safely and effectively participate in the M&A and direct investment market. Doing so in the right way could unlock significant benefits for KiwiSaver members and the broader New Zealand economy.

Reasons for KiwiSaver providers' reluctance towards direct investment

The unique management and regulatory framework of KiwiSaver funds is typically pointed to as the reason for their limited involvement in M&A activities. These funds are of course designed with a long-term savings goal in mind, primarily retirement savings. This, in very broad terms, may skew the incentives for a KiwiSaver manager to a conservative approach, favouring stability and consistent growth over the potential risks and opportunities tied to M&A activity. Regulatory requirements and transaction costs might also discourage KiwiSaver funds from participating in M&A. For example:

Liquidity

Direct investments by private equity investors typically anticipate a 5 to 10-year period between the investment and the realisation of returns. These investments are less liquid than more traditional investments like bonds and listed securities.

This type of investment profile may not suit KiwiSaver funds designed for individuals with shorter term investment timeframes, for example, those nearing retirement or wanting to purchase a first home, who are planning to withdraw their funds in the near term. However, with appropriate liquidity risk arrangements, this should not deter funds from allocating a small portion of KiwiSaver funds to direct investment. For funds with a higher risk profile, i.e. where recommended investment horizons will likely be 7+ years, there is a real opportunity to diversify further and potentially outperform the market through direct investments.

Even where a long-term horizon is recommended, managers need to provide for the ability of members to switch between funds and between managers.

Expertise required

Direct investment (if not outsourced) requires different skills from stock selection across equities markets. This likely requires use of specialists with experience in dealing with unlisted investment opportunities and the ongoing management of businesses generally. Not all KiwiSaver providers have that expertise.

Regulation

KiwiSaver funds are regulated differently from private equity funds. They are required to allow for a member to transfer to another KiwiSaver provider within 10 working days, and they are also open to early withdrawal in other circumstances (e.g. first home withdrawals) and as a result they usually provide for daily unit pricing, to revalue their assets regularly. However, with the right mechanisms in place, and with the benefit of actuarial analysis of past investor behaviour, this should be able to be managed, to allow a greater level of private equity investment than many KiwiSaver managers currently engage in. After all, as the FMA's KiwiSaver Annual Report 2023 points out, only about 4% of KiwiSaver investors transferred between providers in the year to 31 March 2023.

In the longer term, the challenge can be further addressed by legislative change to allow KiwiSaver members, who wish to do so, to agree to lock in their investment for longer periods. This may be particularly appropriate for those with significant balances, who are not eligible for a first home withdrawal (eg because they already have a house).

Fees

KiwiSaver managers have to ensure that their fees are not "unreasonable". Given the relative complexity associated with the management of private assets, this may act as an inhibitor to providers investing in private equity. Further, fees may be benchmarked against the fees for investment in a highly liquid index in determining whether fees are "not unreasonable". Such an approach may cause providers to be discouraged from private asset investment if it results in fees that are "out of step" with the market and therefore potentially vulnerable to being categorised as "unreasonable".

The FMA points out in its Value for Money (VfM) Industry Report, that value for money does not necessarily mean "cheapest". It says that "In focusing on after-fees performance relative to a market index, however, the VfM Guidance does enable scrutiny of whether active and passive funds are delivering the desired results (respectively, outperformance or close replication of market index performance after fees) and, if not, whether members of those funds are receiving value for money."

Plainly, the VfM focus is on underperforming active managers in traded investments, not private equity investors. However, managers should be justified in charging higher fees for the management of funds which allocate to private asset investment compared to those that do not, where the private asset investments are expected to have, or have the potential, to earn returns that warrant those extra costs. The challenge then is to identify an appropriate benchmark for fees and performance in relation to private equity investments – which should not be the same as for publicly traded investments. That is something, we expect the sector and the FMA will work together to solve for.

Examples of KiwiSaver funds undertaking direct investments

The small number of KiwiSaver schemes that buck that trend and allocate to private equity investments include Simplicity, Booster, Milford, KiwiWealth (now part of Fisher), Generate and Pathfinder.

It is noteworthy that, some providers (i.e. Simplicity, Booster and Milford) are actually investing while the others undertake their investments via private equity funds such as Movac.

Simplicity announced earlier in 2023 that it would be increasing its asset allocation to unlisted New Zealand investments across all its existing KiwiSaver and investment funds. This will bring its total allocation of unlisted assets from 7.5% to approximately 10% of funds under its management.

