Law Council
OF AUSTRALIA

Business Law Section

Corporate control transactions in Australia

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Schedule 1

About the Business Law Section of the Law Council of Australia

The Business Law Section was established in August 1980 by the Law Council of Australia with jurisdiction in all matters pertaining to business law. It is governed by a set of by-laws adopted by the Law Council and the members of the Section. The Business Law Section conducts itself as a section of the Law Council of Australia Limited.

The Business Law Section provides a forum through which lawyers and others interested in law affecting business can discuss current issues, debate and contribute to the process of law reform in Australia, as well as enhance their professional skills.

The Law Council of Australia Limited itself is a representative body with its members being:

- Australian Capital Territory Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar
- Law Firms Australia
- The Victorian Bar Inc
- Western Australian Bar Association

Operating as a section of the Law Council, the Business Law Section is often called upon to make or assist in making submissions for the Law Council in areas of business law applicable on a national basis.

Currently the Business Law Section has approximately 900 members. It currently has 15 specialist committees and working groups:

- Competition & Consumer Law Committee
- Construction & Infrastructure Law Committee
- Corporations Law Committee
- Customs & International Transactions Committee
- Digital Commerce Committee
- Financial Services Committee
- Foreign Corrupt Practices Working Group
- Foreign Investment Committee
- Insolvency & Reconstruction Law Committee
- Intellectual Property Committee
- Media & Communications Committee

- Privacy Law Committee
- SME Business Law Committee
- Taxation Law Committee
- Technology in Mergers & Acquisitions Working Group

As different or newer areas of business law develop, the Business Law Section evolves to meet the needs or objectives of its members in emerging areas by establishing new working groups or committees, depending on how it may better achieve its objectives.

The Section has an Executive Committee of 11 members drawn from different states and territories and fields of practice. The Executive Committees meet quarterly to set objectives, policy and priorities for the Section.

Current members of the Executive are:

- Mr Philip Argy, Chairman
- Professor Pamela Hanrahan, Deputy Chair
- Mr Adrian Varrasso, Treasurer
- Mr Greg Rodgers
- Mr John Keeves
- Ms Rachel Webber
- Ms Caroline Coops
- Dr Elizabeth Boros
- Ms Shannon Finch
- Mr Clint Harding
- Mr Peter Leech

The Section’s administration team serves the Section nationally and is based in the Law Council’s offices in Canberra.

For Further Information

This submission has been prepared by the Corporations Committee of the Business Law Section (the **Committee**).

The Committee would be pleased to discuss any aspect of this submission.

Any queries can be directed to the following members of the Committee:

- Guy Alexander (Partner, Allens) at guy.alexander@allens.com.au or 0414 223 150; and
- Andrew Rich (Partner, Herbert Smith Freehills) at andrew.rich@hsf.com or 0407 538 761.

With compliments

Philip Argy
Chairman
Business Law Section

Executive Summary

The Treasury has published a consultation paper on possible reforms to the takeover bid and scheme of arrangement regimes, titled *"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 (the **Consultation Paper**).

This submission has been prepared by the Corporations Committee of the Business Law Section of the Law Council of Australia (the **Committee**) in response to that consultation paper.

An executive summary of the views of the Committee is set out below and the detailed submission of the Committee is set out in Schedule 1. Schedule 2 summarises various aspects of the role of the Court in schemes of arrangement.

1. Takeovers and the Takeovers Panel (Discussion Questions 1-2)

The Committee believes that the current takeover regime in Chapter 6 of the *Corporations Act 2001* (Cth) (**Corporations Act**) achieves outcomes that are broadly aligned with the Eggleston Principles (noting that not all provisions in Chapter 6 are consistent with the Eggleston Principles, see section 1 of Schedule 1). However, there are a number of changes which could be made to make takeovers more efficient, to reduce unnecessary costs and to improve the operation of the regime. These proposed changes are set out in section 2.2 of Schedule 1, but broadly include:

- changes to simplify the takeovers process (e.g. electronic despatch of takeover documentation and removal of the need to post notices of variation);
- changes to ensure that Chapter 6 of the Corporations Act reflects published ASIC class orders; and
- changes to ensure that the statutory provisions align with Takeovers Panel policy (e.g. aligning the collateral benefits rule in section 623 and the position taken by the Takeovers Panel); and
- various other changes to simplify and clarify the operation of the regime.

2. Schemes of arrangement and the Court (Discussion Questions 3-4)

The Committee also believes that the scheme of arrangement regime in Part 5.1 of the Corporations Act achieves outcomes that are broadly aligned with the Eggleston Principles. However, as with takeovers, there are a number of changes which could be made to make schemes more efficient, to reduce unnecessary costs and to improve the operation of the regime. These proposed changes, which are set out in section 4.2 of Schedule 1, include streamlining the Court process and amending the disclosure requirements in Part 3 of Schedule 8 of the *Corporations Regulations 2001* (Cth) (**Corporations Regulations**) to remove outdated language and to make the requirements more closely align with the disclosure requirements for a takeover.

Some of the criticisms concerning the current procedure relating to schemes of arrangement are matters that could be addressed by the Courts streamlining their proceedings. The Chief Justices of the Federal Court of Australia and the Supreme Court of New South Wales have authorised us to say that, if the legal profession considers there are unnecessary costs or steps in the Courts' approach to schemes of arrangement, their Courts would be happy to receive suggestions and review scheme proceedings accordingly.

The Committee has established a subcommittee to put proposals to the Courts to assist in such a review. In conjunction with the Federal Court of Australia and the Supreme Court of New South Wales, the Law Council will seek to involve the Supreme Courts of the other States and Territories.

It is submitted that it would be premature for decisions to be made about proposals to remove the Courts' jurisdiction in respect of schemes of arrangement until that review is completed.

3. Regulatory consistency between takeovers and schemes (Discussion Question 5)

The Committee's view is that there is sufficient regulatory consistency between takeovers and schemes, once regard is had to the fact that they are quite different processes. Indeed it is arguable that the shareholder protections in schemes (such as ASIC and Court supervision, and the class tests for voting on a scheme) are actually greater than the protections under a takeover.

Discussion Question 5 mentions three specific issues and asks whether there should be 'regulatory consistency' on these issues. In this regard:

(a) the minimum disclosure requirements in schemes are, in practice, already almost identical to that in takeovers (although, as noted above, the Committee does favour reviewing and amending the scheme disclosure requirements under the Corporations Regulations to more expressly align them with the takeover disclosure requirements in the Corporations Act);

(b) while it is true that the minimum bid price rule does not apply to schemes, the following points are relevant:

- it is unclear how and for what period it would apply in the context of a shareholder vote on a scheme as opposed to an offer to purchase shares (for example, from which event would the 4 month period look back from - the date of the first court hearing, the date of announcement of the scheme or some other event?);

- in a scheme of arrangement, unlike in a takeover (where pre-bid acquisitions by the bidder can count towards (i) any minimum acceptance condition and (ii) the compulsory acquisition threshold), pre-scheme acquisitions by a bidder in the scheme context *cannot* be counted towards the scheme approval threshold, as the bidder would either form a separate

class or have its votes completely disregarded on the grounds of an extraneous interest;

- if the Takeovers Panel wanted the minimum bid price rule to apply to schemes, it could do so simply by amending its Guidance Note 6. The Panel has consulted on this issue in the past and decided not to do this; and

- in any event, the policy basis for the minimum bid price rule where the pre-scheme acquisition is below 20% is not clear, even in relation to takeovers; and

(c) it would be inappropriate and unnecessary to apply the collateral benefits rule in the context of schemes, as the protections that the rule seeks to achieve are already safeguarded by the class voting requirements in schemes, which requirements are simply absent in takeovers.

4. The role of the Takeovers Panel in relation to schemes (Discussion Questions 6-8)

There is limited support amongst Committee members for a model where, in relation to members' schemes of arrangement which effect a change of control, the Takeovers Panel replaces the Court in the scheme process, and takes over the supervision of, and is required to consider the fairness of and approve, such schemes, in the same way as the Court currently does. The detailed reasons for the Committee's view are set out in section 6.2 and 7.4 of Schedule 1.

There is, therefore, strong support amongst Committee members for the retention of the current scheme of arrangement regime under Part 5.1 of the Corporations Act (including the Court supervision and approval requirements) in relation to members' schemes which effect a change in control.

There are some Committee members who support the introduction of a new and *additional* regime in Chapter 6 of the Corporations Act, under which a bidder would be able to acquire all of the shares in a target company, once the acquisition has been approved by 75% or more of the votes cast at a meeting convened by the target company, and provided the Takeovers Panel has not intervened (on application of a shareholder, ASIC or other interested party) to prevent the acquisition proceeding. This new regime would be in *addition* to, and would not replace, the existing Court approved scheme of arrangement process in Part 5.1 of the Corporations Act. The market would have a choice. That possible new regime is described further in section 7.2 of Schedule 1, and the arguments put by those who support such a new regime are set out in section 7.3 of Schedule 1.

However, while some Committee members support the introduction of such a new regime, there is also a body of Committee members who believe that such a regime is unnecessary and would deprive target shareholders of a number of very important protections in the current scheme process. The arguments against the introduction of such a regime are set out in section 7.4 of Schedule 1.

The Committee is also of the view that if the Government were minded to continue to investigate an expansion of the powers of the Takeovers Panel in relation to members' schemes of arrangement, including the introduction of any new regime, there would need to be further broad market consultation on the actual specifics of the proposed changes. The current Consultation Paper does not give any detail as to a proposed model, or what such changes would look like, and it is very difficult to respond to any new proposal in the abstract. In particular, there would need to be broad consultation with shareholder groups if Chapter 6 of the Corporations Act were proposed to be amended to include a new procedure under which a shareholder's shares could be compulsorily acquired with a 75% vote (which may represent considerably less than 75% of the shares on issue), without any Court supervision.

5. Advance rulings (Discussion Questions 9-12)

The Committee supports the introduction of an advance rulings power, but notes that there are a number of important practical factors that would need to be addressed to ensure that such a power was of utility to market participants in undertaking takeovers.

Some of the practical issues here include:

(a) the Panel would need additional resources and funding (eg, the Panel would benefit from retaining the services of a number of recently retired experienced takeover and scheme practitioners to anchor the increased scope of work);

(b) any advance ruling by the Takeovers Panel will be dependent on the facts at the time the ruling is sought, and which have been notified to the Panel. However, takeovers typically involve a complex factual matrix which is constantly changing (e.g. introduction of new bidders; variation of bids; changes in underlying market dynamics etc.). Any advance ruling may therefore quickly become non-binding if the underlying facts change;

(c) for procedural fairness reasons, the Takeovers Panel may not feel that it is appropriate to grant a binding advance ruling without having first consulted affected parties, such as other existing or potential competing bidders; major shareholders; the target; and ASIC. It is highly unlikely that bidders would want to go through a consultation process (typically such a ruling would only be attractive if it can be obtained on a confidential basis, ahead of taking the action); and

(d) the Treasury paper seems to assume that the advance rulings power would actually be exercised by the Executive of the Takeovers Panel, rather than a sitting Takeovers Panel. This raises the question of whether such a ruling given by the Panel Executive would in fact be binding on any subsequent sitting Panel. Assuming that it would not be binding on a subsequent sitting Panel, this defeats the purpose of getting a binding ruling.

The Treasury paper seeks to derive support for the suggestion that our Takeovers Panel should have an advance rulings power from the fact that the

UK, Hong Kong and Singapore Panels have such a power. However, the Australian Takeovers Panel is currently very different to other panels, including the UK Takeovers Panel, in terms of structure, powers, processes, resources and funding.

6. General (Discussion Question 13)

As discussed above (and as outlined in more detail in sections 2.2 and 4.2 of Schedule 1), there are a range of changes which could be made to Chapter 6 and Part 5.1 of the Corporations Act to make takeover bids and schemes of arrangement, respectively, more efficient, to reduce unnecessary costs and to improve their operation. In the Committee's view, many of these changes are well overdue, and the Government should concentrate on making these changes before looking more broadly at other policy options.

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Schedule 1
Responses to the Treasury's questions

TAKEOVERS RULES AND THE TAKEOVERS PANEL

1 Question 1 – views on the current takeover regime

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

The Corporations Committee of the Business Law Section of the Law Council of Australia (the **Committee**) considers that the current takeover regime in Chapter 6 of the Corporations Act is working well and achieves outcomes that are broadly aligned with the Eggleston Principles.

That said, not all provisions in Chapter 6 are consistent with the Eggleston Principles. For example:

- the on-market acquisition exemption (in item 2 of s611);
- the shareholder approved acquisition regime (in item 7 of s611);
- the 3% creep rule (in item 9 of s611)[1],

each have a different policy basis which is inconsistent with the Eggleston Principles.

We are not suggesting that these provisions should be removed from Chapter 6. We are merely highlighting that the Eggleston Principles are not an exhaustive statement of the policy considerations underpinning all of the various provisions in Chapter 6.

2 Question 2 – possible changes to the takeover regime

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

2.1 Some background observations on the takeover regime

The takeover regime in Chapter 6 of the Corporations Act comprises a well-established and well-understood body of law. However, as outlined in section 2.2 of this Schedule 1, there are some areas where the takeover regime could be improved to make it more efficient.

[1] The 3% creep rule can be used by acquirers to effect changes of control with no ability for any shareholder to participate in the transaction leading to change of control unless he or she happens to be the counterparty to the acquirer.

2.2 Changes that should be made to the takeover regime

The Committee proposes the following changes to the takeover regime in Chapter 6 of the Corporations Act to make them more efficient and reduce unnecessary costs and to improve their operation.

Item	Proposed change	Description of the change
1.	Various ASIC class orders and instruments should be written into the law	ASIC has enacted numerous class orders and instruments to address drafting shortcomings and anomalies in Chapter 6 of the Corporations Act. These have received general acceptance from market practitioners and have, in many cases, been in place since the current takeover provisions were enacted on 13 March 2000. Bruce Dyer (former Counsel at the Takeovers Panel) has (painstakingly) pulled together a compilation of all of these class orders and instruments – see the following link: https://www.conisante.com.au/conisante-consulting That compilation highlights the significant extent of the ASIC class orders and instruments. It is inefficient, unnecessary and confusing for these class orders and instruments to sit outside the Corporations Act. Given their general acceptance, they should be enacted.
2.	Abolish the prohibition on escalator agreements (s622)	The prohibition on escalator agreements in s622 of the Corporations Act should be abolished. There is no policy basis for the retention of this rule as target shareholders would be protected regardless by fundamental takeover rules requiring the terms of a takeover bid to be the same for all shareholders (s619) and through the operation of the minimum bid price rule (s621(3)). In addition, bidders and target shareholders can achieve economically the same result, as can be achieved via escalator agreements, through entry into pre-bid acceptance agreements. A pre-bid acceptance agreement requires a shareholder to accept an offer under a takeover bid, thus legitimately ensuring that that shareholder will receive whatever price is offered under the bid by virtue of the "statutory escalator", which requires that, under an off-market takeover bid, all target shareholders shall be entitled to any increase in the offer consideration.[2] It is noted that the Takeovers Panel has not expressed any concerns with escalator agreements.[3]

[2] For examples of pre-bid acceptance agreements, see *Re Advance Property Fund* [2000] ATP 7 and *Re Alpha Healthcare Ltd* [2001] ATP 13.

[3] See *Re GoldLink IncomePlus Ltd (No 2)* [2008] ATP 19 and *Re Normandy Mining Ltd (No 4)* [2001] ATP 31 at [41]-[42].

Item	Proposed change	Description of the change
		This is not a new recommendation. There have been repeated calls over many years for the abolition of the prohibition on escalator agreements.[4]
3.	Align the collateral benefits rule (s623) and the Panel's position on collateral benefits	The collateral benefits rule in s623, and the approach taken to its operation and enforcement by the Takeovers Panel,[5] need to be aligned. It makes no sense (and materially increases the regulatory burden) for certain actions to technically breach s623, where the Takeovers Panel would not regard those same actions as giving rise to unacceptable circumstances (and vice versa). This is all the more illogical given that a breach of s623 is a criminal offence.
4.	Amend the bid funding rule to align with the Panel's position (s631(2))	The bid funding rule in s631(2)(b) should be amended to reflect the position of the Takeovers Panel. Section 631(2)(b) says that a person must not publicly propose a takeover bid if they are "reckless" as to whether they will be able to perform their takeover payment obligations. By way of contrast, the position of the Takeovers Panel is that a person must have a "reasonable basis" to believe that they will be able to perform their takeover payment obligations.[6] The Panel has made it clear that whether a bidder has a "reasonable basis" is to be assessed *objectively* and will depend on the circumstances of each case.[7] By way of contrast, the Court has made it clear that, in determining recklessness for the purposes of s631(2)(b), a *subjective* test must be applied.[8] This interpretation has significant implications when assessing whether there has been a breach of s631(2)(b) in relation to takeover funding as it is: ● looking only to the subjective belief of the bidder when a takeover is announced; and ● not requiring guaranteed funding to be in place even at the stage when offers are made to target shareholders.

[4] For a further discussion on escalator agreements and pre-bid acceptance agreements, see Levy R, *Takeovers Law & Strategy*, Fifth Edition, Lawbook Co., 2017, at 146-149 [7.30].

[5] See Takeovers Panel, Guidance Note 21, "Collateral Benefits", First Issue, 14 April 2008.

[6] Takeovers Panel, Guidance Note 14, "Funding arrangements", Third Issue, dated 26 November 2015.

[7] Takeovers Panel, Guidance Note 14, "Funding arrangements", Third Issue, dated 26 November 2015, at 4 [10].

[8] *Australian Securities and Investments Commission v Mariner Corporation Limited* [2015] FCA 589 at [249].

Item	Proposed change	Description of the change
		We consider that law reform is appropriate to remove the inconsistency between the Panel's position and s631(2)(b).[9] The Committee recommends that the Panel's objective test be codified.
5.	Remove requirement for notices of variation to be posted to shareholders (s650D(1)(c))	Consistently with facilitating business transactions and the "cutting red tape" philosophy of the "Modernising Business Communications" reform agenda, s650D(1)(c) should be deleted so that a notice of variation of a takeover bid does not need to be sent to target shareholders to be valid. Target shareholders will receive notice of the variation through the ASX company announcements platform for listed targets. This approach would be consistent with the supplementary bidder's statement regime in s643 (which does not require supplementary bidder's statements to be sent to target shareholders in the case of listed entities) as well as other provisions requiring notices from bidders such as s630 and s650F (which relates to the status of conditions), which notices are not required to be sent to target shareholders. On many occasions, bidders only make their decision on whether to extend a takeover bid at the last minute. However, to ensure compliance with s650D(1)(c), they are required to print thousands of notices of variation to be sent to shareholders well ahead of the deadline in case they do decide to extend. On some occasions, bidders will print multiple different versions of a notice of variation (e.g. one for a 1 week extension and another for a 2 week extension) – this is a complete waste of costs and environmentally unfriendly.
6.	Remove the need to send a notice to shareholders about an automatic extension and remove its repeated application (s624(2))	If, within the last 7 days of the offer period, the bidder's voting power increases above 50% or the bidder increases the offer consideration, the offer period automatically extends by 14 days and the bidder must send a notice to shareholders within 3 days (s624(2)). Consistently with our above proposal relating to notices of variation, s624(2) should be simplified so that a notice of automatic extension of a takeover does not need to be sent to target shareholders. Shareholders will receive notice of the extension through the ASX company announcements platform for listed targets. In addition, s624 may be triggered more than once and this should be reformed. The example, which has occurred in some takeovers, is where a bidder moves over 50% and this triggers the issue of executive or other options diluting the bidder below 50%. When the bidder then moves back over 50%, there is a second automatic extension that has no

[9] For a further discussion on this law reform suggestion, see Morgan A, "Takeover Funding: The Rhyme of the Modern Mariner", Chapter 10, in Damian T and James C (eds), *Towns Under Siege: Developments in Australian Takeovers and Schemes*, 2016. Ross Parsons Centre of Commercial, Corporate and Taxation Law, The University of Sydney, at 404-407, Section [10.7.3]

Item	Proposed change	Description of the change
		policy need or basis, and certainly no need for yet another shareholder notice.
7.	Electronic despatch of takeover documents • Allow electronic despatch of takeover documents (item 6 of s633(1)) • Targets to make email addresses available to bidders (s641)	The takeover rules should be amended to facilitate despatch of takeover documents electronically. We understand that Treasury is separately considering law reform proposals in relation to this issue (including requiring targets to make available the email addresses of shareholders to bidders). Accordingly, we have not made detailed submissions in relation to this issue here. That said, if Treasury would like to hear further submissions from us in relation to this issue, please let us know. There would be merit in mandating despatch of takeover documents by email, if a target shareholder has provided an email address.
8.	Simplify the minimum bid price rule by testing its operation at the announcement date not the date the offers are made (s621(3))	The operation of the minimum bid price rule in s621(3) is unnecessarily complex and should be simplified.[10] It can also make it difficult for bidders to launch a bid with confidence and can deter takeover activity with no commensurate benefit to the market. The minimum bid price rule should operate so that it is tested at the *date of announcement* of a takeover bid and not, as currently, at the *date when the takeover offers are made* to target shareholders (which can be up to 2 months after the date of announcement of a takeover bid). This would be consistent with the approach taken under the UK Takeover Code.[11] This would avoid the problem which arises when a takeover bid is announced offering scrip consideration. If the bidder has acquired shares in the past 4 months, it is at risk of the value of its scrip falling between the announcement of the takeover and the offers being made, which could result in a breach of the minimum bid price rule. This can make it difficult for bidders to launch a takeover bid with confidence and can deter takeover activity with no commensurate benefit to the market. Bidders may seek to protect themselves from the operation of the minimum bid price rule by subjecting their bid to a defeating condition relating to the satisfaction of the compliance with the minimum bid price rule. However, this is unsatisfactory for shareholders, and an informed market, as it may result in a takeover bid being withdrawn if the condition is not satisfied. Bidders who do not protect themselves with such a defeating condition place themselves at risk of certain mischievous

[10] See ASIC Corporations (Minimum Bid Price) Instrument 2015/1068 and ASIC Regulatory Guide 9, at Part D.

[11] UK Takeover Code, rule 11.1 (noting that under the UK Takeover Code, the "offer period" commences upon announcement of a takeover offer).

Item	Proposed change	Description of the change
		market participants seeking to reduce the value of the bidder's shares with a view to gaming the application of the minimum bid price rule (as well as being exposed to the usual risk of market fluctuations in the usual course). Finally, it is noted that there are some who hold the view that the minimum bid price rule should be abandoned altogether given that Chapter 6 of the Corporations Act allows persons to freely acquire up to 20% of a company.[12] Equally, there are others who believe the minimum bid price rule should be retained.
9.	Refine the 2-month rule (s631) – distinguish between pre-conditional offers and firm intentions to make offers	The rule in s631 of the Corporations Act, which requires a bidder to send takeover offers to target shareholders within two months after it "publicly proposes to make a takeover bid", needs to be amended to expressly distinguish between: • announcements of offers that are subject to *pre-conditions* (which do not start the two month clock running); and • announcements of firm intentions to make an offer (which do start the two-month clock running). We would suggest that once any pre-conditions are satisfied, the bidder should then have one month to send its offers to target shareholders. This would be similar to how the takeover rules operate in the UK[13] and Hong Kong.[14] Much confusion and uncertainty arises as ASIC's publicly stated position is that it takes an extremely broad interpretation of the meaning of 'publicly propose' (as used in s631).[15] In particular, ASIC takes the view that even if a bidder announces that it will only proceed with a takeover bid if certain pre-conditions are fulfilled (eg satisfactory completion of due diligence or a board recommendation), this statement constitutes a "public proposal" to make a takeover bid. This then enlivens s631 (which makes it a criminal offence not to make offers within two months). This makes no sense – if the

[12] For a further discussion on this law reform possibility, see Levy R, *Takeovers Law & Strategy*, Fifth Edition, Lawbook Co., 2017, at 5 [1.40] and see also Levy R and Furphy B, "Takeover Law Reform Proposals", Chapter 16, in Damian T and James C (eds), *Towns Under Siege: Developments in Australian Takeovers and Schemes*, 2016. Ross Parsons Centre of Commercial, Corporate and Taxation Law, The University of Sydney, at 603-604, Section [16.6].

[13] UK Takeover Code, rules 2.5 and 2.7.

[14] Hong Kong Takeovers Code, rules 3.5 and 3.7.

[15] See ASIC Regulatory Guide 59, "Announcing and withdrawing takeover bids", dated August 1995, at [59.15]-[59.23].

Item	Proposed change	Description of the change
		pre-conditions are not fulfilled, a bidder should not be at risk of committing a criminal offence in such circumstances.[16] ASIC's publicly stated position was articulated back in 1995 – way before the emergence of non-binding indicative offers (**NBIOs**) being made by potential bidders to potential targets (NBIOs are commonplace today). The market is well familiar with NBIOs – the market is clear that these are not firm intentions to proceed with a takeover bid or a scheme of arrangement and that there is no assurance that any transaction will ultimately occur. As a result of ASIC's publicly stated position, some potential bidders seek to avoid the serious consequences of an unintended triggering of the 2 month rule in s631 by using terminology in their announcements such as "business combinations", "control transactions" or "schemes of arrangement" instead of "takeover bid" (which is the only phrase referenced in s631). This should be unnecessary. Other bidders have sought to protect themselves, and have tried to clarify the position for the benefit of the market, in the case of takeovers that are subject to pre-conditions by expressly stating that the announcement is not intended to be a "public proposal" of a takeover bid for the purposes of s631. ASIC has, surprisingly, said that it does not like this (well-intentioned) practice.[17] By providing for separate regimes for takeovers that are subject to pre-conditions and takeovers that are only subject to defeating conditions, the law would provide certainty for the market and prospective bidders would not be subject to the spectre of criminal sanctions for failing to make offers in the event that pre-conditions are not satisfied. Distinguishing between pre-conditional offers and firm intentions to make an offer would also provide certainty as to when a bidder is required to proceed with an offer and send offers to target shareholders. It makes no sense that, if a prospective bidder announces that they would like to explore a possible takeover bid with a target company, that should trigger the 2 month rule in s631; whereas if a prospective bidder announces that they would like to explore a possible scheme of arrangement with a target company that this does not carry the same consequences. The market is today sophisticated enough to fully appreciate that such an announcement provides no assurance whatsoever that a takeover or scheme will ultimately proceed. The real policy issue here is that prospective bidders must not mislead the market in any public announcement and that,

[16] ASIC is ordinarily not prepared to issue a "no action" letter if a bidder does not proceed to make offers within 2 months because of an unfilled pre-condition. ASIC's approach appears to be that the appropriate course of action is for a bidder to apply to ASIC for relief (although as set out in ASIC Regulatory Guide 59 at [59.31], it is noted that "that relief will rarely be given and cannot be given after the section has been breached") or rely on the "defence" contained in s670F of the Corporations Act (see ASIC, Regulation of Corporate Finance: January to June 2016, at [175]).

