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The Treasury

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Corporate control transactions in Australia

Consultation on options to improve schemes of
arrangement, takeover bids, and the role of the
Takeovers Panel

April 2022

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Consultation Process

Request for feedback and comments

Closing date for submissions: 03 June 2022

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The principles outlined in this paper have not received Government approval and are not yet law. As a consequence, this paper is merely a guide as to how the principles might operate.

Improving control transactions in Australia

Introduction

Corporate control refers to the authority to make decisions with respect to a company. This extends to decisions regarding the members of the board of directors,¹ the employment and dismissal of managers,² and the control and management of the resources which a company can allocate and use.³

In Australia, one of two control transaction processes is typically used to effect a change in corporate control. The first is a takeover bid, governed by the **Takeover Rules** in Chapter 6 of the *Corporations Act 2001* (the **Corporations Act**).⁴ The second is the implementation of a scheme of arrangement, a court-approved regime governed by Chapter 5 of the *Corporations Act* (the **Scheme of Arrangement Rules**).

Takeover bids are driven by the ‘bidder,’ who determines the offer price, period, and terms and conditions. For example, takeover bids can be a market bid for securities quoted on a financial market, or an off-market bid for quoted or unquoted securities;⁵ and can be conditional on the satisfaction of certain specified conditions,⁶ or be unconditional.

Schemes of arrangement are largely driven by the target company, which must seek the approval of its shareholders and the Court to propose and implement the scheme. The ‘bidder’ is involved as a counterparty to the scheme implementation deed. Ultimately, a scheme requires the consent of the target and bidding companies, the shareholders of the target company, and the Court. To the extent that the bidder has an interest in the target company, it is not entitled to vote.

Because the takeover process does not require the consent and cooperation of the target company, a takeover bid is often used to acquire target companies in ‘hostile’ circumstances.⁷

On the other hand, as the scheme of arrangement process requires the consent and cooperation of the target company, schemes are, in general, used for ‘friendly’ acquisitions.

As takeovers can be hostile, with the target company subject to multiple competing takeover bids, disputes often arise. Disputes which arise during the takeover period are heard by the Takeovers Panel, which is a peer review dispute resolution body composed of members with expertise in mergers and acquisitions. Its primary power is to make a declaration of ‘unacceptable circumstances’ to protect the rights of persons or groups (especially shareholders of the target company).⁸ The Takeovers Panel seeks to decide disputes in a speedy manner by focusing primarily on commercial

¹ Adolf Berle and Gardiner Means, *The Modern Corporation and Private Property* (Transaction Publishers, 1932); see *Corporations Act 2001* (Cth) s 201G.

² Eugene Fama and Michael Jensen, ‘Separation of Ownership and Control’ (1983) 26(2) *Journal of Law and Economics* 301; see *Corporations Act 2001* (Cth) Part 2G.2.

³ Yin Zhaoliang, *A Study of Some Legal Problems of Corporate Control* (Law Publishing House, 2001); see *Corporations Act 2001* (Cth) Part 2G.2.

⁴ All legislative references in this paper are to the *Corporations Act 2001* (Cth) unless otherwise stated.

⁵ *Corporations Act 2001* (Cth) s 616.

⁶ In the case of off-market bids (*Corporations Act 2001* (Cth) s 625). Typical conditions include: obtaining financing, acceptance from a minimum percentage of shares, no material acquisitions or disposals from the target company, and approval from regulators such as the Foreign Investment Review Board and the ACCC.

⁷ Takeover bids are also used in ‘friendly’ circumstances.

⁸ *Corporations Act 2001* (Cth) s 657A.

and policy issues. In making a declaration of unacceptable circumstances, the Takeovers Panel must have regard to the purpose of the Takeovers Rules contained in s 602 of the Corporations Act.⁹

As schemes are typically friendly, disputes are uncommon (other than disputes about the contractual meaning of the scheme implementation deed). To the extent that disputes arise, they are typically resolved by the Court as part of the court-administered approval process. As schemes are already subject to scrutiny by the Court, the Takeovers Panel is generally reluctant to intervene.¹⁰ However, the Takeovers Panel will conduct proceedings in relation to a scheme in limited circumstances. For example, a bidder may apply for a declaration of unacceptable circumstances where the target company enters a scheme of arrangement with a different bidder.

Table 1 below summarises the main features of the takeover bid and scheme of arrangement processes.

Table 1. Summary of main features of Takeover Bids and Schemes of Arrangement

	Takeover Bid	Scheme of Arrangement
Features of structure		
Controlled by	Bidder	Target
Appropriate for	Hostile & friendly acquisitions	Friendly acquisitions
Method of approval	<ul style="list-style-type: none"> Offer accepted by shareholders Once 90% of securities owned, bidder can exercise compulsory acquisition power¹¹ 	Requires both: <ul style="list-style-type: none"> Members' resolution passed by: (i) 75% of votes cast; and (ii) majority in number present and voting;¹² and Approval by Court¹³
Dispute resolution process	Takeovers Panel via declaration of unacceptable circumstances	<ul style="list-style-type: none"> Court (during statutory approval process) Takeovers Panel (in limited circumstances)
Key statistics by structure (2021)¹⁴		
Number of deals	22	34
Percentage of deals by structure (all deals)	39%	61%
Percentage of deals (deal size over \$1b)	14%	86%
Average deal size	\$539.3 million	\$965.0 million
Average time taken	94 days	115 days
Success rate	55%	90%

⁹ Corporations Act 2001 (Cth) s 657A(2)(b).

¹⁰ See *Re St Barbara Mines Ltd and Taipan Resources NL* (2000) 18 ACLC 913, in which it was noted that the Takeovers Panel is reluctant to intervene in a scheme once a court has 'commenced its scrutiny of the scheme' (at 918).

¹¹ Corporations Act 2001 (Cth) s 661A (compulsory acquisition following takeover bid) & 664A (general compulsory acquisition power).

¹² Corporations Act 2001 (Cth) s 411(4)(a)(ii).

¹³ Corporations Act 2001 (Cth) s 411(4)(b).

¹⁴ Statistics adapted from: Herbert Smith Freehills, *Australian Public M&A Report 2021* (Report, 2021) and Gilbert + Tobin, *Takeovers + Schemes Review 2022* (Report, 2022).

