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THE COMMERCIAL BAR ASSOCIATION OF VICTORIA

SUBMISSION TO THE TREASURY'S CONSULTATION PAPER ISSUED ON 1 APRIL 2022

"CORPORATE CONTROL TRANSACTIONS IN AUSTRALIA CONSULTATION ON OPTIONS TO IMPROVE SCHEMES OF ARRANGEMENT, TAKEOVER BIDS AND THE ROLE OF THE TAKEOVERS PANEL"

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A. Introduction

CommBar

1. The Commercial Bar Association of Victoria (**CommBar**) provides this submission in response to the consultation paper issued by the Treasury on 1 April 2022, entitled "*Corporate control transactions in Australia; consultation on options to improve schemes of arrangement, takeover bids, and the role of the Takeovers Panel"* (**Consultation Paper**).

2. CommBar was established on 26 October 1994 and is an association of the Victorian Bar Inc (**Victorian Bar**).

3. CommBar's members are barristers with expertise and experience in a broad range of commercial law. It comprises 21 areas of specialty, including corporations and securities law. CommBar's purposes include working closely with courts, tribunals, authorities and government departments on law reform in the field of commercial law. CommBar's members include barristers who practise – both as advisers and advocates – in the area of members' schemes of arrangement to effect change of control transactions, and who have extensive expertise and experience in the field.

4. This expertise and experience is not limited to preparation for and appearing at court hearings concerning schemes, but extends to:

   (a) advising on the transaction structures;

   (b) reviewing and advising on transaction documentation before public announcement of the transaction;

   (c) reviewing and advising on the draft scheme booklet (explanatory statement) prior to its lodgement with ASIC, particularly about matters of disclosure;

   (d) advising about issues or concerns raised by ASIC during or following the ASIC review period;

   (e) advising about methods for dispatching the scheme booklet and associated documentation to the members of the target (scheme) company; and

   (f) advising the conduct of the meeting of shareholders of the target company (referred to in this submission as **the scheme meeting**), including about matters of meeting procedure.

5. Our members who practise in the area work closely with instructing solicitors, often under very tight transaction timetables. The focus of this work is to ensure that both the ASIC review of the draft scheme documentation and the court hearings that follow are conducted as efficiently, expeditiously, and effectively as possible.

6. Their work means not only that our members have developed considerable skills and expertise in the area but also those skills and expertise are available to any law firms and their clients contemplating a change of control transaction. Further, having a specialist skill set "on tap" means that even non-specialist solicitors can undertake change of control work, thereby increasing competition and placing downward pressure on fees.

This submission

7. CommBar welcomes the opportunity to provide this submission on members' schemes of arrangement to effect change of control transactions.

8. It is clear that Treasury has prepared the Consultation Paper with a focus on safeguarding shareholder interests in change of control transactions. CommBar agrees with that focus and this submission has been prepared with it in mind.

9. The submission has been prepared by the Corporations and Securities section of Comm Bar, with Greg Ahern (a barrister who specialises in schemes of arrangement) primarily responsible for its preparation. He was assisted by Carl Moller, the chair of the CommBar's Corporations and Securities section. CommBar members Olivia Callahan, Owen Wolahan, Matthew Peckham, James Gray, Dean Merriman, Anna O'Callaghan, Brian Kennedy and Nicole Tyson conducted the case reviews that inform the information set out in the annexed table. CommBar expresses its gratitude to them.

10. This submission is structured as follows:

Part B – sets out observations about the scheme of arrangement statutory regime; and

Part C – addresses questions 3 - 5 ("Schemes of Arrangement and the court") and questions 6 – 8 ("The role of the Takeovers Panel in relation to schemes") of the discussion questions identified in the Consultation Paper.

11. Unless otherwise stated, a reference in this submission to a "scheme of arrangement" or to a "scheme" is a reference to a scheme of arrangement under Part 5.1 of the *Corporations Act 2001* (Cth) to effect a change of control transaction.

12. CommBar would be pleased to discuss any aspect of this submission.

13. Any queries can be directed to the chair of the CommBar's Corporations and Securities section, Carl Moller, on (03) 9225 8748 or at cmoller@vicbar.com.au.

B. Consultation Paper – Observations about the scheme of arrangement regime

(i) The essence of a scheme is to facilitate the compulsory acquisition of property and is very different to a takeover bid

Essence of a change of control scheme

14. As it applies to change of control transactions, the statutory regime in Part 5.1 of the *Corporations Act* governing members' schemes of arrangement is, in essence, a regime to facilitate the compulsory acquisition of property.

15. If the statutory voting majorities are satisfied at the scheme meeting and the court approves the scheme at the second court hearing, then following the lodgement of the approval order with ASIC, the scheme becomes binding on **all** shareholders of the target company. The consequence is that all shareholders in the target, including those who voted "no" at the scheme meeting and those who did not attend the scheme meeting, are compelled to transfer their shares to the bidder, with the transfer taking place under the terms of the scheme without any further involvement by the shareholder.

16. In this context, it is important to remember that the statutory voting majorities for a scheme are anchored to the number of shareholders who "attend" and vote at the scheme meeting and the number of votes cast by those "attending" shareholders, **not** to the total number of shareholders or the total number of shares on issue in the target company.

Voting thresholds

17. The statutory majorities will be satisfied if the scheme resolution is passed:

(a) by a majority in number of shareholders present and voting at the scheme meeting (known as the headcount test);[1] and

(b) by 75% of the votes cast on the resolution at the scheme meeting.[2]

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[1] Section 411(4)(a)(ii)(A) – see the Court's power to dispense with the headcount test.

[2] Section 411(4)(a)(ii)(B).

18. Thus, a relatively small number of target shareholders (representing a relatively low percentage of the total number of shares in the target company) can potentially determine the fate of the other target shareholders.

19. This can be shown by a simple example. Assume that a target company has 1,000 shareholders, who between them hold 10,000 shares in the target company. At the scheme meeting, only 200 shareholders might be present (20% of the total number of shareholders), who hold 4,000 shares (i.e. 40% of the total number of shares in the target). The scheme resolution will pass if (a) the majority of the shareholders present vote in favour of the scheme and (b) that majority holds (between them) 75% of the 4000 shares voted at the meeting (i.e.75% of 4000 shares, being 3,000 shares). Thus, in this example, the votes of holders of 30% of the shares in the target company, who represent less than 20% of the total number of shareholders, will determine the fate of all the 1,000 shareholders and their 10,000 shares.

20. The court is not bound to approve a scheme merely because the statutory voting majorities have been satisfied.[3] While courts have approved schemes with low voter turnouts (recognising that shareholders are not required to attend and vote at a scheme meeting),[4] they have done so only after being satisfied that the low voter turnout was not due to a material error or irregularity in the despatch of the scheme materials (including the scheme booklet).[5]

21. The court's inquiry about voter turnout is an important shareholder safeguard. The court is able to undertake the inquiry because (a) the affidavit evidence at the second court hearing includes evidence about voter turnout and compliance with the despatch process ordered by the court at the first court hearing and (b) the obligation on the target (scheme) company to bring to the court's attention all matters that are relevant to the court's discretion, coupled with the obligation of Counsel for the target company to make full disclosure to the court, including about any aspect of the scheme that is or may be problematic.

22. We elaborate upon the important disclosure obligations of the target (scheme) company and counsel below, when addressing the court's shareholder protection role and the

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3 *Re Opes Prime Stockbroking Ltd (No 1)* (2009) 73 ACSR 385.

4 See, by way of example, the cases referred to in footnote 28 of *Re Ozgrowth Limited [No 2]* [2022] WASC 167; See also *Re Tri AusMin Limited (No 2)* [2014] FCA 833 at [12].

5 *Re Ozgrowth Limtied [No 2]* [2022] WASC 167 at [21]; *Re Tri AusMin Limited (No 2)* [2014] FCA 833 at [10] – [13]; *Re Amcor Limited (No 2)* [2019] FCA 842 at [18]–[20] and *Re Think Childcare Limited (No 2)* [2021] FCA 1228 at [17] – [21].

critical role of those disclosure obligations in safeguarding the interests of target shareholders (particularly "mum and dad" shareholders).

23. The compulsory acquisition regime that applies to schemes (in which a relatively small number of shareholders can potentially determine the fate of all shareholders) is very different to the regime that applies under a takeover bid under Chapter 6 of the *Corporations Act*. Under a takeover bid, the bidder has to acquire a relevant interest in 90% of **all** shares in the target company before it can compulsorily acquire the remaining 10%[6] and even if that 90% threshold is reached, the bidder must go through the process set out in Chapter 6A. Thus, (for instance, in the context of a takeover bid for a widely-held publicly-listed company) acceptance of the bid by a small number of shareholders will not (unless the 90% threshold is reached) result in the remaining shareholders being compelled to accept the bid or to otherwise transfer their shares to the bidder.

24. Simply to compare the threshold for compulsory acquisition under a scheme to that under a takeover bid without taking into account other considerations (such as court supervision and the headcount test for schemes) may oversimply the differences as to "thresholds" between the regimes.[7] But the differences emphasise the importance of the contents of the scheme booklet (including the scheme of arrangement document).

Importance of disclosure: The "scheme booklet"

25. The purpose of the scheme booklet is to explain the transaction and to set out information that is material to making of a decision by shareholders whether or not to agree to the scheme. The scheme booklet is critical, as shareholders will decide whether to attend the scheme meeting and whether to vote on the scheme resolution based on the information disclosed in the scheme booklet. Experience suggests that retail shareholders (particularly mum and dad shareholders) only read the introductory sections of the scheme booklet (including the chairperson's letter) and the "question and answer" section. Accordingly, it is important that the parts of the scheme booklet that such shareholders are likely to read contain full, candid and prominent disclosure in clear terms of all material aspects of the transaction (including why it is being proposed) and that the advantages and disadvantages of the transaction be presented in a balanced way.

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6 Section 661A(1) which provides that a bidder may compulsorily acquire any securities in a bid class if it has obtained a relevant interest in 90% of the relevant securities and acquired at last 75% in number of the relevant securities.

7 See the discussion on this issue in T Damian and A Rich, Schemes, Takeovers and Himalayan Peaks, (4th edition, 2021) at [14.5.2].

26. If such disclosure is not made or if the disclosure is inaccurate or incomplete (or if material information is at the back of a lengthy booklet where it is unlikely to be read), target shareholders may not fully understand the transaction or not be made informed of important aspects of the transaction and may thereby vote or decide not to attend the scheme meeting on a misinformed basis.

27. Further, target shareholders are not likely to review (nor completely understand) the terms of the proposed scheme of arrangement document, which is annexed to the scheme booklet. The terms of that instrument contain important operative provisions dealing with matters such as the transfer of the target shares to the bidder without the need for any act of the shareholder, the trigger event for the transfer, payment by the bidder of the scheme consideration for the transfer and the despatch of the scheme consideration to shareholders, the potential withholding of amounts by the bidder (e.g. in respect of overseas shareholders in certain circumstances), the treatment of unclaimed moneys, the operation of court orders regarding third party payments, and how such court orders sit with the payment of the scheme consideration to shareholders.

28. It must be remembered that the terms of that instrument are effectively "imposed" upon all target shareholders, once the scheme has been approved by the court and the approval order lodged with ASIC. But it is (necessarily) expressed in technical, often dense language that may not be readily comprehensible to non-lawyers.

29. The scheme also contains other "imposed" terms, including warranties (e.g. about encumbrances over the shares and the capacity of the shareholder to transfer shares) that target shareholders are deemed to have given, and agreements by target shareholders (e.g. as to the binding nature of the scheme and other matters concerning transfer of their shares, the transfer of the beneficial interest in the shares prior to registration of the share transfer, the appointment of the target company to undertake actions on the shareholder's behalf in connection to the scheme, and the deemed appointment by the shareholder of the bidder as the shareholders' proxy to attend meetings pending registration of the share transfer).

