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To Director
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The Treasury
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Dear Director

Corporate control transactions in Australia: Consultation on options to improve schemes of arrangement, takeover bids, and the role of the Takeovers Panel - submissions by King & Wood Mallesons

We refer to the consultation paper entitled "*Corporate control transactions in Australia: Consultation on options to improve schemes of arrangement, takeover bids, and the role of the Takeovers Panel*" dated April 2022 ("**Paper**"). We are pleased to provide the following submissions and commentary on the matters raised in the Paper.

Capitalised terms used but not defined in this document have the meaning given in the Paper.

1 Introduction

This document provides feedback on proposed changes as to how schemes of arrangement should be regulated. It also considers changes to the role of ASIC and the Takeovers Panel.

The key factors relevant to this feedback are the Eggleston Principles (including the Masel Principle). Other factors considered include costs to participants and consistency in the regulations as part of a change of control transaction.

The feedback seeks to improve the current system. It does not seek wholesale changes.

2 Proposed structure for regulation of control transactions

2.1 Introduce a new, third pathway for control transactions: The Shareholder Approved Transaction

In practice, the Takeover Rules and Scheme of Arrangement Rules generally work well and achieve outcomes aligned with the Eggleston Principles. While the Takeover Rules and Scheme of Arrangement Rules could benefit from a number of incremental improvements which would enable takeover bids and schemes of arrangement to better achieve the policy objectives articulated in the

Paper, we consider that there will be a better outcome for companies, stakeholders, the market and the public for there to be a new, third pathway for control transactions which operates separately from, and in addition to, takeover bids and schemes of arrangement.

We refer to the proposed new third control transaction pathway as the **Shareholder Approved Transaction**.

The proposed process for a Shareholder Approved Transaction (as described in section 2.3 below) provides for the acquisition of all of the shares and other securities of a company through a streamlined transaction process that is based on a scheme of arrangement.

2.2 Why retain the existing Takeovers Rules and Scheme of Arrangement Rules?

In our proposal, the existing scheme mechanism set out in Part 5.1 of the Corporations Act would remain in its current form. This is because schemes of arrangement play an important role in a variety of control and complex transactions including:

- scrip bids by way of a scheme (which utilise exemptions from foreign prospectus and registration requirements because the scheme process is supervised by a Court);
- acquisitions of stapled securities which also require a trust scheme (i.e. most acquisitions of real estate investment trusts ("**REIT**"));
- re-domiciling and multi-step transactions;[1]
- demergers; and
- reconstructions.

In our proposal, schemes of arrangement could continue to be used by parties to a change of control transaction or other restructurings (such as demergers) where the scheme process is a better arrangement, such as those described in the bullet points above.

We also believe the existing Takeover Rules under Chapter 6 of the Corporations Act do not need to be amended as a result of the introduction of the Shareholder Approved Transaction. Existing takeovers regulation has a role to play including in relation to unsolicited bids.

As there is no supervision by the Court, there are various specific obligations on the parties to a Shareholder Approved Transaction. These are highlighted below. However, these specific obligations can be waived or modified by the Takeovers Panel.

2.3 Key elements of the proposed Shareholder Approved Transaction

The key elements of the proposal are as follows.

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[1] For example:

- the transactions described in the Scheme Booklet dated 16 September 2005 issued by Foodland Associated Limited which involved a demerger implemented by way of a scheme of arrangement followed by two separate acquisitions of the operations of the target by way of separate schemes of arrangement; and
- the transaction described in the Scheme Booklet dated 12 March 2019 issued by Amcor Limited which involved, in effect, the combination of the target with a US based company.

Feature	Commentary
"Shareholder Approved Transaction" Scheme regulated by Takeovers Panel as an "option" to the existing scheme of arrangement regime.	This is a new "Shareholder Approved Transaction" that a target could choose to implement. The existing scheme of arrangement mechanism in Part 5.1 of the Corporations Act would remain as a separate pathway. The Shareholder Approved Transaction would require the agreement of the target. There may be other pre-conditions before a target could chose the Shareholder Approved Transaction.

