CLAYTON UTZ

Corporate control transactions in Australia

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

Submission by Clayton Utz

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Consultation Paper on Corporate control transactions in Australia: options to improve schemes of arrangement, takeover bids, and the role of the Takeovers Panel

Submission by Clayton Utz

Clayton Utz welcomes the opportunity to comment on the issues raised by the Treasury consultation paper published on 1 April 2022 on corporate control transactions in Australia: options to improve schemes of arrangement, takeover bids, and the role of the Takeovers Panel (**Consultation Paper**).

Clayton Utz is a national law firm with offices in Brisbane, Canberra, Melbourne, Perth, Darwin and Sydney. In each of those offices we practice extensively in relation to takeover offers, schemes of arrangements and applications to the Takeovers Panel. We have significant experience in relation to these matters having implemented transactions in acting for bidders, target companies and security holders in relation to such transactions, including many cross-border transactions involving counter-parties in North America and Europe. Our lawyers are particularly experienced and familiar with the procedures adopted by the Courts in relation to schemes of arrangements in each of the cities in which we practice. Our Partners and lawyers have many years of experience in dealing with these matters. Our Partners have been and continue to be members of the Takeovers Panel and are very familiar with its procedures as a consequence.

1. Executive summary

We make these submissions on the following primary grounds:

(a) The current Takeover Rules, in general, operate effectively to provide an efficient environment for the conduct of control transactions in Australia. Whilst some changes may be appropriate to minimise costs and to simplify some procedural matters, in particular in relation to straightforward or smaller transactions, we do not think that an overall reform of the Takeover Rules is necessary.

(b) We believe that takeover bids pursuant to Chapter 6 of the Corporations Act and schemes of arrangement pursuant to Chapter 5 of the Corporations Act both generally achieve outcomes aligned with Eggleston Principles.

(c) The provisions of Part 5 of the Corporations Act relating to schemes of arrangement should be maintained for the reasons outlined and specifically to ensure international recognition of the security holder and Court approval processes which are an essential part of the same. Schemes are already scrutinised with regard to principles well established by the Courts, including fairness, and in our view there is no need to specifically apply the Eggleston Principles. Schemes of arrangements permit a high degree of flexibility which would be impaired by the application of the provisions of Chapter 6 of the Corporations Act to schemes which we submit is unnecessary.

(d) We recognise the potential for efficiencies and cost savings by providing the Takeovers Panel with a role in relation to the conduct of schemes of arrangements. We submit that this should be done by inserting additional provisions in Chapter 6 of the Corporations Act leaving Part 5 intact. We identify two possible ways in which the Takeovers Panel may have a role with respect to schemes. Firstly, by enabling the Panel to perform the roles presently undertaken by the Court or, alternatively, by removing the need for a First and Second Court Hearing or the equivalent with a provision that permits ASIC or a dissatisfied party to make an application to the Panel where appropriate. This is likely to need a review by the Takeovers Panel of its procedures.

(e) Whilst we see some advantage in providing a regime for the making of advance rulings by the Takeovers Panel, we express some caution in relation to this reflecting the fact

that Takeover Panels in other jurisdictions which provide such rulings generally have a role and resources which differ from the Australian Takeovers Panel. If a system for obtaining advance rulings were to be introduced, we submit that this would need to include an appropriate process to allow consultation with all interested parties before any advance ruling becomes binding.

Clayton Utz will respond to the each of the discussion questions posed by Treasury.

2. Takeovers Rules and the Takeovers Panel

Question 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.

The current Takeover Rules

The current Takeover Rules, in general, operate effectively to provide an efficient environment for the conduct of control transactions in Australia. Whilst some changes may be appropriate to minimise costs and to simplify some procedural matters, in particular in relation to straightforward or smaller transactions, we do not think that an overall reform of the Takeover Rules is necessary.

Eggleston Principles

We believe that takeover bids pursuant to Chapter 6 of the Corporations Act and schemes of arrangement pursuant to Chapter 5 of the Corporations Act both generally achieve outcomes aligned with Eggleston Principles.

The Eggleston Principles, despite being introduced in 1969 and amended in 1981, remain relevant and important in enabling control transactions to occur efficiently. In particular, the most recently introduced principle, the Masel principle, which states that control transactions should take place in an efficient, competitive and informed market, has clearly been the dominant and most influential of the Eggleston Principles. This can be seen from the preponderance of cases before the Takeovers Panel where the main issue has been whether the Masel principle has been satisfied. See for example, *Warrnambool Cheese and Butter Factory Company Holdings Limited* [2013] ATP 16, *Ludowici Limited* [2012] ATP 3, *Finders Resources Limited 02* [2018] ATP 9, *Virtus Health Limited* [2022] ATP 5, *AusNet Services Limited 01* [2021] ATP 9, *Sovereign Gold Company Limited* [2016] ATP 12, and *Village Roadshow Limited 02* [2004] ATP 12.

Takeovers Panel influence

The Takeovers Panel has had and continues to have a significant role in achieving the outcomes stipulated in the Eggleston Principles. There are at least two significant examples of this:

(a) Firstly, the Panel has been insistent on ensuring that, where appropriate, a proper auction takes place with respect to control transactions. In circumstances where participants in control transactions have attempted to deny shareholders the opportunity to participate in a proper auction for the ownership and control of the company, the Panel has intervened. For example, in both *AusNet Services Limited 01* [2021] ATP 9 and *Virtus Health Limited* [2022] ATP 5, a prospective bidder together with the target entered into extensive exclusivity arrangements which had the effect of locking up the company and preventing competing bids. The Panel, in both instances, made a declaration of unacceptable circumstances and orders effectively striking down the arrangements to encourage a proper auction to occur and thereby ensuring that the Masel principle and the Eggleston principles more broadly were upheld.

(b) Secondly, the Panel has a significant role in regulating disclosure of economic interests arising from the use of equity derivatives in control transactions through its Guidance Note 20 (**GN 20**). Chapter 6 of the Corporations Act is written around the assumption that

the acquirer will acquire an interest in physical shares. However, an acquirer can often achieve an equivalent, if not better, outcome without acquiring a physical interest in shares by acquiring an economic interest through a derivative transaction, such as a total return swap. Interests such as this, which can only be settled through cash, are not subject to Chapter 6, including the disclosure regime in Chapter 6C. This inadequacy of the legislation is a long-standing issue which has been ignored by policy makers and the legislature, but is currently being addressed in part by the Takeovers Panel's GN 20 which applies to equity derivatives that may not require disclosure under Chapter 6C. The Takeovers Panel through GN 20 has played a significant role in establishing a regime designed to provide adequate disclosure to the market.

Efficiency is enhanced by the Continuous Disclosure Rules

A key mechanism operating in the takeover regime applicable in Australia that enhances the efficiency of the regime is the disclosure to the market established through a continuous disclosure culture. Shareholders and the market generally are able to readily access information in order to make informed decisions, either directly from company disclosures or, importantly, from reports by the media based on the disclosures. The current disclosure framework under sections 674 and 674A of the Corporations Act and ASX Listing Rule 3.1 ensures that there is a strong supply of information to the market and to shareholders so that control transactions take place in Australia in a market that is as fully informed as can be achieved. This outcome is supported by monitoring by ASX and ASIC and vigorous prosecution in the event of a failure to comply with the relevant standards and class actions based on failures to make required disclosures. This disclosure regime plays a significant role in promoting the efficiency of the takeover market in Australia.

