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Dear John

CAMAC Discussion Paper - Members Schemes of Arrangement

We refer to the CAMAC discussion paper "Members Schemes of Arrangement" dated June 2008 (**Discussion Paper**).

As requested in section 5.3 of the Discussion Paper we have prepared submissions on whether section 411 (17) should be repealed, retained in its present form or amended. We apologise for the lateness of our submissions and thank you for accepting them.

As you are aware, our colleagues Stan Lewis and Katrina Sleiman have also prepared a submission in response to the Discussion Paper. We support their submissions on supplementary disclosure and set out our additional submissions in relation to 411(17) below.

Evolution of the scheme process

The mechanism and protections in Chapter 5 have evolved over time to develop into a legitimate alternative to takeovers. Unlike Chapter 6 which was specifically drafted as a change of control regime, schemes have evolved from provisions dealing with court supervised arrangements between a company and its creditors. Over the years, legislation has been tailored to use this procedure for change of control situations. However much of the evolution has developed from judicial involvement in the scheme process.

Justice Lindren has queried the purpose that is served by court supervision of schemes[1] and has cautioned that market participants should not overestimate the protection available under the scheme procedure in Chapter 5, "*It should not be thought that the court's consideration of the question that a meeting be convened can even begin to come to grips with issues of the kind that might be raised by the target's shareholders in a contested inter partes proceeding*".

With respect to Justice Lindgren's view, we consider that court supervision plays an important role in protecting target shareholders in schemes. While it is indisputable that

[1] Justice Lindgren "Private equity and section 411 of the Corporations Act 2001 (Cth)", (2008) 26 *C&SLJ* 287.

issues that arise under schemes are complex (and indeed schemes are often better suited to complex transactions than are takeovers), counsel for the target has a duty to bring all material matters to the court's attention. In ex-parte matters such as schemes, this duty is particularly relevant. This professional obligation as well as the reputation risk involved in withholding information goes a long way to ensuring the court is aware of all the information it needs to assess the scheme.

Further, judicial involvement in schemes has resulted in some admirable outcomes for shareholders. For example, in cash schemes funds must be held in an account on trust for shareholders out of which the cash consideration is paid when the scheme is implemented. This provides even greater settlement certainty for shareholders than under cash bids where protections are limited to disclosure around funding arrangements. There has also been judicial scrutiny of "naked no vote" break fees. These are break fees payable by a target where the scheme is rejected by the target's shareholders, despite the absence of any competing offer from another bidder. In particular the decision in the Bolnisi Gold scheme suggests that while "naked no vote" break fee provisions are likely to be unenforceable if they are found to be contrary to the interests of the target or its shareholders or would coerce target shareholders into voting in favour of the offer, irrespective of its underlying merits.

In our view a triumph of the scheme process is that it allows independent scrutiny of friendly deals by both ASIC and the courts. Friendly takeovers on the other hand are not subject to the same scrutiny, and while the same statutory protections exist regardless of whether the deal is hostile or friendly, the risk of challenge in a friendly takeover context is low.

Our point is – schemes work. That is not to say that the regime may not benefit with a thorough and considered policy review. However, we do not agree with a piecemeal approach that concentrates on section 411(17) in isolation and does not consider it in the overall context of change of control protections.

Process should not undermine protection

We agree with arguments in the Discussion Paper and other submissions on this issue that schemes are a legitimate alternative to takeover bids and that the market should be free to choose the mechanism by which change of control transactions are conducted. The submissions put forward on this issue show that the choice between a scheme and a takeover is frequently driven by which process best suits the structure of the transaction. For example, it is well recognised that schemes may be preferable where greater certainty in timing is required, where transactions are particularly complex or where bidders cannot (usually for funding reasons) run the risk of acquiring less than 100% of the target.

A bid may be preferable where the bidder wishes to retain flexibility in timing and improving consideration to respond to a rival bid or where an agreement has not been or cannot be reached with the target.

However, while bidders and targets are free to take advantage of the process that best suits their change of control transaction, shareholders should be afforded the same protections regardless of the process by which the change of control will occur. Choice of

procedure should not undermine the underlying safety net for those whose shares are being acquired.

What purpose does section 411(17) serve?

We submit that considering shareholder protections is a necessary step of any change of control transaction. Currently section 411(17) provides for this step as part of the scheme process. We do not agree that section 411(17) poses an "undue completion risk"[2] but rather see it as serving an important purpose of actively bringing shareholder protection to ASIC and the court's attention.

That section 411(17) exists is an indication that without specific consideration of the protections provided under takeover bids, the shareholder protection regimes of schemes and bids would not be aligned. This section ensures scheme proponents and the court actively consider the shareholder protections afforded under Ch 6 in the context of the proposed scheme. This may not have been the original purpose of this section but it is the foundation on which scheme jurisprudence has been built. Although section 411(17) does not achieve harmony between the shareholder protections of takeovers and schemes, it achieves a better outcome than not considering shareholder protections at all.

602 principles

Given the important purpose served by section 411(17) we would support the repeal of section 411(17) only if the step of considering shareholder protection was otherwise retained. The Discussion Paper and review of the scheme provisions presents an opportunity to achieve greater harmony between takeovers and schemes by incorporating the section 602 principles into Ch 5.

Replacing section 411(17) with specific reference to 602 principles would provide a legislative basis for the court to review and decide whether or not to approve the scheme.

We submit that, in any event, it is not illogical to apply the 602 principles to schemes as the language of section 602 in theory covers any control transaction. Section 602 provides that the purposes of Chapter 6 are to ensure that:

(a) *the acquisition of control over voting shares* takes place in an efficient, competitive and informed market;

(b) shareholders know the identity of any person who proposes *to acquire a substantial interest in the company*, have a reasonable time to consider the proposal; and are given enough information to enable them to assess the merits of the proposal;

(c) shareholders have a reasonable and equal opportunity to participate in any benefits offered under *any proposal under which a person would acquire a substantial interest in the company*, body or scheme; and

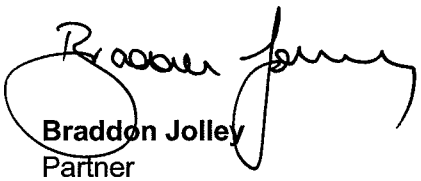
(d) an appropriate procedure is followed as a preliminary to compulsory acquisition of voting shares. (our italics)

[2] Ref Damian and Rich

Conclusion

Although the process of section 411(17) may be clumsy, the underlying protections afforded to shareholders are not, in our view, expendable. We would support a thorough (rather than piecemeal) policy review which involved considering the appropriateness of incorporating the 602 principles into the scheme process.

Yours faithfully
Corrs Chambers Westgarth



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