No equivalent of first and second court hearing	The Shareholder Approved Transaction would not involve:
	▪ court hearings (i.e. the first and second court hearing for a scheme of arrangement); or
	▪ an "equivalent" review by the Takeovers Panel of these court hearings.
	
	Instead under the Shareholder Approved Transaction:
	▪ the target and the acquirer would prepare a booklet ("**Transaction Booklet**") similar to a scheme booklet. It would contain sufficient information to ensure that target shareholders and the directors of the target:
	  ▪ know the identity of the bidder; and
	  ▪ are given enough information to enable them to assess the merits of the proposal;
	▪ a lodgement process for the Transaction Booklet similar to Steps 1 to 5 in section 633 of the Corporations Act with the Transaction Booklet. ASIC or "any person whose interests are affected"[2] (each an "**Interested Party**") dissatisfied with the disclosure in the Transaction Booklet would be able to make an application to the Takeovers Panel;
	▪ there would be a period of say, 14 days, from lodgement with ASIC to dispatch the Transaction Booklet to target shareholders;
	▪ ASIC would be entitled to conduct a post lodgement review of the Transaction Booklet (similar to what it already does for bidder's statements) - but would not be obliged to do so. There may be a benefit in a process similar to the exposure period for a prospectus where ASIC has seven days to comment but can extend the period by up to a further seven days; and

[2] See section 656A(2) of the Corporations Act.

Feature	Commentary
	▪ any Interested Party could make an application to the Takeovers Panel for orders in relation to the Shareholder Approved Transaction. Simply replacing the first and second court hearings with an equivalent review and orders by the Takeovers Panel will not result in a material reduction in the cost or time of an acquisition by a scheme of arrangement. The Takeovers Panel may be willing to require fewer evidentiary documents than are required by the Courts - but the difference will be marginal. At the same time, the Takeovers Panel may be less able to respond in the same flexible way as the Courts to meet preferred timetables.
Voting	The quantitative voting test for the Shareholder Approved Transaction would be the same as section 411(4)(a)(ii) of the Corporations Act - 75% of the votes cast by a majority of the members voting. However, the Shareholder Approved Transaction would not use classes as the basis of voting. Instead, the following would not be permitted to vote (i.e. vote as a separate class): ▪ an associate of the acquirer; and ▪ a person whose votes the Takeovers Panel was of the view should be disregarded. The Takeovers Panel would be able to permit an associate to vote. Where there is any uncertainty, the Parties would be expected to obtain a ruling from the Panel on whether votes should be disregarded. The parties would be required to provide all relevant information on the association and other interests of those voting on the Shareholder Approved Transaction if needed by the Takeovers Panel.
Options/employee rights	There will be a version of the Shareholder Approved Transaction to cover the acquisition or cancellation of options and employee rights.
Conditions for use of the Shareholder Approved Transaction	The Shareholder Approved Transaction potentially means fewer protections for target shareholders than a scheme of arrangement. In particular, the Shareholder Approved Transaction provides for the compulsory acquisition of shares without mandatory court hearings.

Feature	Commentary
	There is therefore a heightened risk of shareholders being disadvantaged. And so, the Shareholder Approved Transaction can only be used in specified circumstances. **<u>Where Shareholder Approved Transaction not used</u>** Circumstances where the Shareholder Approved Transaction could not be used would include, where: ▪ the acquirer has a voting power in more than 20% of the shares in the target; ▪ there are common directors of the acquirer (or an associate) and the target within the last six months; and ▪ the independent expert does not form the view that the acquisition is in the best interests of the target company's shareholders. However, it would be possible for the parties to obtain a waiver of any of these conditions from the Takeovers Panel. It is also anticipated that parties could also obtain an advance ruling on issues such as the right to vote and association. **<u>Approval in company constitution</u>** The Shareholder Approved Transaction has the potential to affect the rights of shareholders. One additional protection is for there to be a requirement that the Shareholder Approved Transaction could only be used where it is already permitted by the constitution of the target. A provision permitting its use could be introduced by companies at their AGM. It could not be introduced at the same time as the resolution to approve the Shareholder Approved Transaction.
Equivalent rules and regulations	To the extent possible, the regulation of Takeovers and Shareholder Approved Transactions would be the substantially the same and based on the Eggleston Principles. For example, the following should specifically apply: ▪ Collateral benefits; ▪ Minimum offer price; ▪ Automatic increase in price if acquisitions above consideration; ▪ Specific disclosures in the Transaction Booklet; and ▪ Due diligence defences for directors for information in the Transaction Booklet.