[17] ASIC, Regulation of Corporate Finance: January to June 2016, at [171]-[178].

Item	Proposed change	Description of the change
		if they do, there should be appropriate consequences. Part 7.10 of the Corporations Act (which includes misleading and deceptive conduct provisions) – which was introduced many years after s631 – now provides the appropriate framework.
10.	Abolish the automatic fatal flaw provision (s612)	Section 612 of the Corporations Act, which deals with the effect of non-compliance with certain takeover rules, is unnecessary and its application can have potentially fatal consequences for a takeover. The effect of this provision is that non-compliance with certain procedural steps and rules for a takeover bid could result in a takeover bid being or becoming void (eg the failure to send a bidder's statement to a shareholder or option holder could invalidate the whole takeover bid[18]). It is unnecessary to have such provision which applies automatically to takeover bids, as it may not always be appropriate that a takeover bid should become void where there has been non-compliance with a procedural step or rule. Non-compliance issues are more appropriately dealt with by the Takeovers Panel, which has the power to make any order it considers appropriate. ASIC has recognised the potential unfairness arising from the operation of s612 and has indicated that it may give case-by-case relief to a bidder from the effect of s612.[19] However, ASIC has said that it considers applications for this relief "will be exceptional" and ASIC considers that it cannot give relief for breaches of the Corporations Act that have already occurred.[20] Importantly, the repeal of s612 would not mean that a breach of any of the provisions listed in s612 would go unpunished. The existing statutory consequences of a breach of any of those provisions would continue to apply (noting that these consequences are in addition to any remedial orders that the Takeovers Panel may choose to make).
11.	Amend the deadline for extending an offer period (s650C)	A core principle of Chapter 6 is that shareholders should have sufficient time to consider a takeover bid. However, we think that the present rules put shareholders in a position which is too advantageous compared to that of the bidder and which inhibit efficiency in takeovers. If the offer has been open for the required minimum one month period, we think that the bidder should *not* be forced to make a decision on whether or not to extend the offer period until *after* a deadline for acceptances, which would occur on

[18] Corporations Act, s612(f).

[19] ASIC Regulatory Guide 9, "Takeover Bids", dated September 2020, at Part N.

[20] ASIC Regulatory Guide 9, "Takeover Bids", dated September 2020, at [9.667]-[9.668].

Item	Proposed change	Description of the change
		the last scheduled day of the offer period. This would give the bidder additional information upon which to decide whether or not to extend the offer. Under our proposal: (a) acceptances would only be valid if received by 7.00pm on the last scheduled day of the offer period (including extensions); (b) the bidder would be able to extend the offer period by ASX announcement at any time up to 9.30am on the following trading day,[21] giving the bidder time to consider its position in light of acceptances received; and (c) if the bidder extends the offer period, the bidder would be obliged to do so for a minimum of 7 or 14 days, and acceptances received since the previous closing time would cease to be late and would become valid. This reform would avoid the present situation where sophisticated shareholders are able to hold off accepting the offer until the last few minutes of an offer period to see if an extension is effected. This prolongs offers and creates inequality between those shareholders and less sophisticated shareholders. This reform would also tend to shorten the time frame of bids. This reform is easily applied to unconditional bids. Conditional bids raise more issues, but we think it could be applied to them with some adjustment. By way of example, once a bid has been open for the required minimum one month period, a bidder should be free to extend the offer period up until 9.30am on the trading day after the scheduled closing date of the offer period (whether or not the bid is then still subject to defeating conditions). This reform would also ensure that there is no repeat of the circumstances that arose in *Re Qantas Airways Ltd (No 2)* [2007] ATP 6 and *Re Qantas Airways Ltd (No 2R)* [2007] ATP 7. In those cases, the bidder's takeover lapsed after falling just short of the 50% minimum acceptance condition. The bidder was unable to count a purported acceptance which was received approximately 5 hours after the scheduled closing time of the offer (that acceptance would have caused the minimum acceptance condition to have been satisfied). The proposed reform would avoid that (provided the bidder was not bound by a last and final 'no extension' statement made before the deadline).

[21] If the target was not listed, notice would be given to the target and ASIC and included on a nominated webpage of the bidder.

Item	Proposed change	Description of the change
12.	Clarify that the Corporations Act does not intend to regulate reverse takeovers unless someone would acquire more than 50% of the bidder (item 4 of s611)	On their face, the exceptions to the "20% rule"[22] in items 4 and 17 of s611 allow a target shareholder to emerge with more than 20% of the shares in the bidder as a result of acceptance of a takeover or the implementation of a scheme of arrangement (being a takeover or scheme where shares in the bidder form all or part of the consideration). In fact, these exceptions are broad enough, on their face, to facilitate a reverse takeover of a bidder without the need for the approval of the bidder's shareholders. Following the Takeovers Panel's decisions in *Re Gloucester Coal Ltd (No 1)* [2009] ATP 6 and *Re Gloucester Coal Ltd (No 1R)* [2009] ATP 9, both ASIC[23] and the Takeovers Panel[24] attempted to articulate their reverse takeover policy. Unfortunately, neither the ASIC policy nor the Takeovers Panel policy make it clear when the approval of the bidder's shareholders will be required for a takeover bid or a scheme of arrangement. This is not in the interests of an efficient, competitive and informed market.[25] By way of example, ASIC talks of the need for bidder shareholder approval if the transaction "has a material effect on control" of the bidder whereas the Takeovers Panel talks of the need for bidder shareholder approval if the transaction "disenfranchises shareholders". Items 4 and 17 of s611 of the Corporations Act should be amended to make it clear that the only limitation on their operation is where a takeover or scheme would result in a target shareholder acquiring in excess of 50% of the voting power in the bidder.[26] The approval (via an ordinary resolution) of the bidder's shareholders should be required in circumstances where a person would emerge with voting power of in excess of 50% as a result of a takeover or scheme (but not in any other circumstances). This should be the extent of the regulation of reverse takeovers by ASIC and the Takeovers Panel. Market participants deserve certainty in the application of the relevant rules. The confusion and uncertainty caused by the statements made by ASIC and the Takeovers Panel, which detract from an efficient, competitive and informed market,

[22] The "20% rule" itself is contained in s606 of the Corporations Act.

[23] ASIC Regulatory Guide 60, "Schemes of arrangement", dated September 2020, at 12 [60.37]-[60.39].

[24] Takeovers Panel, Guidance Note 1, "Unacceptable Circumstances", Sixth Issue, dated 11 July 2018, at 5-6 [18] and 11 [32(b)] (footnote 51).

[25] Damian T and Rich A, *Schemes, Takeovers and Himalayan Peaks: The use of schemes of arrangement*, Fourth Edition, 2021, Ross Parsons Centre of Commercial, Corporate and Taxation Law, The University of Sydney, at Section [9.3.2] (this book is referred to in this submission as, **Damian T and Rich A, *Schemes, Takeovers and Himalayan Peaks,* Fourth Edition**).

[26] The interests of market certainty demand that a bright line numerical test of 'in excess of 50%' be adopted rather than a subjective and imprecise test of a 'change of control'. To highlight this, it is noted that (questionable) views have previously been expressed that a change of control is capable of occurring if someone acquires just over 20% of the shares in a company, see *Re Gloucester Coal Ltd (No 1R)* [2009] ATP 9 at [27]-[29].

Item	Proposed change	Description of the change
		would be addressed by a clear legislative statement along the above lines. By way of comparison, and to add to the regulatory maze in relation to reverse takeovers (noting that ASIC, the Takeovers Panel and ASX all have different policies on reverse takeovers), the ASX has introduced its own rules on reverse takeovers.[27] There has been widespread commendation of the approach taken by the ASX on reverse takeovers, as the rules provide bright lines tests for exactly when the ASX will expect a takeover or scheme to be subject to the approval of the shareholders of a listed bidder.
13.	If the target is unlisted, require: • more frequent notifications of acceptances (s654C); and • a dedicated webpage for takeover documents	***More frequent acceptance updates*** If the target is listed, the bidder must publicly announce every 1% or greater movement in its voting power.[28] This promotes the efficient, competitive and informed market principle. By way of contrast, if the target is unlisted but still subject to Chapter 6 as it has more than 50 members, the bidder is only required to provide notifications upon attaining voting power in the target of 25%, 50%, 75% and 90%.[29] It is anomalous that target shareholders, and the target, should receive less information as to the status of acceptances if the target was unlisted than they would if the target was listed. This lack of information could operate to deter potential competing bidders from emerging and to cause target shareholders to deal in target shares based on assumptions rather than facts. Bidders for unlisted target companies should be required to update the market every time there is an increase of 1% or more in their voting power (as they would be required to do if the target was listed). ***Dedicated website requirement*** Currently, if the target is unlisted, all takeover documents must be given to ASIC. Very few retail shareholders have access to ASIC's database. In addition, access to the documents on ASIC's database is not free and there are often delays in ASIC uploading documents onto its database. To remove this information disadvantage, if the target is unlisted, the bidder and target should be required to each maintain a dedicated webpage regarding to the takeover bid. All notices and announcements regarding the bid would be required to be posted on the webpage, and target

[27] See ASX Listing Rule 7.2, Exceptions 6 and 7. See also the definition of "reverse takeover" in ASX Listing Rule 19.12.

[28] Corporations Act, s671B(1).

[29] Corporations Act, s654C.

Item	Proposed change	Description of the change
		shareholders would be notified of details of the webpage at the commencement of the takeover bid. This would effectively then provide for disclosure neutrality between takeovers for listed companies (where takeover documents are made available on the ASX) and for unlisted companies (where takeovers documents will be made available on a dedicated website)
14.	Clarify that performance rights are "securities" (s92(3))	There is some doubt as to whether certain performance rights are a "security" for the purposes of s92(3) (and hence Chapters 6 and 6A) of the Corporations Act.[30] This uncertainty needs to be removed – they should be "securities" for these purposes. Performance rights have now largely replaced options as an instrument of choice for employee incentive arrangements for ASX listed companies. Options are clearly "securities" - it makes no sense that there can be doubt as to whether a performance right (which is economically and substantively the same kind of instrument as an option) is a security and therefore subject to Chapters 6 and 6A of the Corporations Act. Section 92(3) should be amended to clarify that all performance rights (and similar or equivalent rights) are securities, with the result that a bidder would be able to make a takeover bid in relation to performance rights and compulsorily acquire them under Chapter 6A of the Corporations Act. This change would clarify uncertainty which exists in relation to the status of performance rights holders in takeover bids (and schemes of arrangement where the bidder may wish to rely on the compulsory acquisition regime in Part 6A.2 of the Corporations Act to acquire performance rights), which has created transaction risk for bidders.
15.	Give the Panel the power to award costs in any case	The Takeovers Panel only has the power to make a costs order against a party if it makes a declaration of unacceptable circumstances.[31] As the Panel has noted, this means that it cannot order costs to a successful respondent even if it declines to conduct proceedings because the application was frivolous or vexatious.[32] Accordingly, some applicants consider they have 'nothing to lose'[33] by making an application to the Takeovers

[30] ASIC Regulatory Guide 10, "Compulsory Acquisitions and buyouts", dated June 2013, at [RG 10.125]-[RG 10.127]; see also ASIC Report 530, "Overview of decisions on relief applications: October 2016 to March 2017", dated June 2017, at 29 [151]-[152].

[31] Corporations Act, s657D(1) and s675D(2)(d).

[32] Takeovers Panel, Guidance Note 4, "Remedies General", Sixth Issue, dated 30 January 2017, at [25].

[33] Except, perhaps, in respect of paying their own costs if they have used external legal counsel to represent them.

Item	Proposed change	Description of the change
		Panel – if they are successful, they get what they want and, if they are not successful, they are no worse off.[34] Responding to applications that are made to the Takeovers Panel can cost parties hundreds of thousands of dollars and a delay to a takeover transaction can be fatal. In FY21, the average number of days between an application and a decision from the Panel was 21.5 days[35] – an extremely long period in any change of control transaction.[36] In light of this, it is not appropriate that an applicant is not at risk of a costs order against it in the event of an unsuccessful application to the Takeovers Panel. We recommend that the Takeover Panel be given a general discretion to make a costs order against an unsuccessful applicant. That way, the Panel will be able to make a costs order in similar circumstances to where a Court may make a cost order against an objector in a scheme of arrangement, namely where the application is: • not properly and justifiably advanced;[37] • frivolous, vexatious or without substance;[38] or • being used for an ulterior motive or as a delaying tactic to prevent a takeover from going ahead.[39]
16.	Takeovers Panel to be able to require an undertaking as to damages	The law should be amended to make it clear that the Takeovers Panel can accept an undertaking as to damages when making interim orders There is a concern that too frequently transactions are susceptible to delay by a Panel application which seeks a restraining order without the applicant taking on any risk. This can have a devastating impact on a transaction. This is different from the general rule in a Court, where the Court will almost always require the applicant for an injunction to give an undertaking as to damages. That means, if the injunction is overturned, the applicant must compensate persons affected.

[34] They are not at risk of a cost order being made against them.

[35] Takeovers Panel, Annual Report 2020-21, at 5.

[36] Treasury had expected takeover disputes to be resolved "as quickly and efficiently as possible" by the Panel (see "Corporate Law Economic Reform Program: Commentary on Draft Provisions", The Treasury, 1998, at 100 [17]).

[37] *Re Castlereagh Securities Ltd* [1973] 1 NSWLR 624 at 640-641; *Re Arrowfield Group Ltd* (1995) 17 ACSR 649 at 660-661; *Re Ampol Ltd* (1989) 14 ACSR 772 at 780; *Re Matine Ltd; Chatham Investment Co Ltd; Milkirk Investment Co Ltd* (1998) 28 ACSR 492; *Re NRMA Ltd* (2000) 33 ACSR 595 at 608 [45].

[38] *Re NRMA Ltd* (2000) 33 ACSR 595 at 608 [45]; *Re Delta Gold Ltd* (2001) 40 ACSR 437 at 360 [64]; *Re Kumarina Resources Ltd (No 2)* [2013] FCA 723 at [10].

[39] *Re Crusader Ltd* (1995) 17 ACSR 336 at 349; *Re Matine Ltd; Chatham Investment Co Ltd; Milkirk Investment Co Ltd* (1998) 28 ACSR 492 at 494; *Re NRMA Ltd* (2000) 33 ACSR 595 at 608 [45]; *Re Arc Energy Ltd (No 2)* [2008] FCA 1412 at [14].

Item	Proposed change	Description of the change
		We consider this approach should be expressly contemplated in s201A of the *Australian Securities and Investments Commission Act 2001* (Cth). It would mean that only serious issues are brought to the Panel, consistent with the general policy that frivolous complaints should not unduly interfere with commercial transactions. It would also tend to ensure that, if an applicant was seeking to restrain a transaction, the applicant would seek to have the matter determined well before the transaction was to be implemented in order to avoid giving the undertaking. Timely decision making is one of the key objects of the Panel.[40] Section 201A(1) should be expanded to provide that 'the Panel may accept an undertaking as to damages when considering making an interim order under section 657E in the same way as a court may accept such an undertaking when considering an injunction'. Enforcement could be under s201A(3) and (4).

[40] *Australian Securities and Investments Commission Regulations 2001* (Cth), reg.13(c).

3 Question 3 – views on the scheme of arrangement regime

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.

3.1 Schemes achieve outcomes aligned with, and which promote, the Eggleston Principles

The Committee believes that the scheme of arrangement regime in Part 5.1 of the Corporations Act does achieve outcomes that are broadly aligned with, and in fact promote, the Eggleston Principles.

The Eggleston Principles can be summarised as follows:

- that the identity of the prospective acquirer is known to the shareholders and directors of the target company (the **identity principle**);
- that shareholders and directors have reasonable time to respond to the takeover proposal (the **reasonable time principle**);
- that shareholders have all information necessary to assess the merits of the proposal to acquire control (the **disclosure principle**);
- that, so far as practicable, each shareholder has an equal opportunity to participate in the benefits offered (the **equal opportunity principle**); and
- that acquisitions should take place in an efficient, competitive and informed market (the **Masel principle**).

The scheme of arrangement process achieves each of those outcomes, and in many respects does so more effectively than the takeover regime. For example:

(a) In a Part 5.1 scheme, ASIC and the Court play an important pre-vetting and supervision role. The Court will not grant the orders convening the scheme meeting unless it is satisfied that ASIC has had a reasonable opportunity to review the scheme booklet and that the scheme booklet contains all material information (including disclosure of material benefits that are not being made available to all shareholders) and unless the scheme booklet is accompanied by an independent expert's report. Counsel for the scheme company also has a duty to the Court to bring to its attention any issues which might mean that the vote at the scheme meeting is not an informed consent of shareholders.[41] There are also countless examples of ASIC and/or the Court of its own volition requiring corrective disclosure to scheme documents prior to despatch to target shareholders, and requiring additional disclosure due to new or changed circumstances prior to the scheme meeting. This protection does not exist in a takeover bid.

(b) Having regard to the "identity principle", the "reasonable time principle" and the "disclosure principle", a scheme clearly achieves those outcomes. The identity of the bidder, its intentions in relation to the target's business, employees and

[41] See section 2.4 and section 2.5 of Schedule 2 for a discussion on the factors taken into account by the Court at the first and final court hearings.

assets, and its sources of cash consideration, are all required to be disclosed in the scheme booklet. Also, given the minimum 28 day notice period for a scheme meeting, it is also clear that target shareholders have a reasonable time to assess the merits of the proposal. The disclosure principle is also satisfied, as the scheme booklet must contain all information material to a target shareholder's decision as to whether to vote for or against the proposal, and in practice must be accompanied by an independent expert's report.

(c) So far as the "equal opportunity" principle is concerned, schemes of arrangement generally provide for all target shareholders (other than the bidder itself where it already holds shares in the target) to receive the same consideration, at the same time, and with the same disclosure. Where there are any differences in treatment, shareholders have a number of important safeguards and procedural protections that are not present in takeover bids. These include:

- *the class voting regime* – this requires shareholders with different rights to vote in separate classes.[42] Importantly, the bidder will not be able to vote any shares that it owns or controls in the target at the scheme meeting to approve the scheme. This is unlike a takeover where shares which a bidder owns or controls will be counted towards whether the 90% takeover bid compulsory acquisition threshold has been satisfied;
- *the interest regime* – this allows the Court to discount or disregard votes of particular shareholders on the grounds of an extraneous interest;[43] and
- *the Court's overriding 'fairness discretion'* - the Court has a broad "discretionary power"[44] as to whether to approve a scheme of arrangement on grounds of fairness.[45] This discretion exists, and the Court has an independent obligation to consider the fairness of a scheme,[46] even if the scheme is unopposed or if all of the shareholders have voted in favour of the scheme of arrangement.[47]

(d) The "Masel principle" (that acquisitions should take place in an efficient, competitive and informed market) is also more likely to be achieved in a scheme than a takeover bid. In a scheme, the requirement that ASIC and the Court review the scheme booklet and independent expert's report *before* it is released to the market. This means that the risk that there is a material adverse impact on market integrity and efficiency through defective or inadequate disclosure can be materially reduced. As to competition, there is nothing to suggest that schemes have any more impact on a competitive market than takeovers (note that the Courts approach to exclusivity provisions and break

[42] *Sovereign Life Assurance Company v Dodd* [1892] 2QB 573 at 584. For a summary of the class voting regime, see section 2.2 of Schedule 2.

[43] See, for example, *Re Jax Marine Pty Ltd* [1967] 12 NSWR 145 at 148. For a summary of the interest regime, see section 2.2 of Schedule 2.

[44] *Re Dorman Long and Company Ltd* [1934] 1 Ch 635 at 655; *Chief Commissioner of Pay-roll Tax v Group Four Industries Pty Ltd* [1984] 1 NSWLR 680 at 684; *Re Seven Network Ltd (No 3)* [2010] FCA 400 at [31]; *Re Avoca Resources Ltd (No 2)* [2011] FCA 208 at [7].

[45] *Re Permanent Trustee Co Ltd* (2002) 43 ACSR 601 at 603 [7].

[46] For the classic formulation of this fairness discretion, see *Re Alabama, New Orleans, Texas and Pacific Junction Railway Company* [1891] 1 Ch 213 at 247 (per Fry LJ). For a summary of the fairness regime see section 2.1 of Schedule 2. For a summary of the class voting regime, section 2.2 of Schedule 2.

[47] *Re Halcrow Holdings Ltd* [2011] EWHC 3662 (Ch) at [36]; *Re Inmarsat PLC* [2019] EWHC 3470 (Ch) at [34]; *Re Elegant Hotels Group Plc* [2019] EWHC 3699 (Ch) at [5].

fees in schemes of arrangement has been essentially identical to that of the Takeovers Panel – although, if anything, the Courts have taken a harder line on targets in justifying break fees than the Takeovers Panel has).[48]

(e) There have been a number of examples of where the Courts have required changes to scheme disclosure (or required supplementary disclosure) which achieved outcomes aligned with the Eggleston Principles.[49]

3.2 No explicit statutory equivalent of the Eggleston Principles in Part 5.1

The Treasury Consultation Paper points to the fact that there is no explicit statutory equivalent of the Eggleston Principles in Part 5.1 of the Corporations Act, and then states that this has led to concerns from "some stakeholders" that schemes can – whether intentionally or not – be used in a way that avoids the protections afforded by the Eggleston Principles under Chapter 6 of the Corporations Act. However:

- even if there is no explicit statutory equivalent of the Eggleston Principles in Part 5.1, for the reasons set out above, schemes do achieve outcomes aligned with the Eggleston Principles, in many respects more effectively than takeovers do;
- it is not clear who these concerned stakeholders are, and what protections they are referring to. The only protections which the Treasury Consultation Paper points to as being potentially relevant to schemes are the minimum bid price rule and the collateral benefits rule. As discussed in our answer to Question 5 below, there are good reasons why those provisions should not be applied to the quite different scheme process; and
- although it is a different point, it should be noted that Courts do take the same approach as the Takeovers Panel on issues going to disclosure and to a competitive market. This can be seen, for example, in relation to deal protection and break fees. Here, the Courts have many times expressly endorsed the Takeovers Panel guidance in Guidance Note 7, and applied that guidance to schemes. That is further evidence of the Courts, in practice, applying the Eggleston Principles on which that guidance is based.

3.3 The position of ASIC, the Treasury and CAMAC

(a) ASIC's position

ASIC has made it clear that it will consider the Eggleston Principles and apply them equally to its role in schemes as it does for takeovers.[50]

(b) The Treasury's previous acknowledgment

The Treasury has for a long time acknowledged that the Courts and ASIC take the Eggleston Principles into account:

> "The Eggleston principles underlying the takeover provisions are designed to ensure that shareholders have sufficient time and information and an equal opportunity to participate in changes in corporate control. Both the courts and [ASIC] take these principles into account when approving schemes [of

[48] See, for example, *Re Coca-Cola Amatil Ltd* [2021] NSWSC 270 at [24]; *Re Mortgage Choice Ltd* [2021] NSWSC 553 at [21].

[49] See, for example, the cases mentioned in footnotes 179 and 182.

[50] ASIC Regulatory Guide 60, "Schemes of arrangement", dated September 2020, at 7 [60.20].

> arrangement]. The involvement of the courts and [ASIC] thus ensures that there is adequate shareholder protection."[51]

The Treasury's views and proposals were:

> "developed in consultation with the helpful assistance of a broad range of individuals, companies and association in the business and professional community and the Government's Business Regulation Advisory Group".[52]

(c) CAMAC's position

The Corporations and Markets Advisory Committee (**CAMAC**) publicly consulted on the question of whether the Eggleston Principles should be imported into the scheme of arrangement regime.[53]

CAMAC concluded that it did not see a need to mandate the application of the Eggleston Principles in schemes of arrangement given the nature of schemes and the various protections available to target shareholders in connection with schemes.[54]

[51] The Treasury, "Takeovers: Corporate control: a better environment for productive investment", CLERP Program – Proposals for Reform: Paper No. 4, 1997, at 53 [5.2] (footnotes omitted).

[52] The Treasury, "Takeovers: Corporate control: a better environment for productive investment", CLERP Program – Proposals for Reform: Paper No. 4, 1997, at 5.

[53] Corporations and Markets Advisory Committee, "Members' schemes of arrangement", Discussion Paper, June 2008, at 71-73 [5.2.4].

[54] Corporations and Markets Advisory Committee, "Members' schemes of arrangement", Report, December 2009, at 107 [6.4.2].

4 Question 4 possible changes to the scheme of arrangement regime

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

4.1 Some background observations on the scheme regime

The scheme of arrangement regime in Part 5.1 of the Corporations Act comprises a well-established and well-understood body of law developed from literally thousands of Court decisions. Schemes of arrangement have been used to effect change of control transactions in Australia for around 50 years and for around 100 years in England.[55] As outlined in section 4.2 of this Schedule 1 below, there are some areas where the scheme of arrangement regime could be improved to make it more efficient.