It should be noted that the disclosure regime does not apply to unlisted companies unless they are also "unlisted disclosing entities" (within the meaning of section 111AL of the Corporations Act), therefore information vacuums may be created where a takeover is proposed regarding an unlisted company. It may therefore be worthwhile considering a disclosure regime applicable to unlisted companies to which Chapter 6 applies, which would operate during a takeover period, to ensure efficiency in that market too.

Two contentious issues

We should address two contentious issues.

A significant change, adoption of the follow-on bid rule

Historically, there had been support for the current takeover framework to be replaced by a system aligned with the follow-on bid rule. This would be a significant change to the policy underlying the current takeover framework. The principle underlying the follow-on bid rule is that an acquirer should be permitted to acquire more than 20% of the securities in an entity to which Chapter 6 of the Corporations Act applies and retain those securities, provided they make a bid on the same terms for the remaining shares in that entity. There has not been any lobbying for this approach for a while and it is our view that the Australian Takeover Rules, as presently framed, are a more appropriate regulatory framework for dealing with control transactions. Underpinning the Australian approach is that, where appropriate, there should be an auction for control and ownership so as to provide an optimal outcome for security holders. The current approach is operating efficiently to achieve this outcome together with significant support from the Takeovers Panel, referred to above, and should therefore be maintained.

Further, in the US there is a principle, commonly known as the Revlon principle, which has been developed by the Delaware Supreme Court which imposes a duty on target boards to promote an auction for control. However, introducing such a duty is unnecessary within the Australian framework as the Takeover Rules, together with the Takeovers Panel's approach, effectively promote the auction process.

Disclosure of initial approaches

A subject which has received comment and complaint by shareholders and potential acquirers, for separate reasons, is the question of whether a company should be required to disclose, as a matter of course, that it has received an acquisition proposal and if so, it's views on the same. Shareholders have in the past expressed concern and frustration where directors have not responded to approaches in cases where shareholders are of the view that it would be in their best interest to do so. Likewise, prospective bidders express frustration with the inability to get a response from a target board with respect to their proposals.

A practice had tended to evolve, under the previous ASIC Guidance Note 8, pursuant to which boards were advised that it was their duty to inform the market of receipt of an approach even if the board considered the approach was not appropriate to recommend. The current version of Guidance Note 8 has encouraged the view that boards do not need to inform the market upon receipt of a proposed bid nor of their response. This does not negate the duty of boards to give due consideration to the proposal and make a decision that is in the best interest of shareholders and the company.

Whilst the failure to disclose or failure to respond has been the subject of criticism and in many cases frustration, on the part of shareholders and bidders, on balance we believe that the current market practice is appropriate, except where the terms of an approach become known to the market but the board has not disclosed its response (if any) or other circumstances exist so that as a consequence the market is not properly informed.

Question 2: What changes (if any) could be made to make takeovers more efficient and reduce unnecessary costs?

We specifically recommend changes in relation to the processes presently undertaken in relation to schemes of arrangement under Part 5.1 of the Corporations Act, in particular to simplify and minimise materials provided to the Court as part of that process and to simplify the matters to be included in the Scheme Book by rationalising the information required - see our response to Question 4.

We submit that changes may be made to enhance the role of the Takeovers Panel to make takeovers implemented by means of a scheme more efficient and reduce unnecessary costs - see our responses to Questions 6, 7 and 8. We see some scope for providing advance rulings through, for example, ASIC and/or the Takeovers Panel, subject to appropriate safeguards - see our responses to Questions 10, 11 and 12.

3. Schemes of Arrangement and the Court

Background

The Court approved scheme of arrangement process has international recognition. UK and Australian based schemes of arrangement are routinely given effect in US and European security regulatory regimes.

The Australian judicature has developed well recognised principles capable of being applied by market participants in the negotiation, information support, articulation, solicitation, approval and implementation of schemes of arrangement. A high degree of consistency exists between Australian and UK law in this regard, promoting comity and certainty in the application of similar processes across different securities markets.

Schemes of arrangement are routinely used to provide certainty across many forms of potential, often overlapping, transactions.

The most common forms are simple exchange schemes (scrip and/or cash), demerger and structured option or debt derivative right workouts. Sometimes these are pure Australian domestic arrangements, though this is becoming unusual and particularly in the case of transactions involving

scrip consideration, it is now more common that companies of all sizes must address extraterritorial elements and/or the non-consensual treatment of rights within often complex settings.

Schemes have also been applied across a range of transactions involving the compulsory outcome of a court based process.[1] Common examples include reconstructions and amalgamations, redomiciliations, demutualisations, demergers and trust schemes, among others. Other forms have become rarer, the prime example of which is the cancellation and capital reduction schemes[2].

It is important that schemes of arrangements be preserved to maintain these principles and this level of flexibility, albeit with some simplification of the process in certain cases.

We now answer the questions raised having regards to the above comments.

Question 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.

Yes - the first three Eggleston Principles form a necessary part of the process of disclosure within the Scheme Booklet, as reviewed by ASIC and the Court prior to despatch to target shareholders. The fourth principle is normally applied, though flexibility of judicial discretion means that uncommon cases can still be the subject of a scheme of arrangement. This allows the 'equality principle' to be applied subject to both the Masel principle and having regard to broader public policy considerations, as described below.

To mandate Eggleston principles within the scheme landscape would in our view stifle the execution of more complex arrangements and act as an unnecessary fetter on judicial discretion. Properly analysed, the Court's role in approving schemes forms an essential part of the process and ensures that matters including disclosure, class distribution, fairness of process and the overall scheme process are proactively overseen, both by ASIC and the Court.

Schemes are, by their very nature, intended to be flexible and to facilitate a range of transactions which would be otherwise be challenging. A striking example of this is the scheme of arrangement pursuant to which St George Bank acquired Advance Bank, which was enhanced by the inclusion of a power of attorney which permitted the removal of a "poison pill" in the constitution of Advance Bank. This would otherwise have required approval by an absolute majority of 90% of Advance Bank shareholders (Clayton Utz was the author of this scheme).

We do not understand that the current discussions are intended to quell the use of schemes, and so we suggest a cautious approach be taken before additional requirements are imposed on the scheme process which could result in a dampening effect.

The introduction of such requirements to schemes would result in a dampening effect because of the uncertainty associated with the application of the Eggleston Principles in addition to the principles already applied by the Court as described above, as:

(a) The mandatory imposition of the Eggleston Principles is not necessarily appropriate in the context of schemes, given that the proposal comes from the company itself, and directors have a duty to act in the best interests of the company in putting forward the scheme, and both the Court and ASIC have a protective role.[3]

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[1] Non exhaustive examples include arrangements affecting the rights of third parties (*Lehman Brothers Asia Holdings Ltd (in liquidation) v City of Swan* [2010] HCA 11; corporate reorganisations (Chevron's 2022 TAPL/CAPL scheme is a recently approved and non-reported example); management agreements (Macquarie Capital is one example).