30. These "imposed" terms are not matters of mere formality nor simple machinery provisions. They both regulate the compulsory transfer of shareholders' property (their shares) and the payment for that transfer, and require (through deeming provisions) the target shareholders to give warranties. If not drafted appropriately, these terms can operate to the detriment of the target shareholders. Accordingly, it is important, in drafting scheme terms, that the interests of the target shareholders are considered and that the terms safeguard those interests. Ultimately, it is target shareholders whose shares will be compulsorily acquired on the terms of the scheme. It is reasonable for target shareholders to proceed on the basis that the scheme terms have been prepared as to protect their interests.

31. Scheme terms continue to evolve. A relatively recent development that further safeguards shareholders' interests has been to make the transfer of the target shares to

the bidder conditional not on the deposit by the bidder of the scheme consideration into a trust account operated by the target company (which had been the previous practice) but upon the actual despatch of the consideration from the trust account to the target shareholders.[8] Having the transfer of target shares take place after the despatch of the scheme consideration effectively removes any risk that target shareholders will not be paid for the compulsory transfer of their shares.

Review of the scheme booklet and the terms of the scheme: by ASIC and the court

32. Both the draft scheme booklet and the terms of the proposed scheme are reviewed in the first instance by ASIC (during the statutory ASIC review period) and by the court in the lead up to and at the first court hearing.

33. ASIC's review is undertaken by experienced staff, who are familiar with schemes and recent developments in both transactional structuring and practice and procedure. ASIC's role means that, in reviewing the documentation for a particular scheme, its staff bring their experience and lessons from reviewing schemes in other transactions. Invariably, the ASIC review will identify matters that require further disclosure in the draft scheme booklet. It is not uncommon that the ASIC review can result in changes to the terms of the scheme as well.

34. Similarly, it is not uncommon for the court, after reviewing the draft scheme booklet, to require further disclosure about the proposed transaction (often, more detailed and prominent disclosure of certain matters in the chairperson's letter). Examples of scheme transactions where this has occurred are set out in paragraph 66 below. Further, it is part of the court's role at the first court hearing to consider the operative and technical terms of a scheme and to suggest or indicate what changes (if any) should be made to the terms of the scheme.[9]

35. When requiring changes be made to the draft scheme booklet and scheme terms, the courts are seeking to safeguard the interests of target shareholders. By requiring more detailed and prominent disclosure, the courts are seeking to ensure that shareholders are fully informed and able to vote on an informed basis. By reviewing and amending, if need be, the scheme terms, the courts seek to ensure that if the scheme is approved and a compulsory transfer of shares occurs, the terms of the scheme do not operate against the interests of the target shareholders.

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[8] See, by way of example, *Re Kidman Resources Limited* [2019] FCA 1226 at [41] – [43].

[9] *Re Wesfarmers Limited* [2018] WASC 308 at [127] and *Re Kangaroo Resources Limited* [2018] WASC 327 at [50].

36. It is very important to understand that the court's review of the draft scheme booklet is not a duplication of the review undertaken by ASIC. ASIC reviews the draft scheme booklet through "two lenses". First, ASIC looks to see if the draft booklet contains the "prescribed information" required under section 412(1) of the *Corporations Act* (being the information prescribed by regulation 5.1.01 of the *Corporations Regulations* and Schedule 8 to those Regulations).[10] Secondly, ASIC reviews the draft booklet through the lens of the "Eggleston Principles" in section 602 and the bidder statement content requirements in section 636 to determine if target shareholders are being adequately informed and protected in the same way they would if the proposed change of control transaction had been undertaken through a Chapter 6 takeover bid.[11]

37. At the first court hearing, the court relies on ASIC's statutory role in respect of schemes,[12] and does not seek to duplicate it. Any further disclosure that the court requires usually follows counsel drawing the court's attention (through its full disclosure obligation) to particular aspects of the scheme. Having those matters drawn to its attention, the court considers whether the adequacy of the disclosure and its prominence is sufficient. If it is not, the court will require further disclosure.

38. Further, in satisfying itself that the scheme booklet will adequately inform target shareholders about the transaction, the court relies upon the verification process undertaken by the target company and the bidder. That process is described and explained in affidavit evidence filed before the first court hearing. These affidavits are made by the company officers or advisers who were responsible for the verification process. By the affidavit, they give sworn evidence about the process. The target company's affidavits will usually include a statement to the effect that the deponent is not aware of any other material information that has not been included in the draft scheme booklet.

39. The awareness that the draft scheme booklet (including the terms of the scheme) will be reviewed by ASIC and the court, coupled with the knowledge that the scheme company has a legal obligation to bring to the court's attention all relevant matters and the "full disclosure" obligation on the part of counsel, brings a sharp focus and attention to the task of preparing scheme documentation. For individual officers or advisers, having to make an affidavit has the same effect.

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[10] ASIC Regulatory Guide 60 at RG 60.9.

[11] ASIC Regulatory Guide 60 at RG 60.10, 60.19 and 60.20.

[12] *Re Seven Network Limited (No 3)* [2010] FCA 400 at [43]; *Re Seven Network Limited* [2010] FCA 220 at [15].

Importance of disclosure: duties of the target company and its counsel

40. Section 412(1) of the *Corporations Act* requires that the draft scheme booklet contain, in addition to prescribed information, any information that is material to target shareholders in determining how to vote, in a given scheme transaction. But, given that the target and the bidder are seeking to use the scheme booklet to present the transaction in the most positive light and encourage a "yes" vote, they may be tempted to play down any disadvantages of the transaction or to address issues or concerns at the back of the scheme booklet in general language. These could relate to matters such as operational and financial performance of the target company, benefits payable to directors if the scheme proceeds or any on-going involvement of a target company director with the business of the target company following its acquisition by the bidder.

41. The existence of a court-supervised regime under which the target company has an obligation to bring to the court's attention all relevant matters means that the draft scheme booklet – and importantly, the form and location of the disclosure it contains – is prepared with that regime in mind.

42. The role of counsel for a target company also fulfils an important function in relation to disclosure and the preparation of the terms of the draft scheme. Counsel's primary duty is to the court. So, for example, if a target company is "pushing back" on making disclosure of a particular matter, the fact that counsel will specifically draw that matter to the court's attention (with the likelihood that the court will require disclosure and may make adverse comments about the target company's position) acts as a strong incentive for the target company to make the disclosure up-front. The same incentive applies for the scheme terms, including to the inclusion of appropriate shareholder safeguards.

43. Resistance or hesitancy about disclosure can arise irrespective of the size of the target company or the aggregate value of the transaction. But the shareholder safeguards that come from the scheme company's obligation to bring all relevant matters – and counsel's obligation to bring any problematic aspect – to the court's attention apply to **all** scheme companies, irrespective of their size. Accordingly, caution should be exercised when considering whether there should be a less formal scheme regime for smaller companies or smaller transactions, if such a regime were to remove or limit these safeguards

Comparison with takeovers

44. Just as the "compulsory acquisition threshold" for a scheme is different to a takeover bid, so too the terms of a scheme are different to the terms of a takeover bid. Whereas the terms of the scheme are intended to facilitate the compulsory acquisition of property (being the shares of the target shareholders), the terms of a takeover bid reflect a contractual offer and acceptance process, which a particular target shareholder can reject or ignore "without consequence", unless the 90% threshold for the takeover bid

is satisfied. In this sense, the terms of a takeover bid do not require the pre-vetting or independent review (including by ASIC) prior to being despatched to target shareholders that a scheme (and the scheme booklet) do.

(ii) The respective roles of the court, ASIC and the Takeovers Panel

Introductory comments

45. The Consultation Paper states (without citing examples) that there have been cases where there have been disputes before both the Takeovers Panel and the courts in relation to the same scheme transaction and that, where this arises, it is likely to lead to significant and sometimes duplicate costs for the parties involved.

46. It is important to understand the different roles and functions that the Takeovers Panel and the courts perform in relation to scheme transactions.

47. Although there have been matters where an application has been made to the Takeovers Panel on a discrete issue in a scheme transaction (such as the issue of exclusivity in a "pre-scheme" agreement or the operation of a clause in a scheme implementation agreement),[13] those applications have usually (if not invariably) been made shortly after the relevant agreement was entered into and before any application had been made to the court for orders to convene a scheme meeting. Thus, the application to the court came after the resolution of the application to the Takeovers Panel. Further, the issue before the Takeovers Panel has usually been discrete (such as exclusivity, for example) and not the same as the issues requiring court determination. Accordingly, there has been "no duplication of issues" between the Takeovers Panel and the court and "no duplication of any costs". In the relatively uncommon situation where the Takeovers Panel has made a determination (and/or published reasons) in a particular scheme transaction, the Panel and the court have performed their respective but different functions.[14]

48. In the section above, we highlighted aspects of the review process undertaken by ASIC and the court in the context of the compulsory acquisition nature of a scheme. In this section, we address:

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[13] *AusNet Limited Services 01* [2021] ATP 9; ***Virtus Health Limited*** [2022] ATP 5 and *Ross Human Directions Ltd* [2010] ATP 8.

[14] See the attached table of cases, which shows a small number of Takeover Panel determinations in a scheme transaction in the context of the volume of scheme cases heard by the courts.

(a) the broader role of the court in respect of schemes as well as the court's performance in dealing with scheme cases;

(b) the important statutory role played by ASIC, along with the assistance and guidance it provides to the market by issuing guidance notes and reports; and

(c) the complementary role played by the Takeovers Panel in schemes.

The performance of the court in scheme matters

49. In recent years (and save for a pandemic-induced lull in part of 2020), there has been a high level of scheme activity, with 2021 being a record year for public mergers and acquisitions.[15]

50. Recent years have also seen complex issues arise in scheme cases, including whether a director receiving a benefit that other shareholders are not should make a voting recommendation and whether a special dividend constitutes "financial assistance" for the purposes of section 260A of the *Corporations Act.* The period has also seen novel approaches being adopted in scheme transaction structures, such as having two concurrent but alternative schemes being proposed, having schemes proposed with an alternative takeover bid, and having schemes proposed with a concurrent share sale agreement for a founding shareholder.[16]

51. During the early period of the pandemic, courts adapted quickly to the need for virtual scheme meetings by using the powers under section 1319 to fashion appropriate orders dealing with both convening and holding virtual scheme meetings and for the scheme materials to be despatched to target shareholders in a pandemic environment.[17] These developments provide a good illustration of how, over many years, courts have adopted a pragmatic and sensible approach to issues that have arisen in schemes.[18]

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[15] Gilbert + Tobin – Analysis of Australian public mergers & Acquisitions in 2021.

[16] Re Healthscope Limited [2019] FCA 542; *Re Village Roadshow Limited* [2020] FCA 1669; *Re Virtus Health Limited* [2022] NSWSC 597.

[17] *Re Avita Medical Limited* [2020] FCA 592; *Re Windlab Limited* [2020] NSWSC 571; *Re Zenith Energy Ltd* [2020] WASC 266.

[18] Other examples include supplementary disclosure and mechanisms to accommodate competing and revised proposals within the scheme framework: see Damian and Rich, *Schemes, Takeovers and Himalayan Peaks* (4th edition, 2021) at page 1641 for examples of where the courts have developed sensible approaches to scheme issues; see also *Re Billabong International Limited (No 2)* 2018] FCA 496 and *Re OneVue Holdings*

Table of cases

52. Attached to this submission is a table that sets out (to the best of our knowledge) all change of control scheme cases that have been heard in Australia since 1 July 2018.