Booster undertook its first direct investment in 2017 and now allocates up to 5% of its funds across direct business investments within its Tahi fund and two listed funds which focus on productive land (NZX:PLP) and innovation (NZX:BIF). Its investments now total NZD320 million, of which NZD75 million represents investors who have specifically invested into these funds.

Booster's Chair, Paul Foley, commented *"We see direct investment as an appropriate allocation within an overall asset allocation. It involves additional work for any manager undertaking such investments, but we believe we should do this in the interests of our investors. It opens up opportunities to a much broader section of the NZ economy than is available within only listed markets. Our members also appreciate that there is a real connection between their savings and businesses operating in their communities."*

Milford has been investing in private New Zealand companies for over a decade and has raised two dedicated private equity funds totalling circa NZD300 million, which invest alongside other Milford funds such as the Active Growth Fund, to back private kiwi businesses. Milford's KiwiSaver clients can also access these private equity activities via the Milford KiwiSaver Aggressive Fund.

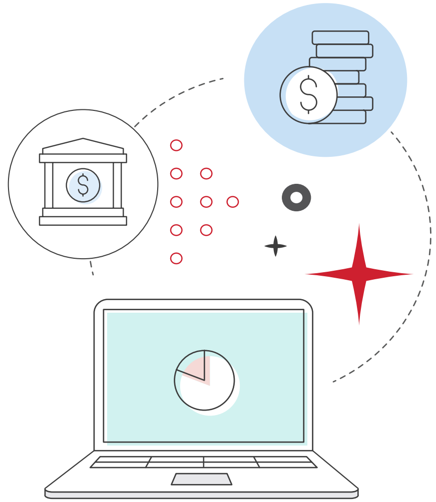
Brooke Bone, Private Markets Investment Director at Milford, said *"KiwiSaver is a long-term investment product which lends itself ideally to investment in alternative, long term assets such as private equity. KiwiSaver is a growing pool of funds, now around NZD100 billion, but the majority of the money is being invested offshore, so there is an opportunity to channel more of this to growing NZ companies, supporting the local economy and providing a potential pipeline of new listings for the NZX in future."*

Over the past 12 months, Generate has made three significant investments into non-listed assets. The investments include a USD25 million investment into CIM Group, a USD25 million investment into Novva Data Centres, and USD25 million into the New Zealand based Movac Growth 6 Fund.

Another KiwiSaver provider engaging in private asset investment through Movac is KiwiWealth, which in 2020 invested NZD54 million in Movac Fund 5. KiwiWealth also committed up to NZD50 million to Pioneer Capital's latest NZD300 million private equity fund in 2021.

John Berry, CEO of Pathfinder KiwiSaver, has been quoted as saying *"There's a reason high net worth investors in large, long-term sophisticated endowment funds invest in private assets. Over the long term they pay higher returns than listed markets if managed and diversified properly"*.

> It opens up opportunities to a much broader section of the NZ economy than is available within only listed markets."
>
> Paul Foley, Chair of Booster



What we're seeing and predicting

All in all, activity among KiwiSaver providers over the past three years has shown a slight uptick in investments in private equity (both by way of direct investment and through direct investment funds such as Movac). This trend has likely been boosted by the potential for returns from private equity investments in comparison to equity in publicly listed companies.

There have also been calls for KiwiSaver providers to increase their direct investments for reasons other than the possibility of higher returns. These reasons include the potential for private equity investment to support startups and local businesses, finance large-scale infrastructure projects, and target more sustainable investment opportunities.

In its *UpStart Nation2023 Report*, the Startup Advisors Council recommended a four-pronged approach to remove barriers to KiwiSaver funds directly investing in startups and venture funds. The recommendations were for the Government to eliminate the liquidity barrier by guaranteeing the short-term liquidity of any investments in an eligible New Zealand venture fund, to consider moving from daily liquidity to 90-day liquidity, to institute a break out fee/return reporting for KiwiSaver investments in illiquid assets, and to provide guidance on asset allocation.

Likewise, the Centre for Sustainable Finance's 2023 publication *Investing in Private Assets: Joint Paper on Key Recommendations to Reduce Barriers and Challenges for KiwiSaver Funds to invest in Private Assets* sets out a series of recommendations to help facilitate the private sector's involvement in decarbonisation investments which usually are in the form of private assets. Many of these recommendations apply equally to other forms of private investment.