4.2 Changes that should be made to the scheme regime

The following table summarises the changes that the Committee proposes be made to the scheme of arrangement regime to make it more efficient and reduce unnecessary costs.

The Corporations and Markets Advisory Committee (**CAMAC**) undertook a comprehensive public consultation process on a number of reforms to the scheme regime.[56] CAMAC's final report contained a number of sensible law reform recommendations.[57] None of those recommendations was ever acted upon by Parliament. We have referenced various of those recommendations in the table below.

Item	Proposed change	Description of the change	CAMAC's position
1.	Reduce the Court paperwork	***Practice and procedure to be streamlined*** There is a significant amount of evidence and other materials required to be prepared and delivered to the Court ahead of the first and final court hearings.[58] This is not a legislative requirement, but rather a result of the practice and procedure that has emerged over many years. This practice and procedure should be streamlined. This would result in cost saving and the removal of unnecessary (and immaterial) materials having to be reviewed by the Court. One proposal would be for some or all of the various court affidavits to be replaced with an officer's certificate which is delivered to the Court ahead of each of the two court hearings. That certificate would draw to the Court's attention all relevant matters, including all matters that could be	Not considered

[55] See, for example, *Re Castlereagh Securities Ltd* [1973] NSWLR 624; *Re Australian Foundation Investment Company Ltd* [1974] VR 331; *Re The Bank of Adelaide* (1979) 4 ACLR 393 for examples of the earliest members' schemes in Australia. See *Re Guardian Assurance Company* [1917] 1 Ch 431 for the first reported example of a members' scheme in England.

[56] Corporations and Markets Advisory Committee, "Members' schemes of arrangement", Discussion Paper, June 2008.

[57] Corporations and Markets Advisory Committee, "Members' schemes of arrangement", Report, December 2009.

[58] For a description of the evidence, see Damian T and Rich A, *Schemes, Takeovers and Himalayan Peaks*, Fourth Edition, at Section [5.11], 718-724.

Item	Proposed change	Description of the change	CAMAC's position
		considered relevant to the exercise of the Court's discretions.[59] The certificate for the final court hearing would also set out the voting results from the scheme meeting(s) and would highlight any areas of departure from the Court's orders. The target company would continue to be obliged to provide a written outline of submissions to the Court ahead of each Court hearing. ***Court engagement in the streamlining process*** Some of the criticisms concerning the current procedure relating to schemes of arrangement are matters that could be addressed by the Courts streamlining their proceedings. The Chief Justices of the Federal Court of Australia and the Supreme Court of New South Wales have authorised us to say that, if the legal profession considers there are unnecessary costs or steps in the Courts' approach to schemes of arrangement, their Courts would be happy to receive suggestions and review scheme proceedings accordingly. The Committee intends to establish a subcommittee to put proposals to the Courts to assist in such a review. In conjunction with the Federal Court of Australia and the Supreme Court of New South Wales, the Law Council will seek to involve the Supreme Courts of the other States and Territories. It is submitted that it would be premature for decisions to be made about proposals to remove the Courts' jurisdiction in respect of schemes of arrangement until that review is completed.	
2.	Re-write the disclosure requirements and repeal Schedule 8 of the Corporations Regulations	The Courts and ASIC have made it clear that they expect that shareholders will, in connection with a scheme of arrangement, receive an equivalent level of information to that which they would have received had the transaction been effected by way of a takeover bid.[60] However, there is nothing in Part 5.1 of the Corporations Act that expressly requires a target company to have regard to the takeover bid disclosure requirements in Chapter 6 of the Corporations Act when drafting its scheme booklet. That said, scheme proponents proceed on the basis that this is indeed the requirement.	Agree[65]

[59] As scheme proponents are already subject to such an obligation, this should not result in the imposition of any additional regulation or cost (see, for example, *Re Marketeers Pty Ltd* [1982] Qd R 93 at 96; *Re Archaean Gold NL* (1997) 23 ACSR 143 at 148; *Re Permanent Trustee Co Ltd* (2002) 43 ACSR 601 at 603 [7]; *Re Diversa Ltd (No 3)* [2016] FCA 1284 at [4]).

[60] See section 5.2 of this Schedule 2 for a further discussion in relation to this issue.

[65] Corporations and Markets Advisory Committee, "Members' schemes of arrangement", Report, December 2009, at 71 [4.5.1].

Item	Proposed change	Description of the change	CAMAC's position
		An alternative means of ensuring disclosure neutrality between takeovers and schemes, rather than relying on the expectation of the Courts and ASIC, would be to take the takeover disclosure provisions in s636 and s638 of the Corporations Act and specifically tailor them for schemes of arrangement and write them into Part 5.1 of the Corporations Act. Coupled with these changes, we would also advocate the repeal of the now antiquated checklist of disclosure items in Part 3 of Schedule 8 of the Corporations Regulations which apply to schemes.[61] To the extent that any of the items in Part 3 of Schedule 8 are still appropriate for express inclusion in the legislation – the target directors' recommendation[62] and the independent expert's report requirement[63] would fall into that category – those provisions should be removed from the Corporations Regulations and instead written into the body of Part 5.1. To be clear though, we support the retention of the requirement, currently in s412(1)(a)(i), that the scheme booklet disclose any material interests of target directors and any other information that is material to members (being information that is known to directors and which has not previously been disclosed). We recommend this requirement be extended to expressly require disclosure of material information in the possession of the bidder and its directors.[64]	
3.	Introduce a stand-alone liability and defence regime for directors and officers	Schemes should be subject to a stand-alone liability and defence regime, modelled on the regime in the takeover provisions. Unlike a scheme booklet, takeover documents (like fundraising documents[66]) are subject to a stand-alone liability and defence regime which operates to the exclusion of the general misleading or deceptive conduct provisions.[67]	Agree[70]

[61] As an example of how antiquated the provisions in Schedule 8 are, a number of the rules refer to concepts that have long been repealed and replaced in the Corporations Act (eg referring to "entitlements" to shares rather than "relevant interests" in shares – see rule 8306).

[62] Corporations Regulations, Schedule 8, rule 8301.

[63] Corporations Regulations, Schedule 8, rule 8306.

[64] Compare Corporations Act, s636(1)(m).

For a more detailed discussion in relation to this reform proposal, see Damian T and Rich A, *Schemes, Takeovers and Himalayan Peaks*, Fourth Edition, at Section [5.6.5].

[66] See Corporations Act, Part 6D.3.

[67] Corporations Act, Chapter 6B.

[70] Corporations and Markets Advisory Committee, "Members' schemes of arrangement", Report, December 2009, at 72-73 [4.5.2].

Item	Proposed change	Description of the change	CAMAC's position
		Significantly, the takeover liability regime contains defences to liability, including the so-called "due diligence defences".[68] It is plainly anomalous that issuers (and those involved in the issue) of scheme booklets do not have the same level of protection in the form of defences to liability compared to issuers (and those involved in the issue) of takeover documents. There is no sensible policy argument why this amendment should not be made.[69]	
4.	Remove the head count test	For a scheme to bind a particular class of shareholders, a resolution in favour of the scheme must be agreed to at the scheme meeting: • by a majority in number of the shareholders in that class present and voting at the class meeting, either in person or by proxy (this limb is referred to as "**the head count test**"); and • by at least 75% of the votes cast on the resolution by the shareholders in that class present and voting at the class meeting, either in person or by proxy.[71] The Court has the power to dispense with the head count test.[72] However, despite the existence of this power, the Committee considers that the head count test should be removed altogether. Although there are no express limitations in the legislation on what a Court may take into account in deciding whether to exercise its dispensation power, Parliament made it clear that it expected that this power would, absent other extraordinary circumstances, only be exercised in the event of "share splitting".[73] However, as share splitting can be so difficult to prove, this power is unlikely to completely remove the temptation to engage in share splitting.[74] For the purposes of the head count test, each shareholder has one vote irrespective of the number of shares held. This is inconsistent with the economic precept underpinning the Corporations Act – that is, one share one vote – and the	Agree[85]

[68] Corporations Act, s670D. The "due diligence" defences are also available in the case of fundraising documents (see Corporations Act, s730-s733).

[69] For a more detailed discussion in relation to this reform proposal, see Damian T and Rich A, *Schemes, Takeovers and Himalayan Peaks*, Fourth Edition, at Section [5.9].

[71] Corporations Act, s411(4)(a)(ii).

[72] This power was conferred by the addition of the words "unless the Court orders otherwise" at the introduction of s411(4)(a)(ii)(A). These words were added by the *Corporations Amendment (Insolvency) Act 2007* (Cth).

[73] Explanatory Memorandum to the *Corporations Amendment (Insolvency) Bill 2007* (Cth), at 57 [4.179]-[4.181].

[74] For an example of a scheme involving share splitting with an intention to manipulate the outcome of the vote, see *Re PCCW Ltd* [2009] HKCFI 243 and *Re Dee Valley Group plc* [2017] EWHC 184 (Ch).

[85] Corporations and Markets Advisory Committee, "Members' schemes of arrangement", Report, December 2009, at 94 [5.4.5].

Item	Proposed change	Description of the change	CAMAC's position

takeover bid provisions do not contain an equivalent member agreement threshold to the head count test.[75]

Those with the overwhelming economic interest in the target should have the largest say on the outcome of the scheme.[76]

The head count test also places significant power in the hands of shareholders with small shareholdings, which power bears no resemblance or proportionality to their economic stake in the scheme company. As stated by Kwan J in *Re PCCW Ltd*[77]:

> "The significance of the majority in number test is that a scheme of arrangement which is supported by holders of an overwhelming majority in value of the scheme shares could still be defeated by persons holding a very small number of scheme shares but who hold them numerically in a large number of registered names."[78]

The only argument for retaining the head count test is that it provides a mechanism for seeking to ensure that a scheme of arrangement only proceeds if the consideration proposed to be paid by the bidder is regarded as acceptable by a majority of target shareholders and to prevent bidders from obtaining outright ownership at less than a fair price.

However, the prevalence of nominee and custodian holdings today (and the ease with which nominee and custodian holdings can be created without any adverse stamp duty or capital gains tax consequences) means that even these ideological objectives are unattainable given the focus of the head count test on "registered" shareholders.[79] Equally, even proponents of the head count test would, presumably, regard it as anomalous (and even unfair) that a nominee or custodian who may hold shares on behalf of many beneficial owners only has one vote for the purposes of the head count test.[80]

There is no head count requirement as a prerequisite to a bidder being entitled to exercise a right of compulsory acquisition following a successful takeover bid. However, prior to 13 March 2000, the compulsory acquisition threshold

[75] See s661A(1)(b) (for takeovers), s256C(1) (equal capital reductions) and s256C(2) (selective capital reductions) of the Corporations Act.

[76] In *Re Boart Longyear Ltd* [2019] FCA 62, 97.61% of the votes were cast in favour of the scheme, but only 31.12% of the members (by number) voted in favour of the scheme. Boart Longyear asked the Court to dispense with the head count test. Farrell J declined to do so given the statements in the Explanatory Memorandum to the *Corporations Amendment (Insolvency) Bill 2007* (Cth) which made it clear that the headcount test should only be dispensed with where the vote had been unfairly influenced.

[77] *Re PCCW Ltd* [2009] HKCFI 243.

[78] *Re PCCW Ltd* [2009] HKCFI 243 at [15].

[79] Barrett J, in *Re Spark Infrastructure Holdings Ltd (No 1)* [2010] NSWSC 1497, remarked (at [29]) that there was "substance in the criticism" that the head count test disenfranchised persons who held shares through nominees or custodians.

[80] For example, in *Re Tronox Ltd* [2019] FCA 312. 99.7% of all shares were held in the name of Cede & Co. It is anomalous that, despite holding almost all the shares, the depositary only had one vote for the purposes of the head count test.

Item	Proposed change	Description of the change	CAMAC's position
		applicable to takeover bids contained a 75% head count requirement.[81] The existence of this provision provided an opportunity for share splitting and the frustration of bidders' attempts to satisfy the compulsory acquisition thresholds. ASIC was required to take action on a number of occasions to address the effects of share splitting.[82] That head count requirement was (sensibly) abolished on 13 March 2000 following a recommendation from the Legal Committee of the Companies and Securities Advisory Committee which noted that the head count requirement was "vulnerable to share splitting and other artifices by offeree shareholders and bidders".[83] This recommendation was later adopted by the Treasury who explained that the head count requirement should be removed so as to: "overcome the potential problem of a single shareholding being distributed among several people to deliberately increase the number of shareholders able to oppose the bid."[84]	
5.	Give ASIC broad modification and exemption powers	Parliament has bestowed a "wide discretionary power"[86] on ASIC to modify, or exempt a person from, the takeover provisions in Chapters 6 and 6A of the Corporations Act.[87] By contrast, ASIC does not have modification and exemption powers in relation to the scheme provisions which are as broad as those which exist in relation to the takeover provisions. ASIC has only limited powers to relieve scheme proponents from the "checklist" requirements in Part 3 of Schedule 8 of the Corporations Regulations.[88] ASIC has no power to grant relief from any of the provisions in Part 5.1 of the Corporations Act.	Disagree[91]

[81] See s701(2)(c) of the pre-13 March 2000 version of the *Corporations Law*.

[82] See *Peninsula Gold Pty Ltd v ASC* (1996) 19 ACSR 703 at 705-706 [4] and 711 [18] (see especially ASC's media release dated 23 May 1996 which is reproduced at 705-706 [4] of that *Peninsula Gold* decision) and *Peninsula Gold Pty Ltd v ASC* (1996) 21 ACSR 246.

[83] Report by the Legal Committee of the Companies and Securities Advisory Committee, "Compulsory Acquisitions", January 1996, at [2.35] (see Recommendation 7).

[84] The Treasury, "Takeovers – Corporate control: a better environment for productive investment", CLERP Program – Proposals for Reform: Paper No.4, 1997, at 28.

For a more detailed discussion in relation to this reform proposal, see Damian T and Rich A, *Schemes, Takeovers and Himalayan Peaks*, Fourth Edition, at Section [4.3.5].

[86] *ASIC v DB Management Pty Ltd* (2000) 199 CLR 321 at 341-342 [47].

[87] Corporations Act, s655A, s673 and s669.

[88] See the chapeau to subregulation 5.1.01(1) ("unless ASIC otherwise allows") and see also *Corporations Regulations 2001* (Cth), Schedule 8, Part 3, rule 8305. See further ASIC's pro forma relief instruments numbered 191, 192, 194 and 195.

[91] Corporations and Markets Advisory Committee, "Members' schemes of arrangement", Report, December 2009, at 106 [6.4.1].

Item	Proposed change	Description of the change	CAMAC's position
		The scheme provisions should be amended to give ASIC modification and exemption powers equivalent to those contained in the takeover provisions, particularly if our reform proposal in item 2 above is adopted. As is the case in relation to the takeover regime,[89] any challenges to a decision of ASIC to exercise such powers should be heard in the Takeovers Panel (not the Administrative Appeals Tribunal, as is currently the case with ASIC's limited powers).[90]	
6.	Expand the scheme of arrangement regime to managed investments schemes	The definition of "Part 5.1 body" (which delineates the type of entities that can be the subject of a scheme of arrangement) should be expanded to include registered managed investment schemes. This would remove the need for 'stapled entities' that are the subject of a change of control transaction to have to run a parallel scheme of arrangement and "trust scheme" (as is currently the case) – the removal of the duplication of process would result in a saving of costs. The *Corporate Law Economic Reform Program Act 1999* (Cth) extended the operation of the takeover regime in Chapter 6 of the Corporations Act to include registered managed investment schemes.[92] The policy rationale for this change was to expose managers of these schemes to the same competitive pressures to perform as company directors through the discipline of the threat of a potential takeover bid.[93] Those reforms have had their desired effect – the amount of takeover bid activity in the listed trust sector since 2000 is evidence of this. In what was, presumably, a drafting oversight, there was no corresponding extension of the operation of Part 5.1 of the Corporations Act to registered managed investment schemes. The result is that the scheme of arrangement procedure is not available to effect changes of control of registered managed investment schemes.[94] This is despite the fact that managed investment schemes perform substantively the same role as companies. In this regard, the Treasury's comments are apt:	Agree[100]

[89] Corporations Act, Part 6.10.

[90] For a more detailed discussion in relation to this reform proposal, see Damian T and Rich A, *Schemes, Takeovers and Himalayan Peaks*, Fourth Edition, at Section [5.10.1].

[92] Corporations Act, s604. These provisions do not apply to registered managed investment schemes that are not listed on a prescribed exchange. There is also a policy discussion to be had as to whether s604 (and the proposed application of Part 5.1 to registered schemes) should apply to unlisted, as well as listed, registered schemes.

[93] See Parliamentary Joint Committee on Corporations and Securities, "Report on the Corporate Law Economic Reform Program Bill 1998", May 1999, at [3.7]; The Treasury, "Takeovers – corporate control: a better environment for productive investment", CLERP Program – Proposals for Reform: Paper No.4, 1997, at 7; The Treasury, "Commentary on Draft Provisions", CLERP Program, 1998, at 93.

[94] *Re Spark Infrastructure RE Ltd* [2021] NSWSC 1385 at [26].

[100] Corporations and Markets Advisory Committee, "Members' schemes of arrangement", Report, December 2009, at 119 [7.6.2].

Item	Proposed change	Description of the change	CAMAC's position
		"Entities which perform substantively the same role should *prima facie* be subject to similar regulation."[95] This reform proposal is not novel. There have been repeated calls from reform bodies for the scheme of arrangement regime to be expanded to registered schemes.[96] The failure to extend the definition of "Part 5.1 body" to include registered managed investment schemes (or previously "prescribed interest" or "collective investment schemes") has resulted in the emergence of so-called "trust schemes" as an alternative to takeover bids to effect changes of control of managed investment schemes.[97] This has resulted in schemes of arrangement having to be run in parallel with trust schemes. For completeness, it is noted that the current practice whereby responsible entities of managed investment schemes seek judicial advice in connection with trust schemes, could simply be folded into the scheme of arrangement process.[98] This would further streamline the process and reduce costs.[99]	
7.	Repeal s411(17)	Subsection 411(17) of the Corporations Act should be repealed. It has well and truly passed its 'use by' date. Despite schemes of arrangement being used to effect change of control transactions in multiple different countries, Australia is the only country to have introduced s411(17) into the law. Subsection 411(17) was originally only introduced in 1981 to achieve Parliament's (then) policy objective that schemes should not become a way of escaping the protections of the (then) new takeovers code in the *Companies (Acquisitions of Shares) Act 1980* (Cth). The subsection was carefully worded so as not to undermine the availability of schemes of arrangement to effect change of control transactions.[101]	

[95] The Treasury, "Takeovers – corporate control: a better environment for productive investment", CLERP Program – Proposals for Reform: Paper No.4, 1997, at 45.

[96] See, for example, Companies and Securities Law Review Committee, Report to the Ministerial Council, "Prescribed Interests", August 1998, at [133]. This report followed an earlier discussion paper issued by the Companies and Securities Law Review Committee titled "Prescribed Interests: Discussion Paper No.6", May 1987. The extension of the scheme of arrangement provisions was discussed at 108. See also Australian Law Reform Commission, Report No 65, "Collective Investments: Other People's Money", 1993, Volume 1, at 118 [11.14].

[97] For discussion on "trust schemes", see Takeovers Panel, Guidance Note 15, "Trust Scheme Mergers", Second Issue, 6 May 2011.

[98] For a discussion on the judicial review process, see Damian T and Rich A, *Schemes, Takeovers and Himalayan Peaks*, Fourth Edition, at Section [9.10.2].

[99] For a more detailed discussion in relation to this reform proposal, see Damian T and Rich A, *Schemes, Takeovers and Himalayan Peaks*, Fourth Edition, at Section [3.5.2].

[101] For a detailed discussion on the history and interpretation of s411(17), see *Schemes, Takeovers and Himalayan Peaks*, at Section [10.3] 1352-1382 and at Chapter 11 generally.

Item	Proposed change	Description of the change	CAMAC's position
		ASIC and the Takeovers Panel have accepted that a scheme of arrangement is an appropriate mechanism for effecting a change of control transaction.[102] However, the precise operation of s411(17) of the Corporations Act (and, in particular, paragraph (a) of that subsection) remains a source of lingering uncertainty and adds an unquantifiable and unacceptable element of completion risk to any scheme of arrangement. This is made all the more objectionable because, whether or not s411(17) will, in fact, give rise to completion risk issues in a particular scheme, will not be known until the final court hearing (that is, after the great time and financial expense of undertaking the scheme process has been incurred). Schemes of arrangement serve an important role in the market for corporate control and there are comprehensive protections and safeguards for dissentients and minorities inherent in the scheme process. Part 5.1 of the Corporations Act should have excised from it the single provision (s411(17)) that casts a shadow over the ability of merger participants to use the scheme procedure to effect a change of control transaction. There is no equivalent provision in the English scheme of arrangement provisions – there is no need for such a provision in the Australian scheme of arrangement provisions.	
8.	Expanding the operation of s413	***Removal of the requirement that the scheme must involve an amalgamation or reconstruction*** The Consultation Paper states that the Court has the power (in s413 of the Corporations Act) to "make orders concerning the transfer of assets or liabilities".[103] However, this power is very limited and is not available in the ordinary case of a scheme which is being used to effect a change of control.[104] This power is only available if the scheme of arrangement involves a "reconstruction" or an "amalgamation".[105] A common variety scheme of arrangement which is being used to effect a change of control transaction does not involve a "reconstruction" or "amalgamation". There is no policy basis for requiring the existence of an "amalgamation" or "reconstruction" as a necessary filter for the availability of such ancillary orders in connection with a scheme of	Not considered

[102] ASIC Regulatory Guide 60, "Schemes of arrangement", dated September 2020, at 7 [60.18]; *Re St Barbara Mines Ltd and Taipan Resources NL* (2000) 18 ACLC 913 at 917 [22]; *Re Colonial First State Property Trust Group (No 1)* (2002) 43 ACSR 143 at 154-155 [67]-[73]; Takeovers Panel, Guidance Note 15, "Trust scheme mergers", Second Issue, 6 May 2011, at [8].

[103] Treasury Consultation Paper, at 7.

[104] For a more detailed discussion in relation to the operation of s413, see Damian T and Rich A, *Schemes, Takeovers and Himalayan Peaks*, Fourth Edition, at Section [9.2].

[105] See the chapeau to s413(1) of the Corporations Act. For a discussion on the meaning of "reconstruction" and "amalgamation", see Damian T and Rich A, *Schemes, Takeovers and Himalayan Peaks*, at 1187-1200, Section [9.2.2].

Item	Proposed change	Description of the change	CAMAC's position
		arrangement. The Court should be given the power to make the orders in s413 in the case of any scheme. ***Removal of the right to terminate upon a transfer*** Section 413(1) enables a Court to, among other things, make an order which has the effect of transferring a contract even if it contains a provision to the effect that it cannot be assigned without a party's consent.[106] Such orders effect a "statutory novation" under which "the transferee company steps for all purposes into the shoes of the transferor".[107] Given that s413(1) can effect a statutory transfer of a contract, it should follow that the counterparty to a contract that has been transferred by Court order should not be able to terminate the contract merely as a result of the Court-ordered and effected transfer. If it could do so, this would frustrate the effect of the Court's order. The Committee considers s413(1) should be amended to make it clear that a counterparty cannot terminate a contract solely because the provision has been invoked.[108] ***Statutory licences*** There is a question as to whether s413(1) can be used to transfer a statutory licence. Whilst s413(1) is arguably, on its face, broad enough to provide for such transfers, s413(1)	

[106] *Nokes v Doncaster Amalgamated Collieries Ltd* [1940] AC 1014 (where Lord Romer stated (at 1043): "Property passing by the order will also include assets that were only transferrable by the transferor company with the assent of a third party, for such assets are property notwithstanding any restrictions upon their assignability"); *Stork ICM Australia Pty Ltd v Stork Food Systems Australasia Pty Ltd* [2006] FCA 1849 at [96]-[99]; *J.P. Morgan Operations Australia Ltd v J.P. Morgan Australia Group Pty Ltd* [2018] FCA 1131 at [28].

[107] *Re TSB Nuclear Energy Investment UK Ltd and Toshiba Nuclear Energy Holdings (UK) Ltd* [2014] EWHC 1272 (Ch) at [10].

[108] This issue arose in *Re Fiducian Portfolio Services Ltd (No 2)* [2015] FCA 95, where the scheme company sought, in connection with the proposed restructure of the Fiducian group, an order under s413(1)(g) to the effect that no party to a contract to be transferred under the reconstruction shall be entitled to terminate the contract or vary its rights or obligations (or the rights or obligations of the scheme company) merely as a result or consequence of the implementation of, or the taking of any act or deed in connection with, the scheme of arrangement or the transfers of the contracts from one Fiducian group company to another Fiducian group company. Yates J declined to grant the relevant order sought by the scheme company. His Honour stated (at [40]):

> "I am not persuaded that, in the circumstances of the present case, the order sought is one that falls within the power conferred by s413(1)(g)."

His Honour (at [42]) summarised his reasons for declining to grant the following order as follows:

> "It seems to me that there are at least two difficulties confronting the plaintiff. First, by relying on what are truly no more than abstract or theoretical possibilities, the plaintiff has not established that the order sought is "necessary" to fully and effectively carry out of the scheme for reconstruction. Secondly, assuming that a particular contractual provision will be triggered in one of the ways postulated, the plaintiff merely seeks to avoid a contractual outcome that has already been agreed upon. Whether, in such a case, a contracting party would seek to exercise the rights available to it is another matter. But, in my view, it cannot be said that the order is necessary to ensure that the reconstruction is fully and effectively "carried out". In truth, the order merely seeks to provide for the consequences of the reconstruction, not its effectuation. I do not accept that, without the order, the purpose of the restructure will be frustrated."