53. The table shows that, despite the rise in scheme activity, courts have operated extremely effectively and efficiently in dealing with scheme cases. For the financial years ended 30 June 2019, 2020 and 2021, there were 30, 20 and 27 change of control scheme cases heard respectively (where a case comprises both the first and second court hearing) with 35 change of control scheme cases being heard in the period 1 July 2021 to 30 April 2022. The table also shows that:

    (a) court orders (whether meeting orders or approval orders) are almost invariably made on the day of the relevant hearing;

    (b) reasons for decision are usually published shortly after the date of the hearing; and

    (c) there are judges across Australia who have expertise in scheme cases.

54. The timely publication of written reasons for decision, particularly in times of increased scheme activity, has led to greater "knowledge capture" on key scheme issues (including about novel and complex matters). That in turn has facilitated a more consistent approach by courts across the nation to schemes and scheme transaction structures. This knowledge-capture and national approach has provided greater certainty to scheme proponents and their advisers in formulating and proposing particular transactions.

55. Further, the duration of most scheme hearings is around 1 hour, with many hearings completed in less than that. There are several reasons for that. First, the evidence is in writing (oral evidence is seldom required in a scheme case) and is readily understood by those who practice in the area. Second, the court receives written submissions (drafted or settled by counsel) in advance of the hearing, which outline the transaction and identify key aspects including any matters required to drawn to the court's attention. Finally, counsel for the target company can take the judge at the hearing to particular aspects of the scheme materials and elaborate upon them as well as address any questions or issues raised by the judge. The provision of written submissions together

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Limited (No 2) [2020] FCA 1427 regarding approaches adopted to accommodate proposals to increase the scheme consideration amount.

with oral submissions at the hearing enables the judge to prepare written reasons quickly.

56. Accordingly, it appears that scheme cases do not absorb a lot of court time and resources, compared to (say) civil trials or appeals. Further, the expedition of the hearings means that judges often list them outside their other court commitments. Courts also understand the tight timetables to which scheme proponents work and are flexible and accommodating about dates and times for hearings and the provision of material to the court.

The role of the court

57. A scheme usually involves two court hearings: the first court hearing at which the scheme company seeks orders that a scheme meeting be convened; and the second court hearing, which occurs after the meeting and at which the court's approval of the scheme is sought (if the scheme has been agreed to the scheme meeting).

The first court hearing

58. At the first court hearing, the court will consider whether the proposed scheme is fit for consideration at the proposed meeting and whether target shareholders will be properly informed (by the scheme booklet) about the proposed transaction before the meeting.[19]

59. Under section 411(2) of the *Corporations Act*, the court must not make a scheme meeting order unless 14 days' notice of the first court hearing has been given to ASIC and the court is satisfied that ASIC has had a reasonable opportunity to examine the terms of the scheme and the draft scheme booklet, and to make submissions to the court about them. As noted above, in addition to ensuring that the scheme booklet contains the "prescribed information", the ASIC review is undertaken through the prism of the Eggleston Principles in section 602 and the bidder statement content requirements in section 636.

60. Because there is no contradictor at a first court hearing (the bidder may appear by leave but does not typically appear as a contradictor but rather as a supporter of the scheme), the scheme company has a "heavy responsibility" of bringing to the court's attention

[19] See, by way of example, *Re Kidman Resources Limited* [2019] FCA 1226 at [22] – [24] and *Re Think Childcare Limited* [2021] FCA 1042 at [38].

all relevant matters.[20] In *Re Zenyth Therapeutics Limited v Smith* [2006] VSC 436 (at [92]), Justice Dodds-Streeton set out the requirements of this obligation:

> "*Under a scheme of arrangement, corporate control and the expropriation of interests may be achieved by means of a considerably smaller majority than that required for a takeover under Chapter 6 of the Act. Full and fair disclosure is essential. Proponents of schemes should adopt a liberal approach when determining the degree of disclosure necessary to fulfil their obligations."*

61. The court's role is supervisory and, to a degree, inquisitorial.[21] Courts do not give a perfunctory consideration to the scheme. Judges often interrogate not only the material but also counsel for the scheme company. As noted above, the court is heavily reliant upon counsel to bring to its attention any aspect of the scheme that requires attention, including any matter that is potentially problematic.[22] In *Re SMS Management & Technology Limited* [2017] VSC 257 (at [8] – [9]), Justice Robson described counsel's obligation in a scheme and the importance of that role as follows:

> *"The preparation of a scheme arrangement involves a high degree of care and skill and a large volume of papers produced. This requires the involvement of competent and experienced solicitors. It is customary, and of a great deal of assistance to the Court, for the application to the Court be made by experienced and competent counsel.*
>
> *The Court relies greatly on counsel bringing to the attention of the Court matters in the scheme that should be addressed by the Court or otherwise known by the Court…."*.

62. The court also relies on ASIC to raise any particular issues about the scheme.[23] In *Re Seven Network Limited* [2010] FCA 220, Justice Jacobson, in referring to the court's reliance on ASIC, said as follows "*Importantly, the role of ASIC has been referred to by the High Court which observed that its predecessor, the Australian Securities*

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[20] *Re Wesfarmers Limited* [2018] WASC 308 at [45]; *Re Seven Network Limited* [2010] FCA 220 at [9]; *Re Macquarie Capital Alliance Ltd* [2008] NSWSC 745; *Re Permanent Trustee Co Ltd* [2002] NSWSC 117.

[21] Re *NRMA Limited* [2000] NSWSC 82 at [12].

[22] *Re Seven Network Limited (No 3)* [2010] FCA 400 at [42]; *Re Seven Network Limited* [2010] FCA 220 at [13]; *Re Straits Resources Ltd* [2010] FCA 1466 at [52]; *Re SMS Management & Technology Limited* [2017] VSC 257 at [8] – [9].

[23] *Re Seven Network Limited* [2010] FCA 220 at [15]; *Re Seven Network Limited (No 3)* [2010] FCA 400 at [43].

Commission, has an obligation to assist the Court by presenting argument if it deems that course necessary or desirable". [24]

63. ASIC performs this role either by appearing at the first court hearing to raise any concerns[25] or by setting out its concerns in a letter provided to the court (noting that ASIC customarily provides what is known as a "no intention to appear" letter, but will from time to time raise particular matters for the court's attention in that letter).[26]

64. In *Re SMS Management & Technology Limited* [2017] VSC 257 (at [7]), Justice Robson said the following about the importance of ASIC's role in reviewing the scheme booklet and providing assistance to the court:

> *"ASIC plays an important role in the scheme approval process; the scheme booklet is required by law to contain a great deal of information, and it must be provided to ASIC for examination of the terms of the scheme and the explanatory statement. The Court is greatly assisted by the role that ASIC performs in considering the scheme material."*

65. The court's supervisory role extends to considering the operative and technical terms of the proposed scheme. At the first court hearing, courts have raised issues about the terms of the proposed scheme and requested that consideration be given by the scheme company and its legal advisers to those matters.[27] Examples relate to technical terms of the proposed scheme as well as terms governing the timing of the transfer of the target shares to the bidder in the context of the payment of the scheme consideration to the shareholders.[28] As Justice Vaughan observed in *Re Wesfarmers Limited* [2018] WASC 308, as part of its supervisory role, the court may suggest or require the re-drafting of the scheme documentation and may seek to ensure that the terms of the scheme will be

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[24] *Re Seven Network Limited* [2010] FCA 220 at [15], where the relevant High Court case was *Australian Securities Commission v Marlborough Gold Mines Limited* (1993) 177 CLR 485 (at 506).

[25] See, by way of example, *Re Healthscope Limited* [2019] FCA 542 and *Re Capilano Honey Limited (No 2)* [2018] FCA 1925.

[26] See, by way of example, *Re Unity Mining Limited (No 3)* [2016] VSC 831.

[27] *Re Wesfarmers Limited* [2018] WASC 308 at [127].

[28] *Re Wesfarmers Limited* [2018] WASC 308 at [127] and *Re Kangaroo Resources Limited* [2018] WASC 327 at [50].

enforceable by those bound by it against those who seek to implement the scheme or obtain benefits from it.[29]

66. As noted above, the court's first court hearing role also includes a review of the draft scheme booklet. The court may suggest or require that additional disclosure is made.[30] Examples include additional information in the chairperson's letter about franking credits in respect of a potential special dividend,[31] additional information about a tax withholding declaration in the scheme[32] and further disclosure of employee arrangements and entitlements relating to a chief executive officer.[33]

67. Thus, it is readily apparent that the court has the interests of target shareholders "front of mind".

The second court hearing

68. If the target shareholders pass the scheme resolution by the statutory majorities at the scheme meeting, the target returns to court to seek that the scheme be approved under section 411(4) of the *Corporations Act*.

69. As noted above, the court is not bound to approve a scheme simply because the target shareholders have agreed to it.[34] Further, the second court hearing provides an opportunity for any person interested in the scheme to come forward and make arguments in opposition to its approval. There have been cases in which that has occurred.[35] Thus, the second court hearing becomes the forum in which that dispute is heard. Importantly, the dispute is heard in open court, and can be attended not only by

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29 *Re Wesfarmers Limited* [2018] WASC 308 [68].

30 *Re Wesfarmers Limited* [2018] WASC 308 at [68]; *Re Kangaroo Resources Limited* [2018] WASC 327 at [31].

31 *Re SMS Management & Technology Limited* [2017] VSC 257 at [34].

32 Ibid at [36] – [37].

33 *Re 3P Learning Limited* [2020] NSWSC 1573 at [10]. For other examples of further disclosures made in the draft scheme booklet through the Court process see Damian and Rich, *Schemes, Takeovers and Himalayan Peaks* (4th edition, 2021) at page 179, footnote 92.

34 *Re Healthscope Limited (No 2)* [2019] FCA 759 at [6].

35 *Re Zenyth Therapeutics Limited v Smith* [2006] VSC 436.

shareholders and others interested in the scheme company, but also by the general public.

70. In assessing whether to approve the scheme, the matters that the court considers include: whether there has been full and fair disclosure to members of all material information; whether the meeting orders made at the first meeting (both as to the despatch of the scheme materials and the holding of the meeting) were complied with; whether the scheme is "fair" and reasonable so that an intelligent and honest person properly informed might approve it; and whether the target company has brought to the Court's attention all matters that could be considered relevant to the exercise of the Court's discretion whether to approve the scheme.[36] The court also considers whether there is any suggestion of oppression of any minority.[37]

71. As described above, shareholders have a right to appear at the second court hearing and object to the approval of the scheme. This right to object is referred to in the scheme booklet and the scheme company is required to advertise the date of the second court hearing and a shareholders' right to object. While there is no general or ordinary rule about the costs of a shareholder objector, courts have made costs orders in favour of shareholder objectors where there has been a sensible basis for their objections.[38]

72. As noted above, even if the statutory voting majorities are met at the scheme meeting, the court will consider the overall voter turnout levels and, where they were low, seek to satisfy itself, based on the evidence, that no material error or irregularity arose regarding the despatch of the scheme materials. There have been cases where such matters have meant that courts have refused to approve schemes even where the statutory voting majorities have been satisfied.[39]

73. The Consultation Paper refers, in the context of shareholder protection, to section 411(17) of the *Corporations Act*. That section relates to the role of the court at the second court hearing. In essence, it requires that the court must not approve a scheme unless (a) it is satisfied either that the scheme has not been proposed for the purpose of enabling any person to avoid the operation of Chapter 6 or (b) a statement in writing by ASIC is produced to the court stating that ASIC has no objection to the scheme

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36 *Re Kidman Resources Limited (No 2)* [2019] FCA 1513 at [15].

37 *Re Healthscope Limited (No 2)* [2019] FCA 759 at [7].

38 *Re NRMA Limited* [2000] NSWSC at [47].

39 Damian and Rich, *Schemes, Takeovers and Himalayan Peaks* (4th edition, 2021) at page 1623, footnote 85.

(although the court need not approve a scheme merely because such a statement has been provided).

