



CORPORATE & COMMERCIAL

Material adverse change clauses: lessons from Cosette v Mayne Pharma

The recent Supreme Court of New South Wales decision in *Cosette Pharmaceuticals Inc v Mayne Pharma Group Limited* ([2025] NSWSC 1204) provides significant guidance on the construction and operation of material adverse change (MAC) provisions in M&A transactions.

MAC clauses are contractual provisions that allow a buyer to withdraw from a transaction if a significant adverse event affects the target's business between signing and completion. In Australia, MAC clauses are common in M&A deals and lending arrangements, but judicial interpretation remains limited.

The judgment, delivered on 15 October 2025, rejected Cosette's attempt to terminate its A\$672 million acquisition of Mayne Pharma, finding that no MAC had occurred under the Scheme Implementation Deed (SID).

This case offers valuable insights into the legal interpretation of MAC clauses and practical considerations for corporates navigating transactional risk.

BACKGROUND

Mayne Pharma Group Limited (MPG), an ASX-listed pharmaceutical company, entered into a SID with Cosette Pharmaceuticals, Inc. (Cosette) for Cosette to acquire all MPG shares. The SID included a MAC clause, which allowed Cosette to terminate if an event diminished MPG's "Maintainable EBITDA" over a 12-month period by at least A\$10.76 million, subject to carve-outs and exceptions.

Following a decline in MPG's sales and the receipt of a regulatory letter from the US FDA, Cosette issued a MAC notice and purported to terminate the SID. MPG sought declarations that Cosette's termination was invalid. Cosette cross-claimed for a declaration that it had validly terminated and sought a break fee.

THE COURT'S APPROACH TO THE MAC CLAUSE

Quantitative thresholds and causation

Black J emphasised that the MAC clause required Cosette to prove that the alleged adverse events (including sales declines and regulatory issues) had, or were reasonably expected to have, the effect of diminishing MPG's Maintainable EBITDA by at least A\$10.76 million over a 12-month period.

Importantly, the Court held:

"A change in forecast is not itself an 'event, occurrence, change, circumstance or matter', but the reflection of a range of other events... which give rise to the range of earnings that are the subject of that forecast." (at [265])

The Court preferred the approach in *Akorn Inc v Fresenius Kabi AG* (Del Ch 2018) that a failure to meet a financial projection is not itself an adverse change, but rather evidence of such a change. The focus must be on actual adverse developments, not merely revised forecasts.

Exclusions and carve-outs

The Court rigorously applied the carve-outs in the MAC definition, including exceptions for matters fairly disclosed in due diligence, general economic conditions, and regulatory changes. For example, the decline in January 2025 EBITDA was found to have been fairly disclosed and thus could not be relied upon by Cosette to trigger the MAC.

Expert evidence and quantification

Both parties relied on expert accounting evidence to quantify the impact of the alleged adverse events. The Court found that, after correcting for certain accounting adjustments (notably the Doryx Co-Pay Adjustment), the decline in Maintainable EBITDA did not meet the MAC threshold. The Court was critical of attempts to rely on changes in forecasts rather than actual results, and emphasised the need for robust, fact-based quantification.

Affirmation and election

Even if Cosette had established a MAC, the Court found that Cosette had affirmed the SID by entering into an amendment deed, executing a deed poll, and supporting the SID at the first court hearing, with knowledge of the relevant facts. The anti-waiver clause did not prevent this election.

KEY TAKEAWAYS FOR CORPORATES

MAC clauses must be precise and evidence-based

- MAC provisions with clear, quantitative thresholds provide certainty but also set a high bar for termination. Parties seeking to rely on a MAC must be able to prove, with evidence, that the threshold has been met by actual adverse events, not just missed forecasts.
- Carve-outs for disclosed matters, general economic conditions, and regulatory changes are likely to be strictly enforced.

Disclosure and due diligence are critical

- Information fairly disclosed in due diligence will generally be excluded from MAC analysis. Sellers should ensure comprehensive and well-documented disclosure processes.
- Buyers must review data rooms carefully, as the failure to identify adverse information may preclude later reliance on it.

Forecasts are not guarantees

- Courts are reluctant to treat missed forecasts as MAC events unless the underlying causes are themselves adverse events that meet the contractual threshold.
- Disclaimers and qualifications in transaction documents and data rooms are effective in limiting liability for forward-looking statements.

Affirmation and conduct post-breach

- Parties who, with knowledge of potential termination rights, take steps to affirm or continue with a transaction (such as amending the agreement or supporting court applications) may lose the right to terminate, even if anti-waiver clauses exist.
- Timely and clear reservation of rights is essential if a party wishes to preserve termination rights.

Litigation strategy

- Robust contemporaneous evidence, including credible witness testimony and expert analysis, is crucial in MAC disputes.
- Parties should ensure their internal processes for forecasting and disclosure are well documented and defensible.

IMPLICATIONS FOR THE MARKET

The decision reinforces that MAC clauses are not a catch-all escape mechanism. Courts will require clear evidence of a substantial and enduring adverse change, and buyers must act promptly and in good faith.

Corporates should review their transaction documents, disclosure practices, and internal processes in light of this judgment to ensure they are well positioned in any future MAC dispute. This case is also a reminder that transactional certainty begins with precise drafting and ends with disciplined execution.



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