[2] Corporations and Markets Advisory Committee, *Members' schemes of arrangement*, (Report, December 2009) proposes sensible changes to enable capital reductions to proceed via a court supervised scheme process.

[3] Corporations and Markets Advisory Committee, *Members' schemes of arrangement*, (Report, December 2009), 107.

(b) A key difference between schemes and takeovers is the mandatory element which is apparent in schemes, and not in takeovers. Takeovers are essentially consensual arrangements between bidder and accepting shareholders, whereas a scheme of arrangement is an arrangement between a company and its members, by which individual members will be bound by the outcome of the majority's vote at the members' meeting. In this way, the "equality of opportunity principle" does not fit comfortably within the scheme context.

(c) The equality of opportunity principle within the takeovers context has been criticised, yet has survived, in part simply because it is so entrenched in Australian takeover regulatory frameworks.[4] The Eggleston report itself acknowledged that the equality principle was the most difficult principle in practice, and further that it may be impossible in certain circumstances, for example, offers for a limited proportion of the shares.[5] The principle has evaded clear definition, and the spread of the principle to schemes would only add to the uncertainty surrounding how it ought to be interpreted.

(d) The equality of opportunity principle[6] itself is made even more challenging as it is arguably in conflict with the Masel principle of an 'efficient, competitive and informed market'. For example, mandating that each and every scheme deal with the equality of opportunity principle will result in change of control transactions (amongst other things) becoming more rigid and less flexible in their application, thereby running the risk of stifling future innovation, to the ultimate detriment of the market and investors. We submit that there are sufficient existing protections within the scheme process.

Further, the current scheme legislative structure includes protections which effectively embody the Eggleston principles, such as:

(a) the requirement for disclosure of all material information (including the identities of persons involved in the transaction, sufficient information to enable shareholders to assess the consideration and benefits being offered and more generally assess the fairness and merits of the proposal) within the Scheme Booklet, and the adequacy of such disclosure is reviewed by ASIC and the Court;[7]

(b) reasonable time to consider the proposal by virtue of the notice periods for meetings;[8]

(c) whether or not the scheme will proceed is determined by Court and shareholder approvals which involves two court applications (which may be opposed) and at least 75% of votes cast and 50% of shareholders present and voting in favour – which is necessarily prolonged and ensures full and frank disclosure (including any independent expert's report);[9] and

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[4] Armson, Emma, "Evolution of Australian Takeover Legislation" (2013) 39(3) *Monash University Law Review* 654.

[5] Company Law Advisory Committee, Australian Parliament, Second Interim Report to the Standing Committee of Attorneys-General on Disclosure of Substantial Shareholdings and Takeovers (1969), [21]

[6] Described in s 602(c) as "as far as practicable, the holders of the relevant class of voting shares or interests all have a reasonable and equal opportunity to participate in any benefits accruing to the holders through any proposal under which a person would acquire a substantial interest in the company, body or scheme"

[7] See section 411(3) and section 412 of the *Corporations Act 2001* (Cth); Schedule 8 of the *Corporations Regulations 2001* (Cth); ASIC Regulatory Guides 60, 111 and 112. See also *Re NRMA Insurance Ltd (No 1)* [2000] NSWSC 82; 156 FLR 349 per Santow J at [30] and *Re Foundation Healthcare* [2002] FCA 742; 42 ACSR 252 at [38] per French J.

[8] See *Federal Court (Corporations) Rules* 2000, rule 3.3(2). An ASX listed company is required to provide its shareholders with 28 days' notice. The notice period for a target company that is not listed on the ASX is at least 21 days (including a company listed on a foreign exchange): s 249H(1) and 249HA(1) and definition of "listed" in s. 9; and *Re Tronox Ltd* [2019] FCA 312, [57].

[9] *Re Ranger Minerals Ltd* (2002) 42 ACSR 582, [44].

(d) the fairness discretion afforded to the court to approve or reject a scheme.[10]

As part of the fairness discretion, the Court may consider and assess whether features of a scheme of arrangement which are inconsistent with the Eggleston principles, including the policy of the equality of opportunity principle.[11] The Court also considers oppression principles when considering fairness.[12] Therefore, the Court's fairness discretion appropriately accommodates principles of Chapter 6 equality when necessary. However, discretion afforded to the court makes clear that it is not necessary to consider all principles in every scheme case. This discretion is key to ensuring flexibility and innovation is maintained.

Further, the judiciary has recognised that it may be appropriate to consider the shareholder protection afforded to individual shareholders in Chapter 6 of the *Corporations Act* (which contains s 602), when considering a scheme of arrangement and to adopt analogous safeguards (where appropriate).[13] It has been observed that: "[t]he Scheme and takeover provisions should be interpreted and applied in a way which afforded a harmonious, practical and mutually supportive operation to each, and in a manner keeping with the aim of preventing the circumvention of protections given to minority shareholders".[14] This is the flexible approach that ought to be maintained, rather than mandating consideration of extraneous principles which are already effectively incorporated within the current scheme landscape.

Question 4: What changes (if any) could be made to make members' schemes of arrangement more efficient and reduce unnecessary costs?

There are several amendments which may enable members' schemes of arrangement to be more efficient.

Firstly, the duplication of rules regarding disclosure in the *Corporations Act* and the various applicable Court rules should be harmonised to ensure that the same matters are covered consistently and comprehensively, particularly in relation to affidavit material for the Court hearings.

This could be effected by way of a "national practice note" to document and codify the best practice for schemes in the Court and should be available to simplify (and where appropriate, condense) the materials filed in Court, for example:

(a) reduce the level of detail included in the affidavit material regarding verification of the Scheme Booklet. Currently, parties may have 5-10 pages of affidavit material in relation to verification. It may be sufficient for the target to provide the Court with verification certificates signed by the bidder and the target respectively, in respect of the verification process undertaken by each party;

(b) for all cash schemes, there is no need for the bidder to file separate affidavit evidence, so long as the deed poll and the relevant scheme transaction documents are put before the Court in the affidavit materials filed by the target;

(c) if the break free follows conventional principles, there should not be a need to extensively describe the calculation in affidavits and/or extensively refer to the exclusivity provisions, so long as the relevant scheme transaction documents are put before the Court in the affidavit materials filed by the target. These provisions are clearly referred to in the scheme implementation deed, and any prior exclusivity arrangements (such as in confidentiality agreements) would also be disclosed to the Court;

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[10] See *Re iCar Asia Ltd* [2021] NSWSC 1713, [17].
[11] *Re iCar Asia Ltd* [2021] NSWSC 1713, [17].
[12] *Re Ranger Minerals Ltd* (2002) 42 ACSR 582, [39].
[13] *Re Ranger Minerals Ltd* (2002) 42 ACSR 582, [36].
[14] *Catto v Ampol Ltd* (1989) NSWLR 342 per Kirby P at 345.

(d) putting on extensive affidavit material as to the printing and despatch of the Scheme Booklet to the scheme shareholders should be unnecessary, particularly given that the despatch of scheme documentation in now being done electronically and a copy of the Scheme Booklet is available online; and

(e) the materials to be annexed to affidavits should be kept to a minimum – e.g., the scheme implementation deed, scheme itself, deed poll, voting intentions document, escrow arrangements. For example, unnecessary correspondence regarding mark-ups with ASIC on the Scheme Booklet should be avoided unless there is an unresolved issue and/or ASIC or the Court requires that it be produced.