74. Courts have recognised that many transactions that could be carried out under Chapter 6 are carried out by a scheme and that the *Corporations Act* provides a choice and is neutral as to the choice made.[40] The Takeovers Panel also recognises that schemes are an alternative to a Chapter 6 takeover bid.[41]

75. In circumstances where ASIC has not provided a statement in section 411(17), the courts have adopted a practical approach when interpreting the section's requirements, recognising that a transaction can be undertaken via a scheme or a takeover.[42] But that does not diminish shareholder protection. Once it is recognised that change of control transactions can be undertaken through either a scheme or a takeover, shareholder protection is addressed through the court's role at both the first and the second court hearings (as described above).

The Eggleston Principles in the context of the courts approach to schemes

76. The Consultation Paper also refers (at page 10) to concerns from some stakeholders that schemes are being used in a way that avoid the protections afforded by the Eggleston Principles. The Consultation Paper repeats this statement (at page 12), saying that the Government is aware of some concerns that schemes can be used in a way that avoids the Eggleston Principles. These ostensible concerns are not identified or explained, which makes it difficult specifically address them or their underlying premises (if any).

77. Further, the Consultation Paper refers (at page 12) to "regulatory inconsistency" between takeovers and schemes and notes that the minimum disclosure requirements, the minimum bid price rule and the rule against collateral benefits (contained in Chapter 6) apply to takeovers but not schemes. The Paper observes that questions have been raised whether the regulatory requirements between schemes and takeovers should be aligned. Again, the "questions" are not identified.

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40 *Re Coles Group Limited (No 2)* [2007] VSC 523 at [22] and *Re Rusina Mining NL (No 2)* (2010) 78 ACSR 615 at [39].

41 *Re Colonial First State Property Group (No 1)* [2002] ATP 15 at [71] and T Damian and A Rich, Schemes, Takeovers and Himalayan Peaks, 4th Edition at [11.9].

42 *Re Rusina Mining NL (No 2)* [2010] FCA 609 and *Re Cortona Resources Ltd (No 2)* [2013] FCA 302.

78. We make the following observations about the Eggleston Principles in the context of schemes and the Consultation Paper's statement about "regulatory inconsistency" between takeovers and schemes.

79. First, the Consultation Paper appears to proceed on the premise that the scheme regime is required to ensure that the Eggleston Principles are upheld and applied (as shown by the words on page 9 "Ensuring schemes uphold the Eggleston Principles") in order to ensure shareholder protection. With respect, that premise does not withstand scrutiny. The Eggleston Principles and the rules in Chapter 6 rules are statutory requirements that apply to a takeover bid in circumstances where a bidder's statement is sent without being pre-vetted by ASIC, where there is no statutory supervision of the process, where the bidder can bypass the directors of the target company and make an offer direct to the target company shareholders and where any intervention of the Takeovers Panel occurs only if an application is made to it.

80. In that unsupervised environment, it makes sense to prescribe the actions of the participants in a takeover bid process, so as to protect shareholder interests. But the rigid application of these principles and rules is not required under the scheme process, which is subject not only to the court's supervision but its ultimate approval. But the rigid application of these principles to schemes could operate **against** shareholder interest. The scheme process enables and facilitates flexibility in change of control transactions and for the transaction to be tailored to the particular commercial circumstances.[43] For example, a bidder may require that key members of management receive part of their scheme consideration as scrip in the bidder vehicle, thereby achieving a higher cash price for other shareholders. Further, the scheme regime allows such differential treatment to be addressed by having separate class meetings for those receiving part scrip and those receiving all cash.

81. Second, in any event, the Eggleston Principles are already accommodated in the scheme process. As noted above, ASIC reviews the draft scheme booklet through the lens of the Eggleston Principles and the bidder statement content requirements. ASIC also considers the question of collateral benefits when reviewing the draft scheme materials.[44]

82. Following the ASIC review, the court's approach at the first hearing also accommodates the substance of the Eggleston Principles, while preserving the ability for more flexible transactions structures. At the first court hearing, the "identity principle", the "reasonable time principle" and the "disclosure principle" are each addressed, with the court sometimes requiring additional disclosure. If a scheme involves differential scheme consideration or collateral benefits (relevant to the "equality principle") these

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[43] This flexibility is inherent not only the purpose of schemes of arrangement and the and statutory provisions governing them it is also reflected in their history. The origins of the scheme of arrangement lie in the *Companies Act 1862* (UK).

[44] ASIC Regulatory Guide 60 at RG 60.24.

can be addressed by having separate class meetings or by the recipient of the benefit not voting at the scheme meeting.

83. The court expressly takes account of the Eggleston Principles through its reference to guidance notes issued by the Takeovers Panel on the question of exclusivity and break fees (Guidance Note 7) and collateral benefits (Guidance Note 21).[45] On the question of collateral benefits, the court in a recent scheme case arguably looked beyond the approach adopted by the Takeovers Panel: *Re Webster Limited* [2019] NSWSC 1907 (at [20]-[21]). While Guidance Note 21 looks at the concept of "net benefit", in that case the Court observed that while the relevant arrangements were economically neutral, they nonetheless conferred a right on the relevant shareholders that other shareholders did not have. (As it happened, the scheme had been structured in such a way that the Court did not ultimately have to decide whether separate classes were required.)

84. Another recent case addressed the minimum bid price rule (and section 602 more generally) in some detail in the context of a scheme: *Re iCar Asia Limited* [2021] NSWSC 1713. There, the Court referred to submissions to the effect that while section 602 has no direct application to schemes, the policies of section 602 may nonetheless be a relevant consideration for a court when considering a scheme and that, in assessing the fairness of a scheme, the court is entitled to have regard to the equality principle.[46] The Court accepted the submission that, if features of a scheme were inconsistent with the equality principle, that would be a factor for the court to consider and weigh up as part of its fairness discretion along with the protections and safeguards available under the scheme process.[47]

85. In *Re iCar Asia Limited*, there was a difference between the cash consideration per share payable under the scheme and the value of the cash consideration payable to a certain shareholder under a pre-scheme sale agreement (which was higher). The Court determined that this matter did not give rise to any reason not to convene the scheme meeting. The factors it took into account in reaching this view included the relevant disclosures in the scheme booklet, the view of the independent expert, the fact that the independent board committee had regard to the sale agreement in forming its recommendation to shareholders to vote in favour of the scheme, and ASIC's ultimate

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45 As to Guidance Note 21, see *Re Healthscope Limited* [2019] FCA 542; *Re Webster Limited* [2019] NSWSC 1907; *Re David Jones Ltd (No 2)* (2014) 101 ASCR 381. As to Guidance Note 7 see, *Re Windlab Limited* [2020] NSWSC 571; *Re DuluxGroup Limited* [2019] FCA 961; *Re Webster Limited* [2019] NSWSC 1907.

46 *Re iCar Asia Limited* [2021] NSWSC 1713, at [17].

47 Ibid [17].

position (after considering submissions) that it did not intend to appear and make submissions at the first hearing.[48]

86. The Court's approach in *Re iCar Asia Limited* demonstrates a clear recognition that, while section 602 has no direct application to schemes, the policies underlying the section may be a relevant consideration in considering the fairness of a scheme along with the protections and safeguards provided by the scheme process. Although the principles in section 602 guide a Chapter 6 takeover, takeover offers are made to target shareholders without the protections and safeguards – and "built-in" court oversight – of the scheme process.

87. Given the differences between the Chapter 6 takeover bid process and the scheme process and the approach adopted by courts regarding the Eggleston Principles and the Chapter 6 takeover rules, CommBar submits that it is not appropriate or desirable for there to be regulatory alignment between takeovers and schemes.

The role of ASIC

88. This submission has already addressed the important, statutorily-recognised, role that ASIC plays in the scheme process and the reliance that courts repose on ASIC and its role. It is not necessary to repeat those matters. But it is useful to make a few further observations about the benefits of ASIC's role in terms of shareholder protection and helping to facilitate a more consistent approach to scheme transactions across Australia.

89. In *Re Kangaroo Resources Limited* [2018] WASC 327, Justice Vaughan referred (at [32]) to the active engagement that had taken place by ASIC in its review of the draft scheme booklet and that disclosures about the funding for the transaction, the exclusivity arrangements and the break fee had been considerably enhanced as a result of the conferral between ASIC and the legal advisers for the scheme company. The enhanced disclosures provided important protection in terms of shareholder understanding of these material matters.

90. ASIC's approach to reviewing scheme materials is set out in Regulatory Guide 60, with which practitioners in the field are very familiar and understand. Further, ASIC produces a corporate finance report twice a year that includes updates about mergers and acquisitions and ASIC's position on scheme issues or developments during the relevant period. Again, these reports are well-known to and discussed by those who practice in the area and provide valuable assistance to scheme proponents when considering how to structure and approach a particular transaction.

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[48] Ibid [19].

The role of the Takeovers Panel

91. Division 2 of Chapter 6 of the *Corporations Act g*overns the role of the Takeovers Panel. Section 659AA provides for the Takeovers Panel to be "the main forum for resolving disputes about a takeover bid until the bid period has ended".

92. While the Takeovers Panel may be the "main forum" for resolving disputes about takeover bids, it is not a court and does not exercise judicial power.[49] Further, the Panel does not have power to enforce its own orders. It is the role of the court, exercising judicial power, to make orders to ensure compliance with the Takeovers Panel determinations.[50]

93. There are presently 51 part-time members of the Takeovers Panel, comprising lawyers, company directors, investment bankers and other professionals. As at 30 June 2021, the Takeovers Executive was comprised of five staff (including two administrative staff) and legal secondees from major law firms around Australia (there being three secondees during the 2021 financial year).[51]

94. The Takeovers Panel has played a complementary and important role in schemes, where declarations by the Panel on discrete issues in the period following the announcement of a scheme transaction or potential scheme transaction, particularly about exclusivity and other deal protection devices, have played an important function in facilitating a more competitive market for change of control transactions for particular targets. These applications to the Panel are often made shortly after the announcement of scheme transactions or potential scheme transactions.

95. Recent examples show the important complementary role played by the Takeovers Panel. In *AusNet Limited Services 01* [2021] ATP 9, the Panel made a declaration of unacceptable circumstances in relation to a confidentiality deed which AusNet had entered with Brookfield Infrastructure Group (Australia) Pty Ltd and which AusNet had announced provided for Brookfield to conduct due diligence and for the parties to negotiate a scheme implementation deed on an exclusive basis. The confidentiality deed contained deal protection measures, including a no-talk restriction which did not have a "fiduciary out". An application was made to the Takeovers Panel by Australian Pipeline Limited (a competing bidder). The Panel made a declaration that the no-talk restriction without a fiduciary out (when taken with other relevant circumstances) constituted unacceptable circumstances. Subsequent to that declaration, the Supreme

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[49] Damian and Rich, *Schemes, Takeovers and Himalayan Peaks*, (4th edition, 2021) at [2.5.8].

[50] *Attorney General for the Commonwealth v Alinta* (2008) 233 CLR 542.

[51] See the Takeovers Panel Annual Report, 2020-2021.

Court of New South Wales made scheme meeting orders at the first court hearing in relation to a proposed scheme under which an entity controlled by Brookfield Asset Management Inc would acquire all of the schemes in AusNet.[52]

C. Discussion Questions

Schemes of Arrangement and the court

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.

96. As will be clear from what has been said above about the role and performance of the court in change of control schemes, CommBar considers that the scheme of arrangement rules work efficiently and effectively and that having judges with deep expertise in schemes and processes that are understood by practitioners, has led to a more consistent nation-wide approach to schemes and scheme transaction structures that provides greater certainty to scheme proponents and their advisers.