Consultation Objectives

On 30 April 2021, the Government announced it would consult on expanding the role the Takeovers Panel plays in control transactions, including options for the Takeovers Panel to consider and/or approve members' schemes of arrangement and potentially give advance rulings, with an aim of reducing the time and costs of mergers and acquisitions. This consultation seeks feedback on:

- the operation of takeovers and schemes generally, and whether they are meeting the broader policy objectives in respect of control transactions in Australian law
- the role of the Takeovers Panel and ASIC in regulating takeovers generally
- the role of the Court, the Takeovers Panel, and ASIC in regulating schemes generally.

In particular, this paper seeks feedback which will assist the Government in understanding whether:

- schemes used to effect a change in corporate control should continue to be regulated primarily by the Court, or should instead be regulated primarily by the Takeovers Panel (noting that not all schemes of arrangement relate to changes in corporate control), or alternatively
- Chapter 5 schemes should continue to be regulated by the Court, and a new type of scheme should be created under Chapter 6 that is regulated by the Takeovers Panel
- the Takeovers Panel should be empowered to give advance rulings.

Submissions may be provided until 3 June 2022. Discussion questions are included to guide feedback. Further information and suggestions relevant to the role and remit of the Takeovers Panel are welcome.

On 2 August 2021, the Government released a separate consultation paper, *Helping Companies Restructure by Improving Schemes of Arrangement*,¹⁵ which relates to the use of creditors' schemes of arrangement to restructure severely distressed companies. Any recommended changes to the Scheme of Arrangement Rules arising from this consultation will be considered in the context of the proposed reforms to creditors' schemes of arrangement.

Current Regulatory Framework

As explained above, there are two legal regimes for undertaking a change in corporate control in Australia, being the Takeover Rules and the Scheme of Arrangement Rules.

Both regimes cover the following matters: (i) who may assess the proposed transaction; (ii) the process to be followed in making that assessment; (iii) the rules to be applied in making the assessment; (iv) the consequences of a positive or adverse assessment; and (v) the review of assessments.

Takeovers and the Takeovers Panel

Under the Takeover Rules, a takeover is defined as a transaction that increases the shareholding of an acquirer to a proportion that is more than 20 per cent of voting interests in the company, but less than 90 per cent.¹⁶ However, this definition currently only applies to public companies with more than 50 members, listed companies, some listed bodies and listed registered schemes. In contrast the Scheme of Arrangement Rules apply to companies of any size.

A takeover bid under the Takeover Rules is an acquirer-driven process. It involves a potential acquirer making an offer to all shareholders of a target company or unitholders of a trust to acquire their

¹⁵ See paper at <https://treasury.gov.au/consultation/c2021-190907>.

¹⁶ *Corporations Act 2001* (Cth) s 606.

shares or units on the same terms. A takeover bid can be used for either a friendly or hostile acquisition of a company or trust, but is typically preferred in hostile circumstances.

The Takeover Rules provide a prescriptive timeframe for the preparation and provision of information (in the form of a bidder's statement and offer documents) to the target company, shareholders and ASIC.¹⁷ The Takeover Rules also provide specific and general disclosure requirements for these documents.¹⁸

Disputes that arise in the course of a bid are primarily determined by the Takeovers Panel, whose primary power is to make declarations of unacceptable circumstances, having regard broadly to the policy objectives outlined in the Takeover Rules.

The Takeovers Panel was established in its current form in 2000 to resolve disputes about takeovers. It is a peer-review body composed of appointed part-time members with expertise in mergers and acquisitions as either investment bankers, lawyers, company directors or other professionals. It has a full-time Executive based in Melbourne to assist members of the Takeovers Panel and the takeovers community and to draft policy.

Since its inception, the Takeovers Panel has enjoyed a positive reputation for the timeliness of its decision making, its ease and relative affordability of access, and the commercially minded, informal, and non-legalistic approach it takes to resolving disputes. The Takeovers Panel Stakeholder Survey 2020 reported 91% of stakeholders were either very satisfied or somewhat satisfied with the Takeovers Panel.¹⁹ As such, it has grown to play an important role in the regulation of takeovers in Australia and has considered a large number of applications in relation to a wide range of companies.

Table 2 below shows that the Takeovers Panel has processed an average of approximately 31 applications a year over the past three years. the Takeovers Panel made undertakings and orders for most of the applications it considered. The Takeovers Panel declined to make declarations or orders in only a small number of the cases it considered.

Table 2. Current resourcing of and applications to the Takeovers Panel

Year	Panel resources and staffing		Panel applications	
	Takeovers Panel Members	Executive Staff (avg staffing level)	Applications processed	Matters concerning schemes
2018-19 ²⁰	43	5.7	30	0
2019-20 ²¹	46	5.7	35	2 ²²
2020-21 ²³	49	6.5	29	0
2021-22 ²⁴	50	7.6	23	9

Full details (including whether: proceedings were conducted, declarations of unacceptable circumstances were made, orders were made, and/or undertakings were accepted) are available in Table 3 of each of the Panel's annual reports.

¹⁷ *Corporations Act 2001* (Cth) s 633; as well as the Division 4 requirements for supplementary documents in certain circumstances.

¹⁸ *Corporations Act 2001* (Cth) ss 636 and 638.

¹⁹ Takeovers Panel Media Release TP21/2014 "Ipsos Finds 91% of Stakeholders Satisfied with the Panel", 27 April 2021 <https://www.takeovers.gov.au/content/DisplayDoc.aspx?doc=media_releases/2021/014.htm>

²⁰ Takeovers Panel Annual Report 2018-2019 <https://www.takeovers.gov.au/content/resources/reports/annual_reports/2018-19/default.aspx>.

²¹ Takeovers Panel Annual Report 2019-2020 <https://www.takeovers.gov.au/content/resources/reports/annual_reports/2019-20/default.aspx>.

²² *GBST Holdings Limited* [2019] ATP 15; and *Pacific Energy Limited* [2019] ATP 20.

²³ Takeovers Panel Annual Report 2020-2021 <https://www.takeovers.gov.au/content/resources/reports/annual_reports/2020-21/default.aspx>.

²⁴ Figures for FY2021-22 to date (up to 29 March 2022).

Schemes of arrangement and the role of the Court

Current jurisdiction, scope, and use for both control and non-control transactions

Members' schemes of arrangement are a mechanism for achieving a binding arrangement with shareholders on structural change within a company or a corporate group. They are used to achieve changes in capital structure, to the rights of members, and/or to the relationship between corporate entities. In particular, they are often used to effect changes of corporate control, in non-hostile circumstances.

Creditors' schemes of arrangement also rely on the Schemes of Arrangement Rules in Chapter 5 but are undertaken for a different purpose and are assessed by the Court in a different way to members' schemes of arrangement. Further, members' schemes of arrangement can be used for purposes other than control transactions, such as for (for example) demutualisation, de-amalgamations and reorganising capital structures, or a combination of purposes.