Secondly, the matters to be included within the Scheme Booklet material should be rationalised, particularly in relation to more straightforward schemes. The “FAQs” and introductory sections, where there is extensive duplication, are ripe for simplification. This may present an opportunity for ASIC to provide a general “plain English” guidance note on the key process, to avoid market participants re-writing and repeating the basic concepts each time.

Thirdly, guidance should be provided (for example, by ASIC Regulatory Guide) to facilitate a more cohesive and consistent application of how directors’ interests are dealt with in schemes, for example, how incentive schemes may affect the directors’ ability to provide recommendations or act as chairpersons in the meeting. This is particularly relevant given the recent differing judicial views on this matter.

Finally, the requirement to attach the scheme to the constitution is antiquated and serves no useful purpose, so we would support the repeal of s 411(11). Historically, there was a central place for a hard-copy constitution, however, the digital age has overtaken this practice. It is common for parties to be exempted from compliance with s 411(11).[15]

We strongly disagree that the mandatory transfer of the scheme of arrangement jurisdiction from the Courts to the Takeovers Panel would be appropriate:

(a) The Court's appraisal of the fairness of a scheme is one of the principal reasons why the scheme procedure does not offend the "*Gambotto* principles", which could otherwise preclude the compulsory transfer of shares held by dissenting shareholders, which is an essential feature of a scheme approved by the requisite shareholder majorities and the Court.[16] The scrutiny applied to Scheme Booklets and process by the Courts (in addition to ASIC) is an important check on a scheme of arrangement.[17]

(b) The Courts have a large body of precedent in relation to schemes and are adept at managing the complexities that arise. Generally, the Courts publish decisions relating to schemes of arrangement relatively swiftly, and objections are considered and addressed with relatively ease at either the first or Second Court Hearings.

(c) The 50 Panel members are appointed on a part-time basis, for three years, and usually have extensive ties to investment banks, companies or law firms (which can give rise to difficulties of managing potential conflicts of interest and time).[18] In contrast, the same judges often hear scheme disputes regularly and generally enjoy lengthy tenure in their roles. With all due respect to the Panel and its extensive body of decisions, we submit that the complex schemes are better considered by experienced judges, as opposed to the Panel.

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[15] See, for example, *Re Avita Medical Ltd (No 3)* [2020] FCA 896.
[16] see *Gambotto v WCP Ltd* (1995) 182 CLR 432, 444 - 447; *Re NRMA Ltd* (2000) 33 ACSR 595, [59].
[17] see T Damian & A Rich, *Schemes, Takeovers and Himalayan Peaks: The use of schemes of arrangement* (4th ed), p 1639 & 1868.
[18] https://www.takeovers.gov.au/content/DisplayDoc.aspx?doc=about/panel_members.htm

(d) As noted in Q3 above, schemes of arrangement are often used to facilitate cross-border transactions particularly for dual or even singular exchange related securities. For example, securities can be issued to target members in, or who are citizens or residents of, the United States pursuant to an Australian court approved scheme of arrangement, without the need to comply with the US registration and prospectus requirements, as a result of the exemption provided in the US Securities Act.[19] As the US Securities Act exemption from requiring a US registration statement (prospectus) for a scrip bid will not apply to a non-court process, removing the Court from the scheme process would reduce the pool of available bidders able to make scrip bids and/or would require expensive overseas registration processes.

(e) The Court process remains particularly necessary for complex restructures by way of scheme of arrangement. The Court has very broad powers to make a variety of appropriate ancillary orders in connection with complex schemes of arrangement.[20]

We comment further in relation to the potential role of the Takeovers Panel in schemes in providing efficiencies and cost savings in response to Questions 6, 7 and 8.

Question 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?

Further to our answer to Question 3, ASIC and the Court currently flexibly apply the Takeovers Rules to schemes where the scheme is analogous to takeovers. However, we see no benefit, and in fact see detriment, to the wholesale importation of takeovers regulations to schemes.

By way of illustration, we consider the minimum disclosure requirements, minimum bid rule, rule against collateral benefits and the same terms rule below.

Minimum disclosure requirements

The scheme of arrangement process is underpinned by a Scheme Booklet, which must include extensive disclosures, including:[21]

(a) all the information that is material to a member's decision and judgment as to whether to vote in favour of or against the scheme and whether or not to vote at all;[22]

(b) where a scheme of arrangement is being used to effect a change of control transaction, it must contain an equivalent level of disclosure to that which would have been provided if the transaction had been effected by takeover bid;[23]

(c) if securities form all or part of the consideration, it must contain all the information that would have been required to be included in a prospectus for an offer of those securities;[24] and

[19] see section 3(a)(10) of the *US Securities Act* 1933; and see for example the recent Federal Court decision of *Re AuStar Gold Ltd (No 2)* [2021] FCA 972 at [7] -[8] (one of the many examples of where scheme proponents have proceeded in reliance on the *US Securities Act* 1993 exemption - see also T Damian & A Rich, *Schemes, Takeovers and Himalayan Peaks: The use of schemes of arrangement* (4th ed), p 1562, footnote 15).
[20] see section 413(1) of the *Corporations Act 2001* (Cth).
[21] See T Damian & A Rich, *Schemes, Takeovers and Himalayan Peaks: The use of schemes of arrangement* (4th ed), p 604-606.
[22] *Re Wesfarmers Ltd; Ex parte Wesfarmers Ltd* [2018] WASC 308; see also s 411(3) and 412(1) *Corporations Act 2001* (Cth).
[23] See *Re Coventry Resources Ltd* [2012] FCA 1252, ASIC Regulatory Guide 60.
[24] See s 636(1)(g) *Corporations Act 2001* (Cth); ASIC Regulatory Guide 60, [60.68]; *Re Coventry Resources Ltd* [2012] FCA 1252, [30], [32]-[33]); ASIC Class Order [CO 13/521]. See also: ASIC Class Order [CO 13/525]

(d) further prescribed information, including benefits payable to directors, secretaries and executive officers or senior managers.[25]

It would appear unnecessary for the disclosure requirements of schemes of arrangement to conform to all the disclosure requirements applicable to takeovers in circumstances, where if the scheme is akin to a takeover, such disclosure requirements already do apply.

The key disclosure requirements in a takeover bid include:

(a) in the case of the Bidder's Statement, in addition to specified items, any other information that is material to the making of the decision by a holder of bid class securities whether to accept an offer under the bid which is known to the bidder and does not relate to the value of any securities offered as consideration; [26] and

(b) in the case of the Target's Statement, all the information that holders of bid class securities and their professional advisers would reasonably require to make an informed assessment whether to accept the offer under the bid, to the extent to which it is reasonable for investors and their professional advisers to expect to receive the same and is known to any directors of the target. [27]

In addition, in a case where securities form all or part of the consideration, the Bidder's Statement must contain information similar to that identified in paragraph (b) above.

In summary there is no lesser standard of disclosure in a scheme of arrangement when compared to a takeover offer and indeed in the former case all of the relevant information is contained in the one place, in the Scheme Booklet.