97. This submission has addressed, in some detail, the approach adopted by courts with respect to both the Eggleston Principles and the Chapter 6 takeover rules. What that discussion demonstrates, CommBar submits, is that it is not appropriate or desirable for there to be regulatory alignment between takeovers and schemes.

98. The Eggleston Principles already play a role with schemes, first during ASIC's review of the draft scheme materials and then by the court at the first court hearing. Overlaid on that is the fact of the court's supervision (which does not exist in a takeover bid), and the duties on the scheme company (and counsel) to bring to the court's attention all relevant matters.

99. To seek to impose a regulatory alignment or a rigid application of the Eggleston Principles in this court-supervised regime, which already provides for full disclosure, could undermine the flexibility of the scheme of arrangement regime and the advantages it provides to formulating and implementing transactions tailored to the unique circumstances of the particular target and thereby the best interests of shareholders. The court is well able to deal with matters such as differential scheme consideration or collateral benefits through existing mechanisms such as ordering separate class meetings or that relevant shareholders not vote at the scheme meeting.

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[52] For another recent example, see *Virtus Health Limited* [2022] ATP 5, where the Takeovers Panel made a declaration of unacceptable circumstances in relation to certain exclusivity arrangements and where subsequently, scheme meeting orders were made at a first court hearing in relation to a proposed scheme for the acquisition of all of the shares in Virtus: see *Re Virtus Health Limited* [2022] NSWSC 597.

And as shown above, the court in a recent case arguably went **beyond** the net benefit test set out in Takeovers Panel Guidance Note 21. But binding courts to a rigid application of the takeover rules relating to collateral benefits and the net benefit test could act to the detriment of the interests of shareholders. The courts need to retain the flexibility to address the particular circumstances of scheme transactions to ensure that they are fair and to ensure that shareholders' interests are protected.

100. The Consultation Paper refers to "concerns" of some stakeholders that schemes are being used in a way that avoid the protections afforded by the Eggleston Principles. Because the concerns are not identified, it is difficult to address them.

101. If the Treasury is concerned about particular matters that have arisen in schemes concerning the Eggleston Principles or the Chapter 6 rules, CommBar would be pleased to consider them and provide a further submission about them and, if it is necessary for them to be addressed in the scheme regime, how that might be achieved.

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

102. Although CommBar considers that the present scheme system operates effectively and efficiently, there are ways that the scheme process could be streamlined and made more cost-efficient without losing important in-built safeguards.

103. The first relates to the scheme booklet and the second to the written submissions prepared for the first court hearing.

104. Scheme booklets are often very lengthy and at times difficult to navigate, particularly for retail "mum and dad" shareholders. As Justice Vaughan has observed, a balance needs to be struck as insufficient information may mean that members are not properly informed whereas too much information may mean that disclosure is unintelligible or incomprehensible.[53] The scheme booklet needs to be "realistically useful" to its intended audience.[54]

105. CommBar submits that practitioners could revisit, along with guidance from ASIC, how scheme booklets are prepared and presented. If scheme booklets were to be more streamlined and user-friendly, not only would their utility and comprehensibility be enhanced but also the cost of their preparation reduced. Many scheme booklets contain

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[53] *Re Wesfarmers Ltd* [2018] WASC 308 at [56].

[54] See the reference to *Fraser v NMRA Holdings Ltd* (1995) 55 FCR 452, 468 (in a different context) referred to at [56] of *Re Wesfarmers Ltd* [2018] WASC 308.

defined terms and so a shareholder may need to have one hand on the glossary page at the back of the booklet (where the definitions are typically set out) while reading the booklet in order to understand what is being said. Having a summary of the transaction at the start of the booklet which is not "glossary or definition driven" would assist shareholders in understanding what is being proposed in relation to their shares.

106. ASIC Regulatory Guide 228 "sets out our guidance on how to word and present prospectuses in a 'clear, concise and effective' manner". Attention could be turned to adopting the same type of wording and presentation concepts in the overall presentation of scheme booklets. Following a period of consultation with practitioners, a regulatory guide or other form of guidance should be promulgated about how scheme booklets should be prepared and presented.

107. As to written submissions, as noted above, written submissions play an important part in the court being able to efficiently and effectively deal with scheme matters, including the timely preparation of written reasons for decision. The matters addressed by such submissions include issues are that are commonly addressed at first court hearings (such as performance risk, exclusivity provisions and break fees). As a consequence, the submissions can be very lengthy.

108. Therefore, methods limiting the length of written submissions would be useful. Matters that are commonly addressed at a first or second court hearing could be identified in a court practice note that sets out the acceptable parameters for each matter. The written submissions could then say, in respect of each such matter, whether it accords with the practice note and then address the extent to which the relevant matter varies from the practice note.

109. It is tempting to say that affidavit evidence should be limited in order to reduce cost. But that temptation must be avoided. It needs be borne in mind that (insofar as change of control transactions are concerned) a scheme of arrangement is a process for compulsory acquisition of property. The court can only exercise its supervisory jurisdiction if it has the relevant evidence before it. It cannot enquire about matters it does not know about and cannot make decisions about aspects of the scheme without the relevant evidence. It cannot understand how a particular agreement operates in the totality of a scheme transaction if that agreement is not put into evidence before the court.

110. As noted above, the evidence required at both the first and second court hearings is well-understood by the relevant actors and each affidavit plays an important part in informing the court of relevant matters. The discipline of preparing affidavit material can reveal matters that are relevant to the exercise of its discretion. For example, the preparation of affidavit material about the despatch of scheme materials to shareholders requires the making of detailed investigations and inquiries that can reveal that errors or irregularities occurred in the despatch process. Requiring officers to make formal statements on oath about what they did (including inquiries they undertook) and why

enhances not only the disclosure made to the court but also, before the event, the relevant officer's attendance to and proper discharge of their tasks and responsibilities.

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?

111. This question is addressed in the answer to question 3 above.

112. In CommBar's view, it would not be desirable or appropriate for there to be regulatory alignment between takeovers and schemes.

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?

113. Before considering this question, it is convenient to make some initial observations.

Even if change of control schemes were transferred to the Takeovers Panel, the courts would still have power over other schemes

114. It is important to appreciate that even if the courts' role in change of control schemes were transferred to the Takeovers Panel:

(a) the courts' supervisory role would remain for other schemes, such as demerger schemes, re-domiciliation schemes, schemes to facilitate an internal reconstruction or amalgamation of a company and creditors' schemes; and

(b) some change of control schemes would nonetheless remain with the courts.

115. As to the second point, where a scheme involves the issue of scrip to an overseas shareholder in the United States, scheme proponents will likely continue to seek an approval order from the court in order to seek to rely upon the exemption provided by section 3(a)(10) of the US Securities Act of 1933 from the registration requirements

under that Act.[55] Further, a change of control scheme that also has a demerger element would remain with the courts, such as the recent transaction in *Re Cassini Resources Ltd* [2020] WASC 317. In addition, change of control transactions for those trust schemes in which the responsible entity seeks judicial advice would remain with the courts.

116. Accordingly, if the court's role in schemes were transferred to the Takeovers Panel, some change of control schemes would remain with the courts, with the potential for inconsistent outcomes and approaches. Better, the existing system – involving ASIC's statutory role and the courts' supervisory role – achieves the dual purpose of protecting shareholders' interests and facilitating an ever-increasing national approach to schemes. In addition, the complementary role played by the Takeovers Panel in addressing discrete matters such as "exclusivity" early on in a scheme transaction has played an important function in facilitating a more competitive market.

Implications and consequences of a transfer to the Takeovers Panel

117. As the Takeovers Panel is not a court and does not exercise judicial power, the question of transferring to it any aspect of the courts' role in schemes raises complex legal issues, including:

(a) whether legislation purporting to confer the courts' powers or functions on the Takeovers Panel would be constitutional; and

(b) whether the implied exclusion from the "Gambotto principles" for compromises, amalgamations and reconstructions, schemes of arrangement and takeover offers (for which protection is afforded to minorities under the *Corporations Act*) would apply if any role or function of the court in schemes were transferred to the Panel.[56]

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[55] As to a discussion of section 3(a)(10) of the US Securities Act 1933 and examples of cases which has sought to rely upon this exemption see Damian and Rich, *Schemes, Takeovers and Himalayan Peaks*, (4th edition. 2021) at 13.2.7.

[56] The "Gambotto principles' are those enunciated by the High Court in *Gambotto v W.C.P* (1995) 182 CLR 432 (and where, in essence, the Gambotto principles address the circumstances in which the majority can expropriate the shareholding interests of the minority); see also *Arakella v Paton* [2004] NSWSC 13 at [137].

118. In addition to these issues, the question of any transfer of the courts' role in change of control schemes to the Panel raises substantial practical and procedural issues. These include (but are not limited to):

(a) the cost of resourcing the Takeovers Panel to undertake the task of reviewing the draft scheme materials (since presumably that task would not fall to the Panel's 51 part-time members or to the current Panel executive who are responsible for discharging their current roles);

(b) whether there would be a role for ASIC in relation to schemes – either a specific role like the one already prescribed under Part 5.1 or a more general role reflecting its role as the corporate regulator;

(c) how the in-built safeguards that protect shareholders' interests in what is a compulsory acquisition of property regime would be preserved;

(d) whether there would be an obligation on the part of the scheme company to bring to the Panel's attention all relevant matters pertaining to the scheme and if so, how that obligation would operate and how the Panel would enforce it;

(e) whether the Panel would confer with advisers about disclosures in the draft scheme booklet (which as Justice Vaughan observed in the case discussed above led to enhanced disclosure);

(f) whether shareholders would have a right to object and be heard by the Panel, and if so, what the position for payment of their legal costs would be;

(g) how orders made by the Panel would be enforced, and whether courts would be required to enforce them;

(h) whether there would be any role for the courts in overseeing, superintending or reviewing actions or decisions of the Panel and, if so, the basis upon which such a role would be performed (i.e. whether it would be limited to cases of jurisdictional or other error or would encompass a broader type of "merits review");

(i) given that the courts would still have a role in determining certain types of change of control schemes involving the issue of scrip (discussed above):

(i) what processes would be put in place (if any are possible) to avoid inconsistent outcomes or decisions between the courts and the Panel in such schemes; and

(ii) whether the "split" between courts and the Panel depending on the character of a particular transaction justifies the inevitable loss of institutional experience and knowledge by each, and whether the benefits from the transfer outweigh that loss.

119. These questions need only be considered if there is a compelling reason for the courts' supervisory role to be transferred to the Takeovers Panel.

120. In CommBar's view, no such reason exists.

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? 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?

121. If, despite the above, a position was adopted to transfer some or all of the courts' role and functions for a change of control scheme, it would be critical for the in-built shareholder safeguards to be preserved in substance (including a legal obligation on the part of the scheme company to bring to the Takeovers Panel's attention all relevant matters as well as procedures and obligations which replicate the full disclosure obligation currently discharged by counsel with serious consequences if such obligations were not discharged).

122. As noted at the beginning of this submission, it is clear that the Consultation Paper has been prepared with a focus on safeguarding shareholder interests in change of control transactions. Any transfer of the courts' role in schemes to the Takeovers Panel would need to reflect this focus.

123. Given that the schemes are, in essence, a process for the compulsory acquisition of property, consideration would need to be given to having public hearings of the Panel on scheme matters in which objectors can appear rather than having compulsory acquisitions happening on the papers (noting that presently, Takeover Panel applications are primarily determined on written submissions). This would involve, in effect, the transferring of the costs of the current supervisory system from courts to the Panel. It is doubtful, therefore, whether transferring the courts' role to the Panel would achieve any real reduction in costs.

124. As to efficiency, the courts already operate efficiently, with orders usually made on the day with written reasons published shortly after and where the courts are usually able to address matters during the course of a hearing. Whether the Panel could reproduce that approach or those outcomes would depend upon the processes, procedures and resources put in place to handle the volume of cases currently handled by the courts.