Any options to expand the remit of the Takeovers Panel in respect of schemes of arrangement will need to consider the impacts on these other forms and purposes of schemes.

Scheme of arrangement process

Under current law all schemes of arrangement, including those used to effect a change of control, are administered and ultimately approved by the Courts.

Before a scheme is proposed, the target company prepares an explanatory statement (known as a scheme booklet) that sets out the effect of the proposed scheme, including any information that is material to deciding whether to agree to the proposed scheme. Along with the scheme booklet, the target company engages an independent expert to provide an opinion on whether the proposed scheme is in the best interests of the target company's shareholders. The company must consider whether they should request any exemptions or modifications from the Scheme of Arrangement Rules.

In broad terms, once a scheme is proposed the process comprises three stages.

The first stage involves a first court hearing, at which the Court determines whether to make an order convening a meeting or meetings of the company's members and will make orders for the dispatch of the scheme documentation. At the first hearing, the Court reviews disclosures against the 'material information' standard, with input from ASIC according to its regulatory priorities. As part of the review of documentation, Courts can impose alterations or conditions of the disclosures before documents are sent to members. ASIC is also able to waive certain disclosure requirements. While these waivers are reviewable by the Administrative Appeals Tribunal, this is rare in practice. Waivers are not reviewable by the Takeovers Panel.

It is incumbent on the target company to provide the necessary documents to its own shareholders. While not required by law, Courts typically require disclosure documents and notice of meetings in line within statutory deadlines – for example, to have sent documents 28 days prior to the meeting for a listed company.

In requiring the meeting to be called, Courts have a wide range of powers to attach conditions to the meeting or to have the meeting proceed in a way best suited to protect member interests. Courts will normally make practical orders designed to increase the awareness of such a meeting, such as requiring the target company to publicise the meeting in newspapers, online or through other appropriate media depending on the case and shareholders effected.

If the Court orders that the meeting or meetings be convened, the second stage of the process is the meeting or meetings at which the members vote on the proposed scheme. For a scheme to be

approved, it must be agreed to by: (i) a majority in number of the members present and voting,²⁵ and (ii) 75% of the votes cast by value.²⁶

The Court has the power to make orders facilitating a scheme (including in relation to incidental, consequential and supplemental matters). For example, the Court can make orders concerning the transfer of assets or liabilities.²⁷

If the members resolve to approve the scheme, the final stage of the process involves a second court hearing at which the Court will consider whether to sanction the scheme. In its determination, the Court considers whether the scheme is fair and reasonable, among other considerations. If the scheme is sanctioned by the Court, it will be binding on the members of the company.

The Court hearings provide a forum for resolving disputes about the conduct of a takeover effected by a scheme of arrangement.

The Takeovers Panel may also consider disputes in respect of schemes of arrangement. In practice, the Takeovers Panel is mindful of interactions where applications to it overlap, or interact with, schemes of arrangement which are being supervised by the Courts. The Takeovers Panel tend not to conduct proceedings directly concerning schemes of arrangement where the issue has already been taken up by the Court.²⁸

However, the Takeovers Panel may consider an application when the application raises issues which would not be considered by the Court.

There have been cases where disputes in respect of the same takeover have been determined by both the Courts and the Takeovers Panel.

Criteria followed to determine the approval of schemes

The Court and ASIC apply various criteria and legal principles at different stages of the scheme of arrangement process to consider and approve the scheme.

Prior to the first hearing, the target company provides the scheme booklet to ASIC, who review the disclosure against the regulatory and statutory disclosure requirements contained in the Corporations Act and the *Corporations Regulations 2001* (Cth), in particular to ensure all 'material information' is included in the disclosure. ASIC also has regard to the Eggleston Principles in reviewing schemes of arrangement.²⁹

At the first hearing, the Court considers whether to approve the scheme booklet and convene members meeting. The Court will approve the members' meeting if it considers the scheme would be approved, having regard to:

- the adequacy of disclosure (according to the same statutory and regulatory standards as ASIC)
- whether ASIC has had reasonable time to examine the proposed scheme
- whether the scheme has been proposed properly and in good faith
- whether the Court would subsequently approve the scheme at the final hearing if no objections were raised.

²⁵ The Court has the discretion to approve the scheme even if the scheme has not been approved by the majority of the members present and voting.

²⁶ *Corporations Act 2001* (Cth) s 411(4)(a)(ii).

²⁷ *Corporations Act 2001* (Cth) s 413.

²⁸ See for example *Ross Human Directions Ltd* [2010] ATP 8 at [19] and *PM Capital Asian Opportunities Fund Limited 01* [2021] ATP 17 at [98] to [100].

²⁹ Australian Securities & Investments Commission, *Regulatory Guide 60: Schemes of arrangement*, September 2020, [60.102] to [60.103].

As a matter of practice, the Government understands ASIC will normally either appear in Court to object to certain aspects of the arrangement, or otherwise provide a letter informing the Court that ASIC has no objection to the arrangement. In considering whether to object, ASIC typically has regard to the Eggleston Principles,³⁰ though there are no statutory requirements in respect of what ASIC can or should put before the Court.

At the second court hearing, for final approval of the scheme, the Court has regard to the following factors when considering whether to approve the scheme:

- the fairness of the scheme (and may grant approval subject to ‘such alterations or conditions as it thinks just’)³¹
- whether the appropriate voting thresholds were met at the members’ meeting. For a scheme to be approved by the Court, approval must first be granted by a vote at the scheme meeting. A resolution in favour must be passed at the scheme meeting by each class of members by both:³²
 - a 75% of the votes (based on shareholding) cast on the resolution
 - more than 50% in number, of members voting on the resolution at the meeting whether they are attending in person or by proxy.
- The Court generally does not consider whether the scheme is in the best interest of members on the basis that this is for the members to decide.

Schemes of arrangement only become operational once the Court order of final approval is lodged with ASIC.

Responsibilities of ASIC and the Takeovers Panel in regulating schemes and takeovers

ASIC and the Takeovers Panel are the two main bodies responsible for the oversight of control transaction processes in Australia. Each plays a different role:

- ASIC, as the corporate regulator, oversees control transaction processes. It exercises powers including reviewing and monitoring disclosures and conduct in relation to takeover bids, examining the draft explanatory statement and terms of a proposed scheme of arrangement,³³ and exempting and modifying the application of the Scheme of Arrangement Rules as they apply to specific companies.³⁴
- The Takeovers Panel, as a peer-review and dispute resolution body, is responsible for resolving disputes about takeovers. It hears and decides applications brought by parties interested in the transaction to stop or modify a takeover by making a declaration of ‘unacceptable circumstances.’³⁵ The Takeovers Panel does not oversee the takeovers process proactively; instead, it relies on applications from interested parties to enliven its decision-making authority.³⁶

³⁰ Australian Securities & Investments Commission, *Regulatory Guide 60: Schemes of arrangement*, September 2020, [6.104] to [60.106].