Feature	Commentary
Review of Transaction Booklet	As outlined above, and similar to ASIC's review of bidder's and target's statements, ASIC would have the option to review the Transaction Booklet after lodgement. As also noted above, there may be a benefit in a process similar to the exposure period for a prospectus where ASIC has seven days to comment but can extend the period by up to a further seven days.
Supplementary statements	There will be a specific regime for a supplementary Transaction Booklet that will be the equivalent of a supplementary bidder's and target's statement.
Independent expert's report	Required for all Shareholder Approved Transactions. The independent expert must find that the proposed acquisition is in the best interests of target shareholders. The independent expert's report must be updated between one and two weeks before the meeting for the Shareholder Approved Transaction.
Conditions precedent	All conditions precedent (other than those directly related to the shareholder vote) must be satisfied at the time of the shareholder vote. The reason for this requirement is that it ensures that all information is available to target shareholders when they vote. This is not a requirement for a scheme of arrangement under Part 5.1 of the Corporations Act. However, a scheme of arrangement has the benefit of the supervision of the Court. However, this requirement can be waived by the Takeovers Panel.
Completion	Completion must occur within two weeks of the shareholder meeting that approves the Shareholder Approved Transaction. This ensures that there is no delay in the provision of consideration. However, this requirement can be waived by the Takeovers Panel.
Compulsory acquisition	Dissenting shareholders under a Shareholder Approved Transaction will have the same rights as dissenting shareholders in a takeover under Part 6A.1 of the Corporations Act.

Feature	Commentary
Takeovers Panel jurisdiction	The Takeovers Panel would, to the extent permitted by law, have exclusive jurisdiction over transactions proposed to be undertaken under the Shareholder Approved Transaction. The acquirer, target, target shareholders, ASIC and other persons with standing could apply to the Takeovers Panel to address issues in connection with a proposed Shareholder Approved Transaction, including disclosure or voting issues.

3 Discussion questions

Our responses to the discussion questions set out in the Paper are set out in the schedule to this document.

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We would be pleased to discuss these points further if that would be useful for you.

Yours faithfully

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Schedule - Responses to Discussion Questions

Takeover Rules and the Takeovers Panel

1 What are your views on the current Takeover Rules? Do takeovers generally achieve outcomes aligned with the Eggleston Principles? Please provide examples where possible.

The Takeover Rules generally achieve outcomes aligned with the Eggleston Principles. Chapter 6 of the Corporations Act, ASIC Regulatory Guides and Takeovers Panel Reasons for Decision and Guidance Notes all provide a reasonably detailed set of rules and guidance which help achieve this outcome. The regular Corporate Finance Update's published by ASIC also provide useful insights to market participants as to what current issues are arising in the context of control transactions and how ASIC is approaching them.

That is not to say that the current Takeover Rules could not benefit from a number of improvements, many of which have been agitated in other forms, including:

- updating section 648C of the Corporations Act to permit the electronic dispatch of documents, which change would have significant cost and environmental benefits;[3]
- removing provisions which do not appear to us to serve a policy objective or otherwise where appropriate protection is provided to market participants by other means, the most obvious example to us being the prohibition on escalation agreements in section 622 of the Corporations Act;
- incorporating into the Takeover Rules long-standing, uncontroversial modifications made by various ASIC instruments, such as the modifications made by ASIC Instrument 2016/72 (*Consents to Statements*) to sections 636 and 638 of the Corporations Act; and
- addressing some of the matters which have been identified by the Australian Law Reform Commission in its current inquiry into the potential simplification of laws that regulate financial services in Australia, including improving the navigability of legislation.