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 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?***

125. CommBar repeats the answer to question 7 above.

126. Additionally, we observe that ASIC plays an effective and important role in schemes which the courts rely upon in discharging their supervisory role.

127. If the courts' role or function in schemes were transferred to the Takeovers Panel, CommBar submits that ASIC's review role should be preserved, particularly given that ASIC's role would remain for non-change of control schemes, as well as those change of control of schemes that would remain with the courts.

ANNEXURE

Note: The schemes identified in the table have been ordered by reference to the date of the **first court hearing**.

So, where the first court hearing and the second court hearing straddle two financial years, the scheme is described as falling within the first year.

The column headed "Takeovers Panel" indicates whether the Takeovers Panel published reasons for decision in any application that may have been made concerning the transaction the subject of the scheme.

Company name	Court	First court hearing					Second court hearing					Takeovers Panel
		Judge	Hearing date	Date of orders	Date of reasons	Citation	Judge	Hearing date	Date of orders	Date of reasons	Citation	
FY 2022 (1 Jul 2021 – 30 Apr 2022)												
Virtus Health Ltd	NSWSC	Black J	28 Apr 2022 2 May 3022 4 May 2022	4 May 22	16 May 22	[2022] NSWSC 597	Virtus was the subject of a bidding war between CapVest and BGH Capital. The proposed scheme related to a takeover by CapVest. Virtus received a superior takeover from BGH and, on 27 May 2022, announced the transaction implementation deed with CapVest had been terminated.					Yes
Palladium Holdings Pty Ltd	FCA	Yates J	6 Apr 2022	6 Apr 2022	6 Apr 2022	[2022] FCA 526	Yates J	16 May 2022	16 May 2022	16 May 2022	[2022] FCA 563	No
Crown Resorts Ltd	FCA	O'Bryan J	29 Mar 2022	29 Mar 2022	8 Apr 2022	[2022] FCA 367	The scheme meeting was held on 20 May 2022. On 24 May 2022, Crown sought and obtained orders to have the second hearing adjourned, to allow the bidder to obtain regulatory gaming approvals					No
Crestone Holdings Ltd	NSWSC	Black J	22 Mar 22	22 Mar 22	12 Apr 22	[2022] NSWSC 433	Black J	27 Apr 22	27 Apr 22	12 May 22	[2022] NSWSC 578	No
Ozgrowth Ltd	WASC	Hill J	28 Feb 2022	28 Feb 2022	30 Mar 2022	[2022] WASC 107	Hill J	8 Apr 2022	8 Apr 2022	13 May 2022	[2022] WASC 167	No

Company name	Court	First court hearing					Second court hearing					Takeovers Panel
		Judge	Hearing date	Date of orders	Date of reasons	Citation	Judge	Hearing date	Date of orders	Date of reasons	Citation	
Bardoc Gold Ltd	WASC	Strk J	22 Feb 2022	22 Feb 2022	17 Mar 2022	[2022] WASC 94	Strk J	1 Apr 2022	1 Apr 2022	7 Apr 2022	[2022] WASC 113	No
Australian Pharmaceutical Industries Ltd	FCA	Beach J	14 Feb 2022	14 Feb 2022	15 Feb 2022	[2022] FCA 103	Beach J	21 Mar 2022	21 Mar 2022	-	-	No
Over the Wire Holdings Ltd	FCA	Halley J	21 Jan 2022	21 Jan 2022	25 Jan 2022	[2022] FCA 26	Halley J	3 Mar 2022	3 Mar 2022	4 Mar 2022	[2022] FCA 181	No
Sydney Airport Ltd	NSWSC	Black J	17 Dec 2021	17 Dec 2021	21 Jan 2022	[2022] NSWSC 25	Black J	9 Feb 2022	9 Feb 2022	11 Feb 2022	[2022] NSWSC 103	No
Quantum Health Group Ltd	NSWSC	Black J	17 Dec 2021	17 Dec 2021	21 Jan 2022	[2022] NSWSC 26	Black J	1 Feb 2022	1 Feb 2022	9 Feb 2022	[2022] NSWSC 74	No
Ausnet Services Ltd	NSWSC	Black J	16 Dec 2021	16 Dec 2021	20 Jan 2022	[2022] NSWSC 21	Black J	3 Feb 2022	3 Feb 2022	11 Feb 2022	[2022] NSWSC 79	Yes
Class Ltd	NSWSC	Black J	15 Dec 2021	15 Dec 2021	20 Jan 2022	[2022] NSWSC 22	Black J	4 Feb 2022	4 Feb 2022	11 Feb 2022	[2022] NSWSC 80	No
iCar Asia Ltd	NSWSC	Black J	8 Dec 2021	8 Dec 2021	29 Dec 2021	[2021] NSWSC 1713	Black J	2 Feb 2022	2 Feb 2022	9 Feb 2022	[2022] NSWSC 75	No

Company name	Court	First court hearing					Second court hearing					Takeovers Panel
		Judge	Hearing date	Date of orders	Date of reasons	Citation	Judge	Hearing date	Date of orders	Date of reasons	Citation	
Aventus Holdings Ltd	NSWSC	Black J	7 Dec 2021	7 Dec 2021	29 Dec 2021	[2021] NSWSC 1711	Black J	22 Feb 2022	22 Feb 2022	15 Mar 2022	[2022] NSWSC 266	No
PM Capital Asian Opportunities Fund Ltd	FCA	Beach J	4 Nov 2021	4 Nov 2021	8 Nov 2021	[2021] FCA 1380	PM Capital was the subject of a bidding war between PGF and WAM. The proposed scheme related to a merger with PGF. At a meeting on 13 December 2021, the resolution approving the scheme was not passed by the requisite majorities. Subsequently, PM Capital's directors recommended members accept WAM's takeover offer					Yes
Afterpay Ltd	NSWSC	Black J	4 Nov 2021	4 Nov 2021	8 Nov 2021	[2021] NSWSC 1435	Black J	17 Dec 2021	17 Dec 2021	29 Dec 2021	[2021] NSWSC 1709	No
Intega Group Ltd	NSWSC	Black J	2 Nov 2021	2 Nov 2021	8 Nov 2021	[2021] NSWSC 1434	Black J	9 Dec 2021	9 Dec 2021	29 Dec 2021	[2021] NSWSC 1707	No
Australian Leisure and Entertainment Property Management Ltd	NSWSC	Black J	28 Oct 2021	28 Oct 2021	4 Nov 2021	[2021] NSWSC 1421	Black J	7 Dec 2021	7 Dec 2021	29 Dec 2021	[2021] NSWSC 1710	No
1300 Smiles Ltd	FCA	Farrell J	12 Oct 2021	12 Oct 2021	22 Oct 2021	[2021] FCA 1287	Farrell J	17 Nov 2021	17 Nov 2021	19 Nov 2021	[2021] FCA 1448	No
Think Childcare Ltd	FCA	O'Callaghan J	6 Oct 2021	18 Oct 2021	-	[2021] FCA 1042	O'Callaghan J	6 Oct 2021	6 Oct 2021	6 Oct 2021	[2021] FCA 1228	No

Company name	Court	First court hearing					Second court hearing					Takeovers Panel
		Judge	Hearing date	Date of orders	Date of reasons	Citation	Judge	Hearing date	Date of orders	Date of reasons	Citation	
5G Networks Ltd	FCA	Beach J	1 Oct 2021	1 Oct 2021	1 Oct 2021	[2021] FCA 1189	Beach J	11 Nov 2021	11 Nov 2021	11 Nov 2021	-	No
Huon Aquaculture Group Ltd	FCA	O'Callaghan J	22 Sep 2021	22 Sep 2021	22 Sep 2021	[2021] FCA 1170	O'Callaghan J	3 Nov 2021	3 Nov 2021	3 Nov 2021	[2021] FCA 1385	No
Japara Healthcare Ltd	FCA	Moshinsky J	17 Sep 2021	17 Sep 2021	23 Sept 2021	[2021] FCA 1150	Moshinsky J	25 Oct 2021	25 Oct 2021	27 Oct 2021	[2021] FCA 1317	No
Empired Ltd	FCA	McKerracher J	20 Sep 2021	20 Sep 2021	21 Sep 2021	[2021] FCA 1141	McKerracher J	1 Nov 2021	1 Nov 2021	15 Nov 2021	[2021] FCA 1409	No
rhipe Ltd	NSWSC	Black J	7 Sep 2021	7 Sep 2021	15 Sep 2021	[2021] NSWSC 1170	Black J	13 Oct 2021	13 Oct 2021	14 Oct 2021	[2021] NSWSC 1307	No
Firefly Resources Ltd	WASC	Strk J	6 Sep 2021	6 Sep 2021	22 Nov 2021	[2021] WASC 376	Strk J	15 Oct 2021	15 Oct 2021	22 Nov 2021	[2021] WASC 376	No
Youfoodz Holdings Ltd	FCA	Middleton J	2 Sep 2021	2 Sep 2021	9 Sept 2021	[2021] FCA 1081	Middleton J	13 Oct 2021	13 Oct 2021	22 Oct 2021	[2021] FCA 1288	No
Valmec Ltd	WASC	Hill J	31 Aug 2021	31 Aug 2021	26 Nov 2021	[2021] WASC 420	Hill J	6 Oct 2021	6 Oct 2021	26 Nov 2021	[2021] WASC 420	No

Company name	Court	First court hearing					Second court hearing					Takeovers Panel
		Judge	Hearing date	Date of orders	Date of reasons	Citation	Judge	Hearing date	Date of orders	Date of reasons	Citation	
Templeton Global Growth Fund Ltd	NSWSC	Black	25 Aug 2021	25 Aug 2021	15 Sep 2021	[2021] NSWSC 1169	Black J	19 Oct 2021	19 Oct 2021	21 Oct 2021	[2021] NSWSC 1351	No
Milton Corporation Ltd	FCA	Lee J	5 Aug 2021	5 Aug 2021	5 Aug 2021	[2021] FCA 992	Lee J	20 Sep 2021	20 Sep 2021	20 Sep 2021	[2021] FCA 1178	No
Mainstream Group Holdings Ltd	FCA	Perram J	4 Aug 2021	4 Aug 2021	11 Aug 2021	[2021] FCA 948	Perram J	15 Oct 2021	15 Oct 2021	19 Oct 2021	[2021] FCA 1271	No
Wameja Ltd	FCA	Farrell J	26 Jul 2021	27 Jul 2021	29 Jul 2021	[2021] FCA 878	Farrell J	9 Sept 2021	9 Sept 2021	17 Sept 2021	[2021] FCA 1130	No
Dragontail Systems Ltd	FCA	Halley J	16 Jul 2021	16 Jul 2021	22 Jul 2021	[2021] FCA 834	Halley J	31 Aug 2021	31 Aug 2021	10 Sept 2021	[2021] FCA 1109	No
Isentia Group Ltd	NSWSC	Black J	16 Jul 2021	16 Jul 2021	27 Jul 2021	[2021] NSWSC 910	Black J	20 Aug 2021	20 Aug 2021	25 Aug 2021	[2021] NSWSC 1069	No
Galaxy Resources Ltd	WASC	Hill J	2 Jul 2021	2 Jul 2021	12 Aug 2021	[2021] WASC 277	Hill J	13 Aug 2021	13 Aug 2021	16 Aug 2021	[2021] WASC 314	No
FY 2021 (1 Jul 2020 – 30 Jun 2021)												
AuStar Gold Ltd	FCA	Davies J	22 Jun 2021	22 Jun 2021	28 Jun 2021	[2021] FCA 711	Davies J	11 Aug 2021	11 Aug 2021	17 Aug 2021	[2021] FCA 972	No

