

Our Ref: HM;PZ

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15 October 2008

Mr John Kluver
Executive Director
Corporations and Markets Advisory Committee
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Dear Mr Kluver

Re: Members' Schemes of Arrangement – Discussion Paper

1. Introduction

I refer to the Discussion Paper published June 2008 entitled 'Members' Schemes of Arrangement (**Discussion Paper**).

The Discussion Paper has been reviewed by the Law Society's Business Law Committee (**Committee**) and the Law Society welcomes the opportunity to make a submission.

Set out below are certain views expressed by the Committee. As the Discussion Paper has not been considered by the Council of the Law Society, the views expressed are those of the Committee alone.

2. Information to Shareholders

- 2.1 The Committee supports the view that the specific disclosure obligations, set out in Corporations Regulations, Schedule 8, Part 3, should not be omitted but should be revised to be more consistent with the required content of bid documents.
- 2.2 The Committee supports the cost-reduction proposals set out in paragraph 3.1.2 of the Discussion Paper on the assumption that the full Explanatory Statement would always be made available to a shareholder upon request.

- 2.3 The Committee supports the view that the scheme provisions should incorporate a supplementary disclosure regime similar to that for a bid.
- 2.4 For the reasons set out in section 3.3 of the Discussion Paper, the Committee supports the view that information supplied in an Explanatory Statement under a scheme should be subject to a stand-alone liability and defence regime that is modelled on that applicable to bids.
- 2.5 The Committee supports the view that for an independent expert's report on a scheme, the expert should apply the 'fair and reasonable' test which applies to bids rather than the current 'best interests' test.

3. Voting on Schemes

- 3.1 The Committee supports the view that the court be given an express power, at the first court hearing, to make a binding determination on the composition of classes. As there is usually a considerable period of time between the initial announcement and the first court hearing, it would be possible for shareholders to be given advance notification (i.e. 14 days) of any application to the first court hearing for a binding determination on class composition.
- 3.2 The Committee also supports the proposal that the court be given an express 'curative' power at the second court hearing to approve a scheme if the classes have been wrongly constituted.
- 3.3 For clarification, the Committee supports the proposal that the scheme provisions specifically state that any votes passed in favour of the scheme by an intending controller should be disregarded.
- 3.4 The Committee agrees with the Law Council that the headcount test for shareholders in schemes should be abolished for the reasons set out in section 4.2.4 of the Discussion Paper under the heading: 'Option 4: Dispense with the headcount test'.
- 3.5 The Committee supports the view that for a scheme involving a company limited by guarantee there should be one voting test being approval of 75% of the members who vote on the resolution.

4. Regulatory and Judicial Powers

- 4.1 The Committee supports the view that:
 - (a) ASIC's dispensing and consent powers with respect to schemes do not need to be expanded; and
 - (b) there should be a short-form merger procedure for wholly-owned corporate groups that would not require shareholder approval.
- 4.2 For the reasons set out in section 5.2.4 of the Discussion Paper, the Committee supports the view that section 411(17) should be amended to include the Eggleston principles and to require further statements which would facilitate consideration of the scheme and its documentation.

5. Extension and Simplification of Schemes

- 5.1 The Committee supports the view that optionholders and noteholders should participate in members' schemes and be treated as separate classes from holders of issued shares (with different exercise prices and expiry dates being ignored). The headcount test should not apply.
- 5.2 The scheme provisions should be amended to cover listed managed schemes in order to better protect the interest of unitholders, including the overriding of any equivalent provisions in the constituent documents of a managed scheme.
- 5.3 The Committee supports the view that there should be a short-form merger procedure as described in section 6.3 of the Discussion Paper for wholly-owned corporate groups.
- 5.4 The Committee supports the view that scheme provisions should not be adapted to facilitate their use where a target board opposes a scheme and is unwilling to put the proposal to shareholders. It is not practicable to make such amendments.

6. Further Advice

The Committee is interested to provide further advice to CAMAC.

If any further information is required in relation to the submission, please contact Petra Zlatevska, Executive Member of the Business Law Committee by phone on (02) 9926 0106, or by email to pzlatevska@lawsocnsw.asn.au.

Yours sincerely

Hugh Macken
President