Even with those improvements, we are not of the view that the preference of many bidders and targets to pursue a control transaction by way of a scheme of arrangement rather than a takeover bid will change. The reason for this is that a takeover bid has certain practical disadvantages, including a higher threshold to acquire 100% and an unwillingness of some shareholders to accept a conditional offer (normally the minimum acceptance condition) which can make it difficult to end the takeover offer.

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

Other than updating section 648C of the Corporations Act to permit the electronic dispatch of documents (as discussed above), there are no material changes that could be made to make takeovers more efficient and reduce unnecessary costs.

However, there may be some limited benefit in being able to obtain advance rulings on certain issues such as collateral benefits and the application of the minimum bid price. The uncertainty around these

[3] See for example the relief provided by ASIC to Healthscope Limited under section 655A(1)(b) of the Corporations Act (ASIC declaration 19-0338).

and similar issues means that there is an incentive to favour a scheme of arrangement where the specific rules are less and there is an expectation that the Court and the Takeovers Panel will take a commercial view.

Schemes of Arrangement and the Court

3 What are your views on the Scheme of Arrangement Rules? Do schemes of arrangement generally achieve outcomes aligned with the Eggleston Principles? Please provide examples where possible.

In practice, the Scheme of Arrangement Rules generally work well, and schemes of arrangement normally achieve outcomes aligned with the Eggleston Principles. This is as a result of ASIC guidance (in particular Regulatory Guide 60 *Schemes of arrangement*), the supervision of the Courts, the willingness of the Takeovers Panel to be involved in appropriate circumstances (usually before the Court has been involved) and custom and practice.

For example:

- the Takeovers Panel made orders in connection with exclusivity arrangements in *AusNet Services Limited 01* [2021] ATP 9 and *Virtus Health* [2022] ATP 5; and
- the Courts have considered the issue of collateral benefits mostly in the context of class voting in cases such as in *Re Healthscope Ltd* [2019] FCA 542.

Nonetheless, there are circumstances where divergent rules apply as between takeovers and schemes of arrangement such that some of the specific Takeover Rules which are based on Eggleston Principles do not apply to schemes of arrangement. For instance, the minimum bid price rule set out in section 621(3) of the Corporations Act (which is a manifestation of the equality of opportunity principles in section 602(c) of the Corporations Act) has not been applied to a scheme of arrangement in the same way as it is applied to a takeover bid (see for example *Ranger Minerals Ltd* [2002] WASC 207 and *Re Anzon Australia Ltd* [2008] FCA 309).

Schemes of arrangement also play an important role in a variety of control and complex transactions:

- scrip bids by way of a scheme (which utilise exemptions from foreign prospectus and registration requirements because the scheme process is supervised by a Court);
- acquisitions of stapled securities which also require a trust scheme (i.e. most acquisitions of REITs);
- re-domiciling and multi-step transactions;[4]
- demergers; and
- reconstruction.

[4] For example:

- the transactions described in the Scheme Booklet dated 16 September 2005 issued by Foodland Associated Limited which involved a demerger implemented by way of a scheme of arrangement followed by two separate acquisitions of the operations of the target by way of separate schemes of arrangement; and
- the transaction described in the Scheme Booklet dated 12 March 2019 issued by Amcor Limited which involved, in effect, the combination of the target with a US based company.

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

In general, members' schemes of arrangement are efficient, and the costs are not significant within the context of most transactions in larger companies. Although there is anecdotal evidence that the costs can be material for smaller transactions.

The most obvious change that could be made to reduce unnecessary costs would be to streamline the documentation requirements for the first and second court hearings. At present both court hearings require a number of affidavits from separate individuals. We consider that the affidavits could be reduced to two, one given by an officer of the target and one given by an officer of the bidder. However, we appreciate that it may be difficult to implement such a change given that the State governments would also need to support the change on the basis that State Supreme Courts also have jurisdiction.