Company name	Court	First court hearing					Second court hearing					Takeovers Panel
		Judge	Hearing date	Date of orders	Date of reasons	Citation	Judge	Hearing date	Date of orders	Date of reasons	Citation	
APN Property Group Ltd	VSC	Riordan J	15 Jun 2021	15 Jun 2021	15 Jun 2021	[2021] VSC 389	Osborne J	4 Aug 2021	4 Aug 2021	11 Aug 2021	[2021] VSC 490	No
BINGO Industries Ltd	NSWSC	Black J	9 Jun 2021	9 Jun 2021	1 Jul 2021	[2021] NSWSC 798	Black J	15 Jul 2021	15 Jul 2021	27 Jul 2021	[2021] NSWSC 911	No
Vocus Group Ltd	NSWSC	Black J	18 May 2021	18 May 2021	3 Jun 2021	[2021] NSWSC 630	Black J	24 Jun 2021	24 Jun 2021	12 Jul 2021	[2021] NSWSC 843	No
Mortgage Choice Ltd	NSWSC	Black J	6 May 2021	6 May 2021	18 May 2021	[2021] NSWSC 553	Black J	17 Jun 2021	17 Jun 2021	6 Jul 2021	[2021] NSWSC 819	No
Asaleo Care Ltd	FCA	Banks-Smith J	22 Apr 2021	22 Apr 2021	23 Apr 2021	[2021] FCA 406	Banks-Smith J	9 Jun 2021	11 Jun 2021	11 Jun 2021	[2021] FCA 636	No
Redflex Holdings Ltd	FCA	Yates J	7 Apr 2021	7 Apr 2021	30 Apr 2021	[2021] FCA 417	Yates J	14 May 2021	14 May 2021	19 May 2021[57]	[2021] FCA 527	No
86 400 Holdings Ltd	FCA	Anderson J	29 Mar 2021	29 Mar 2021	29 Mar 2021	[2021] FCA 311	Anderson J	11 May 2021	11 May 2021	11 May 2021	[2021] FCA 524	No
WPP AUNZ Ltd	NSWSC	Black J	16 Mar 2021	16 Mar 2021	16 Apr 2021	[2021] NSWSC 388	Black J	23 Apr 2021	23 Apr 2021	12 May 2021	[2021] NSWSC 520	No

[57] See also [2021] FCA 474, in interim, (on 7 May 2021) application to make amendment to resolution.

Company name	Court	First court hearing					Second court hearing					Takeovers Panel
		Judge	Hearing date	Date of orders	Date of reasons	Citation	Judge	Hearing date	Date of orders	Date of reasons	Citation	
Coca-Cola Amatil Ltd	NSWSC	Black J	12 Mar 2021	12 Mar 2021	22 Mar 2021	[2021] NSWSC 270	Black J	20 Apr 2021	20 Apr 2021	7 May 2021	[2021] NSWSC 489	No
Electric Metals (USA) Ltd	FCA	Farrell J	17-18 Feb 2021	18 Feb 2021	13 Apr 2021	[2021] FCA 352	Farrell J	13 Apr 2021	13 Apr 2021	13 Apr 2021	[2021] FCA 352	No
CannPal Animal Therapeutics Ltd	WASC	Hill J	1 Feb 2021	1 Feb 2021	17 Feb 2021	[2021] WASC 37	Hill J	10 Mar 2021	10 Mar 2021	26 Mar 2021	[2021] WASC 83	No
RXP Services Ltd	FCA	Beach J	29 Jan 2021	29 Jan 2021	29 Jan 2021	[2021] FCA 38	Beach J	4 Mar 2021	4 Mar 2021	-	-	No
NTM Gold Ltd	WASC	Vaughan J	27 Jan 2021	27 Jan 2021	28 Jan 2021	[2021] WASC 22	Vaughan J	5 Mar 2021	5 Mar 2021	5 Mar 2021	[2021] WASC 58	No
WOTSO Ltd	NSWSC	Black J	18 Dec 2020	18 Dec 2020	22 Jan 2021	[2021] NSWSC 21	Black J	5 Feb 2021	5 Feb 2021	17 Feb 2021	[2021] NSWSC 100	No
Sarcen Mineral Holdings Ltd	WASC	Hill J	9 Dec 2020	9 Dec 2020	8 Jan 2021	[2020] WASC 483	Hill J	2 Feb 2021	2 Feb 2021	12 Feb 2021	[2021] WASC 32	No
Real Energy Corporation Ltd	FCA	Yates J	5 Nov 2020	5 Nov 2020	5 Nov 2020	[2020] FCA 1634	Yates J	25 Feb 2021, 26 Feb 2021, 5 Mar 2021	5 Mar 2021	30 Apr 2021	[2021] FCA 422	No
DWS Ltd	FCA	Beach J	30 Oct 2020	30 Oct 2020	2 Nov 2020	[2020] FCA 1590	Beach J	23 Dec 2020	23 Dec 2020	-	-	No

Company name	Court	First court hearing					Second court hearing					Takeovers Panel
		Judge	Hearing date	Date of orders	Date of reasons	Citation	Judge	Hearing date	Date of orders	Date of reasons	Citation	
Citadel Group Ltd	FCA	Beach J	29 Oct 2020	29 Oct 2020	30 Oct 2020	[2020] FCA 1580	Beach J	7 Dec 2020	7 Dec 2020	-	-	No
3P Learning Ltd	NSWSC	Black J	20 Oct 2020	20 Oct 2020	9 Nov 2020	[2020] NSWSC 1573	The resolution to approve the scheme was not approved at the shareholders' meeting					No
GetSwift Ltd	FCA	Farrell J	8, 9 Oct 2020	9 Oct 2020	1 Dec 2020	- (see [2020] FCA 1733)	Farrell J	12, 13, 16, 26 and 27 Nov 2020	27 Nov 2020[58] 17 Dec 2020[59]	1 Dec 2020	[2020] FCA 1733	No
Village Roadshow Ltd	FCA	Middleton J	9 Oct 2020	9 Oct 2020	18 Nov 2020	[2020] FCA 1669	Middleton J	15 Dec 2020	15 Dec 2020	23 Dec 2020	[2020] FCA 1857	No
OneVue Holdings Ltd	FCA	Markovic J	4 Sep 2020	4 Sep 2020	16 Sept 2020	[2020] FCA 1321	Markovic J	28 Oct 2020	28 Oct 2020	2 Nov 2020	[2020] FCA 1584	No
Vault Intelligence Ltd	FCA	O'Bryan J	28 Aug 2020	28 Aug 2020	28 Aug 2020	[2020] FCA 1342	O'Bryan J	7 Oct 2020	7 Oct 2020	16 Oct 2020	[2020] FCA 1504	No

[58] Orders standing matter over pending FIRB approval.

[59] Orders approving scheme, subject to FIRB order.

Company name	Court	First court hearing					Second court hearing					Takeovers Panel
		Judge	Hearing date	Date of orders	Date of reasons	Citation	Judge	Hearing date	Date of orders	Date of reasons	Citation	
Webcentral Group Ltd	NSWSC	Black J	21 Aug 2020	21 Aug 2020	18 Sep 2020	[2020] NSWSC 1279	WebCentral received a superior takeover bid and, on 17 Sept 2020, announced that its directors had withdrawn their recommendation that shareholders vote in favour of the scheme. WebCentral applied for and obtained orders that the scheme meeting not proceed.					Yes
Cassini Resources Ltd	WASC	Hill J	12 Aug 2020	12 Aug 2020	7 Sept 2020	[2020] WASC 317	This matter involved inter-conditional schemes of arrangement: one providing for a demerger of a subsidiary; the other for the acquisition of shares in the company by a bidder. Both the demerger and the acquisition schemes were successful. But the reasons for judgment on the approval applications have not been located.					No
Exore Resources Ltd	WASC	Vaughan J	4 Aug 2020	4 Aug 2020	4 Aug 2020	[2020] WASC 285	Vaughan J	15 Sep 2020	15 Sep 2020	15 Sep 2020	[2020] WASC 333	No
FY 2020 (1 Jul 2019 – 30 Jun 2020)												
Zenith Energy Ltd	WASC	Hill J	25 Jun 2020	25 Jun 2020	16 Jul 2020	[2020] WASC 266	Hill J	6 Aug 2020	6 Aug 2020	6 Aug 2020	[2020] WASC 289	N
Sienna Cancer Diagnostics Ltd	FCA	Moshinsky J	10 Jun 2020	10 Jun 2020	10 Jun 2020	[2020] FCA 899	Moshinsky J	17, 20 Jul 2020	20 Jul 2020	20 Jul 2020	[2020] FCA 1088	No
CSG Ltd Ltd	NSWSC	Black J	17 Dec 2019	17 Dec 2019	30 Dec 2019	[2019] NSWSC 1905	Gleeson J	5 Feb 2020	5 Feb 2020	5 Feb 2020	[2020] NSWSC 39	No

Company name	Court	First court hearing					Second court hearing					Takeovers Panel
		Judge	Hearing date	Date of orders	Date of reasons	Citation	Judge	Hearing date	Date of orders	Date of reasons	Citation	
QMS Media Ltd	FCA	O'Callaghan J	12 Dec 2019	12 Dec 2019	20 Dec 2019	[2019] FCA 2172	O'Callaghan J	10 Feb 2020	10 Feb 2020	17 Feb 2020	[2020] FCA 142	N
Webster Ltd	NSWSC	Black J	12 Dec 2019	12 Dec 2019	30 Dec 2019	[2019] NSWSC 1907	Gleeson J	5 Feb 2020	6 Feb 2020	6 Feb 2020	[2020] NSWSC 40	No
URB Investments Ltd	FCA	Markovic J	4 Nov 2019	4 Nov 2019	25 Nov 2019	[2019] FCA 1977	Markovic J	10 Dec 2019	10 Dec 2019	20 Dec 2019	[2019] FCA 2160	N
Bellamy's Australia Ltd	NSWSC	Black J	30 Oct 2019	30 Oct 2019	28 Nov 2019	[2019] NSWSC 1671	Black J	9 Dec 2019	9 Dec 2019	23 Dec 2019	[2019] NSWSC 1889	No
Konekt Ltd[60]	FCA	Farrell J	30 Oct 2019	30 Oct 2019	4 Nov 2019	[2019] FCA 1811	Farrell J	9 Dec 2019	9 Dec 2019	12 Dec 2019	[2019] FCA 2105	No
ERM Power Ltd	NSWSC	Black J	4 Oct 2019	4 Oct 2019	4 Nov 2019	[2019] NSWSC 1502).	Black J	12 Nov 2019	12 Nov 2019	28 Nov 2019	[2019] NSWSC 1672	No
Wellcom Group Ltd	FCA	O'Bryan J	4 Oct 2019	4 Oct 2019	18 Oct 2019	[2019] FCA 1655	O'Bryan J	13 Nov 1019	13 Nov 2019	22 Nov 2019	[2019] FCA 1872	No

[60] There was also an intermediate hearing between the first and second hearings. It concerned an application under s 1319 of the *Corporations Act* for orders relating to the despatch of a supplementary scheme booklet, containing a further offer: see [2019] FCA 1997.

