New Zealand M&A update

September 2019

CHAPMAN TRIPP

Coming off recent highs, New Zealand M&A activity to date in 2019 has been more subdued (outside of a small number of high value deals), with sales taking longer to negotiate and close. This trend is likely to continue for the rest of the year.

Top deals for 2019

1. Infratil acquisition of Vodafone NZ for NZ$3.4b (completed)
2. Resolution Life acquisition of AMP Life for AU$3b (announced)
3. Apax Partners takeover of Trade Me for AU$2.6b (completed)
4. Advent International acquisition of Transaction Services Group for AU$1.4b (announced)
5. Yili Group acquisition of Westland Co-operative Dairy for AU$567m (completed)
6. Froneri acquisition of Tip Top for NZ$380m (completed)

Market observations

1. Obtaining Overseas Investment Act consent is taking longer (as the regulator deals with greater demands from Ministers and the current legislative review process) and is less certain (due to greater Ministerial activism). Consents generally take at least three months, and can take over 12 months, to obtain.
2. Purchasers who do not trigger regulatory consent thresholds (or who can use structures to minimise or avoid consent requirements) are significantly more attractive to vendors.
3. M&A in the financial services sector remains active, reflecting a focus on bank balance sheets and regulatory change.
4. Schemes of arrangement remain an attractive mechanism to execute takeovers. Recent scheme takeovers include:
   - Yili Group's acquisition of Westland Co-operative Dairy
   - Apax Partners' takeover of Trade Me, and
   - CITIC Capital's takeover of Trilogy International.

AUSTRALASIAN LAW AWARDS
New Zealand Deal Firm of the Year
Australasian Law Awards 2019

NEW ZEALAND LAW AWARDS
Deal Team of the Year (>100 lawyers)
New Zealand Law Awards 2018

NEW ZEALAND LAW AWARDS
Large Law Firm of the Year
New Zealand Law Awards 2018

Chambers AND PARTNERS
New Zealand Law Firm of the Year
Chambers Asia Pacific Awards 2018

IFLR
Most Innovative National Law Firm (New Zealand)
IFLR Asia Awards 2018

Regulatory environment update

Regulation has always been a part of doing business in New Zealand and our regulators have been active in recent years.

Overseas Investment Office (*OIO*)

Investments by overseas investors in New Zealand are regulated by the Overseas Investment Act (*OIA*) 2005 and the Overseas Investment Regulations 2005. The rules have been significantly tightened since the arrival of the Labour-led Government in 2017.

When is consent required?

OIA consent is required where an "overseas person" will acquire an interest in:

- significant business assets – where the cost of a business acquisition, or the value of the applicable New Zealand assets, exceeds NZ$100m (a higher limit of NZ$530m applies for Australian non-government investors and NZ$200m for non-government investors from certain countries in connection with the CPTPP)
- sensitive land – includes rural land, residential land and forestry rights, or
- fishing quota.

Offshore transactions

Transactions occurring outside New Zealand may still require OIO consent if the target business has a direct or indirect interest in land or other assets in New Zealand.

Timeframe update

Processing times for consent applications by the OIO have increased significantly and can range from 3-4 months (for a simple business acquisition) to over 12 months (for complicated applications involving sensitive land).

Ministerial activism

A new trend of Ministerial activism is contributing to these increasing processing times. Since the change in government, Ministers have given clearer direction to the OIO on their priorities for overseas investment, both through Ministerial Directive Letters and informally. For applicants this means more questions, greater scepticism and testing of national benefit claims, and higher evidential thresholds.

Also, and unusually by previous practice, Ministers have twice declined applications when the OIO's recommendation was that they should be consented. Both concerned mining operations:

- Minister and Green MP Eugenie Sage this year refused consent to Oceania Gold (New Zealand) Ltd to buy land to expand its Waihi gold mining operation, and
- Bathurst was refused consent in late 2017 to acquire a coal mine.

Overseas Investment Act review

The OIA is currently being reviewed and is expected to be substantially amended. Submissions on the consultation document closed on 24 May 2019. The government is planning to have the legislation implementing the review's recommendations passed by mid-2020. The most significant expected change is the introduction of a national interest test to operate alongside a simplified benefit to New Zealand test. This would address many of the concerns with current screening methods while still allowing for delegation to the OIO, driving timely decisions.