Item	Proposed change	Description of the change	CAMAC's position
		should be amended to make it clear that it can be used to effect transfers of statutory and other licences.[109] ***Requirement for the transferee to be a "company"*** Section 413(1) requires the transferee to be a "company" (a narrower concept than "Part 5.1 body"). The term "company" is defined in s9 of the Corporations Act to mean "a company registered under this Act". There is no policy basis for limiting the identity of the transferees in this way. The provision should be amended so as to allow for a transfer to any "entity".[110] This became an issue in *Equatorial Mining Pty Ltd v Antofagasta Investment Company Ltd*[111] where the Court was forced to take a commercial approach and found a convoluted way around this issue. This should not have been necessary.	

4.3 Creditors' schemes of arrangement

Finally, as Treasury would be aware from its consultation process in 2021, the scheme of arrangement regime in Part 5.1 of the Corporations Act is also used to effect arrangement and compromises between companies and their creditors.[112]

If any reforms are to be made to the scheme of arrangement regime in the context of members' schemes, great care will need to be taken to ensure that such changes do not (inadvertently) adversely affect the creditors scheme of arrangement regime.[113]

[109] In *Warrnambool Cheese and Butter Factory Company Ltd v Warrnambool Cheese and Butter Company Holdings Ltd* [2017] FCA 302, all of the assets and liabilities were transferred from a number of subsidiaries to Warrnambool Cheese and Butter Company Holdings Ltd. Yates J noted that one of the advantages of proceeding by way of scheme of arrangement and s413 was to remove the need to involve, in the restructure, government authorities (which had issued licences and permits to the scheme companies) (see [2017] FCA 302 at [9]). See also *Chevron (TAPL) Pty Ltd v Chevron Australia Pty Ltd, in the matter of Chevron (TAPL) Pty Ltd (No 2)* [2022] FCA 381.

[110] The definition of "entity" in s64A of the Corporations Act could be adopted for these purposes.

[111] [2013] FCA 1452.

[112] See The Treasury, "Helping Companies Restructure by Improving Schemes of Arrangement", Consultation Paper, dated 2 August 2021.

[113] In this regard, reference is made to the excellent submission by TMA Australia dated 17 September 2021, which was made in response to the Treasury's consultation paper titled "Helping Companies Restructure by Improving Schemes of Arrangement", Consultation Paper", dated 2 August 2021.

5 Question 5 – regulatory consistency and the minimum bid and the collateral benefits rules

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?

5.1 Introduction – a general observation

There is *already* regulatory consistency between takeovers and schemes. Whilst takeovers and schemes are quite different procedures, they both result in similar regulatory and policy outcomes.

In fact, in many ways, schemes of arrangement provide shareholders with *greater* protections than what takeovers provide.

5.2 Minimum disclosure requirements

The minimum disclosure requirements are *already* aligned between takeovers and schemes.

In the case of a scheme of arrangement which is being used to effect a change of control transaction, the scheme booklet fulfils the same function as the bidder's statement and the target's statement in a takeover bid context. It is prepared with joint input from the target and the bidder.

The Courts and ASIC have long required – and market participants have long accepted - that the disclosure requirements for a scheme booklet are equivalent to what is required in a bidder's statement and target's statement.[114] Related to this point, if securities form all or part of the consideration, the scheme booklet must contain all the information that would have been required to be included in a prospectus for an offer of those securities.[115]

That said, as outlined in more detail in item 2 of the table in section 0 of this Schedule 1, we see merit in taking the takeover disclosure provisions in s636 and s638 of the Corporations Act, specifically tailoring them for schemes, and writing them into Part 5.1.

5.3 Minimum bid price rule

(a) Important differences between takeovers and schemes

The minimum bid price rule should *not* be rigidly applied to schemes of arrangement. As explained in section 5.3(b) of this Schedule 1 below, it would be inappropriate and unnecessary to do so given the existing protections and safeguards in relation to schemes.

[114] See, for example, *Re Archaean Gold NL* (1997) 23 ACSR 143 at 145-146; *Re International Goldfields Ltd* [2004] WASC 112 at [33]; *Re Capel Finance Ltd* (2005) 52 ACSR 601 at 603 [7]; *Re Crown Diamonds NL* (2005) 54 ACSR 46 at 50 [20] and 52 [38]-[41]; *Re Rural Press Ltd (No 2)* [2007] FCA 686 at [27]; *Re Peak Coal Ltd* [2010] FCA 6 at [8]; *Re Peak Coal Ltd (No 2)* [2010] FCA 45 at [9]; *Re Mosaic Oil NL (No 2)* [2010] FCA 1186 at [28]; *Re World Titanium Resources Ltd* [2011] FCA 1480 at [36]; *Re Coventry Resources Ltd* [2012] FCA 1252 at [30]. See also ASIC Regulatory Guide 60, "Schemes of arrangement", September 2020.

[115] See *Corporations Act 2001* (Cth), s636(1)(g) (as modified or varied by ASIC Class Order [CO 13/521]) and s708(17); ASIC Regulatory Guide 60, "Schemes of arrangement", dated September 2020, at 17 [60.66]; *Re Coventry Resources Ltd* [2012] FCA 1252 at [30] and [32]-[33].

In assessing the fairness of any scheme of arrangement, the Court is entitled to take into account the policy of the minimum bid price rule in s621(3) and the equality of opportunity principle in s602(c). However, this is not to say that, if certain features of a scheme of arrangement are inconsistent with either s621(3) or s602(c) (or, for that matter, s623), the Court must decline to approve the scheme of arrangement. Instead, such features would merely be one factor, along with many others, for the Court to consider as part of its fairness discretion.

The Courts have confirmed that it is not appropriate or necessary to apply the minimum bid price rule to schemes in the same way that the rule is applied in takeovers. This is because any perceived inequality of opportunity is adequately dealt with through:

- full disclosure of any pre-scheme acquisitions in the scheme booklet; and
- a vote of *disinterested* target shareholders.[116]

The key point here is that, unlike in a takeover, where pre-bid acquisitions by the bidder can count towards (i) any minimum acceptance condition and (ii) the compulsory acquisition threshold[117], pre-scheme acquisitions by a bidder in the schemes context *cannot* be counted towards the scheme approval threshold, as the bidder would either form a separate class or have its votes completely disregarded on the grounds of an extraneous interest.[118]

When exercising its broad fairness discretion in deciding whether to approve a scheme of arrangement, the Court is entitled to take into account:

- any acquisitions made by the bidder ahead of the scheme of arrangement; and
- any other feature of the scheme that may be perceived to be inconsistent with the equality of opportunity principle.

(b) The additional protections and safeguards in schemes

Furthermore, it is unnecessary and inappropriate for the minimum bid price rule to be applied to schemes of arrangement in the same way as it is applied to takeovers because schemes of arrangement already contain effective shareholder protection mechanisms and safeguards which address similar policy concerns as s621(3) (and s602(c) and s623).

Those mechanisms and safeguards, which are not all present in takeover bids, include:

- the inherent nature of schemes where only transactions supported by the target board are put to target shareholders for a vote (noting that target directors will take into account any recent pre-scheme acquisitions by the bidder in deciding whether to put forward a scheme);
- the requirement to disclose all material information in the (ASIC pre-vetted) scheme booklet (this includes details of any pre-scheme acquisitions by the bidder);
- the class voting regime and the interest regime (which gives the Court the ability to discount or disregard votes on the grounds of an extraneous interest).[119] As noted in section 5.3(a) of this Schedule 1, unlike in a takeover bid where pre-bid

[116] See *Re Ranger Minerals Ltd* (2002) 42 ACSR 582 at 592 [43]-[45] and 593 [48]; *Re Anzon Australia Ltd* [2008] FCA 309 at [11]; *Re Goodman Fielder Ltd* [2014] FCA 1449 at [19]-[20]; *Re ICar Asia Ltd* [2021] NSWSC 1713 at [18]-[19]. For a detailed discussion on the applicable of the minimum bid price rule in schemes, see Damian T and Rich A, *Schemes, Takeovers and Himalayan Peaks*, Fourth Edition, at Section [6.5.5] pages 938-945.

[117] Corporations Act, s661A(1).

[118] See, for example, *Re Hellenic & General Trust Ltd* [1975] 3 All ER 382 at 386. For a further discussion in relation to this issue see Damian T and Rich A, *Schemes, Takeovers and Himalayan Peaks*, Fourth Edition, at Section [6.4.9] 839-848.

[119] These regimes are explained in detail in section 2.2 of Schedule 2.

acquisitions by the bidder can be counted towards any minimum acceptance condition and the compulsory acquisition threshold, any pre-scheme acquisitions by the bidder will not be able to be counted towards the shareholder approval threshold in a scheme. In other words, the approval of disinterested shareholders (who will, no doubt, take into account any pre-scheme acquisitions), is required for a scheme but not a takeover;

- the commissioning of an independent expert's report in connection with every scheme (noting that the expert will take into account any pre-scheme acquisitions by the bidder);[120] and
- the requirement for Court approval (noting that, as discussed elsewhere in this submission, the Court has a broad fairness discretion which it exercises in deciding whether to approve a scheme).[121]

(c) **Takeovers Panel and the minimum bid price rule in schemes**

If the Takeovers Panel wanted the minimum bid price rule to apply to schemes, it could do so simply by amending its Guidance Note 6 to state that the Panel would consider unacceptable circumstances to exist if the bidder acquires target shares, in the 4 months before the date of the scheme booklet, at a price which is higher than that offered under the scheme of arrangement. In other words, there is no need for Parliament to amend Part 5.1 of the Corporations Act to achieve this outcome if that was considered to be the appropriate policy position.

In this regard, it is noted that the Takeovers Panel has previously issued a consultation paper asking for submissions as to whether the minimum bid price rule policy should be applied to schemes.[122] Following completion of the public consultation process, the Panel decided not to extend the policy to schemes.[123]

(d) **Time to revisit the policy justification for the minimum bid price rule?**

In any event, the policy basis for retaining the minimum bid price rule in circumstances where the Corporations Act allows persons to freely acquire up to 20% of a company is not clear, even in relation to takeovers.[124]

5.4 Collateral benefits rule

Similarly, the collateral benefits rule should *not* be applied to schemes of arrangement. It would be inappropriate, and is unnecessary, to do so given the existing protections and safeguards in relation to schemes.

Under the takeover regime, the conferral of a collateral benefit that is likely to induce a shareholder or an associate to accept a takeover is prohibited.[125] The takeover regime does not contain a flexible mechanism that allows for such benefits to be given provided

[120] Whilst the Corporations Regulations only mandate an independent expert's report if the bidder has a 30% or great stake in the target or if the bidder and target have a common director (see Schedule 8, Part 3, rules 8303 and 8306), the (almost universal) market practice is for such a report to be commissions in connection with schemes of arrangement.

[121] See section 2.1 of Schedule 2.

[122] Takeovers Panel, "Consultation Paper – Rewrite of GN 6 'Minimum Bid Price Rule', GN 13 'Broker Handling Fees' and GN 15 'Trust Scheme Mergers'", 23 December 2010, at 3 [10].

[123] Takeovers Panel, "Amendment of GN 12 – Rewrite of GN 6, GN 13 and GN 15 – Public Consultation Response Statement", 6 May 2011, at 3.

[124] For a further discussion on this law reform possibility, see Levy R, *Takeovers Law & Strategy*, Fifth Edition, Lawbook Co., 2017, at 5 [1.40] and see also Levy R and Furphy B, "Takeover Law Reform Proposals", Chapter 16, in Damian T and James C (eds), *Towns Under Siege: Developments in Australian Takeovers and Schemes*, 2016. Ross Parsons Centre of Commercial, Corporate and Taxation Law, The University of Sydney, at 603-604, Section [16.6].

[125] Corporations Act, s623(1).

that the recipient of the benefit is excluded from the calculation of any minimum acceptance condition or the compulsory acquisition threshold.

By way of contrast, schemes are far more flexible and allow for collateral benefits to be given provided that, in appropriate cases, the recipient of the benefit is placed in a separate class for voting purposes, or has their votes disregarded on the grounds of an extraneous interest. There is extensive case law providing guidance to market participants on the appropriate treatment of collateral benefits in schemes.[126]

It should be acknowledged that there is nothing *per se* inappropriate about a bidder giving a collateral benefit to a particular shareholder. The giving of a benefit may, in fact, be necessary for other shareholders to even get to consider a scheme of arrangement. The key point from a policy perspective is that:

- any such benefits must be fully disclosed in the scheme booklet; and
- in appropriate cases, the votes of the recipient of the benefit should be excluded from the approval threshold, thus leaving the outcome of the scheme in the hands of the remaining shareholders.

If collateral benefits were to be outlawed in schemes in the same way as they are in takeovers, this would mean that many transactions would simply not be able to proceed – this would be to detriment of everyone, including retail shareholders.

By way of example, in the recent $32 billion (EV) acquisition of Sydney Airport (the largest takeover in Australia's corporate history) by a consortium of investors, a 15% securityholder, UniSuper, was treated very differently to the other securityholders.[127] Essentially, UniSuper was offered the opportunity to exchange its securities in Sydney Airport for securities in the consortium's bid vehicle, whereas all other securityholders were offered $8.75 cash. There was full disclosure in the scheme booklet of the benefit that UniSuper was to receive, and this benefit was taken into account by the target directors and the independent expert. UniSuper was, as required by the well-established class rules, placed in a separate class for voting purposes. The consequence of this was that the outcome of the scheme was put in the hands of those securityholders who were only able to receive cash. At the scheme meeting, those security holders approved the scheme by the requisite majorities.[128]

5.5 Concluding remarks

To rigidly impose the minimum bid price rule and the collateral benefits rule on schemes would be to the detriment of all stakeholders. Many transactions would simply not be able to proceed. As explained above, there are significant minority shareholder protections built into the scheme regime which already strike the appropriate balance.

[126] See, for example, *Re Aston Resources Ltd* [2012] FCA 229; *Re David Jones Ltd (No 2)* [2014] FCA 720; *Re David Jones Ltd (No 3)* [2014] FCA 753; *Re Pulse Health Ltd* [2017] NSWSC 654; *Re Tronox Ltd* [2019] FCA 312; *Re Healthscope Ltd* [2019] FCA 542; *Re URB Investments Ltd* [2019] FCA 1977.

For a detailed discussion on the treatment of collateral benefits in schemes, see Damian T and Rich A, *Schemes, Takeovers and Himalayan Peaks*, Fourth Edition, at Section [6.5.4] pages 913-938.

[127] *Re Sydney Airport Ltd and the Trust Company (Sydney Airport) Ltd as responsible entity for Sydney Airport Trust 1* [2022] NSWSC 25; *Re Sydney Airport Ltd and the Trust Company (Sydney Airport) Ltd as responsible entity for Sydney Airport Trust 1 (No 2)* [2022] NSWSC 103.

[128] Sydney Airport, ASX announcement, Sydney Airport Scheme Meeting Results, 3 February 2022.

6 Question 6 – views on expanding the Takeovers Panel's powers to include approval of members' schemes of arrangement

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?

6.1 The position of the Committee

The position of the Committee can be summarised as follows:

(1) there is limited support for a model where, in relation to members' schemes of arrangement which effect a change of control, the Takeovers Panel replaces the Court in the scheme process, and takes over supervision of, and is required to consider the fairness of and approve, such schemes, in the same way as the Court currently does;[129]

(2) there is strong support for the retention of the current scheme of arrangement regime under Part 5.1 of the Corporations Act (including the Court supervision and approval requirements) in relation to members' schemes which effect a change in control;

(3) there are some Committee members who support the introduction of a new and *additional* regime in Chapter 6 of the Corporations Act, under which a bidder would be able to acquire all of the shares in a target company, once the acquisition has been approved by 75% or more of the votes cast at a meeting convened by the target company, and provided the Takeovers Panel has not intervened (on application of a shareholder, ASIC or other interested party) to prevent the acquisition proceeding. This new regime would be in *addition* to, and would not replace, the existing Court supervised scheme of arrangement regime in Part 5.1 of the Corporations Act. That possible new regime is described further in section 7.2 of this Schedule 1, and the arguments put by those who support such a new regime are set out in section 7.3 of this Schedule 1; and

(4) while some Committee members support the introduction of such a new regime, there is also a body of Committee members who believe that such a regime is unnecessary and would deprive target shareholders of a number of very important protections in the current scheme process. The arguments against the introduction of such a regime are set out in section 7.4 of this Schedule 1.

[129] That limited support is for a model under which the Panel assumes the Court's role in respect of members' schemes that effect change of control transactions, but not in respect of other schemes.

6.2 Possibility of the Takeovers Panel replacing the Court in supervising and approving members' schemes of arrangement

(a) Introduction

As mentioned in section 6.1 above, there is limited support for a model where, in relation to members' schemes of arrangement which effect a change of control, the Takeovers Panel replaces the Court in the scheme process, and takes over supervision of, and is required to approve, such schemes, in the same way as the Court currently does. Some of the reasons for this lack of support are summarised below.

(b) Many members' schemes of arrangement which effect a change of control can only proceed with Court approval

Many members' schemes of arrangement which effect a change of control would still need to be undertaken by way of a court approved scheme of arrangement under Part 5.1, as they rely on approval by a Court.

For example, many schemes involving an offer of shares (rather than cash) as all or part of the scheme consideration (also known as 'scrip' schemes) rely on foreign prospectus exemptions which are only available if the transaction is approved by a Court.[130] Also, in the case of trust schemes (i.e. which involve most REITs and infrastructure vehicles), the responsible entities / trustees would still require judicial advice from a Court. Any scheme involving a reconstruction or amalgamation would also still need to be approved by a Court under Part 5.1, as too would any scheme involving creditors or a demerger.

For this reason alone, there is no basis for the Takeovers Panel to replace the Court in the current scheme of arrangement process.

(c) The Panel is not the appropriate forum to supervise what is essentially a compulsory acquisition process

The Panel was established as an administrative body to provide efficient and prompt resolution of takeover disputes. However, there is a fundamental difference between a takeover, which involves target shareholders voluntarily deciding to accept a takeover offer, and a scheme of arrangement. The latter is effectively a compulsory acquisition procedure under which target shareholders may have their shares acquired against their will, regardless of whether they voted against the scheme or did not vote at all, if the scheme is approved by 75% of the votes cast and a majority in number of those shareholders voting. That should only occur with the supervision of the Court exercising a broad fairness discretion.

The membership of the Panel and the way in which it operates to seek to effect speedy resolution of takeover disputes is simply not the appropriate forum for protection of target shareholders whose shares are being compulsorily acquired. The Panel's focus is on whether there has been an impact on the market for corporate control (not whether a shareholder's proprietary rights should be abrogated), and its approach to takeover

[130] By way of example, currently shares can be issued to target shareholders in, or who are citizens or residents of, the US pursuant to an Australian scheme of arrangement without compliance with the US registration and prospectus requirements as a result of the exemption provided by section 3(a)(10) of the *US Securities Act of 1933*. One of the key requirements for that exemption to be available is that a Court (or authorised government entity) has held a hearing concerning, and has considered, the fairness of the particular transaction (see US Securities Exchange Commission, Division of Corporate Finance: Revised Staff Legal Bulletin No.3A (CF), dated 18 June 2008). For a further discussion on s3(a)(10), and examples of where the Division has accepted the use of schemes of arrangement in the context of s3(a)(10), see Damian T and Rich A, *Schemes, Takeovers and Himalayan Peaks*, Fourth Edition, at Section [13.2.7], pages 1562-1566 – the authors were assisted by two US attorneys with that Section of the book).

This exemption is frequently relied on by scheme proponents in connection with Australian schemes of arrangement (see the examples listed in Damian T and Rich A, *Schemes, Takeovers and Himalayan Peaks*, Fourth Edition, at Section [13.2.7], page 1562, footnote 15). Without Court approval in a scheme, bidders would no longer have the ability to issue shares to shareholders based in the US with the benefit of the US exemption, which requires a court-based process.

disputes is to focus on a speedy resolution so that the takeover can proceed and the shareholders can decide whether to accept it or not. That is not appropriate where a target shareholder is having their shares compulsorily acquired.

(d) **The Panel is not set up and does not have the resources to perform this function**

The 51 sitting members of the Takeovers Panel are directors, solicitors, barristers and investment bankers. The fact that all Panel members have full time (and very busy) day jobs means that the Panel is simply not geared up to take over the role of the Court.

George Durbridge (then Counsel of the Takeovers Panel), who was commenting on whether the Takeovers Panel could fulfil the function currently performed by the Court in relation to schemes, succinctly summarised the reality of the situation:

> "The Panel as it now exists is not set up to provide the appropriate skills, availability (local and over time) and consistency."[131]

In short, the Takeovers Panel would simply not be equipped to handle the sheer volume of scheme proceedings. Between 1 January 2018 and 31 March 2022, there have been around 340 scheme decisions from the Courts. By way of contrast, over this period, there were around 100 decisions from the Takeovers Panel.

The pressure on the Takeovers Panel's resources, which are currently very limited, would be enormous if jurisdiction over schemes were to be transferred from the Courts to the Takeovers Panel.

On the basis of the number of Court decisions compared to the number of Panel decisions over the period 1 January 2018 to 31 March 2022 (as referred to above), the Panel's resources (including the number of Panel members) would need to be at least tripled, which would have an inevitable adverse impact on the consistency of decision making (as to which, see section 6.2(f) of this Schedule 1).

Significant additional Commonwealth funding and resources would be required if the Takeovers Panel was to assume the role of the Court.[132] In addition, the structure of the Takeovers Panel would require a complete overhaul. The cost of all this would well and truly exceed the current cost of having schemes heard in the Court system (which is split between the States and Commonwealth).[133]

(e) **If the Takeovers Panel simply replaces the Court, several important minority protections would be lost**

If the Takeovers Panel simply replaces the Court, several important minority protections would be lost. For example:

- ***the Court's fairness discretion:*** the Court has a broad supervisory jurisdiction over schemes of arrangement and closely examines the *fairness* of any scheme.[134] As discussed above, that is quite different to the Takeovers Panel, which is focussed only on whether an acquisition impacts the market for control; and

[131] Durbridge G, "Commentary on Tony Damian's Paper on Reforming the Scheme Provisions", Law Council of Australia − Business Law Section, Corporations Workshop, 1-3 July 2005, Canberra, at 10.

[132] That said, there are some who are of the view that it ought not be controversial that the Takeovers Panel would need more resources to take on new roles (eg schemes or advance rulings) and that the reforms should not be opposed just because of cost. They are of the view that, in the long run, it could be a cost saving if the Panel had adequate resources and concentrated expertise.

[133] Schemes of arrangement are heard in both the State Supreme Courts and the Federal Court.

[134] The nature of the Court's fairness discretion is discussed in detail in section 2.1 of Schedule 2.

For a more general discussion on the role of the Court at the first and final court hearings, see section 2 of Schedule 2. That discussion reveals that the role of the Court is significant and provides important safeguards and protections for minority shareholders.

- **obligation on scheme proponents to draw relevant matters to the Court's attention:** the legal representatives of scheme proponents are required to bring to the Court's attention all matters that could be considered relevant to the exercise of the Court's discretions.[135] This obligation brings with it a serious obligation to be discharged by those legal representatives of the scheme proponents.[136] It is not clear that scheme proponents (or their representatives) would be under the same duty to the Takeovers Panel if members' schemes of arrangement were supervised by the Takeovers Panel only.

(f) **The Court provides consistency in decision making**

There is no evidence to suggest that a transfer of jurisdiction over schemes to the Takeovers Panel will result in greater consistency in decisions. To the contrary, there are a handful of judges around Australia who hear most scheme applications compared with 51 part-time members of the Panel. The number of Panel members would need to be significantly increased if the Panel was to assume the role of the Court.

As we have seen in other areas of the Panel's jurisdiction (like cases on whether particular shareholders are 'associates' for the purposes of Chapter 6), there is not always consistency of thinking or approach on issues (the time it can take the Panel to issue or amend its Guidance Notes, is also evidence of this[137]). We are likely to see further erosion of consistency of decision making if the number of Panel members is significantly increased.

The success of the scheme of arrangement regime has, in a large part, been perpetuated by the fact that there are only a small number of judges hearing schemes. This has resulted in considerable consistency in decision making.

To illustrate this point, between 1 January 2018 and 31 March 2022, just 11 judges have supervised 81% of all schemes of arrangement.[138] This fact means that those judges have acquired a deep understanding of the legal and commercial issues that arise in relation to schemes of arrangement.

To further illustrate this point, between 1 January 2018 and 31 March 2022, one judge (Black J) presided over around 100 scheme hearings, whereas the most active Takeovers Panel member in the same period (Mr Bruce McLennan) presided over only 14 Panel proceedings. A trend emerges when looking at other judges and Takeovers Panel members as well – between 1 January 2018 and 31 March 2022:

- a total of 11 judges have presided over 10 or more scheme hearings (with 6 of them presiding over 20 or more scheme hearings), whereas
- only 3 Panel members have presided over 10 or more Panel proceedings.

(g) **The Court provides a valuable contribution to the practice, policy and procedure of schemes**

If the Takeovers Panel replaced the Court in schemes, this would result in the loss of the valuable contribution that the Courts make in relation to the practice, policy and procedure of schemes of arrangement.

The guidance provided by the frequent Court decisions in schemes is a valuable feature of the existing scheme of arrangement regime. Court decisions are an important source

[135] See, for example, *Re Marketeers Pty Ltd* [1982] Qd R 93 at 96; *Re Archaean Gold NL* (1997) 23 ACSR 143 at 148; *Re Permanent Trustee Co Ltd* (2002) 43 ACSR 601 at 603 [7]; *Re Diversa Ltd (No 3)* [2016] FCA 1284 at [4].

[136] *Re Permanent Trustee Co Ltd* (2002) 43 ACSR 601 at 603 [7].

[137] See section 6.2(g) of this Schedule 1.

[138] The data is based off schemes of arrangement where a reported judgment was delivered.

for identifying, and informing those considering embarking on a scheme of, the features of schemes of arrangement that are and are not appropriate.

