

ASA Submission: CAMAC Discussion on Members Schemes of Arrangement

The ASA is pleased to be able to contribute to the discussion on members schemes of arrangement and to comment from the perspective of the retail shareholders. The uses of members' schemes have evolved over time, whilst the relevant provisions of the Corporations Act 2001 have remained largely unchanged.

The ASA supports legislative change to ensure that the scheme process continues to offer mechanisms for the protection of retail shareholders, can be made more efficient both in terms of time and cost and where appropriate to remove differences between the scheme and bid processes.

The ASA

The Australian Shareholders' Association (ASA) is a not-for-profit organisation formed to represent, protect and promote the interests of investors in shares, managed investments, superannuation and other financial investments.

Submission

Part 3 Information to Shareholders

Effective Disclosure

The CAMAC Members Schemes of Arrangement Discussion Paper (the paper) discusses the disclosure requirements of section 412 of the Corporations Act 2001 (the Act). The voluminous documents accompanying both schemes and bids frequently overwhelm retail shareholders. The experience of the ASA is that retail shareholders confronted with this excess of information do not know where to begin and frequently do not read any of the material provided.

The ASA supports the suggestion contained in the paper to introduce a 'concise, clear and effective requirement' to the explanatory statement.

Part 3.1.2 of the paper makes suggestion of a 'road map' of the information to be made available to shareholders. The ASA would support this suggestion. The role of the court and ASIC in considering and reviewing scheme documents provides sufficient safeguards to ensure that the 'roadmap' contains the appropriate information.

The ASA also supports information being provided in a summary form with reference to the full information, which could be accessed either on the web or by requesting the hard copy.

Many shareholders either do not have internet access, or lack the confidence to access this information on the web. Accordingly the 'roadmap' and any summary documents should be both available on line and provided in hard copy to shareholders. Likewise any document incorporated by reference should be available either online or upon request, by post.

Supplementary disclosure

The ASA supports a supplementary disclosure regime for schemes similar to that which applies to bids.

Experts Opinion

The 'best interests' of diverse groups of shareholders will vary. Given this and the efficiency and simplicity of having the same test for both bids and schemes, the ASA supports the application of the 'fair and reasonable' test to schemes.

Part 4 Voting on Schemes

Class Voting

The ASA supports the status quo on the determination of voting classes. Any determination at the outset of proceedings which becomes binding is likely to disadvantage shareholders. At this stage particularly there is likely to be an imbalance of information between the shareholders and the company. Given this imbalance it is more appropriate that the court be able to determine that the classes were not properly constituted at a second hearing, even if this may lead to delay and additional cost in the case of court decision in favour of dissident shareholders.

Headcount Test

The purpose of the headcount test is to protect small shareholders. However given the low numbers of shareholders who generally vote in schemes, as evidenced in the paper, it is not an effective protection measure and as noted could in fact be used by a larger shareholder to block a scheme. The Act currently provides the court with a much more effective means of protecting small shareholders, in the discretion to refuse approval.

Accordingly the approval of schemes should be on the basis of a special majority of 75% of the votes cast on the resolution. In addition there should be a 90% entitlement test of for compulsory acquisition to take effect.

Part 5 Regulatory and Judicial Powers

ASIC exemption and modification powers

The ASA supports expansion of ASIC's role in schemes to give it general exemption and modification powers, provided that this change would reduce the time and cost of schemes of arrangement.

In the event that a short form merger procedure not requiring shareholder approval for wholly owned corporate groups is not adopted, then ASIC should have the power to exempt companies from complying with the shareholder disclosure requirements.

Purpose and Comparable Protections Test

The paper identifies the application of section 411(17) as the cause of uncertainty during the scheme procedure. It is obviously in the interests of shareholders to avoid situations arising where the bulk of the costs of a scheme are incurred before the scheme can be certain of success.

However cost and time considerations must be balanced against the need provide protection for retail shareholders, who are less likely to understand the intricacies and consequences of the proposals or to be able to mobilise to ensure their views are placed before the court to be considered as part of the courts wider fairness discretion.

The paper quotes an argument that as no scheme has been rejected on the basis of section 411 (17) that the section has no practical function. This

argument does not however take into account the effect which the review process carried out by ASIC prior to the hearing might have in ensuring that applications which come before the court are fair. Given that the role of the court is not investigatory, the ASA supports a continued role for ASIC in reviewing schemes and advising the court of 'no objection'.

Part 6 Extension and Simplification of Schemes

Options and Convertible Noteholders

Holders of options and convertible notes are currently treated as creditors and as such dealt with by a creditor scheme. Option and convertible note holders however have deferred their right to become shareholders and accordingly it is more appropriate that they be treated as shareholders in a scheme than as creditors.

Managed Investment Schemes

Although the Takeovers Panel has issued a Guidance Note requiring various voting and disclosure procedures to apply to trust schemes, without the judicial oversight provided by the scheme provisions, unit holders are not sufficiently protected.

Applying the scheme provisions to managed investment schemes would provide unit holders with the protection and oversight of the court, as well as provide a simpler and more transparent process for all parties.

Mergers within Corporate Groups

The short form merger process proposed in section 6.3 of the paper for intergroup re-structuring is supported by the ASA. Shareholders do not require the protective measures provided by the court, or the disclosure requirements for change of control schemes in these circumstances. Accordingly it is in the interests of shareholders that the process should be made efficient both in terms of time and cost.