The flexibility afforded by the Court to consider the appropriate level of disclosure in the application to the particular scheme is important. As Vaughan J noted in *Re Wesfarmers Ltd:*[28]

> *In each case the extent of disclosure required is a question of fact and degree dependent on the nature of the scheme and the context in which it is advanced for consideration. This must be considered in a practical and commercially realistic way having regard to the complexity of the proposed scheme.*
>
> *In any large or complex proposed scheme of arrangement there is balance to be struck. An insufficiency of information may mean that members are not properly informed. Too much information may mean that disclosure is unintelligible or incomprehensible.*

Minimum Bid Price

The minimum bid price rule is derived from the equality principle. The minimum bid price rule provides that a bidder must offer consideration for shares in the target company which equals or exceeds the maximum amount which the bidder provided or agreed as consideration for such shares in the four months before the bid.[29]

It is accepted that in evaluating the fairness of a scheme, the Court will consider the policy of the minimum bid price rule. The price at which the scheme company's shares were acquired by the acquiring party in the period prior to the scheme may be addressed by appropriate disclosure in the

[25] Part 3 of Schedule 8 of the *Corporations Regulations 2001* (Cth).
[26] See s 636(1)(m) *Corporations Act 2001* (Cth)
[27] See s 638(1) *Corporations Act 2001* (Cth)
[28] *Re Wesfarmers Ltd*; *Ex parte Wesfarmers Ltd* [2018] WASC 308, [55]-[56].
[29] Section 621(3) *Corporations Act* 2001 (Cth).

Scheme Booklet, and the independent expert's report which will contain an opinion on the value of scheme consideration.[30]

Other safeguards include: that only transactions supported by the target board are put to target shareholders for a vote (noting that directors would take into account recent pre-scheme acquisitions in deciding whether to present the scheme for voting), the extensive disclosure requirements in the Scheme Booklet (including disclosure of pre-scheme acquisitions by the bidder), the class voting system and ability of the Court to discount or disregard votes on account of extraneous interest.[31]

There does not appear to be a legitimate reason to import a hurdle into the scheme of arrangement legislative landscape. The inclusion of such a requirement may discourage a person from offering a scheme within a four-month period (or at all). The Court recognises that shareholders are generally "the best judges of whether an arrangement is to their commercial advantage",[32] and given the extensive disclosure requirements, it does not appear reasonable to include a further barrier to the implementation of a scheme of arrangement.

Rule against collateral benefits

The rule against collateral benefits is another rule derived from the equality principle. It provides that a bidder cannot offer or agree to give a benefit to the person if: (a) it is likely to induce them to accept or dispose of securities, and (b) the benefit is not offered to all holders of securities in the bid class.[33]

The Courts have recognised that, although s 623 does not strictly apply, it may be relevant when dealing with "acquisition" schemes, for the purposes of "neutrality" between Chapter 6 and certain schemes.[34] The approach taken to collateral benefits in those cases is the "net benefits" test adopted by the Takeovers Panel in *Guidance Note 21 Collateral Benefits*.[35]

However, one of the reasons for the continued existence of schemes to effect mergers is the flexible way of accommodating differences in the treatment of shareholders, which will be considered as part of the fairness discretion by the Court.[36]

For collateral benefits the fairness issue is dealt with by: (a) deciding whether the differences are "class creating"; or (b) enquiring whether processes have been established by the scheme company to "tag" votes of interested shareholders or for interested shareholders to abstain from voting.[37] The Court has described that either approach allows appropriately informed shareholders who will not share in a benefit to determine the outcome of the approval resolution, and prevents shareholders with greater bargaining power from being advantaged over shareholders with less bargaining power without the consent of the less powerful shareholders.[38] It appears in practice this is mostly dealt with by the party with a collateral benefit undertaking not to vote[39] or abstaining from voting.[40]

Collateral benefits are otherwise considered by ASIC when reviewing a scheme of arrangement. Where the affected shareholders vote in a separate class and the explanatory statement explains

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[30] *Re iCar Asia Ltd* [2021] NSWSC 1713 [17], citing: *Re Ranger Minerals Ltd* (2002) 42 ACSR 582 [44], [48]; *Anzon Australia Ltd* [2008] FCA 309 at [14]; *Re Goodman Fielder Ltd* [2014] FCA 1449 at [19] –[20]
[31] T Damian & A Rich, *Schemes, Takeovers and Himalayan Peaks: The use of schemes of arrangement* (4th ed), p 939-940.
[32] *Aventus Holdings Ltd* [2022] NSWSC 266, [10]; citing *Re NRMA Ltd (No 2) (2000)* 156 FLR 412; [2000] NSWSC 408 at [22*]; Re Seven Network Ltd* (2010) 267 ALR 583; 77 ACSR 701; [2010] FCA 400 at [31]; *Re Atlas Iron Ltd (No 2)* [2016] FCA 481 at [5].
[33] Section 623(1) *Corporations Act* 2001 (Cth).
[34] *Re David Jones Ltd* (No 3) [2014] FCA 753 at [12].
[35] *The Trust Company (Re Services) Limited as responsible entity of the VitalHarvest Freehold Trust* [2021] NSWSC 108, [23], citing *Boral Energy Resources Ltd v TU Australia (Queensland) Pty Ltd* (1998) 43 NSWLR 638, 680; *Re David Jones Ltd* (No 3) [2014] FCA 753, [15].
[36] *Re David Jones Ltd* (No 3) [2014] FCA 753 at [13].
[37] Ibid.
[38] Ibid.
[39] See *Re Webster Ltd* [2019] NSWSC 1907.
[40] See *Re Dreamscape Networks Ltd* [2019] WASC 412.

the benefit and includes an independent valuation of the benefit, ASIC will generally not object to the scheme.[41]

Whilst not required by law, both ASIC and the Court require that, in the case of a scheme of arrangement, an independent expert's report is prepared and provided to shareholders in which the expert opines as to whether the scheme, and in particular the consideration, is in the best interest of shareholders and accordingly is fair and reasonable. Where there may be a collateral benefit provided, the independent expert would normally be expected to include in its report an assessment of the same in determining whether the scheme is in the best interest of the shareholders generally.

The practices of the Court and ASIC above suggest that the potential mischief created by collateral benefits is currently adequately dealt with in the current regulation of schemes, and there is no requirement to mandate s 623 to apply to schemes.

Same terms rule

The rule in s 619 that all the offers made under an off-market bid must be the same should not be applied to schemes. One of the key benefits of the scheme process is that it affords different proposals to members by using a flexible class regime.[42] This rule has no application to schemes.

Protection is afforded to the shareholders by the requirement that the scheme be approved separately by the holders of different classes of shares, and for this purpose, the determination of classes is not made by reference to the terms of the securities held, but rather whether the interests of the shareholders concerned are such that it is appropriate for the shareholders to vote as one class or as separate classes. A scheme which proves differing terms to shareholders will almost certainly require there to be separate class votes. Furthermore, the independent expert's report, in opining whether the scheme is in the best interest of shareholder, will undoubtedly assess the impact of differing terms where that occurs.

4. The role of the Takeovers Panel in relation to schemes

Question 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?