The Courts have, at times with the assistance of ASIC, adopted a commercial, pragmatic and common-sense approach in assessing new features and practices in schemes and in deciding whether the fairness of a particular scheme of arrangement is such that it is deserving of the Court's approval.

Over the years the Courts have shown leadership and filled the legislative and policy void by developing sensible approaches to a number of important aspects of schemes of arrangement, including:

(1) developing the framework for the approach to be taken in relation to collateral benefits, and equality of opportunity, in schemes;

(2) navigating the legal uncertainty caused by the enactment of the predecessor of s411(17) and arriving at a sensible approach to the difficult question of the relevance of the takeover provisions to schemes of arrangement;

(3) devising a regime to enable bidders to acquire options and performance rights under schemes of arrangement;

(4) ensuring consistency of disclosure between takeovers and schemes;

(5) facilitating the electronic despatch of scheme booklets;

(6) facilitating virtual meetings;

(7) settling on an approach to call option agreements and voting intention statements;

(8) developing a supplementary disclosure regime;

(9) implementing a procedure to accommodate changes to the terms of a scheme of arrangement after the scheme booklet has been published;

(10) facilitating stub equity transactions;

(11) resolving the approach to be taken to director recommendations in circumstances where a director may receive a material benefit in connection with a scheme (for example, through their holding of performance rights or options); and

(12) formulating a series of requirements for, and expectations of consortium members for, equity commitment letters in the context of consortium bids.

It must not be forgotten that the Courts have often been forced to consider, and settle on approaches to, such matters quite literally in real time in open Court. Criticisms of the approach taken by the Courts are rare. Further, in instances where the Courts have adopted an approach which, with the benefit of hindsight, was inappropriate, unnecessary or went too far (eg as some would say happened in *Re Gazal Corporation Limited*[139]),[140] the Courts have demonstrated that they are nimble enough to quickly refine and adapt their practices and policies as they go.[141]

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[139] [2019] FCA 701.

[140] In *Re Gazal Corporation Limited* [2019] FCA 701 the Court suggested that it would have been better practice if the CEO (who was to receive a bonus if the scheme became effective) had declined to make a recommendation to shareholders as to how they should vote on the scheme (see at [30]).

[141] See, for example, the way the Courts swiftly refined the approach in relation to the issue raised in *Re Gazal Corporation Limited* [2019] FCA 701 at [30] (see the string of cases referred to in Damian T and Rich A, *Schemes, Takeovers and Himalayan Peaks*, Fourth Edition, at 609-634). The position now taken by the Courts – which is to the effect that any director benefits require prominent disclosure and that there is no general rule that a director should not make a recommendation merely because they stand to receive a benefit if the scheme is implemented – has been well received by market participants.

The Takeovers Panel has also done some very good work on the policy front. However, settling on a policy position has often taken considerable time[142] and, even when the policy position has been settled, some important issues have been left unresolved.[143] In addition, there are a number of policy areas that are in need of updating. [144]This is unsurprising given that the adoption of any policy, or the variation of any existing policy, necessitates the canvassing the views, and the seeking of some form of consensus from, 51 members of the Takeovers Panel. This is not going to get any easier if membership of the Takeovers Panel is to be significantly expanded to accommodate the assumption of the role currently played by the Courts in schemes.

Furthermore, despite having had a rule making power since 13 March 2000,[145] the Takeovers Panel has not utilised this power.[146]

(h) **Removing the Court from the Australian scheme of arrangement approval process would make Australia an international outlier**

Removing the Court from the Australian scheme of arrangement approval process would make Australia an international outlier.

By way of example, in the leading and most sophisticated scheme of arrangement jurisdiction in the world – the United Kingdom – the Court is required to approve any scheme of arrangement.

As shown in the table below, many jurisdictions have a scheme of arrangement regime.

	Jurisdiction	Court approval required?
1.	Australia[147]	☑
2.	Bermuda[148]	☑
3.	British Virgin Islands[149]	☑

[142] By way of example, the Panel took over 12 months to finalise an amendment to its policy on equity derivatives (see (i) Takeovers Panel, Consultation Paper, "Guidance Note 20 – Equity Derivatives", dated 10 April 2019 and (ii) Takeovers Panel, Public Consultation Response Statement, "Guidance Note 20 – Equity Derivatives", dated 28 May 2020).

[143] For example, on 20 April 2010, the Panel invited submissions on, among other things, whether it should provide guidance on what constitutes a change of control for the purpose of a reverse takeover and whether the triggering of that definition should result in the requirement for a vote of the bidder's shareholders. However, the Panel's reverse takeover policy in Guidance Note 1 has done little to clarify matters and much uncertainty remains (see Guidance Note 1, Unacceptable Circumstances, Sixth Issue, dated 11 July 2018, at [32(b)] footnote 51).

Furthermore, the Panel's 4 month lock out rule following a "no increase statement" (see Guidance Note 1 Unacceptable Circumstances, Sixth Issue, dated 11 July 2018, at [32(a)] footnote 39), leaves a number of important matters unresolved – thus creating a degree of uncertainty as to the potential future scope and direction of the policy (see Rich A and Haddy S, "The Takeovers Panel's New 4 Month Lock Out Rule", Herbert Smith Freehills, Legal Briefings, 30 July 2018).

[144] By way of example, the market is waiting for the Panel to commence a consultation process on reforms to its (very much outdated) policy on insider participation in control transactions (see Takeovers Panel, Guidance Note 19, "Insider Participation in Control Transactions", Second Issue, dated 18 December 2007).

[145] Corporations Act, s658C.

[146] It is understood that the Panel has a number of technical concerns in relation to the operation of this rule making power.

[147] Corporations Act 2001 (Cth), Part 5.1.

[148] Companies Act 1981, Part VII (specifically sections 99-100).

[149] BVI Business Companies Act 2004 Part IX, section 179A.

4.	Canada[150]	☑
5.	Cayman Islands[151]	☑
6.	Fiji[152]	☑
7.	Ghana[153]	☑
8.	Guernsey[154]	☑
9.	Hong Kong[155]	☑
10.	Ireland[156]	☑
11.	India[157]	☒[158]
12.	Isle of Man[159]	☑
13.	Jersey[160]	☑
14.	Malaysia[161]	☑
15.	New Zealand[162]	☑
16.	Nigeria[163]	☑
17.	Papua New Guinea[164]	☑

[150] Canada has a "plan of arrangement" regime which is a very similar regime to the scheme of arrangement regime. See Canada Business Corporations Act, R.S.C. 1985, c. C-44, section 192.

[151] Cayman Islands Companies Act, section 86.

[152] Companies Act 2015, sections 437-439.

[153] Companies Act 2019, section 239.

[154] The Companies (Guernsey) Law 2008, sections 105-111.

[155] Companies Ordinance, Cap 622, Part 13, Division 2.

[156] Companies Act 2014, sections 449-455.

[157] Indian Companies Act 2013, section 230-240.

[158] In India, schemes of arrangement are subject to approval by The National Company Law Tribunal (**Tribunal**). The Tribunal was established in 2016 under the *Companies Act 2013,* section 408. The Tribunal is a quasi-judicial body and consolidates the corporate jurisdiction of the Company Law Board, Board for Industrial and Financial Reconstruction (BIFR), the Appellate Authority for Industrial and Financial Reconstruction (AAIFR) and the powers relating to winding up or restructuring and other provisions vested in High Courts. It is understood that the Tribunal essentially operates like a Court (it has been vested with the powers / jurisdiction of the courts in relation to companies matters and can enforce the law).

[159] Companies Act 2006, sections 157-161.

[160] Companies (Jersey) Law 1991, sections 125-127.

[161] Companies Act 2016, Subdivision 2, section 366.

[162] Companies Act 1993 (NZ), Part 15, section 236.

[163] Companies and Allied Matters Act 2020, Chapter 27.

[164] Companies Act 1997 (PNG), Part XVI, section 250.

18.	Singapore[165]	☑
19.	South Africa[166]	☑☒[167]
20.	United Kingdom[168]	☑

The only jurisdiction where there is no requirement for Court approval is India (however, a new quasi-judicial body has been established to supervise and, if thought fit, approve all schemes). In South Africa, Court approval is only required in certain circumstances, but an "appraisal right' regime was introduced to protect minority shareholders as a result of the removal of the Court approval requirement.

(i) Constitutional limits on the powers of the Takeovers Panel

The Takeovers Panel is only constitutionally valid if it operates as an administrative body, not a court. It cannot exercise the judicial power of the Commonwealth.[169] The validity of the Takeovers Panel has been upheld in the High Court, but on the basis that it is exercising administrative, not judicial, power.[170]

If the Takeovers Panel were to replace the Court and take over the supervision of, and be required to approve, all members' schemes of arrangement which effect a change of control, it is likely to require powers similar to those exercised by a Court, which may lead to renewed challenges to the Constitutional validity of the Takeovers Panel.

(j) Limits on the power of the Takeovers Panel to approve what is essentially a compulsory acquisition of members' shares

The Court's appraisal of the fairness of a scheme of arrangement is one of the principal reasons why compulsory acquisition of shares via a scheme of arrangement (with a 75% vote) does not offend the "*Gambotto* principles".[171]

In this regard, the comments of Austin J in *Arakella v Paton*[172] are relevant. In that case, his Honour left open the question of "whether [to satisfy the "*Gambotto* principles"] the forum [that appraises the fairness of a scheme] must be a court and whether the

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[165] Companies Act, Part 7, section 210 and Insolvency, Restructuring and Dissolution Act 2018 (No. 40 of 2018), Part 5.

[166] Companies Act No. 71 of 2008, sections 112-115.

[167] Court approval is required (a) if the special resolution was opposed by at least 15% of the votes exercised on the resolution and, within five business days after the vote, any person who voted against the resolution requires that the company seek Court approval; or (b) if, on application by any person who voted against the resolution within ten business days after the vote, the Court grants that person leave to apply for a review of the transaction.

As part of the legislative reform package that removed the requirement for Court approval in all cases, South Africa introduced an "appraisal right" for shareholders. This entitles any dissenting shareholder the right to demand that the target pays it "fair value" for the target shares it holds (see Companies Act No. 71 of 2008, s115(8), s164(3), s164(5) and s164(8)).

[168] Companies Act 2006, Part 26.

[169] See the discussion in *Precision Data Holdings Ltd v Wills* (1991) 173 CLR 167 at 190-191; *Attorney-General for the Commonwealth of Australia v Alinta Ltd* (2008) 233 CLR 542 at 552 [7] per Gleeson J, 553-554 [14] per Gummow J, 563 [49] per Kirby J, 579 [99] and 579 [101] per Hayne J, 580 [105] per Heydon J and 599 [176] per Crennan and Kiefel JJ.

[170] *Attorney-General for the Commonwealth of Australia v Alinta Ltd* (2008) 233 CLR 542 at 552 [7] per Gleeson J, 553-554 [14] per Gummow J, 563 [49] per Kirby J, 579 [99] and 579 [101] per Hayne J, 580 [105] per Heydon J, and 599 [176] per Crennan and Kiefel JJ.

[171] See *Gambotto v WCP Ltd* (1995) 182 CLR 432 at 444-447 (especially at 446); *Re GIO Australia Holdings Ltd* (1999) 33 ACSR 283 at 286 [13]; *Re NRMA Ltd* (2000) 33 ACSR 595 at 613 [59]; *Re Australian Co-Operative Foods Ltd* (2001) 38 ACSR 71 at 86 [72]; *Arakella v Paton* [2004] NSWSC 13 at [130]-[138].

[172] [2004] NSWSC 13.

procedure must be ordained by statute".[173] His Honour was, presumably, contemplating that, if the Takeovers Panel (of which his Honour was then a member) assumed the role played by the Court, this may offend the "*Gambotto* principles".

If the *Gambotto* principles were to start applying to schemes of arrangement (eg as a result of the removal of the Court from the scheme process), schemes could not be used by a bidder to acquire the shares in a target held by those shareholders who did not vote in favour of a scheme of arrangement. In this regard, the authors of *Principles of Corporations Law* state:

> "The interests of shareholders and creditors whose rights may be affected [by a scheme of arrangement] are protected in a number of ways: by the requirement of judicial approval; by the subdivision of members and creditors into classes; by the disclosure requirements which may include an independent expert's report; and by rights of appearance before the court. Consequently the principles enunciated in *Gambotto's* case do not apply when the court exercises its discretions under s411".[174]

The application of the *Gambotto* principles to any changes to the scheme of arrangement regime (eg the removal of the Court or a new regime that did not involve the Court) would need to be carefully worked through by the Treasury.

[173] [2004] NSWSC 13 at [137].

[174] Ford, Austin & Ramsay, *Principles of Corporations Law*, LexisNexis, at [24.036].

7 Question 7 – what would be the advantages and disadvantages of a new procedure in Chapter 6, in addition to the scheme procedure in Part 5.1?

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?

7.1 Introduction

As discussed in section 6.1 of this Schedule 1, there are some Committee members who support the inclusion in Chapter 6 of the Corporations Act of a new and *additional* regime, which would sit *alongside* the existing scheme of arrangement regime in Part 5.1 of the Corporations Act.

In a takeover bid under Chapter 6, a bidder needs to acquire 90% of the shares to compulsorily acquire the shares of any dissenting shareholders.[175] By way of contrast, under this new regime, a bidder would be able to compulsorily acquire all of the shares in a target company, if the acquisition is approved by 75% or more of the votes cast at a meeting convened by the target company, and provided the Takeovers Panel has not intervened (on application of a shareholder, ASIC or other interested party) to prevent the acquisition proceeding.

The Court would have no role in supervising, considering the fairness of, or approving an acquisition under the new regime. Instead, any challenges to an acquisition under the new regime would need to be referred to, and considered by, the Takeovers Panel. In the absence of such a challenge, an acquisition under the new regime would become effective 7 days after the date on which shareholder approval is obtained. The purpose of the 7-day period is to give shareholders, ASIC and other interested parties an opportunity to file an application with the Takeovers Panel.

This possible new regime is described further in section 7.2, and the arguments put by those who support such a new regime are set out in section 7.3.

While some Committee members support the introduction of such a new regime, there is also a body of Committee members who believe that such a regime is unnecessary and would deprive target shareholders of a number of very important protections in the current scheme process. The arguments against the introduction of such a regime are set out in section 7.4.

7.2 Possible new regime

Those Committee members supporting the new regime have provided the following description of it.

> A new Part 6.9A would be inserted into Chapter 6. This aligns the procedure more with the takeovers law (including the s602 objectives of equality etc.), rather than the scheme of arrangement provisions. ASIC's powers to give relief and the Panel's dispute resolution powers would follow.

[175] See Corporations Act, s661A.

The new part would provide for a new procedure (a **takeover scheme**) which would enable all shares in the target company to be acquired by a bidder by following a statutory procedure:

(1) **Agreement:** The directors of the target company must first agree that the procedure may be used (i.e. like a traditional scheme of arrangement, the mechanism is only available for a recommended transaction.)

(2) **Bidder explanatory statement:** The bidder prepares an explanatory statement for target shareholders which would satisfy the equivalent disclosure requirements for a bidder's statement (ie s636). It would set out the terms and conditions of the proposal.

(3) **Target explanatory statement:** The target prepares an explanatory statement in response which satisfies the equivalent disclosure requirements for a target's statement (ie s638) and which is accompanied by a report by an expert that states whether, in the expert's opinion, the takeover scheme is fair and reasonable, giving reasons.

(4) **Notice of meeting:** Both documents, with each document duly approved by the bidder and target respectively as per s637 and s639, are sent to target shareholders together by the target with a notice convening a general meeting of the holders of the relevant shares. We envisage a single booklet (sent electronically) would be the norm.

(5) **ASIC and ASX:** A copy of the document is lodged with ASIC and, if the company is listed, given to the securities exchange. (Note: For consistency with takeovers, ASIC would not have a 14 day statutory right of review of the documents.)

(6) **Supplementary information:** A supplementary document would be issued if there was material change after the date of the notice of meeting.

(7) **Voting approval:** At the general meeting, the acquisition proposal must be approved by 75% of votes cast on the resolution, disregarding any votes cast by:

(A) the bidder and its associates;

(B) any person (or their associate) who would receive a benefit in connection with the scheme which is not offered to all holders of the relevant class of shares; and

(C) any person who has agreed separately with the bidder to be bound by, or excluded from the operation of, the scheme.

This test recognises that some transactions involve shareholders with different interests. Section 623 prohibits collateral benefits after the date of a takeover offer, while allowing pre-offer benefits provided they are disclosed. Therefore, even though shareholders may be treated differently, the takeover scheme would only succeed if the independent shareholders were satisfied with their own outcome and supported the takeover scheme by a 75% vote. It is the same as the policy behind s611 item 7.

(8) **Equal treatment and minimum bid rule:** Under the takeover scheme, all holders eligible to vote must be able to receive the same consideration per share, which must equal or exceed the highest price

paid or agreed to be paid by the bidder during the 4 month period prior to the date of the notice of meeting.

(9) **Effective time:** The scheme becomes binding on all holders once a copy of the resolution is lodged with ASIC, which cannot be for 7 days after the meeting (to allow any person to apply to the Panel if they believe the meeting was conducted improperly). Shareholders must be paid within 14 days after lodgement.

(10) **Dissenting shareholders:** Similar to the rights under Part 6A.1 for compulsory acquisition following a takeover bid, a shareholder who has voted against the transaction could apply to the Court for an order varying the price payable for his or her shares on the grounds that it is not 'fair value' (within the meaning of s667C). The application would need to be made within 1 month after the resolution is lodged with ASIC. Note: In order to promote commercial certainty, the Court would only have power to vary the price, not to cancel the transfer.

(11) **Disputes and ASIC oversight:** The Takeovers Panel would have the same powers as it has for takeovers – to make appropriate orders where there are unacceptable circumstances within the meaning is s657A. ASIC can bring a matter concerning a takeover scheme to the Panel, just as it can for a takeover. Court proceedings (other than those brought by ASIC or a government body) prior to the resolution being lodged would be precluded under an amendment to s659B.

(12) **More M&A:** The new regime would assist Australian businesses (companies and managed investment schemes) to participate in M&A transactions in order to grow their businesses. It would promote greater investment and more efficient use of underlying resources and thereby achieve one of the fundamental goals of corporate law, namely, to enhance the Australia's economy. The proposed regime is designed to balance the rights of the parties to the transactions with the rights of minority shareholders whose shares may be expropriated. The chief protection for them is the need for a 75% vote of independent shareholders, the requirement for an independent expert's report and the ability to seek a Court order varying the price if it is shown to be unfair. All of these protections are based on existing rules in the Corporations Act.

In practice, we would expect the bidder and target to enter into an implementation agreement, very similar to the current practice before a scheme is undertaken. That would allow for the parties to negotiate their arrangements and enable the target to reserve the right to entertain rival offers which are considered superior. Market practice concerning break fees and exclusivity practices would continue.

A key point is the 75% voting threshold. The 75% of votes test may be easier to satisfy than the current 90% compulsory acquisition test for takeover bids. But the procedure is only for target-recommended transactions and must be accompanied by an independent expert's report. The test is on par with the current 75% test for a scheme of arrangement under s411, which has not been controversial. Simplicity is vital.

In any event, the two thresholds are not directly comparable because the 75% threshold excludes shares held by the bidder and associates, whereas the 90% threshold includes their shares. Further, a 75% vote is enough for other major corporate matters which directly affect minority shareholders, such as:

- changes to constitutions;

- variation or cancellation of class rights;
- selective capital reductions and buy backs; and
- financial assistance approvals.

A selective reduction of capital is directly relevant. Under s256C, minority shareholdings can be expropriated against the wishes of the holders with a vote carried by 75% of the members whose shares are to be cancelled. The law permits this if the reduction is 'fair and reasonable' and does not 'materially prejudice the company's ability to pay its creditors': s256B(1). There is no statutory requirement for Court approval and no requirement for an independent expert's opinion.[176] In the event of a dispute, the holder has right to complain to the court under s1324, in which case the company bears the onus: s1324(1B). This technique is not used frequently, but the reason has nothing to do with the Corporations Act. It is due to uncertainty about tax consequences, which makes the technique less attractive compared to mechanisms which do not involve a share cancellation. The key point is that it is clear demonstration that a 75% vote is already accepted by the Corporations Act as providing sufficient protection for minority shareholders, when coupled with the right to seek a court order. The provision cannot be simply dismissed as dealing with share capital maintenance rules.

Furthermore, a 50% vote is enough for item 7 of s611 acquisitions of control and related party transaction approvals, both of which indirectly affect the rights of non-participating shareholders.

In addition, under the model suggested above in this section 7.2, dissenting shareholders can seek a Court order to vary the price if it is shown to be less than 'fair value'. That protection, with the requirement for an independent expert's report, should be sufficient. It exceeds the protection given under the other provisions mentioned above which allow corporate actions with a 75% or 50% vote.

7.3 Arguments in favour of the new regime

Those Committee members supporting the new regime have provided the following description of it.

(1) **No need for court supervision:** The courts' role in schemes of arrangement is a hangover from the 19th century when companies were treated like trusts and courts had a role in supervising commercial transactions. Schemes of arrangement were originally confined to arrangements with creditors in corporate insolvencies. The court had an important role in preventing fraud and ensuring fairness between different classes of creditors. The provisions were extended to members' schemes in the early 20th century, but they give rise to different considerations (and, of course, at the time, there was no companies regulator playing a role like ASIC). There is no longer any cogent reason why courts are required in every members' scheme.

There are very few acquisition schemes where the courts add material value. In this regard, the following is noted:

- A quick review of the vast majority of court decisions in typical members' schemes of arrangement will show that there are no issues in dispute. The hearings and the

[176] However, ASIC nevertheless expects an independent expert's report (see ASIC Regulatory Guide 111, Content of expert reports", dated October 2020 at 5).

judgments are very short and out of proportion to the costs involved.

- There are issues where the courts have added confusion as to the requirements. One example is the *Gazal* case (mentioned elsewhere in this submission) where the court considered that a CEO who was receiving an additional benefit under the transaction should not vote, even though the benefit was fully disclosed. A different view on this identical point was subsequently taken by other courts. That inconsistency adds confusion and detracts from an efficient market.
- There are other issues where the courts have been very liberal in allowing shareholders with different interests to vote with the rest of shareholders (including, for example, stub equity transactions where major holders receiving stub equity will end up with superior rights under the term of the stub equity by virtue of their stake). The fact that a court has discretion to disregard votes at the end of the process is not an adequate solution as shareholders are unlikely to be aware of that and may be discouraged to vote against the scheme thinking it is foregone conclusion. The voting rules should be clear upfront.
- There is an argument made elsewhere in this submission that the parties' duty of candour to the court ensures full disclosure to shareholders in the scheme booklet. In the proposed regime, that is matched by the standard rule that the takeover documents must include all material information: s636(1)(m), s638(1).
- Finally, to the extent that the courts protect shareholders from having their shares expropriated for an unfair price, in modern terms, that is only possible because of the usual requirement for an independent expert to value the shares in a report issued with the scheme booklet. That report is the key protection in that regard, rather than the courts supervision.

The US, which is the largest and most active M&A market in the world, allows mergers with a 50% or 66% vote (depending on jurisdiction) without any court supervision. Requiring court supervision in all acquisition schemes is an expensive anachronism, just as it was for capital reductions which required court confirmation until 1998.

Removing the need for court involvement would mean the new procedure could be undertaken at any time of the year. It would avoid the problem of the courts shutting down over Christmas/New Year period;

(2) **existing scheme procedure retained:** the new regime would be available for acquisition schemes only. The existing scheme of arrangement provisions in Part 5.1 of the Corporations Act would still be available to be used for other transactions, such as scrip-for-scrip acquisition schemes, redomiciliations, demergers, demutualisations, amalgamations, reconstructions and creditors' schemes, and would remain available for acquisition schemes where parties wished to use a court-supervised process (for example, in schemes involving an issue of scrip to US holders, where a Court order is needed to attract

the operation of the exemption in section 3(a)(10) of the US *Securities Act of 1933*[177]). Parties would have a choice;

(3) **regulatory and legal consistency:** the new regime would be subject to the same takeover rules, including minimum disclosure requirements, the minimum bid price rule and the rule against collateral benefits, as well as other regimes applying to Chapter 6 including the liability and defence provisions in Chapter 6B. These rules provide a clear and certain set or rules governing transactions. Elsewhere in this submission it is argued that the proposed regime may be susceptible to challenge under *Gambotto* principles. That is far from clear and, in any event, could be overcome by the legislation which introduces the regime;

(4) **Takeovers Panel:** the Takeovers Panel already hears disputes in control transactions and would have jurisdiction to hear disputes concerning the same regulatory rules as in takeovers. It is well equipped to deal with disputes in control transactions. Later sections of this submission argue that the Panel's processes are susceptible to lengthy delays as the Panel is slow and applicants may seek judicial review remedies. In response, a few points can be made:

- First, the Panel would only be involved if there was a dispute;
- Second, a person would be more likely to make an application early in the process so as to avoid the perception that it may be agitating for purely tactical reasons. That should mean that any dispute is resolved early and would not delay the transaction;
- Third, if the Panel had a routine of seeking an undertaking as to damages (as submitted in section 2.2 of this submission), it would be far more likely that any dispute was commenced early in the process so the applicant would not be faced with that requirement; and
- Fourth, while there have been examples of parties seeking judicial review of Panel decision and causing lengthy delays, they do not relate to sort of dispute we would anticipate under the proposed new regime, which should be confined to issues about disclosure and voting entitlement. Bother those issues should be resolved by the Panel quickly and without delay;

(5) **managed investment schemes:** as Chapter 6 regulates acquisitions in listed managed investment schemes, the new regime would encapsulate those investment vehicles in additional to companies (unlike the current scheme of arrangement regime). This would avoid the uncertainty associated with seeking 'judicial advice' for a trust scheme. This additional regulatory certainty cannot be achieved by the current court supervised scheme of arrangement procedure under s411;

(6) **ASIC relief:** ASIC would be empowered to use its s655A powers to grant relief in connection with acquisitions under the new regime

[177] For a further discussion on the importance of section 3(a)(10) of the US *Securities Act of 1933*, see footnote 130. In this regard, if it was felt important to allow the new regime to approve scrip bids for these purposes, the Panel could be given power to consider the 'fairness' of the transaction when required. That should not be 'judicial' in nature given no law is involved and hence it would be within the constitutional power of the Panel.