In any case, there is an opportunity to make appropriate members' schemes of arrangement more efficient and reduce unnecessary steps by implementing an additional alternative for acquisitions that involve a shareholder vote but did not involve a review by the Court. This is referred to in this document as the Shareholder Approved Transaction and is summarised in section 2. The Shareholder Approved Transaction seeks to ensure that the absence of a review by the Court is balanced by imposing restrictions on when a Shareholder Approved Transaction can be used, although there is the ability of the Takeovers Panel to waive or modify particular restrictions.

The parties would remain free to also used the existing scheme of arrangement provisions under Part 5.1 of the Corporations Act.

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?

There is a fair degree of consistency between takeovers and schemes at the present time. This is as a result of a combination of the supervisory role of the Court, ASIC and Takeovers Panel Guidance and custom and practice.

However, if there was to be a new alternative form of a scheme of arrangement (in this document called the Shareholder Approved Transaction) which did not have Court supervision, there should be a more specific alignment of provisions to ensure consistency between takeovers and the alternative Shareholder Approval Transaction.

In our experience, these specific provisions will be important in ensuring consistency in the absence of the Court process.

However, there should be flexibility for the Takeovers Panel to waive or modify specific provisions applying to Shareholder Approval Transactions.

The role of the Takeovers Panel in relation to schemes

6 What are your views on expanding the Takeovers Panel's powers to include approval of members' schemes of arrangement? What form (if any) should such a power take? Should a

separate regime be established for members' schemes of arrangement for the purposes of a change in corporate control?

The consensus of our public M&A team is that we do not support expanding the Takeover Panel's powers to include approval of members' schemes of arrangement where the Takeovers Panel simply takes the role of the Court.

We think such an approach would have limited cost and time savings. While there could be some saving in the administrative requirements if appropriate practice rules were developed, we consider that the savings would be marginal. With schemes of arrangement under Part 5.1 of the Corporations Act, Courts have shown themselves to be available, commercial and flexible.

However, what is proposed is an alternative method to that set out in Part 5.1 of the Corporations Act. It provides for the acquisition of all of the shares and other securities of a company through a modified form of a scheme of arrangement.

The existing scheme mechanism set out in Part 5.1 of the Corporations Act would remain in its current form. If desired by the parties, the Part 5.1 mechanism could continue to be used by parties to a change of control transaction or other restructurings (such as demergers) where a scheme of arrangement under Part 5.1 has features which mean it is a better arrangement.

As there is no supervision by the Court, there are various specific obligations on the parties to a Shareholder Approval Scheme. These requirements can be waived or modified by the Takeovers Panel.

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?**

The Shareholder Approved Transaction set out in section 2, proposed by us, is an alternative method to that set out in Part 5.1 of the Corporations Act. It provides for the acquisition of all of the shares and other securities of a company through a modified form of a scheme of arrangement. The existing scheme mechanism set out in Part 5.1 of the Corporations Act would remain in its current form.

A key element is that as there is no supervision by the Court, there are various specific obligations on the parties to a Shareholder Approval Scheme. However, these requirements can be waived or modified by the Takeovers Panel.

The advantage of the Shareholder Approved Transaction would include:

- marginally lower costs as a result of not having a formal court process;
- a slightly shorter period to implement the Shareholder Approved Transaction;
- greater flexibility around the timetable as Court dates can sometimes be difficult to schedule for the best day; and
- a specific set of rules to protect shareholders which can be waived in appropriate circumstances by the Takeovers Panel.

The disadvantages of such an approach would be:

- the risk of a lowering of standards as the Transaction Booklet will not be reviewed in advance by ASIC or by the Court, although the risk is the same as currently applies to a takeover where the bidder's statement and target's statement are not reviewed by ASIC or by the Court; and
- the risk of lower legal compliance as there is not a formal Court review supported by affidavits.

Our proposal for a new Shareholder Transaction Approval pathway avoids diminishing the jurisdiction of the Court at the expense of the Takeovers Panel (or vice versa), which we think is unnecessary to achieve efficiency and reduce costs in transactional activity.

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?**

Our view is that the Takeovers Panel should not be given a formal review role for schemes such as that currently performed by the Courts. Our view is that there would be little savings in costs, time or complexity.