With the parties making up the new Coalition Government each having views on what useful changes might be made to KiwiSaver settings, we expect that the sector will want to engage with responsible Ministers to see what useful options could be considered to encourage greater direct investment activity from KiwiSaver funds. Superannuation funds in Australia are significant investors in infrastructure and with the recognition that the upcoming significant infrastructure investment in New Zealand needs to be funded, finding solutions to possible impediments to doing the same here should be part of the conversation.

Even without government action, the actions of those managers that have undertaken direct investment are capable of replication by others, which we believe will be of benefit to both investors and the wider economy.

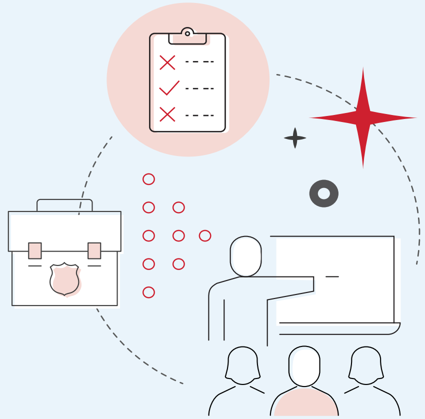
Distressed M&A in New Zealand:
An overview

Michael Langdon

New Zealand's economy, like many others, has been significantly impacted by global events such as the COVID-19 pandemic hangover (inflation, supply chain shocks and high interest rates). These events have led to an increase in distressed M&A activity as healthy companies seek to acquire those in financial distress. Distressed M&A is not without its challenges. The uncertainty of the distressed company's true value, potential liabilities, and the risk of subsequent insolvency proceedings can deter potential acquirers.

Recent case law in New Zealand has highlighted the significant personal financial risk for directors who allow their company to continue trading while insolvent. Unless all creditors of the target are paid after (or as part of) the distressed M&A sale, directors on the "sell side" could be held to be personally liable for any shortfall to creditors. Directors on the "sell side" should often consider how to mitigate personal liability risk (i.e. either cease trading or seek new capital (unlikely if you are selling your business or initiating some form of insolvency proceedings)).

The legal framework in New Zealand therefore plays a crucial role in distressed M&A. New Zealand's main formal insolvency processes are voluntary administration, receivership and liquidation of companies. Each process can have different impact and outcome in the context of distressed M&A.



New Zealand's main insolvency processes

Voluntary administration

Liquidation

Receivership

Voluntary administration

Voluntary administration is a process designed to resolve a company's future direction quickly and help mitigate personal liability risk for breach of director duties. An entity facing financial distress can enter voluntary administration, where an independent administrator is appointed to take control of the company. This process can be used strategically in distressed M&A in several ways:

Breathing space

The primary purpose of voluntary administration is to provide a company with breathing space from its creditors. During this period, a moratorium is placed on most unsecured (and some secured) creditors' claims, which can halt any legal actions and provide time for the company to restructure or find a suitable buyer. It is important to note however that it does not prevent suppliers etc from terminating contractual arrangements due to an "Insolvency Event".

Restructuring

The administrator may consider a deed of company arrangement (DOCA) that details how the company's affairs will be handled. This could involve restructuring the company to make it more attractive to potential acquirers. The DOCA needs to be approved by the creditors (majority in number and 75% in value), providing them with a say in the company's future.

Asset sale

Voluntary administration can facilitate the sale of the distressed company's assets via a DOCA. The administrator also has the general power to sell assets to repay creditors, which could be part of a distressed M&A deal. This can be beneficial for acquirers as they can purchase assets free of liabilities – although as above – if the sale is part of a DOCA it will require creditor approval (majority in number and 75% in value). Importantly from a purchaser's point of view the voidable transaction and voidable disposition provisions (sections 292 to 296D of the Companies Act 1993) do not apply to a transaction or disposition by a company in administration if the transaction or disposition is:

1. carried out by or with the authority of the administrator or deed administrator; or
2. specifically authorised by the deed of company arrangement and carried out by the deed administrator.

Sale of shares

Under the voluntary administration regime, an administrator may consent to the transfer of shares in a company in administration if the administrator is satisfied that the transfer is in the best interests of the company's creditors.

Pre-pack insolvency arrangements

In some cases, a distressed M&A deal can be structured as a pre-pack insolvency arrangement. Here, the terms of the sale are negotiated before the company enters voluntary administration. Once the company is in administration, the sale can be quickly executed, minimising business disruption (once again it will require creditor consent if the sale is documented in the DOCA (majority in number and 75% in value).