(generally not possible under the current scheme of arrangement regime);

(7) **flexibility:** unlike conventional takeover bids which suffer from great uncertainty about timing (as many shareholders will wait until the last minute to see whether others will accept), the new regime will deliver a certain result on the day of the shareholder meeting;

(8) **cost benefits:** the new regime would, as a result of the absence of the Court, have cost benefits.

(9) **absence of Court in other procedures:** takeover bids, capital reductions, approvals under item 7 of s611 and US mergers are not subject to Court approval; and

(10) **net effect:** the new regime would encourage more change of control transactions. It would be of great value to smaller companies for whom the costs of a court supervised scheme of arrangement are prohibitive. That is a part of the market which is in dire need of rationalisation. There is a huge number of companies listed on ASX which have little following, yet the costs of a scheme of arrangement is out of proportion the market cap of the companies.

7.4 Why other Committee members argue that the new regime should not be enacted

(a) Introduction

While some Committee members support the introduction of such a new regime, there is also a body of Committee members who believe that such a regime is unnecessary and would deprive target shareholders of a number of very important protections in the current scheme process. This section 7.4 sets out the arguments against the proposed new regime. This section also responds to a number of the arguments that have been made in support of the proposed new regime.

(b) The proposed voting approval threshold

There is a fundamental threshold issue whether a bidder should be allowed to compulsorily acquire target shareholders' shares as a result of a resolution passed by 75% of the votes actually cast at a shareholder meeting, without the process having been fully subject to Court supervision. The compulsory acquisition threshold under Chapter 6A for a takeover bid is more than 90% of *all* shares.

During the 1980s and 1990s, there were calls for the voting threshold on a scheme of arrangement under Part 5.1 to be increased from 75% to 90% to make schemes 'equivalent to' takeovers, but each time the Government took the view that a 75% voting threshold on a Part 5.1 scheme was appropriate, in large part because the scheme process also involved ASIC and Court supervision.[178]

If a new procedure is to be included in Chapter 6 which allows for compulsory acquisition of a target shareholder's shares, there will be a strong argument from target shareholders that the voting threshold would need to be 90%, to match the 90% threshold for compulsory acquisition under Chapter 6A. This is an issue on which the Government would need to consult those bodies which represent shareholders in listed companies, like the Australian Shareholders Association, before introducing any such new regime.

[178] See, for example, Legal Committee of the Companies and Securities Advisory Committee, "Compulsory Acquisitions Report", Report, January 1996, at 67 [5.11] and 78 [10.8]. See also Legal Committee of the Companies and Securities Advisory Committee, "Compulsory Acquisitions Issues Paper", Report, March 1994, at 29-32.

In this regard, it is important to note that under the proposed new regime to be incorporated into Chapter 6, the shareholder approval threshold is not 75% of all shares – rather, it is only 75% of the shares actually voted at the meeting (in person or by proxy). In practice, because substantially less than all the shares are voted at general meetings, this means that target shareholders will have their shares compulsorily acquired by the vote of shareholders holding less, and most likely materially less, than 75% of the shares in the company. Note that there is also no quorum requirement for voting at the proposed meeting, beyond that contained in most listed company constitutions that 2 (or sometimes a slightly higher number of) members constitute a quorum.

By way of contrast, the 90% compulsory acquisition threshold in takeovers is measured against *all* shares.

(c) **The Panel is not the appropriate forum to supervise what is essentially a compulsory acquisition process**

As previously discussed in section 6.2(c) of this Schedule 1, the Panel was established as an administrative body to provide efficient and prompt resolution of takeover disputes. However, there is a fundamental difference between a takeover, which involves target shareholders voluntarily deciding to accept a takeover offer, and a scheme of arrangement. The latter is effectively a compulsory acquisition procedure under which target shareholders may have their shares acquired against their will, regardless of whether they voted against the scheme or did not vote at all, if the scheme is approved by 75% of the votes cast on the scheme and a majority in number of those shareholders voting on the scheme. That should only occur with the supervision of the Court exercising a broad fairness discretion.

The membership of the Panel and the way in which it operates to seek to effect speedy resolution of takeover disputes, is simply not the appropriate forum for protection of target shareholders whose shares are being compulsorily acquired. The Panel's focus is on whether there has been an impact on the market for corporate control (not whether a shareholders proprietary rights should be abrogated), and its approach to takeover disputes is to focus on a speedy resolution so that the takeover can proceed and the shareholders can decide whether to accept it or not. That is not appropriate where a target shareholder is having their shares compulsorily acquired.

(d) **The important supervisory role of the Court – loss of fundamental shareholder protections**

In a Part 5.1 scheme, ASIC and the Court play an important pre-vetting and supervision role. There are countless examples of ASIC and/or the Court requiring corrective disclosure to scheme documents prior to despatch to target shareholders, and requiring additional disclosure due to new or changed circumstances prior to the scheme meeting.

It is a materially worse outcome for target shareholders if they are forced to take action in the Takeovers Panel (most likely at significant cost to them), or to rely on ASIC taking action, as the only means of addressing voting or disclosure defects.

The following particular points should be noted in relation to the Court's supervisory role:

(1) **Two Court hearings**

The two court hearings in a scheme of arrangement under Part 5.1 of the Corporations Act provide significant protection to minority shareholders. The first court hearing (where the Court considers whether it is appropriate to convene a scheme meeting) is not merely procedural. The Court will closely scrutinise the structure of any scheme and the scheme documents. The Court can take an interventionist and almost inquisitorial approach in deciding whether to convene a scheme meeting. The Court’s scrutiny can result in the target being required to make a number of (sometimes quite substantial) amendments to

the scheme documents.[179] Furthermore, if the Court is not satisfied with the disclosure in the scheme booklet, it will be prepared to decline to make the orders convening the scheme meeting(s).[180] The Court may even, proactively, contact the solicitors for the scheme company ahead of the first court hearing and raise issues with the scheme documents to allow them to be addressed at the first court hearing.[181]

The final court hearing (where the Court considers whether to approve a scheme of arrangement) is no "rubber stamp" exercise either.[182] The Court will not approve a scheme simply because it has been approved by the requisite shareholder majority. The Court will carefully consider and scrutinise all relevant circumstances.[183] The Court has a broad "discretionary power"[184] as to whether to approve a scheme.[185] This discretion exists, and the Court has an independent obligation to consider the fairness of a scheme, even if the scheme is unopposed or if all of the members have overwhelmingly voted in favour of it.[186]

As explained by Parker J in *Re Amcom Telecommunications Ltd (No 4)*[187]:

> "Contrary to what may occasionally be thought, the 'second' hearing is not merely a rubber stamping or box ticking exercise by the Court. Not all shareholders will have a sophisticated and comprehensive appreciation of the legal and commercial ramifications of the orders which might be made at a hearing of this nature. The role to be played by a court pays regard, to some extent, to that consideration."[188]

Similarly, in *Re Opes Prime Stockbroking Ltd (No 1)*[189], Finkelstein J observed:

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[179] See, for example, *Re RM Eastmond Pty Ltd* (1972) 4 ACLR 801 at 802-806; *Re United Medical Protection Ltd* [2007] FCA 631 at [4]; Lindgren KE, "Private Equity and Section 411 of the Corporations Act 2001 (Cth)" (2008) 26 *Company and Securities Law Journal* 287 at 290; *Re Australian Health Management Group Ltd (No 1)* [2008] FCA 1868 at [22]; *Re Lifeplan Australia Friendly Society Ltd (No 1)* (2009) 77 ACSR 1 at 7-8 [33]-[36]; *Re Straits Resources Ltd* [2010] FCA 1466 at [51]; *Re Facilitate Digital Holdings Ltd* [2013] QSC 301 at [9]-[11]; *Re Triausmin Ltd* [2014] FCA 611 at [49]; *Re CIC Australia Ltd* [2015] NSWSC 557 at [20]-[22]; *Re Asciano Ltd* [2015] NSWSC 1548 at [8]-[9]; *Re Ardent Leisure Ltd* [2018] NSWSC 1665 at [16]; *Re Trust Co (Re Services) Ltd as responsible entity of VitalHarvest Freehold Trust* [2021] NSWSC 108 at [9] and [27].

[180] See, for example, *Re Lifeplan Australia Friendly Society Ltd (No 1)* (2009) 77 ACSR 1 at 7 [31]; *Re Lifeplan Australia Friendly Society Ltd (No 2)* [2009] VSC 641; *Re Onthehouse Holdings Ltd* [2016] FCA 1167 at [21]-[30]; *Re MOD Resources Ltd* [2019] WASC 326 at [52]; *Re NTM Gold Ltd* [2021] WASC 22 at [46]; *Re Ovato Print Pty Ltd* [2020] NSWSC 1683 at [24].

[181] See, for example, *Re Trust Co (Re Services) Ltd as responsible entity of VitalHarvest Freehold Trust* [2021] NSWSC 108 at [12].

[182] *Re Central Pacific Minerals NL* [2002] FCA 239 at [14]; *Re The British Aviation Insurance Co Ltd* [2006] BCC 14 at 31 [69]; *Re TDG plc* [2009] 1 BCLC 445 at 451 [30]; *Re PCCW Ltd* [2009] HKCA 178 at [108]; *Re Halcrow Holdings Ltd* [2011] EWHC 3662 (Ch) at [33]; *Re Amcom Telecommunications Ltd (No 4)* [2015] FCA 720 at [31]; *Re Rhythmone Plc* [2019] EWHC 967 (Ch) at [11].

[183] *Re Alabama, New Orleans, Texas and Pacific Junction Railway Company* [1891] 1 Ch 213 at 245; *Re English, Scottish and Australian Chartered Bank* [1893] 3 Ch 385 at 408-409; *Re Crusader Ltd* (1995) 17 ACSR 336 at 343; *The Australian Special Opportunity Fund LP v Equity Trustees Wealth Services Ltd* [2015] NSWCA 225 at [178]; *Re APCOA Parking Holdings GmbH* [2014] EWHC 3849 (Ch) at [182]; *Re Sunbird Business Services Ltd* [2020] EWHC 2493 (Ch) at [127].

[184] *Re Dorman Long and Company Ltd* [1934] 1 Ch 635 at 655; *Chief Commissioner of Pay-roll Tax v Group Four Industries Pty Ltd* [1984] 1 NSWLR 680 at 684; *Re Seven Network Ltd (No 3)* [2010] FCA 400 at [31]; *Re Avoca Resources Ltd (No 2)* [2011] FCA 208 at [7].

[185] *Re Permanent Trustee Co Ltd* (2002) 43 ACSR 601 at 603 [87].

[186] *Re Halcrow Holdings Ltd* [2011] EWHC 3662 (Ch) at [36]; *Re Inmarsat PLC* [2019] EWHC 3470 (Ch) at [34]; *Re Elegant Hotels Group Plc* [2019] EWHC 3699 (Ch) at [5].

[187] [2015] FCA 720.

[188] [2015] FCA 720 at [31].

[189] (2009) 73 ACSR 385.

> "there is a built-in safeguard against majority oppression in that the court is not bound by the decision of the meeting."[190]

The above observation has been cited with approval in *Re Sino Gold Mining Ltd*[191] and *Re Valmec Ltd*[192].

For further details on the nature of the role played by the Court in the scheme of arrangement process, see section 2 of Schedule 2.

(2) **The independent forum for objectors will be absent**

The scheme court hearings provide an open, extremely efficient and transparent forum for scheme proponents, objectors and ASIC to state their case. The absence of this forum under the proposed new regime will mean that objectors and ASIC will have to proactively commence proceedings in the Takeovers Panel, at their own expense, to have their position considered (this can be a very significant, and often prohibitive, cost for most retail shareholders).

The court hearings in a scheme of arrangement provide an "independent forum"[193] for any person whose interests are affected by the scheme of arrangement, or for ASIC, to appear before the Court to object to any aspect of the scheme of arrangement, including the fairness of the scheme.

In other legal proceedings, the omnipresent spectre of high legal costs (and possible cost orders in the event of an unsuccessful application or defence) can operate as a strong disincentive to ventilate issues in a Court. By way of contrast, in the scheme of arrangement context, legal costs and cost orders are usually not as much of an issue because the general rule is that the target company is required to pay an objector's costs and an objector will not suffer any cost order against it in the event of an unsuccessful objection provided that the objections are *bona fide*.[194]

(3) **Obligation on scheme proponents to draw relevant matters to the Court's attention**

Under the scheme of arrangement regime in Part 5.1 of the Corporations Act, scheme proponents are subject to a 'duty of candour' under which they are required to bring to the Court's attention all matters that could be considered relevant to the exercise of the Court's discretions.[195]

This obligation brings with it a serious obligation to be discharged by scheme proponents.[196] The absence of this safeguard is a significant omission from the new regime, which is to the detriment of minority shareholders.

This obligation is an additional protection over and above the legal disclosure requirement for the scheme booklet to contain all information that is material to a shareholder's decision as to whether or not to vote in favour of the scheme and whether

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[190] (2009) 73 ACSR 385 at 403 [66]. Cited with approval by the Court of Appeal in *First Pacific Advisors LLC v Boart Longyear Ltd* [2017] NSWCA 116 at [78]. See also *Re Zenith Energy Ltd* [2020] WASC 266 at [38].

[191] [2009] FCA 1277 at [53].

[192] [2021] WASC 420 at [42]

[193] *Arakella v Paton* (2004) 60 NSWLR 334 at 366 [137]. The Takeovers Panel is also an "independent forum".

[194] See Damian T and Rich A, *Schemes, Takeovers and Himalayan Peaks*, Fourth Edition, at Section [4.6.2] for a detailed discussion on the principles that apply in relation to the costs of, and cost orders against, objectors.

[195] See, for example, *Re Marketeers Pty Ltd* [1982] Qd R 93 at 96; *Re Archaean Gold NL* (1997) 23 ACSR 143 at 148; *Re Permanent Trustee Co Ltd* (2002) 43 ACSR 601 at 603 [7]; *Re Diversa Ltd (No 3)* [2016] FCA 1284 at [4].

[196] *Re Permanent Trustee Co Ltd* (2002) 43 ACSR 601 at 603 [7].

or not to vote at all.[197] That legal disclosure requirement is equivalent to the applicable legal disclosure requirement in takeovers.[198] In other words, the duty of candour to the Court adds an additional layer of protection above and beyond the legal disclosure requirements in schemes booklets and takeover documents.

In this regard, Treasury will recall that, as part of the CLERP reform process, it considered whether schemes of arrangement (with their 75% approval threshold) should be allowed to operate as a regulatory alternative to takeover bids (with their 90% compulsory acquisition threshold). The Treasury was concerned about 'regulatory arbitrage'.[199]

Treasury was ultimately comfortable with the applicable safeguards in schemes of arrangement and recommended that schemes of arrangement continue to be available to be used to effect change of control transactions. [200] Relevantly to the current debate, after consulting a number of individuals, companies and associations as well as the Government's Business Regulation Advisory Group, Treasury stressed the importance of the role of the Court (and ASIC's predecessor, the ASC) in the scheme process and stated:

> "The involvement of the courts and the ASC thus ensures that there is adequate shareholder protection".[201]

(e) **The cost and efficiency argument – Court costs are not significant and the Panel is not cheap or quick**

(1) **Only a small fraction of transaction costs are from the Court process**

Those proposing the new regime say it would, as a result of the absence of the Court, have cost and efficiency benefits.

Whilst there indeed would be some cost savings to scheme proponents from not having to go to Court, the Court provides an extremely important 'check and balance' on the scheme process.

However, to put this aspect of the debate in its proper context, it must be acknowledged that the additional cost of the Court process in a scheme of arrangement is just a small fraction of the overall transaction costs.

There seems to be a mistaken assumption by some that a significant (and possibly even the overwhelming) proportion of the transaction costs in connection with a scheme of arrangement are attributed to of the Court process: that is simply not true.

There are a variety of other transaction costs that arise in connection with any scheme of arrangement – in addition to the fees of the various advisers (including financial advisers / investment bankers, accounting advisers, tax advisers, legal advisers and public relations advisers) there are a variety of other costs that are incurred including financing fees, ASIC fees, printing costs, registry fees, the costs of the independent expert's report etc. Those costs would all still be incurred under the proposed new regime described in section 7.2 of this Schedule 1.

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[197] Corporations Act, s411(3) and s412(1). See also *Bulfin v Bebarfald's Ltd* (1938) 38 SR (NSW) 423 at 440; *Re HIH Casualty and General Insurance Ltd* (2006) 57 ACSR 791 at 812 [81].

[198] See Corporations Act, s636 and s638.

[199] The Treasury, "Takeovers: Corporate control: a better environment for productive investment", CLERP Program – Proposals for Reform: Paper No. 4, 1997, at 50-53 [5.2].

[200] The Treasury, "Takeovers: Corporate control: a better environment for productive investment", CLERP Program – Proposals for Reform: Paper No. 4, 1997, Proposal No. 10, at 53 [5.2].

[201] The Treasury, "Takeovers: Corporate control: a better environment for productive investment", CLERP Program – Proposals for Reform: Paper No. 4, 1997, at 53 [5.2].

(2) **Important considerations relevant to the cost saving debate**

Also relevant to the cost saving debate are the following facts:

- in a scheme of arrangement, all the transaction costs (including the cost of the Court process) are effectively ultimately borne by the bidder as it acquires the target company. In other words, these are not costs borne by shareholders in the target company. Furthermore, there has been no suggestion that bidders would start paying across the estimated quantum of the Court costs to target shareholders in the form of an increased offer price if there was no Court process. By way of analogy, there is no evidence that the consideration payable under takeovers (where there is no Court process) is higher than the consideration payable under schemes because of the Court costs inherent in the latter; and
- as mentioned above, in a scheme the transaction costs are ultimately borne by the bidder. Some of those costs are incurred in connection with the bidder and target fulfilling their duty of candour to the Court.[202] The proposed new regime would not involve the bidder and target having a duty of candour to the Court, as the Court would not be involved. However, shareholders would have the right to launch a dispute in the Takeovers Panel. This ignores the fact that the cost of the dispute process would fall onto shareholders – is it right that a shareholder with, say, $5,000 worth of target shares should have to go to the very significant expense of a Panel application just to protect its rights in circumstances where, under a scheme, the Court would have been the protector of its rights?

In light of the above, one must pause and ask oneself who would really benefit from taking the (relatively modest) cost of the Court process out of the equation and who would really be harmed by this. One might conclude that:

- the party that would benefit the most would be the bidder; and
- the parties that would be harmed the most would be the retail shareholders (noting that they would cease to benefit from Court protection and would have to incur the costs themselves of any Panel challenge).

(3) **The Takeovers Panel is not cheap or quick**

In addition, a shift to the Takeovers Panel may encourage more disputes in schemes, which will even up the cost ledger or quite possibly tilt it the other way (see section 7.4(f) of this Schedule 1). Disputes in the Takeovers Panel can and do:

- cost parties to those disputes, hundreds of thousands of dollars; and
- cause delays (and often quite significant delays) to transactions.

One of the reasons for the introduction of the Takeovers Panel was to remove tactical litigation from takeovers.[203] However, the inescapable fact is that the current Panel system has actually ended up encouraging disputes, with more than 600 applications to the Panel since its reconstitution in 2000. A significant proportion of these applications involve multiple parties. By way of example, over the period 1 January 2012 to 31 December 2021, the average number of parties was 3.2 (excluding ASIC). One can quickly enough do the rough maths of the very significant cost of all these matters.

In terms of efficiency and speed, the Courts are quicker than the Takeovers Panel would be if there was a dispute in a scheme. If there is an objection to a scheme in Court, it is usually dealt with on the same day as the first or final court hearing, resulting in 'same-day justice'.

[202] See section 7.4(d)(3) of this Schedule 1.

[203] Explanatory Memorandum, *Corporate Law Economic Reform Program Bill 1998* (Cth), at [7.1]-[7.3].

By way of contrast, the Takeovers Panel process is much slower. The Panel is taking an average of 21.5 days to make a decision,[204] with its conflict clearance process taking a week longer than it would take a Court to decide the matter in a scheme. This would not be process efficiency.

(f) **Increase in tactical litigation and delays, as well as additional costs, if Panel replaces the Court**

The absence of the Court from the new regime is likely to create an incentive for opportunists (including greenmailers) to launch, or simply threaten to launch, challenges to schemes in the Takeovers Panel unless their demands are met. (The issues raised in this section 7.4(f) are also relevant to the model where the Panel assumes the existing role of the Court – see section 6 of this Schedule 1.)

Objectors will be aware of the following relevant factors that play into their hands:

- unsuccessful applicants in the Takeovers Panel are not at risk of an adverse costs order;[205] and
- the submission of a Takeovers Panel application to challenge a transaction will cause (at least) weeks of delay to a transaction,[206] thus exposing schemes to market risks.

Once the Court has approved a scheme of arrangement and its orders have been lodged with ASIC (thus causing the scheme to become "effective"[207]), the scheme is binding on the target and its shareholders. Once a scheme becomes effective, it will not be open to any person to challenge the validity or binding nature of that scheme. This provides a cost and efficiency benefit that should not be overlooked.

By way of contrast, decisions of the Takeovers Panel are subject to judicial review on administrative law grounds. This will present a further incentive for those looking to leverage a commercial opportunity in relation to a scheme (the mere threat of the commencement of a judicial review process may be sufficient in some cases to assist a greenmailer to get their own way).

This is not a hypothetical possibility. There have already been a number of judicial review applications in relation to Takeovers Panel matters.[208] This has resulted in significant delays (sometimes years of delay), significant Court time and resources being consumed

[204] Takeovers Panel, 2020/21 Annual Report, page 5 (average calendar days between the application being made and the Panel making a decision).

[205] Corporations Act, s657D(1) and s657D(2)(d). See also Takeovers Panel, Guidance Note 4, "Remedies General", Sixth Issue, dated 30 January 2017, at [25].

[206] As mentioned above, the Takeovers Panel is taking an average of 21.5 days to make a decision from the time it receives an application (Takeovers Panel, 2020/21 Annual Report, page 5).

[207] Corporations Act, s411(10).

[208] See, for example, *Aurora Funds Management Limited v Australian Government Takeovers Panel (Judicial Review)* [2020] FCA 496; *Eastern Field Developments Limited v Takeovers Panel* [2019] FCA 311; *Palmer Leisure Coolum Pty Ltd v Takeovers Panel* [2016] FCA 1445; *Palmer Leisure Coolum Pty Ltd v Takeovers Panel* (2015) 328 ALR 664; *Queensland North Australia Pty Ltd v Takeovers Panel (No 2)* [2015] FCAFC 128; *Queensland North Australia Pty Ltd v Takeovers Panel* [2015] FCAFC 68; *Queensland North Australia Pty Ltd v Takeovers Panel* [2014] FCA 591; *Tinkerbell Enterprises Pty Limited as Trustee for The Leanne Catelan Trust v Takeovers Panel* [2012] FCA 1272; *Chaudhri v Takeovers Panel* [2011] FCA 1488; *CEMEX Australia Pty Ltd v Takeovers Panel* [2009] FCAFC 78; *CEMEX Australia Pty Ltd v Takeovers Panel* [2008] FCA 1572; *Glencore International AG (ACN 114 271 055) v Takeovers Panel* [2006] FCA 274; *Glencore International AG & Anor v Takeovers Panel & Ors* [2005] FCA 1290; *Takeovers Panel v Glencore International AG* [2005] FCA 1628; *Attorney-General (Cth) v Alinta Limited* [2008] HCA 2; *Australian Pipeline Limited (ACN 091 344 704) v Alinta Limited (ACN 087 857 001)* [2006] FCA 1378; *Australian Pipeline Ltd (CAN 091 344 704) in its capacity as responsible entity of Australian Pipeline Trust (ARSN 091 678 778) v Alinta Ltd (CAN 087 857 001) (now known as Alinta 2000 Ltd) and Others (No NSW 2123 of 2006*) (2007) 240 ALR 294; *Tower Software Engineering Pty Limited, Pendant Software Pty Limited v Harwood* [2006] FCA 717 (together, the **Judicial Review Judgments**).

and considerable resources of ASIC being diverted from other valuable enforcement activities.

Also relevant in this regard are the following facts:

- objectors are not limited to one application for judicial review;[209]
- even where there is only one judicial review application, the expenditure of the Court's time and resources is not limited to the hearing itself. There is always an element of case management, and the Court is often required to determine interlocutory applications;[210]
- objectors can appeal a judicial review judgment to the Full Court and even the High Court;[211] and
- in circumstances where the application for judicial review is successful, the matter will be remitted back to the Takeovers Panel, consuming further time and costs of the Takeovers Panel, ASIC and the relevant parties.[212]

The statistics coming out on judicial review challenges to decisions of the Takeovers Panel are interesting:

- on average, the time between the first Takeovers Panel application and final determination was over 2 years. The longest duration calculated was 4 years and 5 months for the proceedings relating to the President's Club and Palmer Leisure Coolum Pty Ltd;[213]
- the judicial review hearings have been up to 4 days in length;
- judicial review applications also involve ancillary listings that occur prior to the hearing of the judicial review application itself. [214] There were, for example, 11 ancillary listings for the judicial review application[215] in relation to the

[209] For example, in the proceedings involving Glencore, there were two applications for judicial review (see *Glencore International AG & Anor v Takeovers Panel & Ors* [2005] FCA 1290 and *Glencore International AG (ACN 114 271 055) v Takeovers Panel* [2006] FCA 274). After the first judicial review decision, the matter was remitted back to the Takeovers Panel (see *Glencore International AG & Anor v Takeovers Panel & Ors* [2005] FCA 1290 at [58]). The Takeovers Panel made a further declaration of unacceptable circumstances and Glencore sought judicial review a second time (see *Glencore International AG (ACN 114 271 055) v Takeovers Panel* [2006] FCA 274).