³¹ Gilbert + Tobin, *Takeovers + Schemes Review 2021* (Report, 2021) 22.

³² *Corporations Act 2001* (Cth) s 411(4)(a)(ii).

³³ *Corporations Act 2001* (Cth) s 411(2)(b)(i).

³⁴ See, eg, *Corporations Regulations 2001* (Cth) r 5.1.01 under which ASIC may alter the prescribed contents of the explanatory statement.

³⁵ *Corporations Act 2001* (Cth) s 657A.

³⁶ *Corporations Act 2001* (Cth) s 657C.

This division of responsibility between ASIC and the Takeovers Panel in Australia contrasts the role played by the various takeovers panels which exist in several overseas jurisdictions.

Takeovers panels, or analogous bodies responsible for oversight of takeovers, exist in, for example, the UK, Hong Kong, Singapore, New Zealand, India, Ireland, Malaysia, and South Africa. While these panels generally have a dispute resolution function, based on similar aims and principles as the Takeovers Panel in Australia, overseas panels generally also act as the regulator of takeovers – the role played by ASIC in Australia.

The discussion of the policy objectives underpinning possible reforms to the remit of the Takeovers Panel in this consultation paper considers the regulatory arrangements for takeovers overseas. However, given the different role played by the Takeovers Panel in Australia compared to equivalent bodies in overseas jurisdictions, it may not be appropriate in all instances that the Takeovers Panel adopt functions more appropriate to be carried out by the regulator of takeovers.

Policy Objectives

The current operation of Australia's regulatory framework for control transactions and any future reforms should meet or enhance the following policy objectives:

- That control transactions, including by schemes of arrangement, uphold the policy objectives known as the 'Eggleston Principles'
- That regulatory efficiency is maximised by minimising costs and uncertainties
- That decision-making bodies with responsibility for control transactions, including by schemes of arrangement, have appropriate regulatory powers and that those powers are divided appropriately.

Ensuring schemes uphold the Eggleston Principles

This section will provide an overview of the Eggleston Principles, outline how the Eggleston Principles have been codified in the Takeovers Rules, and discuss whether the Eggleston Principles are adequately promoted by the Schemes of Arrangement Rules as currently formulated.

The Eggleston Principles have underpinned takeovers policy objectives since 1969.³⁷ Their purpose is to provide a legislative safeguard which ensures fair treatment of shareholders, and they should be upheld in all control transactions. The principles aim to achieve this by ensuring that in a takeover:

- the identity of the prospective acquirer is known to the shareholders and directors of the target company (identity principle)
- shareholders and directors have reasonable time to respond to the takeover proposal (reasonable time principle)
- shareholders have all information necessary to assess the merits of the proposal to acquire control (disclosure principle)
- so far as is practicable, each shareholder has an equal opportunity to participate in the benefits offered (equal opportunity principle).

The four Eggleston Principles were later supplemented by a fifth principle: that acquisitions should take place in an efficient, competitive and informed market. This principle, often referred to as the

³⁷ Company Law Advisory Committee, Australian Parliament, Second Interim Report to the Standing Committee of Attorneys-General on Disclosure of Substantial Shareholdings and Takeovers (1969) ('the Eggleston Report').

Masel Principle,³⁸ was implemented in the *Companies (Acquisition of Shares) Act 1980* (Cth),³⁹ which commenced 1 July 1981.

The Eggleston Principles are codified in the Corporations Act as the stated ‘purposes’ of the Takeovers Rules.⁴⁰ This has helped to ensure that changes of control using the Takeover Rules in Australia meet and further these policy objectives. The codification of the Eggleston Principles has been recognised as having a positive impact on the regulation of takeovers in Australia.⁴¹

The Takeovers Panel must consider the principles when considering whether to make a declaration of unacceptable circumstances.⁴²

Despite schemes of arrangement having received judicial and regulatory recognition as an alternative to takeover bids for effecting a change of corporate control, there is no explicit statutory equivalent of the Eggleston Principles in the Schemes of Arrangement Rules. This has led to concerns from some stakeholders that schemes can – whether intentionally or not – be used in a way that avoids the protections afforded by the Eggleston Principles under the Takeover Rules. Other commentators argue that fair treatment of shareholders is ensured by elements in the scheme procedure, and the supervisory role played by ASIC and the Court throughout the scheme process.

While the Eggleston Principles are not explicitly included in the Scheme of Arrangement Rules, they may be upheld indirectly...

The scheme procedure is argued to contain protections equivalent to those in takeover bids, including disclosure requirements which support the identity and disclosure principles, and the class voting test which supports the equality of opportunity principle.⁴³

ASIC protects shareholders’ interests by taking the Eggleston Principles into account when reviewing a scheme which is capable, in whole or part, of being conducted under a takeover bid.⁴⁴ The primary question considered by ASIC in its determination whether to provide a ‘No Objection’ statement under s 411(17)(b) is whether shareholders are adversely effected by the transaction having regard to the s 602 principles.⁴⁵ ASIC’s preparation of this statement both ensures that shareholders receive equivalent protections as under a bid, and assures the Court that ASIC has considered the application of the Eggleston Principles to the proposed arrangement. However, the legal basis for consideration of the principles rests only on ASIC’s *Regulatory Guide 60 – Schemes of arrangement*. Further, where ASIC declines to give a ‘No Objection’ statement, the Eggleston Principles are not explicitly considered by the Court throughout the process.

³⁸ Named for the then chairman of the National Companies and Securities Commission.

³⁹ *Companies (Acquisition of Shares) Act 1980* (Cth).

⁴⁰ *Corporations Act 2001* (Cth) s 602. S 602(d) also includes a separate statutory objective that “appropriate procedure is followed as a preliminary to compulsory acquisition of voting shares or interests or any other kind of securities...”

⁴¹ Australian Law Reform Commission, *Financial Services Legislation: Interim Report A* (Report 137, 2021) 504.

⁴² *Corporations Act 2001* (Cth) ss 657A(2)(b) and 657A(3)(a)(i).