Commerce Commission (*ComCom*)

The ComCom is an independent Crown entity responsible for enforcing anti-trust law (administered through the Commerce Act 1986) in New Zealand including regulating business acquisitions. The ComCom is operationally independent so its approach is unaffected by the change in government, and is instead driven by market dynamics and its increasing maturity as an organisation. Over recent years we have observed:

- high profile mergers being declined ComCom clearence, notably:
  - the NZME/Fairfax (now Stuff) merger, and
  - the Vodafone/Sky merger.
- timeframes getting longer, due in part to an increase in the number of complaints and submissions from third parties on merger clearance processes, and
- non-notified mergers become a Commission priority. Recently, for example, the ComCom filed proceedings in relation to the acquisition by First Gas of GasNet's Bay of Plenty assets, alleging (among other things) a breach of section 47 of the Commerce Act, prohibiting acquisitions that are likely to substantially lessen competition. First Gas filed admissions and was ordered to pay a penalty of NZ$3.4m.

Financial Markets Authority (*FMA*)

The FMA is the government agency responsible for financial regulation. It regulates all financial market participants and exchanges, and sets and enforces financial regulations.

The banking and financial services sector has been under the spotlight in the last 12 months, with significant reviews both in New Zealand and Australia. New Zealand is facing impending regulatory and legislative reform and renewed scrutiny arising out of:

- the findings of the Australian Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (dubbed the *Hayne report* after Commissioner Kenneth Hayne), and
- the FMA and Reserve Bank of New Zealand (*RBNZ*) review into the conduct and culture of domestic banks and life insurers, identifying major shortfalls in governance and risk management.

Reserve Bank of New Zealand

The RBNZ is responsible for the prudential supervision of the banking and insurance sectors. Following criticism after the collapse of insurer CBL, the RBNZ is taking a more active role across a range of issues including:

- asserting its approval role in the AMP/Resolution Life deal, and
- proposing to substantially increase the capital requirements for New Zealand banks, particularly those that are Australian-owned.

Takeovers Panel

The Takeovers Panel is an independent Crown entity which regulates New Zealand's takeovers market. Their role is to enforce the Takeovers Code which restricts investors and their associates from holding or controlling more than 20% of the voting rights in New Zealand registered companies that are listed on the NZX or have 50 or more shareholders and 50 or more share parcels.

NZX

NZX operates New Zealand's stock exchange which comprises two main securities markets – the NZX Main Board and the NZX Debt Market. NZX is primarily responsible for regulating the markets and is a member of the World Federation of Exchanges. In November 2018, the NZX finalised its comprehensive update of its market structure and listing rules and issuers have been able to opt in to the new rules from 1 January 2019.

Sectors focus

We have kept a close eye on key sectors that will have a significant impact on M&A activity.

Tourism

Tourism is New Zealand's second largest export earner and aims to be a NZ$50b industry within the next six years, which is an ambitious goal. The tourism sector is proving attractive to buyers willing to take a longer term view.

Early stage/high tech businesses

New Zealand is globally renowned for its high tech entrepreneurial trait. Our science and technology sector continues to produce start-ups with real global growth potential and innovative disruptors which are attractive targets for overseas VC investors.

Media

Further consolidation of media businesses is expected as falling profits drive a search for synergies, but there are complex antitrust issues to navigate.

Healthcare/aged care

New Zealand's ageing population is setting our healthcare and aged care sectors up for further growth. The retirement sector is driving expansion in the number of expected new villages to meet the rapid increase in demand for accommodation. In addition, the private hospitals sector has plans to expand its facilities to meet the growing need for comprehensive healthcare services.

Infrastructure

New Zealand's infrastructure deficit requires a strong private capital drive. To close the gap, the Government has announced the creation of the New Zealand Infrastructure Commission Te Waihanga board. New Zealand-based infrastructure assets (in the broadest sense) will command a premium, but buyers will need to keep an eye on impending changes to the OIA which could limit overseas investment in assets that have "strategic significance".

Financial services

The regulatory headwinds faced by financial services businesses should drive further M&A activity in the sector. RBNZ proposals to increase capital requirements for our banks, and reforms to the financial adviser regime, should drive further M&A activity.

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