[210] There have been instances where there were multiple interlocutory hearings and case management hearings for proceedings related to judicial review applications. For example, the Commonwealth Courts Portal for QUD526/2012 connected to *Queensland North Australia Pty Ltd v Takeovers Panel* [2014] FCA 591 listed interlocutory hearings as taking place on 24 October 2012 and 13 February 2013. Secondly, the Commonwealth Courts Portal for NSD1583/2017 related to *Aurora Funds Management Limited v Australian Government Takeovers Panel (Judicial Review)* [2020] FCA 496 listed an interlocutory hearing as taking place on 10 October 2019, as well as two case management hearings on 21 November 2017 and 26 November 2019.

[211] See, for example, *Queensland North Australia Pty Ltd v Takeovers Panel* [2015] FCAFC 68, *CEMEX Australia Pty Ltd v Takeovers Panel* [2009] FCAFC 78 and *Australian Pipeline Limited v Alinta Limited* [2007] FCAFC 55) and *Attorney-General (Cth) v Alinta Limited* [2008] HCA 2.

[212] See, for example, *Queensland North Australia Pty Ltd v Takeovers Panel (No 2)* [2015] FCAFC 128 and *Glencore International AG & Anor v Takeovers Panel & Ors* [2005] FCA 1290.

[213] *The President's Club* [2012] ATP 10, *Queensland North Australia Pty Ltd v Takeovers Panel* [2014] FCA 591, *Queensland North Australia Pty Ltd v Takeovers Panel* [2015] FCAFC 68, *Queensland North Australia Pty Ltd v Takeovers Panel (No 2)* [2015] FCAFC 128, *Palmer Leisure Coolum Pty Ltd v Takeovers Panel* [2015] FCA 1498, *the President's Club Limited 02* [2016] ATP 1 and *Palmer Leisure Coolum Pty Ltd v Takeovers Panel* [2016] FCA 1445.

[214] Comprised listings such as 'administrative listings', case management or directions hearings, mentions, notice of motions and interlocutory hearings.

[215] See WAD329/2011.

decision in *Chaudhri v Takeovers Panel* [2011] FCA 148.[216] These proceedings were ultimately withdrawn before the hearing regarding the judicial review application;

- exposing schemes to judicial review would require significantly higher resources and time from ASIC. Our review of the Judicial Review Judgments indicated:
  - ASIC was a party for 12 of the 13 judgments by the Federal Court or Full Federal Court; and
  - ASIC was also represented by Counsel in 10 of the 12 judgments where ASIC was a party.[217]

If the Takeovers Panel were to replace the Courts in the scheme of arrangement process, the Treasury would need to factor in the significant additional potential cost to the Commonwealth arising from the above matters.

(g) The value of Court precedent and oversight

It has been argued, by those pushing the new regime, that the vast majority of Court decisions in typical members' schemes of arrangement involve no issues in dispute and that the hearings and the judgments are short and out of proportion to the costs involved.

The fact that many hearings are relatively short and involve no issues in dispute is testament to the very good job that the Courts are doing (and the respect that bidders and targets have for the Court). The Courts have created a vast body of precedent through their judgments,[218] and bidders and targets are generally very careful to adhere to that precedent, and not overstep the mark, when structuring their transactions. Accordingly, it would arguably be a sign that something was not quite right with the Court process in schemes if there were lengthy hearings and regularly a large number of issues in dispute.

We are not sure why the length of the scheme judgments is relevant. An analysis of the Court judgments shows that they are generally around the same length as the reasons for the decisions coming out of decisions of the Takeovers Panel. In any event, brevity in reasons is to be encouraged, not discouraged.

(h) Gambotto and Constitutional concerns

As mentioned in section 0 of this Schedule 1, there may be obstacles under *The Constitution* in not involving the Court in the new regime and giving the Takeovers Panel an approval power. There are also questions as to whether this would also offend the "*Gambotto* principles". These difficult issues would need to be carefully worked through.

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[216] The pre-trial listings included on the Commonwealth Courts Portal for WAD329/2011 were a directions listing at 11:00 on 5 September 2011, a mention and directions listing at 10:30 on 11 October 2011, an administrative listing at 16:45 on 26 October 2011, a directions and interlocutory hearing at 14:00 on 18 November 2011, an administrative listing at 11:48 on 14 December 2011, an administrative listing at 16:10 on 2 February 2012, a directions listing at 10:45 on 3 February 2012, a directions listing at 09:45 on 24 February 2012, an administrative listing at 08:51 on 21 March 2012, a directions and mention listing at 09:30 on 11 April 2012 and an administrative listing at 16:35 on 20 April 2012.

[217] See *Aurora Funds Management Limited v Australian Government Takeovers Panel (Judicial Review*) [2020] FCA 496, *Palmer Leisure Coolum Pty Ltd v Takeovers Panel* [2015] FCA 1498, *Queensland North Australia Pty Ltd v Takeovers Panel* [2014] FCA 591, *Queensland North Australia Pty Ltd v Takeovers Panel* [2015] FCAFC 68, *Tinkerbell Enterprises Pty Limited as Trustee for The Leanne Catelan Trust v Takeovers Panel [*2012] FCA 1272, *Chaudhri v Takeovers Panel* [2011] FCA 1488, *CEMEX Australia Pty Ltd v Takeovers Panel* [2008] FCA 1572, *CEMEX Australia Pty Ltd v Takeovers Panel* [2009] FCAFC 78, *Glencore International AG & Anor v Takeovers Panel & Ors* [2005] FCA 1290 and *Glencore International AG (ACN 114 271 055) v Takeovers Panel* [2006] FCA 274.

[218] Between 2013 and 2021, for example, there were around 800 written scheme judgments (see Damian T and Rich A, Schemes, *Takeovers and Himalayan Peaks*, Fourth Edition, at page xvii).

(i) Addressing various other arguments

(1) Introduction

This section 7.4(i) responds to a number of the arguments made in support of the new regime.

(2) Relevance of the absence of Court approval in takeovers

Those advocating for the new regime would point to the fact that takeover bids are not subject to Court approval.

However, two important points can be made in response to this.

- first, whilst both schemes of arrangement and takeover bids involve the compulsory acquisition of shares, schemes of arrangement do so with a 75% approval threshold (which is based on only those shareholders who actually vote) whereas takeovers do so with a 90% approval threshold (being 90% of *all* shares). The additional scrutiny of the Court in schemes is justified in such circumstances; and
- second, the scheme of arrangement provisions in the Corporations Act are very broad and provide significant flexibility for those structuring a scheme of arrangement. Accordingly, the safeguard of Court supervision is appropriate. By way of contrast, the takeover provisions in the Corporations Act are quite prescriptive and provide little structural flexibility.

(3) Relevance of the absence of Court approval in the capital reduction procedure

Those advocating for the new regime would point to the fact that the requirement for Court approval of a selective capital reduction was removed in 1998.

However, this misses the point. Capital reductions are merely capital maintenance procedures and cannot be compared to a transaction that effects a change of control of an ASX-listed or widely held company. In the case of such companies, selective capital reductions are extremely rare. If shares in the target are to be cancelled, with the result that a bidder is to acquire 100% ownership, a "cancellation scheme"[219] is generally required to be utilised and, as with all schemes of arrangement, cancellation schemes require Court approval.[220]

In addition, unlike a scheme of arrangement, the voting arrangements for selective capital reductions make it very easy for them to be defeated if the 'bidder' only has a small (or no) shareholding in the target company. In such cases, it is extremely easy for members whose shares are to be cancelled to vote down the reduction by casting votes *against* the reduction.[221] By way of example, if the bidder held no target shares, a shareholder would only need to cast one vote against the reduction to defeat the relevant resolution and hence the whole transaction. If the bidder held 10% of the target shares, a shareholder

[219] This is a transaction under which all of the shares in the target company are cancelled by means of a concurrent scheme of arrangement under Part 5.1 of the Corporations Act and a capital reduction under Part 2J.1 of the Corporations Act.

[220] See Damian T and Rich A, Schemes, *Takeovers and Himalayan Peaks*, Fourth Edition, at Section [3.2.2].

In *Re Robert Stephen Holdings Ltd* [1968] 1 WLR 522, although the Court ultimately approved a standalone selective reduction of capital which had the effect of squeezing-out certain minority shareholders, Plowman J expressed the view (at 524-525) that it was "desirable" that such transactions instead proceed by way of a scheme of arrangement on the basis that minority shareholders were "better protected" under a scheme of arrangement even though minority shareholders could still come to Court and object to a proposed capital reduction. This decision was made at a time when selective capital reductions required Court approval.

[221] Although s256C(2)(a) of the Corporations Act does not permit members whose shares are to be cancelled to cast a vote in favour of the resolution, it does allow them to cast a vote *against* the resolution. See generally *Re Village Roadshow Ltd* (2003) 48 ACSR 167 and *Village Roadshow Ltd v Boswell Film GmbH* (2004) 49 ACSR 27.

would only need to cause 3.34% of the votes to be cast against the reduction to defeat the relevant resolution.

(4) **Relevance of the absence of Court approval in item 7 of s611**

Those advocating for the new regime would point to the absence of Court approval from the regime in item 7 of s611 of the Corporations Act for shareholder-approved acquisitions.[222] They also say that the new regime is based on the same policy as item 7 of s611.

However, this overlooks a critical distinction between the item 7 regime and the proposed new regime: the new regime would involve the *compulsory acquisition* of shares from shareholders to the bidder, whereas under the item 7 regime, no shareholder can have their shares compulsorily acquired. Therefore, unlike the proposed new regime (and unlike schemes of arrangement), the item 7 regime does not raise policy concerns around against the expropriation, or compulsory acquisition, of minority shares.

(5) **The situation in the United States**

Those advocating for the new regime point to the absence of a court approval requirement to implement a merger in the United States.

The United States does not have a scheme of arrangement regime. However, the United States does have merger regimes which are governed by both federal and state laws.

The state of Delaware is the leading domicile for the United States and international corporations. In a merger in Delaware, one company merges "with and into" another company, with the former disappearing as a corporate entity and the latter continuing to exist as the "surviving company" of the merger. By operation of the merger statute, all of the assets and all of the liabilities of the disappearing company are vested in the surviving company.[223]

Comparisons between the US merger regime and schemes overlook two important distinguishing features. These features reveal that the Court is very much part of the US merger process:

- merger litigation is pursued in significant volumes in the US. For example, in 2013, 96% of all completed deals over US$100 million were challenged in at least one lawsuit – that number fell to 73% in 2016 but rose to 85% in 2017;[224] and
- shareholders have an "appraisal right". This gives dissenting shareholders the right to receive the "fair value" of their shares in cash as determined by a Court appraisal proceeding instead of the merger consideration.[225]

(6) **The historical role of the Court**

Those advocating for the new regime correctly point out that the Court has been part of the process since the inception of scheme of arrangement process in the late 19th century.[226]

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[222] Item 7 of s611 of the Corporations Act contains an exception to the 20% rule in s606 which allows a person (the Acquirer) to increase their voting power above 20% if that increase is approved by an ordinary resolution of shareholders (excluding the Acquirer and its associates).

[223] See Delaware General Corporation Law, section 251.

[224] Matthew D Cain, Jill Fisch, Steven Davidoff Solomon and Randall S Thomas, "The Shifting Tides of Merger Litigation", *Vanderbilt Law Review* (2018) (71(2)) 603 at 607-608.

[225] Delaware General Corporation Law, section 262.

[226] The history of the scheme of arrangement legislation can be traced back to ss136-137 and ss159-160 of the English *Companies Act 1862* and later s2 of the English *Joint Stock Companies Arrangement Act 1870*.

However, it is not correct to suggest that, when the scheme provisions were broadened to facilitate schemes between companies and their members (originally schemes only applied to creditors),[227] different considerations came into play that meant that the role of the Court ceased to be as relevant or important. The supervisory role played by the Court in members' schemes is just as important as the role it plays in creditors' schemes.

(j) **If it ain't broke, don't fix it**

Finally, the adage *'if it ain't broke, don't fix it'*, is apt to describe the current situation in relation to the scheme of arrangement regime in Part 5.1 of the Corporations Act. The scheme of arrangement regime is not one of the areas that needs fixing or supplementing with a new regime in Chapter 6 of the Corporations Act – it is working well.

There are, however, plenty of other areas in the Corporations Act that need to be fixed to cut 'red tape' and make the statute's operation more efficient and conducive to the needs of business – there is plenty of low hanging fruit in that regard. These are areas that are more deserving of the Government's attention. To cite just a few obvious examples:

- there is absolutely no reason why, in the 21st century, we should persist with the anachronistic 'financial assistance' regime in Part 2J.3 of the Corporations Act;
- the operation of the voting exclusion rule in s253E, which applies to votes of managed investments schemes, needs to be clarified; and
- the rules relating to the payment of dividends in s254T are also in need of clarification.

The existing scheme of arrangement regime is working well. Whilst there are changes that could be made to improve it (see section 4.2 of this Schedule 1), the removal of the Court from the process - either by having the Takeovers Panel assume the Court's role (as discussed in section 6 of this Schedule 1) or by introducing a new regime which does not have Court supervision or approval (as discussed in this section 0 of this Schedule 1) - is certainly not one of them. It would be a backward step which would tilt the scales too far in favour of bidders. It would remove an important and valuable protection and safeguard for minority shareholders.

[227] This first happened by s24 of the English *Companies Act 1900*.

8 Question 8 – changes required to allow the Panel to assume the Court's role

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?

See section 6.2 of this Schedule 1.

9 Question 9 – whether an advance ruling power would assist

> 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?

The Committee supports the introduction of an advance rulings power.

Examples of where it could be used include:

- areas where the application of the law by ASIC or the Takeovers Panel is unclear, such as in relation to reverse takeovers (see item 12 in section 2 of this Schedule 1);[228] or
- rulings that certain entities are not to be treated as associates, in appropriate cases.

More generally, although the Takeovers Panel has issued a number of helpful Guidance Notes, the real issues that arise in live transactions are often more complex than the general principles articulated in the Guidance Notes.

However, the Committee notes that there are a number of important practical issues that would need to be addressed to ensure that such a power was of utility to market participants in undertaking takeovers.

Bidders are only likely to seek such rulings if the ruling can actually be relied upon in the future. Some of the practical issues here that will need to be navigated if an advance ruling power is to be introduced include:

(a) Any advance ruling by the Takeovers Panel will be dependent on the facts at the time the ruling is sought, and which have been notified to the Panel. Any material change in the underlying facts could render the ruling invalid. Takeovers typically involve a complex factual matrix which is constantly changing (e.g. introduction of new bidders; variation of bids; changes in underlying market dynamics etc.). A large proportion of advance rulings may therefore be out of date (with the attendant uncertainty as to whether they were still binding) shortly after they are given. This is quite different to, say, an ATO tax ruling where the ruling on tax treatment is given on the basis of a transaction structure, which doesn't change, even if the factual matrix surrounding the transaction does. Put another way, there are infinitely more variables which the Panel would need to consider in determining whether a particular course of action will have an unacceptable effect on the market for control for a listed entity, than the ATO has in assessing the tax consequences of a fixed transaction structure.

(b) For procedural fairness reasons, in many cases the Takeovers Panel may not feel that it is appropriate to grant a binding advance ruling without having first consulted with affected parties, such as other existing or potential competing bidders; major shareholders; the target; and ASIC. It is highly unlikely that bidders will want to go through that process (typically such a ruling would only be attractive if it can be obtained on a confidential basis, ahead of taking the action). The Panel could give a conditional ruling (on a confidential *ex parte*

[228] In such cases, the Takeovers Panel could make a ruling on whether a particular scheme of arrangement or takeover bid required the approval of the shareholders of the bidder as a condition precedent.

basis) which may be varied or set aside by the Panel when any views of other parties have been heard, but query why a bidder would go through the process of seeking a ruling if it could be varied or set aside in this way.

(c) The Consultation Paper seems to assume that the advance rulings power would actually be exercised by the Executive of the Takeovers Panel, rather than a sitting Takeovers Panel. This would avoid the need to constitute a sitting Panel for every application which is made for a ruling. This however raises the question whether such a ruling given by the Panel Executive should in fact be binding on any subsequent sitting Panel. If a sitting Panel needs to be free to take a different view than the Executive (even if the underlying facts have not changed), then the advance ruling has little utility. If this is the case, then a bidder can just have a no-names discussion with the Panel Executive, as is the case now, without a formal advance ruling process.

(d) If the advance rulings power would be exercised only by a sitting Panel, then this still raises the question of whether that ruling would then be subject to review to another sitting Panel. If any interested person (e.g. a competing bidder, the target or ASIC) can take the ruling on review to another Panel, it makes the advance ruling process much less attractive for a bidder. Even if there was no review to another Panel, the decision of the Panel is always open to judicial review by the Courts on the application of an interested third party. That judicial review application, which could take years to determine, would look closely at the question of whether all interested parties were granted procedural fairness prior to the ruling being given (i.e. the point in section 9(b) above).

(e) It is true that the advance rulings power could be exercised by ASIC (although this does not solve the issues around rulings being fact dependent, and around the need to provide procedural fairness to affected parties). However, it would be an usual result to have ASIC issue advance rulings, which would then bind the Takeovers Panel, which is supposed to the expert forum for resolving disputes in relation to takeovers.

(f) If an advance ruling by the Takeovers Panel is to be susceptible to being overturned, ASIC and the Panel must be required to relax their opposition to any condition that effectively allows a bidder to terminate a transaction if there is an adverse decision of ASIC, the Panel or any other regulatory (including the Court).[229] If the benefit of an advance ruling can be taken away from a bidder who has proceeded in reliance on the advance ruling, it is only fair that the bidder be able to walk away from the transaction in such circumstances.

The Consultation Paper seems to derive support for the suggestion that our Takeovers Panel have an advance rulings power from the fact that the UK, Hong Kong and Singapore Panels have such a power. However, the Australian Takeovers Panel is very different to other panels, including the UK Panel, in terms of structure, powers, processes and resources.

In particular, as the Consultation Paper notes, the takeover panels in other jurisdictions typically have a much bigger (and costlier) executive, and typically have an active monitoring, investigative and enforcement role (akin to the role played by ASIC in Australia). The Government would need to make a significant increase in its financial contribution to the operation of our Takeovers Panel if it was to play a similar role to panels in other jurisdictions.

[229] *Re Brisbane Broncos Ltd (No 3)* [2002] ATP 3 at [115]-[126].

10 Question 10 – features of an advance ruling power

What features should an advance ruling power in Australia have?

If there was to be an advance ruling power, we think that such power would need to be exercisable by a sitting Panel (rather than just be the Executive) unless significant changes are to be made to the current Executive function of the Takeovers Panel (eg to bring it more into line with the Executive function in the UK Takeover Panel). There is also a question as to whether that ruling would always be subject to review to another Takeovers Panel, and to judicial review by the Courts.

Before granting the ruling, the Panel would be required to consider whether it was appropriate to give all interested parties an opportunity to be heard, or, alternatively, whether the ruling would be a conditional ruling only which may be varied or set aside by the Panel when any views of other parties have been heard. The ruling would also presumably only be binding on the basis of the facts which existed and which were disclosed to the Panel at the time of the ruling application.

11 Question 11 – how the Panel could provide an advance ruling

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

As discussed above, in order to provide procedural fairness, the Takeovers Panel may feel the need in many cases to first consult with all interested parties (which may include other existing or potential competing bidders, major shareholders, the target and ASIC). This would need to be undertaken through a public consultation process to ensure that procedural fairness was afforded to all interested parties.

12 Question 12 – impact of the advance ruling power

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

If the Takeovers Panel did have an advance ruling power, and it is actively used by market participants, then this will be a significant drain on the Takeovers Panel's resources.

It would therefore be necessary for the Government to provide additional resources and funding to the Panel to allow it to undertake this role.

GENERAL

13 Question 13 – policy options to improve change of control transactions

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

As discussed in sections 2 and 10 of this Schedule 1, there are a range of changes which could be made to Chapter 6 of the Corporations Act and Part 5.1 of the Corporations Act to make takeover bids and schemes of arrangement respectively more efficient and to reduce unnecessary costs.

In the Committee's view, many of these changes are well overdue,[230] and the Government should concentrate on making these changes before looking more broadly at other policy options.

[230] For example, a number of the reforms to the scheme of arrangement regime were recommended by CAMAC, after an extensive public consultation paper, a number of years ago (see Corporations and Markets Advisory Committee, "Members' schemes of arrangement", Report, December 2009).

Schedule 2
Various features of schemes of arrangement

VARIOUS FEATURES OF SCHEMES OF ARRANGEMENT

1 Introduction

This Schedule 2 summarises various aspects of the role of the Court in schemes of arrangement. That role is vital and provides significant safeguards and protections to target shareholders.

2 The role of the Court

2.1 The Court's fairness discretion

The Court has a broad supervisory jurisdiction over schemes of arrangement and a broad "discretionary power"[231] as to whether to approve a scheme of arrangement.[232] This discretion exists, and the Court has an independent obligation to consider the *fairness* of a scheme,[233] even if the scheme is unopposed or if all of the shareholders have voted in favour of the scheme of arrangement.[234]

The onus is ultimately on the scheme proponents (that is, the target and the bidder) to satisfy the Court of the fairness of the relevant scheme.[235]

The Court's role in schemes was first articulated by Fry LJ over a hundred years ago – this articulation remains just as relevant today:

> "Under what circumstances is the Court to sanction a resolution which has been passed approving of a compromise or arrangement? I shall not attempt to define what elements may enter into the consideration of the Court beyond this, that I do not doubt for a moment that the Court is bound to ascertain that all the conditions required by the statute have been complied with; it is bound to be satisfied that the proposition was made in good faith; and, further, **it must be**

[231] *Re Dorman Long and Company Ltd* [1934] 1 Ch 635 at 655; *Chief Commissioner of Pay-roll Tax v Group Four Industries Pty Ltd* [1984] 1 NSWLR 680 at 684; *Re Seven Network Ltd (No 3)* [2010] FCA 400 at [31]; *Re Avoca Resources Ltd (No 2)* [2011] FCA 208 at [7].

[232] *Re Permanent Trustee Co Ltd* (2002) 43 ACSR 601 at 603 [7].

[233] For the classic formulation of this fairness discretion, see *Re Alabama, New Orleans, Texas and Pacific Junction Railway Company* [1891] 1 Ch 213 at 247 (per Fry LJ).

[234] *Re Halcrow Holdings Ltd* [2011] EWHC 3662 (Ch) at [36]; *Re Inmarsat PLC* [2019] EWHC 3470 (Ch) at [34]; *Re Elegant Hotels Group Plc* [2019] EWHC 3699 (Ch) at [5].

[235] *Re Holders Investment Trust Ltd* [1971] 1 WLR 583 at 590; *Re Australian Foundation Investment Company Ltd* [1974] VR 331 at 341; *Re T&N Ltd* [2005] 2 BCLC 488 at 514 [81]; *Re PCCW Ltd* [2009] HKCA 178 at [107], [130]-[133] and [150]; *Re Puma Brandenburg Ltd* [2017] (Royal Court of Guernsey, 24 February 2017) at [42]; *Re Realm Therapeutics plc* [2019] EWHC 2080 (Ch) at [59]. The classic formulation of the Court's fairness review is the statement by Fry LJ in *Re Alabama, New Orleans, Texas and Pacific Junction Railway Company* [1891] 1 Ch 213 at 247.

> **satisfied that the proposal was at least so far fair and reasonable, as that an intelligent and honest man, who is a member of that class, and acting alone in respect of his interest as such a member, might approve of it.** What other circumstances the Court may take into consideration I will not attempt to forecast."[236]

The nature of the Court's role was articulated, in more modern language, by Emmett J as follows:

> "While the *primary* task of the Court is to see that the procedure whereby the arrangement has been approved by security holders is formally correct, it has the further duty of satisfying itself that the arrangement is fair and equitable between different classes of security holders, and as between security holders and those who will benefit from it."[237]

One of the commentaries has described the nature of the Court's role in the following terms:

> "The court has closer control over the implementation of a scheme than the Panel could exercise: while the Panel can, in appropriate cases, limit the exercise of votes attached to certain shares, the court supervising a scheme has full control over all aspects of the approval process. The court does not simply apply black letter law: it exercises a wide discretion over process and substance. In so doing, it is guided by the same objectives as would guide the Panel: namely, that the members of the scheme company make informed decisions on the merits of the proposal. For this purpose, members may be divided up into various classes, each with largely common interests."[238]

In exercising its discretion, the Courts have been careful not to seek to provide an exhaustive list of matters, or a "compendious statement of relevant criteria"[239], as to which a Court must be satisfied before granting approval.[240] The Court's discretion is "at large"[241] and is unfettered.[242] However, the Court's discretion must be exercised "rationally and judicially".[243] Matters which are of the greatest weight in one case may be of much less weight in another or may, in the latter, be entirely outweighed by matters not present in the former.[244]

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[236] *Re Alabama, New Orleans, Texas and Pacific Junction Railway Company* [1891] 1 Ch 213 at 247 (emphasis added). This passage has been repeated adopted and endorsed by the Courts ever since (see, for example, *Re APN Outdoor Group Ltd* [2018] FCA 1425 at [11]; *Re Kidman Resources Ltd (No 2)* [2019] FCA 1513 at [20]).

[237] *Re Central Pacific Minerals NL* [2002] FCA 239 at [10].

[238] Renard I and Santamaria JG, *Takeovers and Reconstructions in Australia,* LexisNexis Butterworths, at [1609].

[239] *Re Centro Properties Ltd and CPT Manager Ltd in its capacity as responsible entity of Centro Property Trust* [2011] NSWSC 1465 at [33].