⁴³ Where there is more than one class of shareholders, the scheme must be approved by each class (*Corporations Act 2001* (Cth) s 411(5)). The Court’s overriding discretion whether to approve a scheme also protects shareholder interests, and will be discussed below.

⁴⁴ Australian Securities & Investments Commission, *Regulatory Guide 60: Schemes of arrangement*, September 2020, Section B. See also, in relation to the equivalent role played by ASIC under takeover bids and schemes of arrangement, Australian Securities & Investments Commission, *Regulatory Guide 9: Takeover Bids*, September 2020, [9.8]; and in relation to ‘scrip takeover type schemes,’ Australian Securities & Investments Commission, *Regulatory Guide 60: Schemes of arrangement*, September 2020, [66.67]-[66.68].

⁴⁵ Australian Securities & Investments Commission, *Regulatory Guide 60: Schemes of arrangement*, September 2020, 6 [60.16]-[60.17].

Finally, the Court ensures the interests of shareholders are protected through the anti-Takeovers avoidance provision in s 411(17) of the Corporations Act, and by exercising its overriding fairness discretion whether to approve a scheme.⁴⁶

... but this may not be sufficient to safeguard shareholder interests

The anti-avoidance provision contained in s 411(17) of the Corporations Act provides that the Court may not approve a scheme unless it is satisfied either that arrangement has not been proposed for the purpose of avoiding the Takeovers Rules (including the Eggleston Principles as codified in s 602), or ASIC has provided a 'No Objection' statement.⁴⁷ While the Court is not bound to approve the scheme merely because ASIC has provided a statement, these two options under s 411(17) have been interpreted as representing 'true alternatives.'⁴⁸ That is, the Court is not required to – and generally does not in practice – consider whether the scheme's purpose is to avoid the Takeover Rules if ASIC has provided a 'No Objection' statement under s 411(17)(b).

On its face, the provision as currently worded means that an arrangement which avoids the Takeovers Rules might be approved in circumstances where the Court concludes that avoidance of the Takeover Rules was not the significant or substantial purpose of the arrangement. The provision has been interpreted in this way: the Court is concerned with the purpose, rather than the effect, of the scheme;⁴⁹ and a wide range of reasons have been accepted as bona fide commercial reasons for electing to proceed with a control transaction via a scheme rather than a bid.⁵⁰ It has been argued that the practical effect of the Court's interpretation of the provision makes it relatively easy to satisfy.⁵¹ For these reasons, the Corporations and Markets Advisory Committee (CAMAC) concluded in its 2009 report, 'Members' schemes of arrangement,' that the provision 'fulfils no real purpose' and therefore 'should be repealed.'⁵²

The final safeguard of shareholder interests is the Court's overriding discretion whether to approve a scheme.⁵³ In its exercise of this discretion, the Court may still consider any takeover avoidance purpose, as well as the fairness of the scheme for shareholders, even where ASIC provides a 'No Objection' statement. The Court has also acknowledged that it is entitled to have regard to the Eggleston Principles in the course of exercising its fairness discretion. For example, factors relevant in exercising this discretion have included:

- whether there was full and fair disclosure⁵⁴
- whether resolutions were passed in good faith and not for an illegitimate purpose⁵⁵

⁴⁶ *Corporations Act 2001* (Cth) ss 411(4)(b) and 411(6).

⁴⁷ *Corporations Act 2001* (Cth) s 411(17).

⁴⁸ *Re Advance Bank Australia Ltd* (1997) 22 ASCR 513, 519 (Santow J); *Re Coles Ltd (No 2)* [2007] VSC 523, 500 [33].

⁴⁹ *Re ACM Gold Ltd; Re Mt Leyshon Gold Mines Ltd* (1992) 7 ASCR 231, 239 and 244.

⁵⁰ While the purposes accepted by the Court as legitimate are too numerous to list, some examples include: obtaining greater certainty of outcome within a short timeframe (*Re Capilano Honey Ltd (No 2)* [2018] FCA 1925 [47] Farrell J; providing certainty of outcome through offering a single process (*Re Cortona Resources Ltd (No 2)* [2013] FCA 302, [15] (Barker J); and the need for an 'all or nothing' outcome from the transaction (*Re Ranger Minerals Ltd* (2002) 42 ASCR 582, 588-89 [26]-[31] and 592 [46] (Parker J).

⁵¹ Corporations and Markets Advisory Committee, *Members' schemes of arrangement*, (Report, December 2009) 99; citing AJ Papamatheos, 'Avoidance of takeover laws: manufacturing reasons for a scheme of arrangement' (2006) 19 *Australian Journal of Corporate Law* 216.

⁵² Corporations and Markets Advisory Committee, *Members' schemes of arrangement*, (Report, December 2009) 106.

⁵³ *Corporations Act 2001* (Cth) ss 411(4)(b) and 411(6).

⁵⁴ *Re NRMA Ltd* (2000) 33 ACSR 595, [15]-[19].

⁵⁵ *Re Foundation Healthcare Ltd (No 2)* (2002) 43 ACSR 680.

- whether it is ‘fair and equitable between different classes of security holders, and as between security holders and those who will benefit from [the scheme]’⁵⁶
- whether minority shareholders would be oppressed under the scheme.⁵⁷

Therefore, the Court’s overriding discretion whether to approve a scheme operates as a significant safeguard of shareholders’ interests. However, again, given the absence of an explicit requirement to do so, this discretion does not necessarily ensure that the Eggleston Principles are upheld. It is unclear whether, and what, issues would arise from importing the Eggleston Principles to the scheme process.

Notwithstanding these three protective elements – being the scheme procedure, ASIC’s oversight in their provision of a ‘No Objection’ statement, and the supervisory role played by the Court – the Government is aware of some concerns that schemes of arrangement can be used in a way that avoid the Eggleston Principles. Concerns have also been raised that the aspects of the current provisions aimed at ensuring protection of shareholder interest – namely s 411(17)(a) – serve no practical function, but rather introduce unnecessary uncertainty into the provisions.

There are other aspects of regulatory inconsistency between takeovers and schemes, including minimum disclosure requirements, the minimum bid rule, and the rule against collateral benefits, all of which apply to takeovers but not schemes. Questions have been asked about whether the differences are appropriate or whether regulatory requirements should be aligned between takeovers and schemes.

Improving efficiency and removing unnecessary costs in takeovers

The regulation of control transactions should not drive unnecessary costs and/or uncertainty. Unnecessary regulatory costs are likely to discourage control transaction activity in the market and contribute to inefficient allocation of corporate capital in Australia.