The Shareholder Approved Transaction proposed in section 2 assumes that there is no supervision by the Court. However, there are various specific obligations imposed on the parties before implementing a Shareholder Approved Transaction. These requirements can be waived or modified by the Takeovers Panel.

However, if the Panel were to be given that role, we would keep the process roughly the same (i.e. two court hearings) and retain the existing criteria by which schemes are considered and approved. We would not change the Takeovers Rules either, or the role played by ASIC. What we would do differently is:

- enhance the composition of the Takeovers Panel so that it includes at least six part-time senior members drawn from recently retired practitioners etc who would more likely be free of conflicts and would have the time to review a draft scheme booklet, independent expert's report and other ancillary documents – with the intention that at least one of them, if not more, would sit on any panel relating to a scheme of arrangement;
- enhance the Executive so that it included at least three full-time senior members in addition to those currently;
- review the way the United Kingdom and Hong Kong takeovers panels make and administer policy on schemes of arrangement; and
- provide a transition period to enable the Takeovers Panel to make policy for schemes of arrangement before commencement of the increase in scope.

If this expanded role was given to the Takeovers Panel, there should also be periodic review of the adequacy of resources and funding and resources of the Panel, and its performance

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Advance rulings

9 Would an advance rulings power assist in the regulation of control transaction disputes? Would the Takeovers Panel, its executive, ASIC or another party be best placed to exercise such a power?

There would be some benefit in being able to obtain advance rulings on certain issues such as collateral benefits and the application of the minimum bid price rule.

If advance rulings were to be adopted in Australia, we consider that the Takeovers Panel executive would be best placed to exercise such a power. We would consider enhancing the composition of the Takeovers Panel in the manner described in the answer to point 8.

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

The key features of advance rulings should be that advance rulings:

- would be made public;
- could not be acted upon until they were made public;
- would only apply to the regulator (Takeovers Panel or ASIC) that was issuing them; and
- would not bind a Court in circumstances where the Court had jurisdiction.

11 How can the Takeovers Panel provide an advance ruling in a way does not result in information asymmetries in the market? Who should the Takeovers Panel consult with or seek input from prior to the making of an advance ruling and in what circumstances should that consultation occur?

Advance rulings would assist in the regulation of control transactions. ASIC Guidance Notes and Takeovers Panel Guidance are useful. However, they are usually general. They tend to deal with fairly standard issues and are not updated often. They also rarely address the more difficult or contentious issues.

Our expectation is that advance rulings will address some of the more complex and uncertain issues that arise in connection with takeovers and schemes. And as such, advance rulings would fairly rapidly build up as a base of considered analysis on key issues.

Advance rulings on matters that are under the jurisdiction of the Takeovers Panel should be by the Takeovers Panel. Other advance rulings should be by ASIC.

In general, advanced rulings should only be given where all parties with an interest in the matter are consulted and a reasonable time is provided for consultation. No action can be taken on the basis of an advance ruling without it becoming public. In this respect, an advance ruling is similar to modifications and exemptions given by ASIC.

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

An advance ruling power would increase the involvement of the Takeovers Panel in change of control transactions.

With a few exceptions over the last 12 months, the Takeovers Panel has not had a significant role in major change of control transactions. However, the ability to give advance rulings is likely to result in parties to a transaction and their advisers engaging with the Takeovers Panel on a more regular basis. Parties are likely to prefer the certainty of an advance ruling to the risks of a dispute before the Takeovers Panel.

As noted above, our expectation is that advance rulings will address some of the more complex and uncertain issues that arise in connection with takeovers and schemes. And as such, advance rulings would fairly rapidly build up as a base of considered analysis on key issues.

General

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

Advance rulings are likely to have the effect of there being a larger body of regulatory guidance on current issues in the market. As a general statement, the guidance from ASIC and the Takeovers Panel relates to general issues and is less likely to address the most current and uncertain issues in the market.

If there were not to be advance rulings, both ASIC and the Takeovers Panel should look at ways in which their written guidance was more current and focussed on difficult issues.