We acknowledge the current position whereby the Takeover Panel generally has no real jurisdiction in relation to schemes of arrangement. There are perhaps a narrow set of circumstances where a bid involving a scheme of arrangement is brought to the Panel, but generally any disputes are dealt with through the Court process which applies to schemes.

We continue to see and recognise the Court's role in schemes of arrangements, particularly in relation to those which may be complex, which may involve scrip compensation and particularly those that involve international bidders (due to the international recognition of the process as detailed in our response to Question 4 above).

However, we do also acknowledge some ongoing concerns and rigidity with the Court process, particularly in relation to time and costs. We do see that the potential to use the Takeovers Panel to approve schemes of arrangements in certain circumstances may improve efficiency, subject to some procedural changes identified below, and remove unnecessary costs.

[41] ASIC Regulatory Guide 60, [60.24].
[42] See s 411(1) *Corporations Act 2001* (Cth) which makes clear that a scheme can bind members notwithstanding differences in treatment, provided that the members vote as a separate class.

As submitted in response to Questions 3, 4 and 5, schemes of arrangements undertaken pursuant to Chapter 5 play a significant and important role in control transactions and should be preserved, with the Court continuing to apply its existing principles in considering and approving schemes.

If the Takeover Panel was to be given expanded powers to include the approval of members' schemes of arrangements, we submit that that should be included as a separate regime within Chapter 6, thereby leaving the provisions in Chapter 5 intact.

The question contemplates the possibility of the Takeovers Panel's power being expanded to include approval of member schemes and appears to assume that the Panel in doing so would perform the role currently performed by the Court. The processes which are adopted by the Takeovers Panel in response to an application have been designed to address the primary function which the Panel presently exercises, namely, to determine whether circumstances which exist or may exist in relation to an entity are unacceptable having regard to the Eggleston Principles, amongst other things.

The existing processes require the appointment of a sitting Panel of three members drawn from the part-time members who each review the application made to the Panel and all other relevant documents, and consult with each other and the Panel Executive in determining how to proceed. In our view, in order to perform the role envisaged in this context as efficiently as the Court, there would need to be significant changes to the way in which the Panel discharges its functions and the processes which it follows. For example, it may be that it would be appropriate for a single Panel member to be appointed to deal with a matter (in much the same way as it is dealt with by a single judge of the relevant Court) with a right to seek review by a 3-member Review Panel.

We comment further in response to Question 7 in more detail as to the way in which the Panel might be engaged to simplify the scheme process.

At the present time, schemes of arrangements are dealt with by the Supreme Courts of each of the States and Territories and by the Federal Court in all of its Divisions. There is a considerable volume of work across all these jurisdictions. It would be challenging for the Takeover Panel as presently constituted to adequately address that volume of work. This is particularly so as the members are all appointed on a part time basis, and as indicated above, have to manage their attention to their principal day-to-day functions, which may give rise to potential conflicts of interest and time pressures.

Under its existing processes, Panel proceedings are conducted on a confidential basis and no media briefing or commentary is permitted. Whilst that may be appropriate in relation to the present primary role of the Panel, it does not follow that proceedings of a kind now contemplated should be conducted on such a basis.

We assume that under this model, the Panel would also perform the present role of the Court in relation to the Second Court Hearing. In our view, to ensure that the function is performed by the Panel as efficiently as presently performed by the Court, the processes to be followed by the Panel at this point would also need to be reviewed.

Question 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?

As indicated in response to Question 6, in our view, the transfer to the Takeovers Panel of the Court's functions for a scheme of arrangement would require significant changes to the Panel processes to ensure efficiency. Once these changes are in place (which may require significant time and resources), there may be a reduction in costs to merger parties.

Simplifying the processes in order to gain efficiency through the Takeovers Panel assuming some of the Court's functions might occur at two levels, and there may be more.

Firstly, the Panel could undertake the role of the Court as currently performed at the First Court Hearing, namely to approve the Scheme Booklet for dispatch to shareholders and convening of the scheme meeting of shareholders.

Under this model, the Takeovers Panel could be given the power to conduct what is currently treated as the Second Court Hearing. Alternatively, the need for a Second Court Hearing could be eliminated by a process pursuant to which the entity propounding the scheme could file with the Panel and ASIC a report summarizing the outcome of the shareholder vote on the resolution for approval of the scheme, on the basis that the scheme would then become effective at the expiry of a specified short period of time thereafter, unless an application is made to the Panel by ASIC or an interested party who seeks to challenge the outcome.

Secondly, the processes could be simplified by eliminating the need for both a First Court Hearing and a Second Court Hearing by enabling the entity propounding the scheme to convene the shareholder's meeting to approve the scheme.

Presumably before doing so, the entity propounding the scheme would need to have lodged the Scheme Booklet with ASIC for a review for a specified time period such as the existing 14 days. It may be that, under this alternative, an entity propounding a scheme may elect to proceed without an independent expert's report. However, we envisage that, in order to ensure that shareholders are appropriately protected, the Panel should have the power to require such a report to be prepared and provided to shareholders, either on the application of ASIC or an interested party (or potentially on its own motion). An entity which elects to proceed without such a report would need to assess the likelihood and consequences of such a report being required.

An interested party who wishes to object to the scheme, for example, on the grounds of inadequate disclosure or unfairness, would be entitled to apply to the Panel to seek an order from the Panel that, if the complaint is sustained, appropriate corrective action is taken, which might include an order preventing the scheme from proceeding in its present form.

This second alternative would greatly simplify the process for approval of a scheme of arrangement, and indeed would be appropriate for straightforward and/or smaller schemes where there are unlikely to be any contentious issues. We would support such a proposal in that context. It may be appropriate to specify some parameters limiting the circumstances in which these simplified processes could be adopted. This may include matters such as where:

(a) the transaction is agreed by both bidder and target;

(b) both parties are Australian;

(c) consideration is cash;

(d) exclusivity arrangements and break fee calculations are market standard; and

(e) the total consideration is under a certain amount.

However, the adoption of this process by an entity carries with it a risk that, if Panel proceedings are commenced after the Scheme Booklet has been issued to shareholders, there is a significant risk of disruption and delay in the holding of the shareholders meeting. This is a material risk given that the notice required to convene the shareholder meeting is 28 days and that Takeovers Panel proceedings, whilst conducted in a timely fashion, generally take a period of 10-14 days. The opportunity for disruption to the shareholder approval process is obvious. Under this process, any application to the Panel would have to be made within a relatively short period after the Scheme Booklet has been issued.

In addition to effecting these proposals, provisions could be included so as to make it clear that the Panel's jurisdiction in relation to schemes includes "trust schemes", thereby eliminating the need in

such cases for a Court application to seek judicial advice to approve the steps required to implement the scheme.

It will also be appropriate by amendment to specifically enact that the supervision by the Panel provides a sufficient assessment of "fairness" so as to ensure that the Gambotto principles do not apply in relation to either schemes undertaken by companies or by the responsible entities of unit trusts.

Clearly there will be an opportunity for increased efficiencies and reductions of costs as one moves through the spectrum of potential changes described above.

Question 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?

Our submissions in response to Questions 6 and 7 contain material which is relevant to this section.