This section seeks to identify the key drivers of costs and uncertainty in respect of control transactions, and whether efficiencies could be achieved through changes to the regulatory framework.

For takeovers, the costs are largely borne by the bidder. The standard costs incurred include:

- professional costs associated with preparing legal documents, providing legal and compliance advice, and undertaking due diligence
- obtaining finance for the transaction, as well as the cost of the finance itself
- fees for lodging documents with, and interacting with ASIC (and for listed companies, the ASX).

As the size and complexity of the takeover increases, professional fees and the time taken to complete the takeover may also increase – particularly in handling disputes, whether these are brought before the Courts, the Takeovers Panel, or attract ASIC’s attention.⁵⁸

As the scheme of arrangement process is led by the target, most costs are borne by the target. The standard costs incurred include:

- professional costs associated with preparing a scheme booklet, preparing an independent expert report, preparing and appearing before a Court for at least two hearings, and providing compliance advice in respect of the takeover more broadly
- court fees, and fees to lodge documents with ASIC for review

⁵⁶ *Re Central Pacific Minerals NL* [2002] FCA 239, [10]-[13] (Emmett J).

⁵⁷ See, eg, *Re Ranger Minerals Ltd* (2002) 42 ACSR 582, 591 [39].

⁵⁸ Gilbert + Tobin, *Takeovers + Schemes Review 2021* (Report, 2021) 42.

- organising a meeting of members to obtain agreement to the scheme of arrangement.

Broadly, the acquisition of all shares in a company is more expensive when undertaken via a scheme of arrangement. The Government is aware of concerns amongst some stakeholder that the scheme process may be too expensive for smaller companies.

Other parties may incur costs under both methods:

- For takeover bids, the target company incurs costs in considering and responding to the bid
- For schemes of arrangement, the acquirer incurs costs associated with the transaction, including the preparation of legal documents
- Disputants may also incur costs for professionals to prepare and appear before the Court, or to lodge and prosecute disputes with the Takeovers Panel
- ASIC, the Courts, and the Takeovers Panel incur costs that are covered by fees, levies, or taxes on industry or the general public.

Costs for all parties and institutions can be exacerbated if there is legal uncertainty about the permissibility of various types of conduct. Further, as any process is extended, prospective acquirers may incur additional finance costs and/or miss out on other business opportunities.

At the same time, schemes of arrangement provide benefits relative to a takeover bid under the Takeover Rules. The most important of these is that the set timeframes in the scheme of arrangement process allow for timing certainty for the transaction. That is, parties are certain of the date on which the transaction will complete, which reduces uncertainty and can have other financial benefits (such as in obtaining finance for the deal for the acquirer).

There have also been a number of cases where there have been disputes before *both* the Takeovers Panel and the Court for the same transaction, including for changes in control effected by a scheme of arrangement. While not necessarily common, when this does arise it is likely to lead to significant, and sometimes duplicate, costs for the parties involved.

Noting that the potential risks and issues associated with any specific reform options will require further exploration, a number of the costs explained above may be reduced by expanding the remit of the Takeovers Panel:

- If the review of scheme documentation were undertaken by the Takeovers Panel, the costs associated with having scheme documentation prepared and routinely reviewed could be lower for target companies, as the legal costs associated with dealing with the Takeovers Panel are generally less than those for dealing with the Courts.⁵⁹
- If documents are no longer reviewed as a matter of routine by a regulatory body before being communicated to members, target companies could avoid the costs of preparing for and attending the first hearing and engaging with ASIC on straightforward proposals.
- If the standard review by a Court (or the Takeovers Panel) of disclosure was replaced and supplemented by more prescriptive statutory disclosure requirements (such as a codified statutory regime), parties may benefit from the increased certainty and avoid the need to interact with decision-makers as often. However, parties may face increased costs and uncertainty in the short term as they adjust to a new regime.
- If the Takeovers Panel conducted the final approval process, this may reduce the net costs to both acquirers and target companies of preparing for and attending the final hearing, as the legal costs associated with dealing with the Takeovers Panel may be less than those for dealing with the Courts. Further, were the Takeovers Panel to conduct the approval process on the papers (i.e., by

⁵⁹ KPMG, *Helping companies restructure by improving schemes of arrangement 2021* (Report, 2021) 9.

reviewing written submissions and/or evidence without a public hearing), further savings would be generated by avoiding costs for legal representation and the Court fees for the hearing date.

- If the final approval process were replaced by an opportunity for interested parties to raise concerns before the Takeovers Panel, and alterations or conditions could be imposed prior to a scheme of arrangement becoming effective (following approval by members), the process may sometimes take longer, but the timeframe of the transaction may be more certain, to the benefit of participants.

Ensuring decision-makers have appropriate regulatory powers

The decision-making bodies with responsibility for administering and enforcing control transactions, whether by takeover bid or scheme of arrangement, should have appropriate regulatory powers that support the Eggleston Principles being upheld while minimising costs to participants and improving efficiency.

This section looks at the allocation of regulatory powers among decision-makers in respect of schemes of arrangement for control transactions. It also sets out, at a high level, some of the potential policy options available to the Government in expanding the remit of the Takeovers Panel.

The Courts, the Takeovers Panel and ASIC each have specific powers in respect of the approval of schemes of arrangement, in line with their current roles in respect of schemes:

- The Courts are responsible for considering and approving schemes. Generally, the Court has a broad range of powers available (including procedural powers) to protect shareholders, reduce and/or protect costs and promote public policy objectives more broadly. In particular, s 413 of the Corporations Act, allows the Courts to make any necessary orders in respect of a scheme of arrangement.
- ASIC is the regulator of control transactions (including schemes of arrangement). ASIC has the power to provide relief from regulatory obligations by use of its exemption and modification powers.
- The role of the Takeovers Panel is limited to considering specific policy issues arising in respect of a scheme, as well as being the body in which ASIC exemption and modification decisions are reviewed. It has limited powers in respect of the approval of schemes of arrangement.

Possible modifications to regulatory roles

In relation to regulatory powers for schemes of arrangement for the purpose of effecting a change in corporate control, consideration could be given to the following policy options:

- Providing ASIC with exemption and modification powers commensurate with those available in respect of the Takeover Rules, to complement or replace its ability to make waivers in respect of disclosure.
- Making any waivers made in respect of disclosure, or exemptions or modifications made by ASIC in the context of schemes of arrangement subject to review by the Takeovers Panel.
- Transferring the functions of the Court to the Takeovers Panel wholesale in reviewing scheme documentation, convening members' meetings and/or providing final approval.
- Alternatively transferring to the Takeovers Panel some of the Court's functions, such as:
 - convening the "first court hearing" reviewing scheme documentation, convening members' meetings and leaving final approval to the Courts
 - convening the "second court hearing" and providing final approval to the scheme, with the reviewing of the scheme documentation and the convening of the members' meeting left to either ASIC, the Court and/or to the target company itself.