Company name	Court	First court hearing					Second court hearing					Takeovers Panel
		Judge	Hearing date	Date of orders	Date of reasons	Citation	Judge	Hearing date	Date of orders	Date of reasons	Citation	
Aveo Group Ltd & Aveo Funds Management Ltd	NSWSC	Black J	27 Sep 2019	27 Sep 2019	4 Oct 2019	[2019] NSWSC 1348	Black J	13 Nov 2019	13 Nov 2019	28 Nov 2019	[2019] NSWSC 1679	No
Creso Pharma Ltd	WASC	Hill J	17 Sep 2019	2 Oct 2019	23 Dec 2019	[2019] WASC 472	On 12 Nov 2019, the company announced that it had received a supplementary independent expert report, opining that the scheme consideration was not fair and reasonable and not in the best interest of shareholders, and that the scheme implementation agreement was terminated.					No
AIRR Holdings Ltd	FCA	Besanko J	16 Sep 2019	16 Sep 2019	23 Dec 2019	[2019] FCA 2180	Besanko J	29 Oct 2019	29 Oct 2019	23 Dec 2019	[2019] FCA 2180	No
GBST Holdings Ltd	NSWSC	Black J	11 Sep 2019	11 Sep 2019	24 Sep 2019	[2019] NSWSC 1280	18 Oct 2019	Black J	18 Oct 2019	4 Nov 2019	[2019] NSWSC 1503	Yes
Villa World Ltd	NSWSC	Black J	6 Sep 2019	6 Sep 2019	11 Sep 2019	[2019] NSWSC 1207	15 Oct 2019	Black J	15 Oct 2019	4 Nov 2019	[2019] NSWSC 1509	No
Patersons Securities Ltd	FCA	Colvin J	2 Sep 2019	2 Sep 2019	2 Sep 2019	[2019] FCA 1438	Colvin J	7 Oct 2019	7 Oct 2019	7 Oct 2019	[2019] FCA 1645	No
Dreamscape Networks Ltd	WASC	Hill J	30 Aug 2019	30 Aug 2019	13 Nov 2019	[2019] WASC 412	Hill J	14 Oct 2019	14 Oct 2019	13 Nov 2019	[2019] WASC 412	No
MOD Resources Ltd	WASC	Vaughan J	20 Aug 2019	20 Aug 2019	10 Sept 2019	[2019] WASC 326	Vaughan J	8 Oct 2019	8 Oct 2019	8 Oct 2019	[2019] WASC 360	No

Company name	Court	First court hearing					Second court hearing					Takeovers Panel
		Judge	Hearing date	Date of orders	Date of reasons	Citation	Judge	Hearing date	Date of orders	Date of reasons	Citation	
Kidman Resources Ltd	FCA	O'Callaghan J	30 Jul 2019	30 Jul 2019	7 Aug 2019	[2019] FCA 1226	O'Callaghan J	12 Sep 2019	12 Sep 2019	13 Sep 2019	[2019] FCA 1513	No
Legend Corporation Ltd	FCA	O'Bryan J	5 Jul 2019	5 Jul 2019	12 Aug 2019	[2019] FCA 1249	O'Bryan J	16 Aug 2019	16 Aug 2019	9 Sept 2019	[2019] FCA 1444	No
FY 2019 (1 Jul 2018 – 30 Jun 2019)												
Xenith IP Group Ltd	FCA	Jagot J	18 Jun 2019	18 Jun 2019	-	-	Jagot J	31 Jul 2019	31 Jul 2019	-	-	No
DuluxGroup Ltd	FCA	O'Bryan J	14 Jun 2019	14 Jun 2019	21 Jun 2019	[2019] FCA 961	O'Bryan J	6 Aug 2019	6 Aug 2019	15 Aug 2019	[2019] FCA 1225	No
Ruralco Holdings Ltd	FCA	Farrell J	5 Jun 2019	5 Jun 2019	11 Jun 2019	[2019] FCA 878	Farrell J	12 Sep 2019	12 Sep 2019	12 Sep 2019	[2019] FCA 1507	No
Nzuri Copper Ltd	WASC	Vaughan J	30 May 2019	30 May 2019	5 Jun 2019	[2019] WASC 189	Vaughan J	28 Feb 2020	28 Feb 2020	5 Mar 2020	[2020] WASC 69	No
Spicers Ltd	FCA	Anderson J	17 May 2019	17 May 2019	22 May 2019	[2019] FCA 731	O'Bryan J	3 Jul 2019	3 Jul 2019	19 Jul 2019	[2019] FCA 1110	No
Navitas Ltd	WASC	Vaughan J	10 May 2019	10 May 2019	24 May 2019	[2019] WASC 180	Vaughan J	21 Jun 2019	21 Jun 2019	21 Jun 2019	[2019] WASC 218	No

Company name	Court	First court hearing					Second court hearing					Takeovers Panel
		Judge	Hearing date	Date of orders	Date of reasons	Citation	Judge	Hearing date	Date of orders	Date of reasons	Citation	
Netcomm Wireless Ltd	FCA	Markovic J	1 May 2019	1 May 2019	30 May 2019	[2019] FCA 795	Markovic J	20 Jun 2019	20 Jun 2019	18 Jul 2019	[2019] FCA 1109	No
Verdant Minerals Ltd	FCA	Moshinsky J	16 Apr 2019	16 Apr 2019	24 Apr 2019	[2019] FCA 556	Moshinsky J	31 May 2019	31 May 2019	31 May 2019	[2019] FCA 841	No
Healthscope Ltd	FCA	Beach J	16 Apr 2019	16 Apr 2019	18 Apr 2019	[2019] FCA 542	Beach J	24 May 2019	24 May 2019	24 May 2019	[2019] FCA 759	No
Amcor Ltd	FCA	Beach J	12 Mar 2019	12 Mar 2019	13 Mar 2019	[2019] FCA 346	Beach J	7 May 2019	4 Jun 2019	4 Jun 2019[61]	[2019] FCA 842	No
Xenith IP Group Ltd	FCA	Yates J	19 Feb 2019	19 Feb 2019	20 Feb 2019	[2019] FCA 173	The scheme related to a proposed merger of Xenith and QANTM Intellectual Property. Subsequently, IPH lodged a rival proposal, which was accepted. IPH acquired Xenith by a scheme (see above).					No
Doray Minerals Ltd	WASC	Vaughan J	15 Feb 2019	15 Feb 2019	27 Feb 2019	[2019] WASC 57	Vaughan J	28 Mar 2019	28 Mar 2019	28 Mar 2019	[2019] WASC 99	No
Beadell Resources Ltd	WASC	Vaughan J	21 Dec 2018	21 Dec 2018	21 Dec 2018	[2018] WASC 410	Vaughan	15 Feb 2019	15 Feb 2019	22 Feb 2019	[2019] WASC 53	No
Greencross Ltd	FCA	Yates J	19 Dec 2018	19 Dec 2018	19 Dec 2018	[2018] FCA 2093	Yates J	11 Feb 2019	11 Feb 2019	15 Feb 2019	[2019] FCA 117	No

[61] The court hearing to approve the Scheme took place on 7 May 2019. "But it had to be adjourned several times to enable all conditions precedent, save for Court approval, to be satisfied" see [2019] FCA 842 at [6]

Company name	Court	First court hearing					Second court hearing					Takeovers Panel
		Judge	Hearing date	Date of orders	Date of reasons	Citation	Judge	Hearing date	Date of orders	Date of reasons	Citation	
Terry White Group Ltd	QSC	Bond J	2 Nov 2018	2 Nov 2018	2 Nov 2018	[2018] QSC 254	Although the Court appears to have made orders approving the scheme, no reasons for judgment have been located					No
PrimeQ Ltd	FCA	White J	1 Nov 2018	1 Nov 2018	9 Nov 2018	[2018] FCA 1705	White J	7 Dec 2018	7 Dec 2018	7 Dec 2018	[2018] FCA 2073	No
Decimal Software Ltd	FCA	Banks-Smith J	30 Oct 2018	30 Oct 2018	1 Nov 2018	[2018] FCA 1647	Banks-Smith J	13 Dec 2018	13 Dec 2018	17 Dec 2018	[2018] FCA 2040	No
Genea Ltd	FCA	Markovic J	29 Oct 2018	29 Oct 2018	8 Nov 2018	[2018] FCA 1681	Markovic J	12 Dec 2018	12 Dec 2018	12 Dec 2018	[2018] FCA 2044	No
Kangaroo Resources Ltd	WASC	Vaughan J	16 Oct 2018	16 Oct 2018	25 Oct 2018	[2018] WASC 327	Vaughan J	3 Dec 2018	3 Dec 2018	11 Dec 2018	[2018] WASC 388	No
Spookfish Ltd	FCA	Banks-Smith J	12 Oct 2018	12 Oct 2018	15 Oct 2018	[2018] FCA 1550	Banks-Smith J	23 Nov 2018	23 Nov 2018	6 Dec 2018	[2018] FCA 1966	No
Fairfax Media Ltd	FCA	Gleeson J	12 Oct 2018	12 Oct 2018	24 Oct 2018	[2018] FCA 1610	Gleeson J	27 Nov 2018	27 Nov 2018	3 Dec 2018	[2018] FCA 1930	No
Capilano Honey Ltd	FCA	Farrell J	10,11 Oct 2018	18 Oct 2018	18 Oct 2018	[2018] FCA 1568	Farrell J	23 Nov 2018	23 Nov 2018	30 Nov 2018	[2018] FCA 1925	No
Folkestone Ltd	FCA	Yates J	12 Sep 2018	12 Sep 2018	14 Sep 2018	[2018] FCA 1412	Yates J	22 Oct 2018	22 Oct 2018	22 Oct 2018	[2018] FCA 1593	No

Company name	Court	First court hearing					Second court hearing					Takeovers Panel
		Judge	Hearing date	Date of orders	Date of reasons	Citation	Judge	Hearing date	Date of orders	Date of reasons	Citation	
APN Outdoor Group Ltd	FCA	Markovic J	10 Sep 2018	19 Sep 2018	19 Sep 2018	[2018] FCA 1425	Markovic J	18 Oct 2018	18 Oct 2018	18 Oct 2018	[2018] FCA 1633	No
Sirtex Medical Ltd	FCA	Markovic J	1 Aug 2018	1 Aug 2018	29 Aug 2018	[2018] FCA 1315	Markovic J	12 Sep 2018	12 Sep 2018	12 Oct 2018	[2018] FCA 1559http://classic.austlii.edu.au/cgi-bin/sinodisp/au/cases/cth/FCA/2018/1315.html?stem=0&synonyms=0&query=scheme%20of%20arrangement	No

Company name	Court	First court hearing					Second court hearing					Takeovers Panel
		Judge	Hearing date	Date of orders	Date of reasons	Citation	Judge	Hearing date	Date of orders	Date of reasons	Citation	
Tawana Resources NL	FCA	Banks-Smith J	17 Aug 2018	17 Aug 2018	21 Sep 2018	[2018] FCA 1456[62]	Banks-Smith J	3 Dec 2018	3 Dec 2018	4 Dec 2018	[2018] FCA 1952[63]	No
Excelsior Gold Ltd	FCA	McKerracher J	10 Aug 2018	10 Aug 2018	19 Dec 2018	[2018] FCA 2064	McKerracher J	21 Sep 2018	21 Sep 2018	19 Dec 2018	[2018] FCA 2064	No
Sino Gas & Energy Holdings Ltd	FCA	Gleeson J	27 Jul 2018	27 Jul 2018	10 Aug 2018	[2018] FCA 1183	Markovic J	11 Sep 2018	11 Sep 2018	19 Sep 2018	[2018] FCA 1423	No
Opus Group Ltd	FCA	Banks-Smith J	26 Jul 2018	26 Jul 2018	27 Jul 2018	[2018] FCA 59	Banks-Smith J	13 Sep 2018	13 Sep 2018	13 Sep 2018	[2018] FCA 1413	No
SRG Ltd	FCA	Banks-Smith J	20 Jul 2018	20 Jul 2018	23 Jul 2018	[2018] FCA 1092	Banks-Smith J	27 Aug 2018	27 Aug 2018	17 Sep 2018	[2018] FCA 1424	No

62 See also *Re Tawana Resources NL (No 2)* [2018] FCA 1724 (orders to reconvene meeting and despatch supplementary booklet).

63 See also *Tawana Resources NL, in the matter of Tawana Resources NL (No 4)* [2019] FCA 75 (urgent application to amend orders approving scheme).