As indicated in response to those Questions, significant changes would need to be made to the procedures and processes adopted by the Panel.

We have also outlined in response to Question 7 that there are at least two potential approaches to the way in which scheme processes could be simplified. We submit that, in these alternative processes, the test which would be applied in determining whether the scheme should proceed need not change from that presently applied by the Court and described in response to Question 3 so as to preserve the integrity of the process.

In clarifying and simplifying these processes it would be appropriate to include a provision pursuant to which the Takeovers Panel might consider and approve, or otherwise, the determination which the entity propounding the scheme has made with respect to the scheme classes and voting at shareholder meetings.

In adopting changes such as those outlined above, consideration should be given to ensuring that the Panel does not commence to exercise judicial power and the constitutional limitations which might arise as a consequence. Consideration would also need to be given to the right which the target, target shareholders, ASIC or other person aggrieved should have to appeal or seek review of a Panel determination.

5. Advance rulings

Question 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?

For the reasons set out below, we are not convinced that the introduction of an advanced rulings power would necessarily “assist in the regulation of control transaction disputes”. Nevertheless, we would generally support the suggestion that parties or prospective parties to control transactions be able to seek advance rulings from ASIC and/or the Takeovers Panel (as the case requires), provided that an appropriate process is developed to allow consultation with interested parties before any advance ruling becomes binding. We do however express some caution in adopting the practices of Takeover Panels in other jurisdictions which have a role and resources which differ materially from the Australian Takeovers Panel.

At the outset we would observe that, differences in nomenclature aside, there is already considerable existing infrastructure available by which a market participant can obtain comfort in advance of a control transaction. This is particularly so in the case of ASIC, as the processes for seeking what will often be the practical equivalent of an advance ruling (such as an exemption,

modification, no-action letter or comfort relief) are well established and set out in published policy.[43] There is also detailed published guidance on important ancillary matters, including confidentiality, procedural fairness and the right to seek a review of ASIC's decision by the Takeovers Panel.[44] Generally speaking, we consider that these processes work effectively and that any reforms should build on rather than wholly replace this architecture.

The question whether ASIC or the Panel is the appropriate body to give an advance ruling in any given case would depend on the subject matter and the decisions reached in response to earlier questions. As matters currently stand, given that ASIC is vested with the modification and enforcement powers for Chapter 6, and the review role for the explanatory statement (Scheme Booklet) and section 411(17) matters for Chapter 5, it would seem appropriate to us that any advance ruling on such matters be sought from ASIC in the first instance (with a right of review by the Panel). If however it were decided that some of these roles should be shifted to the Panel (such as the review of the draft Scheme Booklet), then it may be appropriate for advance rulings to be sought from the Panel on those matters, with a standing right for ASIC to be consulted and make submissions if it sees fit.

Whilst we consider that ASIC should generally continue to be the first port of call (with a right to seek review by the Panel) for relief or advance guidance on matters of "black letter" law, we would generally support the proposition that advance guidance could be sought from the Panel executive on broader matters within the Panel's remit.[45] Again, we would note that in our experience, the Panel executive is already helpful, accessible and timely in providing feedback and informal guidance, albeit on the basis that their views could not be taken as constraining a future Panel or its members. While we would be in favour of streamlining and partly formalising this process, we do have some misgivings about the suggestion that advance rulings could be unconditionally binding, for the reasons set out in response to Question 10 below.

Question 10: What features should an advance ruling power in Australia have?

To consider this question, it is instructive to consider the domestic and international examples referred to in the consultation paper.

Domestic examples

As the consultation paper notes, the Australian Taxation Office (**ATO**) has extensive powers to provide advance rulings in various forms, including private binding rulings, public rulings, class rulings, product rulings, oral rulings and administratively-binding advice. In our experience, these are useful tools in providing certainty as to taxation outcomes, including in the context of control transactions. Nevertheless, we would caution against over-reliance on the ATO models and processes in designing any advance ruling power for the Panel, as we perceive a number of important distinctions, including:

- *the stakeholders involved* – generally speaking, ATO rulings will relate to determining tax liabilities as between the taxpayer (or class of taxpayers) and the Commissioner, whereas Panel rulings will potentially relate to a much broader range of issues which could affect (perhaps adversely) the rights and obligations of a number of other stakeholders, such as a target board, target shareholders and/or actual or potential counter-bidders;

- *the stakes involved* – in many cases, ATO rulings are sought so as to avoid material uncertainty as to significant taxation consequences, the risk of potentially material penalties and interest and the prospect of a lengthy and costly dispute with the ATO,

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[43] See in particular ASIC Regulatory Guides 51 (*Applications for Relief*) and 108 (*No-action Letters*)
[44] See ASIC Regulatory Guides 103 (*Confidentiality and release of information*), 92 (*Procedural fairness to third parties*) and 57 (*Notification of rights of review*)
[45] See section 657A *et seq* of the Corporations Act and Takeovers Panel Guidance Note 1 (*Unacceptable Circumstances*)

whereas Panel rulings would be dealing with very different considerations which would otherwise fall to be dealt with via Panel proceedings (which are generally quick and efficient);

- *the time involved* – while understandable in the context of rulings which are binding, potentially of precedent value and involving material sums, the time taken to obtain an ATO ruling is generally measured in months, whereas a process for obtaining Panel rulings which resulted in a similar timeframe would be of no real utility.

In these circumstances, we would regard the models and processes of the Panel's international counterparts in respect of advance rulings as more analogous and helpful guides than those of the ATO and the other domestic regulators referred to in the consultation paper.

International examples

As the consultation paper points out, the City of London's Panel on Takeovers and Mergers (**UK Panel**) has a very well-developed practice of providing advance guidance and rulings, both non-binding and binding.[46] Given the historical inspiration which the Australian Panel and its architects have drawn from the UK Panel, it would be tempting to conclude that the UK Panel is therefore the most analogous model for the purposes of fashioning an advance ruling power in Australia. However, there are a number of important differences between the two markets, including:

- the UK Panel is much more than a forum for the resolution of takeover-related disputes - it is the primary body for rule-making, supervising and regulating takeovers and mergers in the UK (where there is no functional equivalent of ASIC), including by taking enforcement action on its own initiative;

- the Code and associated regulation is generally principles-based (there is no equivalent of the technical provisions set out in Chapter 6 of the *Corporations Act*) and the UK Panel's decision-making processes are based on concepts of appropriate business conduct and standards of commercial behaviour (adverse comment from the UK Panel can have a significant reputational impact within the City for a party and its advisers);

- the UK Panel executive is a substantial and well-resourced operation[47] comprising both permanent employees and secondees from senior levels of many of the City's largest law and accountancy firms, investment banks and stockbrokers (this comment is not intended to reflect adversely on the Australian Panel executive but is simply a reflection of the respective markets and budgets);

- the practice of seeking advance guidance and rulings from the UK Panel is virtually institutionalised, and in many cases, advance consultation with the UK Panel is effectively mandatory where there is "any doubt whatsoever" whether a proposed course of action conforms with the general principles - the Code goes so far as to say that taking legal advice is not an appropriate alternative to obtaining a ruling from the UK Panel executive.[48]

In relation to the other international regulators referred to in the consultation paper, we understand that:

- the Singapore Takeovers Code provides for advance confidential consultation with the Securities Industry Council Secretariat (the equivalent of the Panel executive) which are

[46] *The City Code on Takeovers and Mergers*
[47] We understand that the UK Takeover Panel Executive comprises approximately 30 staff - see *The Takeover Panel 2021 Annual Report* (UK)
[48] Section 6(b) of the *City Code on Takeovers and Mergers*

generally informal and non-binding, although can be escalated to the Council for a formal hearing;[49] and

- the Hong Kong Takeovers Code provides an advance consultation regime leading to informal discussions with the Securities and Futures Council (**SFC**) Executive but does not result in a formal ruling or bind a future Panel (albeit that there is also a separate, more formal path to obtain a ruling if desired).[50]

Given the cross-border differences noted above, we do not consider it necessary or appropriate to vest the Australian Panel with advance ruling powers which are as structured or extensive as the UK Panel, at least not in the first instance. We would certainly not support a regime under which consultation with the Panel was anything other than voluntary.