- Implementing a regime for schemes in which approvals are not required as a matter of course, but in which the Takeovers Panel retains its role as a dispute resolution body to consider any disputes or regulatory issues that arise in the context of the scheme, on application by an interested party (including ASIC).
- Providing the Takeovers Panel with the flexibility the Courts have to attach conditions or requirements to the members' meeting and/or scheme overall.
- Amending the legislative process so that scheme documents, like takeover bid documents, are not routinely reviewed by the Takeovers Panel before being communicated to members, with either prescriptive or principles-based content and disclosure requirements.
- Creating a process whereby some schemes do not require Court approval.
- Potentially allowing schemes in relation to small companies to be streamlined, including by allowing for other bodies like ASIC or a Court Registrar to approve such schemes.
- Allowing ASIC or the Takeovers Panel to certify that certain schemes do not require detailed Court oversight, with Court approval occurring as an administrative process only.
- Expanding the powers of the Takeovers Panel to award costs, in the same manner as the Court presently does or retaining a similar power for the Takeovers Panel.

These reform options could be implemented by either: amending the existing Takeover Rules, the Scheme of Arrangement Rules, or creating a bespoke statutory regime. For example, a bespoke, streamlined schemes process could be administered by the Takeovers Panel, leaving the existing Schemes of Arrangement Rules in place for parties which prefer to use the existing regime instead.

Broadening the situations in which the Takeovers Panel is empowered to act for schemes of arrangement may improve the operation of mergers and acquisitions in general, because the Takeovers Panel:

- is legally required to consider the Eggleston Principles in their assessment of unacceptable circumstances
- is constituted by experts with specialist knowledge of the takeovers market and makes declarations with reference to common market practice
- would have primary oversight of all control transactions, not just those that do not involve schemes of arrangement, improving consistency in regulatory decision-making.

Careful consideration would need to be given to the powers the Takeovers Panel would utilise in such circumstances. The Courts have broad powers to make any necessary orders in respect of the scheme and losing this flexibility may detract from the operation of any new regime. It may not be legally possible to provide equivalent powers to the Takeovers Panel.

A more streamlined and flexible scheme of arrangement regime for changes in corporate control may significantly reduce the costs of a scheme, particularly for the target company. Court fees and the extensive costs of preparing evidence and submissions for Court could largely be avoided, and the costs incurred by the Courts themselves in hearing and approving schemes could also be reduced. A reduction in these regulatory costs could encourage takeover activity, leading to a more efficient allocation of corporate capital in Australia.

The Takeovers Panel would require extra resources to meet the additional workload of such a regime. There is also a risk that amendments to the Schemes of Arrangement Rules or the creation of a new statutory regime may lead to increased uncertainty in the short-term compared to the well-established and understood principles in the existing Scheme of Arrangement Rules.

Comparable arrangements in other jurisdictions

Scheme of arrangement in other jurisdictions do not necessarily require Court approval as a matter of course. Of particular interest is the operation of the statutory regime in South Africa, in which Court approval is not required by default; rather, it is only required if:⁶⁰

- the special resolution was opposed by at least 15% of the voting rights that were exercised on the resolution, and within five business days a person who voted against the resolution requires the company to seek Court approval, and
- within 10 business days of the vote, any person who voted against the resolution successfully applies to the Court for leave to require Court approval.⁶¹

The Court can only set aside the resolution if either:⁶²

- the resolution is manifestly unfair to any class of shareholders, or
- the vote was materially tainted by conflict of interest, inadequate disclosure, failure to comply with the Act, the Memorandum of Incorporation, or any applicable rules of the target company, or other significant and material procedural irregularity.

Because this arrangement potentially reduces shareholder protection by requiring scrutiny of a scheme only if shareholders request it, shareholders are granted additional protections including:

- a requirement to provide an expert's report on the commercial merits of the proposed scheme to shareholders⁶³
- an appraisal right which entitles a member to be bought out at fair value in certain circumstances.⁶⁴

Advance Rulings

Current regulatory framework

There are two official government sources of guidance as to the interpretation of the Takeover Rules. The first is ASIC Regulatory Guidance. In *ASIC Regulatory Guide 9 – Takeover Bids*, ASIC outlines its approach to administering the Takeovers Rules. The second is Guidance Notes produced by the Takeovers Panel. In particular, *Guidance Note 1* outlines the approach taken by the Takeovers Panel to making a declaration of 'unacceptable circumstances'⁶⁵ (the declaration of such being what enables the Takeovers Panel to make orders).⁶⁶

The creation of an advance rulings power exercisable by the Takeovers Panel would provide an additional avenue for market participants to obtain information about how the Takeovers Panel would act in a particular situation. Such a power could be formulated such that it would legally bind the Takeover Panel, which may facilitate consistency in decision-making regardless of the Takeovers Panel members who are selected to consider a specific case.

⁶⁰ *Companies Act 2008* (South Africa) s 115(3).

⁶¹ Leave will only be granted if the Court is satisfied that the person applying for leave (i) acts in good faith; (ii) appears prepared and able to sustain proceedings; and (iii) has alleged facts that, if proved, would allow the Court to set the resolution aside – see *Companies Act 2008* (South Africa) s 115(6).

⁶² *Companies Act 2008* (South Africa) s 115(7).

⁶³ *Companies Act 2008* (South Africa) ss 114(2) & (3).

⁶⁴ *Companies Act 2008* (South Africa) s 164.

⁶⁵ *Corporations Act 2001*, section 657A.

⁶⁶ *Corporations Act 2001*, section 657D.

Advance rulings models

In Australia, several government agencies have advance rulings powers:

- The Australian Taxation Office (ATO) has a statutory framework of public and private rulings as part of its advice and guidance strategy to promote positive engagement with the tax system.
- The Civil Aviation Safety Authority (CASA) issues public rulings on certain provisions of civil aviation legislation.
- The Australian Border Force (ABF) provides private binding rulings on certain aspects of the application of customs law to imported goods.
- The Australian Communications and Media Authority (ACMA) can provide opinions on categories of broadcasting service or whether a person can exercise control of a licence, newspaper or company.

