

ASIC

Australian Securities & Investments Commission

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Mr John Kluver
Executive Director
Corporations and Markets Advisory Committee
GPO Box 3967
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By email: john.kluver@camac.gov.au

Dear Mr Kluver,

ASIC's response to the *Members' Schemes of Arrangement Discussion Paper*

We would like to thank the Corporations and Markets Advisory Committee for giving ASIC the opportunity to provide feedback regarding the *Members' Schemes of Arrangement Discussion Paper* (Discussion Paper). This letter sets out ASIC's response to the proposals in the paper.

Proposals regarding harmonisation of the scheme provisions with Chapter 6

Whilst we agree with the concept of harmonising the regimes governing schemes involving changes of control and takeover bids, we do not support the approach adopted in the Discussion Paper.

This is because the proposals in the Discussion Paper do not achieve harmonisation of the two regimes. They only address some areas of inconsistency between the two regimes. Importantly, the proposals do not address:

- the absence in Chapter 5.1 of any important shareholder protections in Chapter 6, such as the prohibition on discriminatory conditions (section 627), the four month minimum price rule (section 621(3)), the prohibition on the provision of collateral benefits (section 623), and the automatic offer increase provision (section 651A); and
- the role of the Takeovers Panel in schemes.

It is preferable that any harmonisation of the two regimes would result, as far as possible, in a single regulatory regime governing both schemes involving a change of control and takeover bids (for example, by including these schemes in Chapter 6). The

regime should only differentiate between the two where necessary to recognise the inherent differences between schemes and bids (such as the collective as opposed to the individual decision making).

ASIC in particular is concerned with the proposals regarding section 411(17). Given the "friendly" nature of most schemes, shareholders of companies subject to schemes do not get the benefit of the checks and balances imposed on bidders by targets in a takeover bid. In providing the 'no objection' letter to the court, ASIC plays an important gatekeeper role, the removal of which would be of significant detriment to shareholders. In particular we believe that it is important for ASIC to maintain its practice of providing the final 'no objection' letter at the second court hearing rather than the first court hearing. This is because:

(a) it is not unusual for material developments to arise in the month between the court hearings that may require further action such as disclosure by the company conducting the scheme; and

(b) our practice ensures that any objections raised by shareholders after the first hearing can be taken into account by ASIC and the court. (Courts have held that they are not required to look at the issue of whether a scheme has the purpose of avoiding Ch 6 provisions if we have provided a no-objection statement under s411(17)(b)).


Other proposals in the Discussion Paper

ASIC supports the following proposals in the Discussion Paper which address what we recognise as problems arising from existing deficiencies with the scheme provisions:

1. Giving the court the power to make a binding determination as to classes of members at the first hearing and a 'curative power' at the second hearing to approve a scheme where the classes are later found to have been wrongly constituted (section 4.1).
2. Improving disclosure of scheme information to shareholders (section 3.1). ASIC agrees with the introduction of a 'clear, concise and effective' requirement for the scheme's explanatory statement.
3. Extending the schemes provisions to listed managed investment schemes (section 6.2.1) and unlisted managed investment schemes (6.2.2).

If you wish to discuss these issues further at this stage, please contact Suneeta Sidhu on (02) 9911 2314 or by email (suneeta.sidhu@asic.gov.au).

Yours sincerely



Belinda Gibson
Commissioner