We would also respectfully query the need to empower the Australian Panel to give a formal, binding advance ruling. Whilst the UK Panel and the SFC are both empowered to make rulings which are nominally binding, this is usually on the basis that either:

- the executive has had the opportunity to consider submissions from all parties potentially affected by the relevant ruling (which we expect would be rare where the advance ruling is driven by a desire for certainty prior to the announcement of a control transaction); or

- the ruling is binding *pro tem* but subject to being set aside or varied on the application of an interested party once it is made public (in which case the certainty derived from its binding nature is partly illusory).

It seems to us that the extent of the additional processes, safeguards and resources necessary to support an ability on the part of the Australian Panel to make binding advance rulings could be potentially significant. These may include protocols for identifying and affording procedural fairness to third parties whose interests may be affected, a consultation process between the Panel executive and membership (if rulings are to bind a future Panel) and/or ASIC, and avenues for review of and/or appeals against a binding ruling (either on the merits or for an error of law). We would query whether the time, cost and resources involved in establishing these would be warranted by any real, demonstrated need or demand for a binding "advance ruling" system.

As an initial measure, we would suggest that any new advance ruling power to be given to the Panel should be relatively informal and not binding on a future Panel. We understand that the preponderance of advance rulings issued by the foreign regulators mentioned are either non-binding or subject to review, but that instances of Panel members overruling or taking a materially different view from the executive are relatively rare. We would similarly expect that Australian Panel members would have due regard to any advance ruling issued by the executive (albeit non-binding) and that areas of departure would be exceptional. We would also note that longstanding areas of uncertainty which are often advanced in support of a need for binding advance rulings, such as the longevity of a "last and final statement", could be clarified by more definitive published guidance from ASIC developed in consultation with the Panel (or vice versa).

If however binding advance rulings by the Panel were to be entertained, then in our view it would be appropriate for parties or other persons with appropriate standing to enjoy the same rights of review and appeal as if they were aggrieved by a decision or order of the Panel itself (i.e., recourse to a Review Panel and potentially the Federal Court of Australia). Whilst this could of course undermine the certainty which is sought to be achieved by an advance ruling power, we consider this to be preferable to a scenario in which control transaction stakeholders could be prejudiced without an adequate opportunity to be informed, be heard or seek redress.

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[49] *The Singapore Code on Take-Overs and Mergers*, section 2.
[50] *The Codes on Takeovers and Mergers and Share Buy-backs*, section 6.2.

Question 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?

As discussed above, the risk of information asymmetries is one of the reasons why we consider that, at least in the first stage, any advance rulings to be issued by the Panel executive should not purport to bind a future Panel, particularly where (as we expect would often be the case) the Panel has not been able to consult with or hear submissions from all persons whose interests may be affected by a binding ruling.

This risk would be particularly acute where advance rulings are sought by a hostile bidder without the target's knowledge or involvement, or by merger parties before the announcement of a control transaction on a matter which could impact upon the interests of a potential counter-bidder and/or the prospects of a counter-bid being made or succeeding. It would, in our view, be quite unsatisfactory if the rights of a target, target shareholder or counter-bidder were adversely affected by a binding ruling of which it had no contemporaneous knowledge, right to be heard or avenue of appeal.

If the Panel executive were to be empowered to make binding advance rulings, then we would submit that this difficulty be addressed via a sub-classification of rulings similar to that employed by the UK Takeovers Panel, i.e., conditional and unconditional rulings. As we understand it, in circumstances where the UK Panel Executive is unable to receive and consider the views of other parties potentially affected (such as in an application by a bidder on an *ex parte* basis), only conditional rulings would ordinarily be granted.[51] This type of ruling allows it to be varied or set aside once the Executive is able to hear submissions from other interested parties. Even this approach might be thought too onerous in the case of rulings affecting the rights of target shareholders insofar as they would be required to approach the Panel, but for which the ruling would stand.

A further protection in the Australian market could be provided by ASIC. At least in the case of binding rulings, we would submit that ASIC should receive notice of all applications for advance rulings and be afforded a reasonable opportunity to make submissions to the Panel executive. As mentioned above, ASIC has its own well-developed guidance in relation to affording procedural fairness to third parties and is experienced in identifying competing interests, potentially affected third parties and balancing the respective merits of confidentiality, disclosure and timeliness of the decision-making process.[52] It should therefore be well placed to consider and make submissions to the Panel on this subject.

If binding advance rulings are to be given by the Panel, we would also suggest that these be expressly contingent upon the information provided by the applicant being true and not misleading (including by omission). The Panel should reserve the right to withdraw the ruling where inaccurate or incomplete disclosure has been made[53] or where significant time has elapsed and/or circumstances have changed materially since the ruling was granted.

Finally, whether binding or non-binding, we consider that any advanced rulings made by the Panel should be made public at the earliest time practicable, and usually by no later than the time at which the relevant control transaction is announced. Preferably this would be done on an unredacted basis, but there may of course be circumstances in which redaction may be appropriate (e.g., where the advance ruling causes a control transaction to be abandoned prior to announcement). Subject to such exceptional circumstances, a public register of all advance rulings should be maintained on

[51] *The City Code on Takeovers and Mergers*, section A10.
[52] See ASIC RG 92 particularly at 92.31.
[53] As ASIC does with no-action letters – see RG 108.15.

the Panel's website and publicised in a manner similar to ASIC's periodic reporting of corporate finance relief.

Question 12: What impact would the provision of an advance ruling power have on the use of the Takeovers Panel as a dispute resolution forum?

Whilst this is obviously a matter of conjecture, we would not expect that the provision of an advance ruling power would have a material impact on the use of the Panel as a dispute resolution forum. That is to say that we would expect applications for advance rulings to be relatively infrequent, and we would not expect their availability to avoid or resolve a material proportion of the disputes which would otherwise have formed the basis for a conventional application to the Panel. That is not to say that the introduction of an advance ruling power would be unhelpful, but we do query whether the benefits from doing so would be sufficient to warrant the additional resources which would be needed to establish appropriate capacity, processes and safeguards, particularly if such rulings are intended to be binding.

6. General

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

We have nothing further to add to the materials contained in this submission.