Creditor negotiations

The voluntary administrator acts as an independent party who can negotiate with creditors on behalf of the company. This can be particularly useful in distressed M&A situations where the distressed company's debt levels may be a sticking point in negotiations either through consensual negotiations or via the DOCA.

However, using voluntary administration in distressed M&A also carries risks. There is no guarantee that the administration process will result in a sale and/or that the creditors will approve the proposed DOCA.

Receivership

Receivership is another legal process where a receiver is appointed by a secured creditor or court to take control of some or all of a company's assets. This process can be used strategically in distressed M&A in several ways:

Asset sale

The primary role of the receiver is to sell the company's assets to repay the secured creditors. In a distressed M&A scenario, this could mean selling the entire business or parts of it to a buyer. The buyer could potentially acquire these assets at a lower price than in a normal market condition and free of liabilities. A sale by a receiver does not require shareholder approval (often a sticking point in distressed M&A transactions where shareholders refuse consent (e.g. for a major transaction) because they are out of money).

Pre-pack receiverships

Pre-pack arrangements are also positive in receiverships. The goal is to preserve the value of the business and facilitate a quick sale, which can be beneficial in a distressed M&A scenario where time is of the essence and/or where shareholder consent is not forthcoming.

The directors of the distressed company, usually with the help of financial and legal advisors, find a buyer for the company's assets. This could be an existing creditor, a competitor, or another interested party. The terms of the sale are negotiated and agreed upon before the company goes into receivership (with the receiver 'shadowing' the process). A receiver is then formally appointed who immediately completes the sale according to the pre-arranged terms. The proceeds from the sale are used to repay the company's creditors in accordance with the statutory and contractual requirements.

This process can be advantageous in a distressed M&A situation because it allows for a quicker sale, which can help preserve the value of the business and maximise returns for creditors. It also provides certainty for the buyer, as they know they will be able to acquire the assets without a protracted bidding process.

However, pre-pack receiverships can also be controversial. There are concerns about transparency and fairness, particularly if the sale is to a connected party. There are also risks for receivers in pre-packs. Receivers have a duty to get the best price reasonably obtainable on the date of sale. The best way to discharge this duty is to run an open market sale process over a period of time. Pre-pack receiverships are, by their very nature, the opposite approach. Also, because the sale is ultimately a receivership sale there will be very limited warranties etc.

Operational continuity

The receiver has the power to continue operating the business while seeking a buyer. This can maintain the value of the business and make it more attractive to potential acquirers.

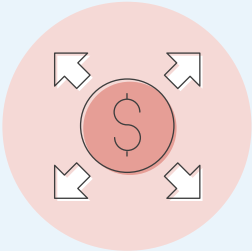
Independent management

The receiver acts independently of the company's existing management. This can be beneficial as it can provide more confidence to potential buyers about the integrity of the sale process.

Quick resolution

Receivership is often a quicker process than other insolvency procedures. This can be advantageous as it allows for a faster transition and reduces the period of uncertainty.

Liquidation



Liquidation is the process of winding up a company, selling its assets, and distributing the proceeds to its creditors. It's typically seen as a last resort when a company is insolvent and cannot be rescued or restructured. However, it can also play a role in distressed M&A in certain circumstances:

Asset acquisition

In a liquidation scenario, the company's assets are sold off to repay creditors. Potential acquirers may be interested in purchasing these assets, often at a lower price than they would command under normal circumstances. This could include tangible assets like property and equipment, as well as intangible assets like intellectual property.

Debt clearance

The proceeds from the sale of assets are used to pay off the company's debts. Once the liquidation process is complete, the company's liabilities are typically extinguished. This can make certain assets more attractive to potential buyers, as they can acquire them free of associated debts.

Market consolidation

If a company in a particular industry goes into liquidation, it can present an opportunity for competitors to acquire its assets and increase their market share. This can be a strategic move in a distressed M&A context.

Quick resolution

Liquidation is often a quicker process than other insolvency procedures, which can be advantageous for potential acquirers looking for a speedy transaction.

However, it's important to note that liquidation is a terminal process – it results in the end of the company. It's also typically driven by the needs of creditors rather than the interests of shareholders or potential acquirers. Therefore, while it can present opportunities, it also carries significant risks and limitations.