[240] *Re AW Allen Ltd* [1930] VLR 251 at 268-269; *Re Permanent Trustee Co Ltd* (2002) 43 ACSR 601 at 603 [7]; *Re Centro Properties Ltd and CPT Manager Ltd in its capacity as responsible entity of Centro Property Trust* [2011] NSWSC 1465 at [33]. See also *Re Sovereign Marine & General Insurance Company Ltd* [2007] EWHC 1331 (Ch) at [56] and *Re The Scottish Lion Insurance Company Ltd* [2009] CSOH 127 at [40] (overturned on unrelated grounds in *Re The Scottish Lion Insurance Company Ltd* [2009] CSIH 6) where the Courts indicated that the factors that the Court may take into account at the final court hearing would be developed on a case-by-case basis.

[241] *Re The Scottish Lion Insurance Company Ltd* [2009] CSOH 127 at [53] (overturned on unrelated grounds in *Re The Scottish Lion Insurance Company Ltd* [2009] CSIH 6).

[242] *Re Acacia Mining plc* [2019] EWHC 2770 (Ch) at [6]; *Re Telford Homes plc* [2019] EWHC 2944 (Ch).

[243] *Re Telford Homes plc* [2019] EWHC 2944 (Ch) at [4].

[244] *Re AW Allen Ltd* [1930] VLR 251 at 269.

The Courts acknowledge, and are entitled to have regard to, the Eggleston Principles when giving a "harmonious, practical and mutually supportive operation"[245] to the scheme regime in the course of exercising their fairness discretion.

However, this is not to say that, if a certain feature of a scheme of arrangement was not entirely consistent with one of the Eggleston Principles, the Court should or would necessarily decline to approve the scheme of arrangement. Rather, such a feature would merely be one factor for the Court to consider and weigh up as part of its fairness discretion, along with many others, including the important protections and safeguards referred to below.

2.2 The class and interest regimes

(a) Introduction

There are two key structural features of the scheme of arrangement regime which are absent in takeovers and which provide additional protection to shareholders. These are:

- *the class voting regime* – this requires shareholders with different rights to vote in separate classes in certain circumstances;[246] and
- *the interest regime* – this allows the Court to discount or disregard votes of particular shareholders on the grounds of an extraneous interest.[247]

(b) The class regime

Shareholders must be marshalled into classes for the purposes of voting on a scheme of arrangement.[248] The scheme approval threshold applies to each class of shareholders.

The class voting regime is both one of the key safeguards, and also one of the key sources of structural flexibility, in a scheme of arrangement.

Significantly, unlike the position under a takeover bid,[249] the classes in connection with a scheme of arrangement will not necessarily be the same as the classes into which the target company has divided its shareholders for registration purposes. Thus, for example, it is possible that a target company's ordinary shareholders could be divided into two or more classes for the purposes of considering a scheme. In fact, a single shareholder can comprise a class.[250]

The time-honoured test for identifying a class for scheme of arrangement purposes is that articulated by Bowen LJ in *Sovereign Life Assurance Company v Dodd*[251] as follows:

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[245] To use the words of Kirby P (as he then was) in *Catto v Ampol Ltd* (1989) 15 ACLR 307 at 310.

[246] *Sovereign Life Assurance Company v Dodd* [1892] 2QB 573 at 584.

See *Schemes, Takeovers and Himalayan Peaks*, Fourth Edition, at Section [6.2] for a detailed discussion on the class voting regime.

[247] See, for example, *Re Jax Marine Pty Ltd* [1967] 12 NSWR 145 at 148.

See *Schemes, Takeovers and Himalayan Peaks*, Fourth Edition, at Section [6.3] for a detailed discussion on the interest regime.

[248] Corporations Act, s411(4).

[249] In relation to the question of classes in the context of takeovers bids, see Corporations Act, s9 (definition of "class") and s605; *Clements Marshall Consolidated Ltd v ENT Ltd* (1988) 13 ACLR 90 at 93; ASIC Regulatory Guide 9, "Takeover bids", dated September 2020, at 14-17 [9.36]-[9.51].

[250] *Re Hastings Deering Pty Ltd* (1985) 9 ACLR 755 at 755; *Re Professional Investment Holdings Ltd (No 2)* [2010] FCA 1336 at [8]. *Re Simavita Holdings Ltd* [2013] FCA 1274 at [20]; *Re Staging Connections Group Ltd* [2015] FCA 1012 at [30]; *Barrick (Lawlers) Pty Ltd v Barrick Mining Company (Australia) Pty Ltd* [2015] FCA 1510 at [34]-[35] and [39]-[40]; *Re Pizza Express Financing 2 plc* [2020] EWHC 2873 (Ch) at [36].

[251] [1892] 2 QB 573 at 583.

> "It seems plain that we must give such a meaning to the term "class" as will prevent the section being so worked as to result in confiscation and injustice, and that it must be confined to those persons whose rights are not so dissimilar as to make it impossible for them to consult together with a view to their common interest."[252]

There are two important and fundamental features of the class test. As discussed below, these are that the focus is on legal rights (not interests) and that identical treatment is not required (the "impossibility" test should be applied).

In order to determine whether separate classes of shareholders are required, one must analyse:

(1) the existing rights of the shareholders against the target company (that is, their rights in the absence of the scheme) which are to be released or varied under the scheme; and

(2) the new rights (if any) which the scheme gives, by way of compromise or arrangement, to those shareholders whose rights are to be released or varied.[253]

If there is a material difference between the rights of different groups of shareholders under (1) and/or (2), those groups *may* (not will) constitute different classes. Whether the groups will, in fact, constitute different classes, ultimately depends on a judgement as to whether any such differences make it *impossible* for the respective groups of shareholders to consult together with a view to their common interest.[254] In other words, the test is not one of identical treatment but one of 'community of interest'.[255]

(c) The interest regime

As indicated above, the fact that particular shareholders may have extraneous *interests* in the outcome of a scheme of arrangement is not, of itself, a reason for placing those shareholders in a separate class for voting purposes.

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[252] [1892] 2 QB 573 at 583. This test has been adopted in Australia. For example, see *Re Chevron (Sydney) Ltd* [1963] VR 249 at 255; *Re Jax Marine Pty Ltd* [1967] 1 NSWR 145 at 147-148; *Nordic Bank plc v International Harvester (Aust) Ltd* (1983) 7 ACLR 796 at 800-801; *Re Direct Acceptance Corporation Ltd* (1987) 5 ACLC 1037 at 1043; *Re Price Mitchell Pty Ltd* (1984) 9 ACLR 1 at 4; *Re NRMA Ltd* (2000) 33 ACSR 595 at 616-617 [76]-[79]; *Re Hills Motorway Ltd* (2002) 43 ACSR 101 at 103-104 [9]-[13]; *Re Cashcard Australia Ltd* (2004) 48 ACSR 738 at 739 [5]; *Re Mutual Home Loans Fund of Australia Ltd* (1979) 4 ACLR 571 at 573; *Re Curry & Mooney Developments Ltd* (1977-1978) CLC ¶40-407 at 29,963; *Re Hostworks Group Ltd* [2008] FCA 64 at [43]; *Re Opes Prime Stockbroking Ltd (No 1)* (2009) 73 ACSR 385 at 403 [64]; *Re Foster's Group Ltd* [2011] VSC 93 at [14]-[15]; *Re Sundance Resources Ltd* [2012] FCA 1290 at [14]..

[253] *Re Hawk Insurance Co Ltd* [2001] 2 BCLC 480 at 518 [30] and 519 [34]. See also *Re Bond Corporation Holdings Ltd* (1991) 5 ACSR 304 at 317; *Re Australian Co-operative Foods Ltd* (2001) 38 ACSR 71 at 88 [81]; *Re Waste Recycling Group plc* [2004] 1 BCLC 352 at 354 [5]; *Re Sovereign Marine & General Insurance Co Ltd* [2006] BCC 774 at 799 [85]; *Re Cape plc* [2006] 3 All ER 1222 at 1232 [33]; *Re T&N Ltd (No 3)* [2007] 1 BCLC 563 at 596 [86]; *Re Opes Prime Stockbroking Ltd (No 1)* (2009) 73 ACSR 385 at 403 [66]; *Re Cattles plc* [2010] EWHC 3611 (Ch) at [4]-[5]; *Re AI Scheme Ltd* [2015] EWHC 1233 (Ch) at [28]; *Metinvest BV* [2016] EWHC 79 (Ch) at [17]; *Re Hibu Group Ltd* [2016] EWHC 1921 (Ch) at [47]; *First Pacific Advisors LLC v Boart Longyear Ltd* [2017] NSWCA 116 at [80]; *Re Castle Trust Direct Plc* [2020] EWHC 969 (Ch) at [16]; *Re Boart Longyear Ltd* [2021] NSWSC 982 at [43].

[254] *Re Hills Motorway Ltd* (2002) 43 ACSR 101 at 104 [12]; *Re Hawk Insurance Co Ltd* [2001] 2 BCLC 480 at 523 [39]; *Re T&N Ltd (No 3)* [2007] 1 BCLC 563 at 595-596 [85]-[86]; *Re Cape plc* [2006] 3 All ER 1222 at 1232 [33]; *Re Wattyl Ltd* [2010] FCA 854 at [15]; *Re Foster's Group Ltd* [2011] VSC 93 at [15]; *Re APCOA Parking Holdings GmbH* [2014] EWHC 3849 (Ch) at [48]-[52]; *Re Metinvest BV* [2016] EWHC 79 (Ch) at [16]; *First Pacific Advisors LLC v Boart Longyear Ltd* [2017] NSWCA 116 at [80]; *Re Noble Group Ltd* [2018] EWHC 2911 (Ch) at [86]; *Re Castle Trust Direct Plc* [2020] EWHC 969 (Ch) at [16]; *Re Bell Group Finance Pty Ltd (in liq)* [2020] WASC 287 at [40]-[41].

[255] *Re Bell Group Finance Pty Ltd (in liq)* [2020] WASC 287 at [41].

However, the Court is entitled to take the existence of such interests into account in exercising its general fairness discretion in deciding whether to approve a scheme.[256] In fact, the Court may discount or even disregard the votes of certain shareholders in appropriate cases on the basis of an extraneous interest.

The interest regime is another of the key safeguards, and one of the key sources of structural flexibility, in a scheme of arrangement.

In short, under the interest regime, a Court may have concerns (and may consider discounting or disregarding votes) if one or more shareholders have voted in favour of a scheme of arrangement not because it would benefit them in their capacity as shareholders, but because it would benefit them in some other capacity (that is, they have an extraneous or divergent interest in the outcome of the scheme of arrangement).[257]

2.3 Other important safeguards and procedural protections

These regimes ensure that schemes of arrangement that feature material inequality of opportunity will only proceed if they are approved by disinterested shareholders (that is, by the target shareholders who do not have the different rights or interests) who have been provided with all material information in the scheme booklet (including consideration of the relevant facts by the independent expert who will take into account any inequality of opportunity in forming its view on the value of the target shares).[258] In addition, shareholders only get to vote on a scheme of arrangement if the target directors believe that it is appropriate to put forward the scheme for their consideration in the first place.

The above safeguards, protections and important differences between takeover bids and schemes of arrangement were acknowledged by Farrell J in *Re David Jones Ltd (No 3)*[259], who stated:

> "The relevance [in a scheme of arrangement] of the principles set out in s602 goes to the question of fairness and the desirability of there being, so far as relevant and possible, neutrality between "acquisition" schemes and Chapter 6 takeovers.
>
> However, one of the reasons for the continued existence of the s411 avenue for effecting mergers is that it is a flexible way of accommodating differences in the treatment of shareholders. It is for this reason that it is not illegal for a collateral benefit to be offered or given. Nor is it necessarily inappropriate for there to be differential consideration or collateral benefits subject to how the related questions of fairness and adequacy of disclosure to shareholders who will not participate in a benefit are addressed. The "fairness" issue is usually dealt with in one of two ways: first, by deciding whether there are differences which are

[256] *Goodfellow v Nelson Line (Liverpool) Ltd* [1912] 2 Ch 324 at 333-334; *Re AW Allen Ltd* [1930] VLR 251 at 264-265 and 270; *Re Chevron (Sydney) Ltd* [1963] VR 249 at 255; *Re Avram Investments Pty Ltd (No 2)* (1992) 10 ACLC 1747 at 1752-1753; *Re Credit Reference Association of Australia Ltd* (1998) 16 ACLC 491 at 494; *Re Jax Marine Pty Ltd* [1967] 1 NSWR 145 at 148-149; *Re Crusader Ltd* (1995) 17 ACSR 336 at 344-345; *Re Landmark Corporation Ltd* [1968] 1 NSWR 759 at 766; *Re BTR plc* [2000] 1 BCLC 740 at 747; *Re Cashcard Australia Ltd* (2004) 48 ACSR 738; *Re Citec Corporation Ltd* (2006) 56 ACSR 663 at 670 [30]; *Re Opes Prime Stockbroking Ltd (No 1)* (2009) 73 ACSR 385 at 404 [71]; *The Australian Special Opportunity Fund LP v Equity Trustees Wealth Services Ltd* [2015] NSWCA 225 at [178]; *Re Lehman Brothers International (Europe) (in administration)* [2018] EWHC 1980 (Ch) at [84].

[257] Damian T and Rich A, *Schemes, Takeovers and Himalayan Peaks*, Fourth Edition, at 795.

[258] Some have advocated for the incorporation of a similar regime into Chapter 6 of the Corporations Act. See Levy R, *Takeovers Law & Strategy*, Fifth Edition, Lawbook Co., 2017, at 6 [1.40] and see also Levy R and Furphy B, "Takeover Law Reform Proposals", Chapter 16, in Damian T and James C (eds), *Towns Under Siege: Developments in Australian Takeovers and Schemes*, 2016. Ross Parsons Centre of Commercial, Corporate and Taxation Law, The University of Sydney, at 605-606, Section [16.7].

[259] [2014] FCA 753.

> "class creating" or, second (and arguably more appropriately where the issue is collateral benefits), by enquiring whether processes have been established by the scheme company to "tag" votes of interested shareholders or for interested shareholders to abstain from voting. Either approach allows appropriately informed shareholders who will not share in a benefit to determine the outcome of the approval resolution and prevents shareholders with greater bargaining power from being advantaged over shareholders with less bargaining power without the consent of the less powerful shareholders."[260]

The Courts have confirmed the appropriateness of the above approach in schemes of arrangement over a number of years. A few examples are set out below.

In *Re Ranger Minerals Ltd*[261], the bidder had acquired target shares in the four months before the posting of the scheme booklet for a price which ASIC argued was higher than the consideration being proposed to be provided under the scheme of arrangement. ASIC submitted that the Court should not make an order convening the scheme meeting unless the value of the consideration proposed to be provided under the scheme matched, as far as practicable, the consideration paid under the pre-scheme acquisition.

In dismissing ASIC's concerns, Parker J made it clear that it was necessary to consider the facts and circumstances of the case, rather than inflexibly imposing the takeover provisions and the Eggleston Principles on the proposed scheme of arrangement. Parker J explained that target shareholders would be adequately protected against any inequality of opportunity through appropriate disclosure in the scheme booklet together with an independent expert's report which contained an opinion on the value of the scheme consideration. His Honour stated:

> "A scheme of arrangement is quite different in form and elements [to a takeover bid]. There is no offer date as a benchmark. Necessarily, the ultimate outcome ie whether or not the scheme will proceed, will be determined by court decision and lodgement of the order. The process involves two court applications, either or both of which may be opposed, and a vote of shareholders at which the support of at least 75 per cent of the shareholders is essential. The process is necessarily prolonged. It ensures that shareholders have full and frank disclosure of all relevant issues. In a case such as the present, where the concern is whether a past and concluded acquisition of a minority holding involved a more valuable consideration than is proposed by the scheme, the court can ensure that the facts relating to the acquisition are fully and frankly presented to the shareholders, and that the shareholders are assisted by independent expert opinion as to the value of the scheme consideration according to a variety of considerations including market price and how it compares with the consideration paid for the past acquisition.
>
> The circumstances of, and reasons for, that past acquisition and the justification offered by the propounders of the scheme for the consideration then paid, can be assessed by shareholders, who should be in a sound position to assess for themselves whether they are disadvantaged by inequality of treatment."[262]

Parker J's approach is consistent with the long held judicial view that, provided all material information is disclosed to them in the scheme booklet, shareholders are capable of judging whether a scheme of arrangement is to their commercial advantage (including schemes of arrangement that depart from a strict adherence to the "equality of opportunity" principle).[263]

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[260] [2014] FCA 753 at [12]-[13].

[261] (2002) 42 ACSR 582.

[262] (2002) 42 ACSR 582 at 592 [44]-[45].

[263] *Re English, Scottish and Australian Chartered Bank* [1893] 3 Ch 385 at 409.

Parker J's approach has been followed in a number of subsequent cases.[264]

2.4 The role of the Court at the first court hearing

The test that the Court will apply at the first court hearing in deciding whether to convene a scheme meeting is the following test articulated by Street CJ (with whom Hutley and Samuels JJA agreed) in *FT Eastment & Sons Pty Ltd v Metal Roof Decking Supplies Pty Ltd*[265]:

> "The approach taken upon a summons is that the court will not ordinarily summon a meeting unless the scheme is of such a nature and cast in such terms that, if it achieves the statutory majority at the creditors' meeting the court would be likely to approve it on the hearing of a petition which is unopposed."[266]

The Court undertakes a substantive role at the first court hearing. The factors that the Court will consider at the first court hearing have been summarised as follows:

> "The Courts have articulated various factors that they will either wish to be satisfied of, or otherwise take into account, at the first court hearing in deciding whether to make an order convening a scheme meeting. These include that:
>
> (1) the scheme company is a "Part 5.1 body";
>
> (2) the proposal can properly be described as an "arrangement" or "compromise". However, the Court has made it clear that it does not have to make a final decision on this issue at the first court hearing;
>
> (3) members or creditors (as the case may be) will be provided with all the main facts and material information relevant to the exercise of their decision as to whether to and how to vote and with nothing which is misleading or deceptive in any material sense, and that the explanatory statement presents a fair picture of the proposal and will allow members a fair consideration;
>
> (4) members or creditors (as the case may be) will have sufficient time to consider the proposed transaction and their position and also to "give vitality to their right to object";
>
> (5) members or creditors (as the case may be) will have a proper opportunity of being present (in person or by proxy) at the scheme meeting;
>
> (6) ASIC has been given at least 14 days' notice of the hearing of the application to convene the scheme meeting (or such lesser period of notice as the Court or ASIC permits) and whether ASIC has had a reasonable opportunity to examine the proposal and the scheme documents and to make submissions to the Court in relation to the proposal and the scheme documents (including the explanatory statement);
>
> (7) the applicable requirements (including disclosure requirements) under the *Corporations Act* , the *Corporations Regulations* and the applicable Court Rules have been complied with or satisfied (as the case may be). If the scheme of arrangement is a cancellation scheme, or otherwise involves a capital reduction or buy back, the requirements of s256B(1) (capital reductions) or

[264] See, for example, *Re Anzon Australia Ltd* [2008] FCA 309 at [14]; *Re Goodman Fielder Ltd* [2014] FCA 1449 at [19]-[20]; *Re iCar Asia Ltd* [2021] NSWSC 1713 at [18]-[19].

For other relevant examples, see *Re Aston Resources Ltd* [2012] FCA 229 at [16]-[35]; *Re David Jones Ltd (No 2)* [2014] FCA 720 at [16]; *Re David Jones Ltd (No 3)* [2014] FCA 753 at [26]; *Re Pulse Health Ltd* [2017] NSWSC 654; *Re Healthscope Ltd [*2019] FCA 542.

[265] (1977) 3 ACLR 69. Although this case concerned a creditors' scheme, Street CJ's comments are equally applicable to a members' scheme.

[266] (1977) 3 ACLR 69 at 72.

s257A (buy backs) (as applicable) of the Corporations Act will also be relevant to the exercise of the Court's discretion as to whether to convene the scheme meeting(s) (and these requirements will also be relevant to the Court's subsequent consideration of whether to approve the scheme of arrangement);

(8) the scheme is *bona fide* and is being properly proposed and not for an improper purpose;

(9) the scheme is not *ultra vires* the members or creditors (as the case may be) or the scheme company;

(10) the scheme is commercially viable and is not commercially unreasonable;

(11) there are no technical or mechanical defects in the proposed scheme itself;

(12) the scheme, if given effect, will not involve any unfair or oppressive result;

(13) the scheme does not offend considerations of public policy or commercial morality, which considerations find a basis in, or can be discerned from the text and subject matter of, the terms of the *Corporations Act* itself or its underlying purpose;

(14) the procedural requirements in the *Corporations Act* and the scheme company's constitution for the calling and conduct of a meeting will be complied with;

(15) the approach to voting is appropriate, from a class and interest perspective;

(16) there are not presently apparent any jurisdictional impediments to the scheme of arrangement being approved at the final court hearing. This question has both a narrow and a broad aspect to it: the narrow aspect is whether the Court has or will have jurisdiction to exercise power in relation to the scheme of arrangement and the broad aspect is whether there is some reason why the Court should not exercise its discretion pursuant to that power. An example of the narrow aspect is the class and interest issue referred to in point (15) above. An example of the broader aspect arises in a creditors' scheme, where the Court may ask itself whether the scheme, although effective domestically, would be recognised and enforced in other jurisdictions in which it is necessary that the scheme should have effect; and

(17) the scheme participants will be able to enforce the entitlements to receive the scheme consideration. In other words, the Court will want to understand whether there is any performance risk in respect of a bidder's obligation to pay the scheme consideration."[267]

2.5 The role of the Court at the final court hearing

At the final court hearing, the first matter that the Court must be satisfied of when deciding whether or not to approve a scheme of arrangement is that all of the relevant statutory provisions have been complied with.

The first statutory matter that the Court must satisfy itself of is that:

- the resolution agreeing to the scheme has been passed by a properly informed requisite majority of members or creditors (as the case may be) at a duly convened and held meeting; and
- all of the other procedural requirements and jurisdictional requirements in Part 5.1 of the *Corporations Act* (including in relation to class composition and member or creditor agreement thresholds) and in the applicable Court Rules, along with the requirements of

[267] *Schemes, Takeovers and Himalayan Peaks*, Fourth Edition, at 172-176 Section [4.2.3] (footnote omitted).

the Court's orders from the first court hearing (including the lodgement of those orders with ASIC), have been complied with and satisfied.

After considering the other procedural requirements in Part 5.1, the Court must, in the case of a members' scheme, then consider the requirements of s411(17) of the Corporations Act.

The factors that the Court will consider at the final court hearing in deciding whether to approve a scheme of arrangement have been summarised as follows:

> "In deciding whether to approve a scheme of arrangement, the Courts have, over the years, indicated that they will consider or take into account a variety of matters, including:
>
> (1) whether the meeting fairly represented members' or creditors' (as the case may be) interests (or the interests of the members or creditors in the relevant class) and whether some of those members or creditors voting at the meeting did so with an extraneous or special interest which differed from the interest of the ordinary independent and objective member or creditor;
>
> (2) considerations of public policy and commercial morality;
>
> (3) whether members or creditors (as the case may be) received adequate notice of the meeting and were given sufficient time to consider the information and proposals contained in the scheme booklet;
>
> (4) whether all material information was provided to members or creditors (as the case may be);
>
> (5) the level of attendance by members or creditors (as the case may be) at the meeting (either in person or by proxy). Although a low turnout will not, of itself, be a valid basis for declining to approve the scheme (it has no statutory significance), if there is a low attendance the Court may look at the size and composition of the voter turnout and enquire whether:
>
> - the meeting was "unrepresentative" of members or creditors (as the case may be) as a whole;
> - the attendance levels (and hence the outcome of the vote) were affected by collateral factors affecting some members or creditors (as the case may be), such as extraneous or special interests, the failure to despatch the scheme booklet to some members or creditors or some other flaw or procedural irregularity in the convening process;
> - members or creditors (as the case may be) have for any reason been deterred from attending or voting at the meeting;
> - there was cogent evidence to the effect that a substantial number of members or creditors (as the case may be) were opposed to the scheme but had not voted, particularly if their opportunity to vote was curtailed in some respect; or
> - the notification process had resulted in members or creditors (as the case may be) not receiving adequate notice of the scheme meeting.
>
> The above said, it is inappropriate for the Court to assume (in the absence of complaint) that members or creditors (as the case may be) who did not vote, objected to the scheme – apathy must not be presumed to be antagonism. […];
>
> (6) any material change of circumstances occurring between the scheme meeting and the final court hearing;
>
> (7) in the case of a members' scheme only, the objectives of Chapter 6 of the *Corporations Act* , which indicate a legislative intent to protect members subject to a takeover bid;

(8) whether members or creditors (as the case may be) have voted in good faith and not for an improper or illegitimate purpose;

(9) whether there is cogent evidence of fraud or *mala fides*. If there is, the Court can, in the exercise of its fairness discretion, or as part of its general jurisdiction to set aside dishonest or fraudulent transactions, decline to approve the scheme;

(10) whether there is evidence that performance and observance of the scheme by members or creditors (as the case may be) would expose some or all of the members or creditors to prejudice or liability by virtue of some pre-existing position occupied by them;

(11) whether there is any evidence of oppression – if the Court considers that there has been oppression, it would be unlikely to approve the scheme;

(12) if the scheme has international elements, whether the scheme will achieve its purpose and have a practical utility. The Court will want to know that, in approving the scheme, it is not acting in vain. In other words, consideration will be given to whether the scheme will be recognised and given effect to in other relevant jurisdictions. This point is generally likely only to be relevant in the case of creditors' schemes of arrangement; and

(13) whether the scheme is void or unlawful / illegal and whether the scheme complies with the law. That said, whilst a Court might entertain an argument that a scheme should not be approved because it would, for example, involve a statutory contravention, there is no precedent for refusing to approve a scheme because it might arguably infringe a private law right or a contractual right of a person not a party to the scheme of arrangement." [268]

[268] *Schemes, Takeovers and Himalayan Peaks*, Fourth Edition, at 361-364 Section [4.4.2] (footnote omitted).