The aim of an advance ruling is to give certainty to applicants as to how a decision-making body will treat or apply the law in certain circumstances. Advance ruling powers enable a regulator to legally commit to not taking enforcement action against the applicant, if the applicant implements the ruling in line with the interpretation of the law taken in the ruling.

The key common feature of these regulatory regimes is that the relevant agency is also responsible for ensuring compliance with the relevant regulatory regimes. As such, they have the power to initiate legal action in the Courts if issues cannot be resolved through less formal means. Internationally, several equivalents to the Takeovers Panel have advance rulings powers. This includes the United Kingdom, Hong Kong and Singapore.

Equivalent international takeovers panels exercising their functions as regulator (or quasi-regulator) of the takeovers market can make rulings to clarify interpretation, modify the application, or waive certain provisions of the relevant takeovers rules.⁶⁷ Rulings made by the panel with respect to waivers, exemptions, and modifications are generally subject to review – for example:

- in the UK, Hong Kong and South Africa, the panels have an internal review process for executive decisions⁶⁸
- in New Zealand, rulings made by the panel may be appealed to the Court⁶⁹
- in Singapore, there is no internal appeal process against decisions of the panel, and it is not yet settled whether rulings of the panel are subject to judicial review.

Like the Australian Takeovers Panel, these panels exercise their powers through hearings. However, unlike the Takeovers Panel, these agencies also have active monitoring, investigative enforcement obligations – akin to the role played by ASIC in the Australian regulatory system.

Consideration could be given to whether it would be appropriate for ASIC to have an advance rulings power or for the Takeovers Panel to have greater role in active enforcement of the Takeovers Rules.

⁶⁷ For example, in the UK, a party may request consent from the panel for the alteration of several rules (UK Code, Introduction, s 2(c); In New Zealand, the panel has broad discretion to exempt any person or transaction from compliance with any provision of the takeovers code (*Takeovers Act 1993* (NZ) s 45); and in South Africa, the panel may grant exemptions subject to limitations (*Companies Act 2008* (South Africa) s 119(6)).

⁶⁸ In the UK, the nature of these internal reviews is set out in the *Rules of the Takeover Appeal Board*; in Hong Kong, the Hong Kong Takeovers Panel itself can review decisions made by the Executive and the Takeovers Appeal Committee reviews decisions made by the Hong Kong Takeovers Panel itself as per Hong Kong Code [9.1] and [14]; in South Africa per s202 of *Companies Act No 71* of 2008.

⁶⁹ *Takeovers Act 1993* (New Zealand) ss 32-35.

Options for an advance rulings power

There are a range of options for structuring an advance ruling power. An advance rulings power could be exercised by either the executive of the Takeovers Panel or its members, on application by a bidder.

Advance rulings could take the form of either a 'private' ruling or a 'public' ruling. Generally, a private ruling is one where the ruling is binding on the decision maker in relation only to the specific circumstances of an application brought forward by a party. A public ruling gives certainty in relation to common circumstances to provide certainty to wider sectors of the public or classes of parties.

In any model, consideration would need to be given to the extent the Takeovers Panel should be required to involve and/or consult with potentially affected parties (including ASIC) in the process of making the advance ruling. For example, whether the Takeovers Panel should be required to consider submissions from affected parties or to publish its rulings.

Consideration would also need to be given to the extent to which an advance ruling would bind the Takeovers Panel in future rulings, and the circumstances in which the advance ruling could be challenged by new evidence or changed circumstances.

Similarly, consideration would need to be given to the extent to which an advance ruling would bind other decision makers, regulators and parties involved in takeovers, including courts, ASIC and private litigants. That is, whether the effect of the advance ruling power would prevent affected parties (including ASIC) from bringing a matter to the courts if they disagreed with the decision-maker's interpretation of the law.

Further Policy Options

This paper has identified several issues with Australia's regimes for effecting changes in corporate control, both under the Takeover Rules and by schemes of arrangement, that have arisen in practice and that may benefit from further consideration. It does not purport to be an exhaustive review. Respondents are invited to raise other aspects of these regimes which may benefit from further consideration, particularly those that:

- promote the Eggleston Principles
- reduce regulatory cost
- clarify the procedural powers used by decision-makers.

Discussion Questions

Takeovers Rules and the Takeovers Panel

1. What are your views on the current Takeovers Rules? Do takeovers generally achieve outcomes aligned with the Eggleston Principles? Please provide examples where possible.
2. What changes (if any) could be made to make takeovers more efficient and reduce unnecessary costs?

Schemes of Arrangement and the Court

3. What are your views on the Scheme of Arrangement Rules? Do schemes of arrangement generally achieve outcomes aligned with the Eggleston Principles? Please provide examples where possible.
4. What changes (if any) could be made to make members' schemes of arrangement more efficient and reduce unnecessary costs?
5. Would there be benefits to establishing regulatory consistency between takeovers and schemes? For example, would there be benefits in aligning the minimum disclosure requirements, the minimum bid rule, and the rule against collateral benefits?

The role of the Takeovers Panel in relation to schemes

6. What are your views on expanding the Takeovers Panel's powers to include approval of members' schemes of arrangement? What form (if any) should such a power take? Should a separate regime be established for members' schemes of arrangement for the purposes of a change in corporate control?
7. If the Takeovers Panel were to take on some or all of the Court's functions for a scheme of arrangement, what difference to efficiency and costs could this make? For example, if the Chapter 5 scheme of arrangement mechanism was retained and a new procedure was added to Chapter 6 (allowing a target to convene a scheme meeting, not requiring formal approval from the Court, and enabling any party to raise a dispute with the Panel as they can for takeovers), what would be the advantages and disadvantages of such a change?
8. If the Takeovers Panel were to be given a formal review role for schemes, such as is currently performed by the courts what, if any, changes might be required to:
 - the scheme of arrangement procedures
 - the criteria by which schemes of arrangement are considered and approved
 - the Takeover Rules
 - the division of responsibilities between ASIC and the Takeovers Panel?

Advance rulings

9. Would an advance rulings power assist in the regulation of control transaction disputes? Would the Takeovers Panel, its executive, ASIC or another party be best placed to exercise such a power?
10. What features should an advance ruling power in Australia have?
11. How can the Takeovers Panel provide an advance ruling in a way does not result in information asymmetries in the market? Who should the Takeovers Panel consult with or seek input from prior to the making of an advance ruling and in what circumstances should that consultation occur?
12. What impact would the provision of an advance ruling power have on the use of the Takeovers Panel as a dispute resolution forum?

General

13. What other policy options could improve the efficiency and reduce the cost of control transactions, whether by takeovers scheme of arrangement?