Due diligence issues

Due diligence is a critical aspect of any M&A transaction, but it becomes even more important in distressed M&A because the seller is unlikely to be willing to provide any comfort (ie the usual suite of warranties and indemnities) and even if it is, may not be in a position to pay out if there is a claim. The acquirer should therefore thoroughly investigate the distressed company's financial situation, including its assets, liabilities, contracts, and potential legal issues. However, due to the urgency of distressed M&A, there may be insufficient time for comprehensive due diligence, increasing risk. The key is to be very clear about the critical success factors of the business you are acquiring and to stress test those factors as much as is possible. And then price the risks accordingly.

Negotiation challenges

Negotiating a distressed M&A deal can be challenging due to the distressed company's precarious financial situation. The acquirer may need to negotiate with the distressed company's creditors, who may have conflicting interests. Furthermore, the distressed company's employees and customers may be anxious about the company's future, adding another layer of complexity to the negotiation process. It is important to identify early on who the key stakeholders are going to be so that any dealbreakers can be identified before too much time and money is wasted.

Legal risks

Distressed M&A also carries legal risks. The acquirer of shares may inherit the distressed company's legal liabilities, including potential claims from creditors, employees, and regulators. Moreover, if the distressed company goes into insolvency proceedings after the acquisition, the transaction may be challenged as a voidable transaction under the Companies Act 1993.

Purchasing assets or a business from a company that subsequently enters a formal insolvency regime can carry several legal risks:

Clawback risk

Insolvency laws often allow for transactions made prior to the insolvency to be reversed or "clawed back" if they are deemed to have been made at an undervalue or with the intention of defrauding creditors. This could potentially affect the validity of the asset or business sale.

Liability for pre-existing debts

Depending on the jurisdiction and the specifics of the transaction, the buyer may inadvertently assume some of the insolvent company's pre-existing debts or liabilities, particularly if the transaction is seen as a de facto merger/share purchase rather than a simple asset purchase.

Warranty and indemnity claims

If the seller becomes insolvent, it may not be able to satisfy any warranty or indemnity claims that arise after the sale. This could leave the buyer with unexpected costs or liabilities. One way to mitigate this risk is to use warranty insurance. Insurers are, in some circumstances, prepared to cover warranties in a distressed M&A scenario. the key is to ensure that this prospect is canvassed at the outset, so the deal and the due diligence process can be structured in a way that will satisfy an insurers requirements.

Damage to reputation

The buyer may suffer reputational damage if it is associated with a company that has gone into insolvency, particularly if there are allegations of improper conduct by the seller.

Operational disruptions

The insolvency process can cause disruptions to the business being acquired, such as loss of key staff, customers, or suppliers, which can affect its value and the success of the acquisition.

Conclusion

Distressed M&A in New Zealand presents both opportunities and challenges. While it offers the potential for growth and expansion at a lower cost, it also carries risks due to the distressed company's financial situation and the legal framework. Therefore, companies considering distressed M&A should conduct thorough due diligence, seek expert advice, and carefully manage the negotiation process to mitigate these risks and maximize the transaction's value.

Post-deal dissonance:

Factors giving rise to disputes

Aaron Lloyd

COVID-19 lockdowns, travel bans, and economic conservatism built up a kind of transactional 'cabin fever', resulting in a relative buying spree throughout 2021, 2022 and into 2023. This produced one of the busiest periods of M&A activity in recent times. But those times have cooled – the economy is contracting, inflation and debt levels remain relatively high, and despite a recent uptick in business confidence, geopolitical uncertainty combines with domestic political change both here and overseas, to create an air of economic uncertainty abroad and at home.

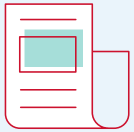
As a result, some of the deals completed over the past two years aren't looking as good as they might have, through that lens of optimism and excitement occasioned by the end of COVID-19 restrictions.

An increasing number of our clients are scrutinising recently completed transactions with an intensity unseen in recent years, and our litigation experts are working closely with us in relation to higher-than-usual post-deal disputes, including disputes over post-completion adjustments and earn out provisions and alleged breaches of warranties.

Transactional lawyers will, rightly, tell you that the best line of defence for buyers and sellers is a thorough due diligence process conducted over the most important parts of the business (i.e. where the greatest risk exists). For vendors, ensuring your warranties, and any representations made, are sound, and that there are no "fish hooks" which could be used later on by a repentant buyer, is another critical step in assessing the terms of any proposed deal. Assessing post-deal dispute risks upfront is something we consider to be an important and prudent step given the increased litigious environment.

Where the parties have already signed, experience in navigating warranty and indemnity provisions, including familiarity with the types of claims and defences deployed in this space, is critical. Although not always possible, a well-advised vendor that acts decisively can achieve the swift resolution of spurious claims, freeing up capital and executive time (e.g. through summary judgment or strike-out proceedings).

For purchasers, it is always better avoiding the need for a dispute to claw back money that has not been well spent. Thorough due diligence, and ensuring language used for deal terms does not provide an out for a vendor in the face of a dispute are steps we strongly encourage.



As the appetite for post-deal litigation rises, we expect to see:

- **A continued increase in warranty and indemnity claims** – this could include claims for breach of contract, relating to financial and operational performance, compliance with laws and regulations (where organisational misconduct is identified post-deal) and (depending on the entity) significant employee claims (we continue to see significant risk around Holidays Act 2003 compliance).
- **Disputes over adjustment mechanisms** – purchasers are pouring over price adjustment mechanisms, wash-ups and earn outs that are intended to correct the price between signing and completion of the transaction. Given current and expected economic volatility, both purchasers and vendors may seek to rely on provisions designed to capture non-recurring or abnormal items for a range of items which were, in fact, expected or entirely ordinary in the context of the business. We have already seen several disputes of this nature arising due to COVID-19's effects on profit and whether this produced a non-recurring or abnormal effect.

In reality, dissatisfied parties are resorting to making use of warranties and adjustment mechanisms to re-value bad deals. Often for entirely justified reasons. Where purchasers have overpaid for assets in a buoyant market, they will be incentivised to shoe-horn claims into ill-suited provisions. In some cases, what they were told by excited and keen vendors may also result in claims for misleading and deceptive conduct. Even where purely speculative, such claims can lead to significant legal spend and put strain on management resource during already testing times. Worse, when they are warranted, they can lead to a significant reversal of expected economic value.

Whether you are a purchaser and a potential claimant, or a vendor (or intermediary) and a potential defendant, there are a number of stumbling blocks to look out for, from limitation periods and notice requirements to a possible duty to mitigate losses in respect of certain kinds of warranties. If you suspect that you have a claim under a warranty or indemnity provision included in a sale and purchase agreement, it is important to check the warranty claims requirements so that you do not miss a key date or technical detail for notification. If you are on the receiving end of breach allegations, be sure to thoroughly check out your potential liability and ability to defend before diving into negotiations.

Finally, as we have said before, do not forget insurance.

Insurers may be brought into the equation where the vendor or purchaser has obtained warranty and indemnity insurance to cover financial losses arising from inaccuracies during the transaction. Parties should make sure to check the scope of cover available to them and consider the position of the other side to the deal (are they insured or un-insured?) when considering the strategy in relation to a warranty claim.

Sample of our 2023 deals

apollo TOURISM & LEISURE LTD

AFCRYO CRYOCOOLER MEMBRANE TECHNOLOGY

Aēsop

AEC

BETTER HEALTH CO.

New Zealand Aged Care Services Limited

ANZ

Kiwi Group Holdings.

GFP GLOBAL FOREST PARTNERS LP

Fonterra

TAB

Partners Group REALIZING POTENTIAL IN PRIVATE MARKETS

Hirepool

SHOOF INTERNATIONAL LTD

Zelandez

Transcold

Auckland GARDEN BAG Company Limited

FLOW STATE SOLUTIONS

ChargeNet

NZBUS

Letterboxd

nextcapital

JUCY

Waterman

DataTorque COLLECTIVE SUCCESS

Our M&A team

We are not afraid of a challenge or to innovate in the pursuit of our clients' goals.

With a reputation for tackling the most significant and complex transactions, our top tier M&A team continues to deliver excellent results to major international corporations, local trade buyers, listed companies, financiers and private equity funds on a variety of M&A and private equity transactions.

Home to one of the largest M&A teams in New Zealand, our Corporate team's expertise is recognised in the market and ranked as Band 1 in Chambers Asia Pacific and The Legal 500, as well as Tier 1 in IFLR 1000 international rankings. Our market-leading partners are backed by highly qualified and talented corporate lawyers, ensuring the seamless delivery of astute commercial advice and excellent client service.

"

The team are very capable in handling complexity, with access to expertise in a wide range of practice areas to support multi-faceted transactions. They demonstrated a high level of expertise, professionalism, and attention to detail, providing practical and strategic advice that helped us navigate a challenging transaction and achieve our objectives."

Chambers and and Partners,
Asia Pacific 2024

Speak to our experts

Corporate and M&A

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