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3 June 2022

Director
Market Conduct Division
Treasury
Langton Crescent
PARKES ACT 2600

By email
takeoversregulation@treasury.gov.au

Dear Sir / Madam

Submission on Consultation Paper regarding Corporate Control Transactions in Australia

Baker McKenzie appreciates the opportunity to comment on the matters set out in Treasury's Consultation Paper entitled Corporate Control Transactions in Australia: Consultation on Options to Improve the Schemes of Arrangement, Takeover Bids, and the role of the Takeovers Panel published in April 2022 (**Consultation Paper**).

Our responses to the discussion questions in the Consultation Paper are set out below. The views expressed in this submission are ours alone, and do not necessarily reflect the views of our clients.

Takeovers Rules and the Takeovers Panel

Discussion Questions

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

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

Response to question 1

Based on our experience, we consider that the current Takeovers Rules overall generally work well and achieve outcomes aligned with the Eggleston Principles.

As noted in the Consultation Paper, schemes of arrangement are currently the preferred transaction structure in the Australian market, particularly for larger transactions. In our experience, a key reason for this trend is that schemes offer parties greater certainty both in terms of the outcome of the transaction and transaction completion timeline. We think that it could be worthwhile for Treasury to consider ways in which the Takeovers Rules could potentially be amended to encourage a greater uptake of takeovers.

Baker McKenzie.

Response to question 2

Without ASIC relief, takeover documents (e.g. bidder's statements and target's statements) are currently required to be dispatched to shareholders in physical form. The Treasury Laws Amendment (Modernising Business Communications) Bill, which has now lapsed, provided (among other things) for amendments to the *Corporations Act 2001* (Cth) (**Corporations Act**) to permit documents sent under Chapters 6-6C[1] to be sent in electronic form.

Enabling these documents to be distributed to shareholders electronically would reduce unnecessary printing and other administrative costs and could improve the efficiency of takeovers. Accordingly, we would be supportive of such an amendment.

Schemes of Arrangement and the Court

Discussion Questions

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

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

5. Would there be benefits to establishing regulatory consistency between takeovers and schemes? For example, would there be benefits in aligning the minimum disclosure requirements, the minimum bid rule, and the rule against collateral benefits?

Response to question 3

Based on our experience, we consider that the current Scheme of Arrangement Rules generally work well and achieve outcomes aligned with the Eggleston Principles. We note the observation in the Consultation Paper[2] that the legal basis for consideration of the Eggleston Principles rests only on ASIC's Regulatory Guide 60, and that where ASIC declines to give a 'No Objection' statement, the Eggleston Principles are not explicitly considered by the Court throughout the scheme process.

In our experience, ASIC does have regard to the Eggleston Principles in its review of the explanatory statement and related materials, and in the event that it has concerns these are typically raised with the parties in advance of the First Court Hearing (or at the First Court Hearing if its concerns are not appropriately addressed before then). That said, we would generally not be opposed to a legislative amendment which further safeguards shareholder interests in this regard (for example, an amendment to section 411(17)).

[1] All statutory references are to the Corporations Act unless otherwise indicated.
[2] See page 10.

Response to question 4

As noted in our response to questions 6-8 below, we generally support the idea of removing or reducing the Court's involvement in relation to members' schemes of arrangement which are relatively straightforward in nature (for example, by way of the introduction of a shareholder approved transaction in the Chapter 6 takeover provisions), and the idea of the Panel having a greater role in schemes.

The following discusses some other potential ideas for reform to the existing scheme process under Chapter 5.

Disclosure

The disclosure requirements for an explanatory statement set out in regulation 5.1.01 and Schedule 8 of the Corporations Regulations 2001 (**Corporations Regulations**) are lengthy and can be sometimes difficult to navigate and apply (particularly for non-lawyers). In our view, these disclosure requirements could be updated and re-formulated in a more simplified manner to enable parties to more efficiently ensure they comply with them.

Additionally, we note that ASIC routinely grants case-by-case relief in relation to certain disclosure requirements for an explanatory statement such as conditional financial disclosure relief.[3] At present parties need to submit applications for relief to ASIC and pay fees for their application. We think that consideration should be given to whether routine ASIC relief could be codified into the legislation (for example, under the Corporations Regulations) to save parties the time and expense of applying to ASIC for standard relief.

There are also a number of disclosure requirements which derive from the case law concerning schemes of arrangement (for example, the disclosure requirements in relation to the recommendation of an interested director). Parties may benefit from such disclosure requirements also being codified into legislation where possible (for example, under the Corporations Regulations) to make the scheme process more efficient.

Affidavits

Consideration should be given to whether affidavits in scheme court hearings, which are often quite lengthy, could be more streamlined. For example, there is currently a practice in schemes of providing affidavit evidence in relation to matters which have become routine in nature for takeover schemes (such as in relation to customary exclusivity arrangements and break-fees). We query whether parties should need to formally tender this as evidence or whether an alternative, less costly method could be adopted.

Expert reports

Further, in our experience it has become mandatory for scheme companies to commission an expert report for every scheme effecting a takeover, even where such a report is not strictly required under the Corporations Regulations. ASIC Regulatory Guide 60 notes at RG 60.76 that "*[e]ven if an expert report is not required under the Corporations*

[3] See ASIC Regulatory Guide 69 at RG 60.90 - RG 60.91.

Regulations, it is common for a scheme company to commission one voluntarily for a transaction that is complex or effects a takeover." We think it would be helpful for this guidance to be expanded to potentially provide examples of where an expert report will not be required (for example, for straightforward schemes) so that scheme companies can have greater clarity regarding whether the time and costs of commissioning an expert's report is required. Based on our experience, this can sometimes discourage parties from choosing the scheme structure in small transactions due to the costs involved in obtaining an expert's report (particularly if a technical or other specialised report is also required).

Response to question 5

We generally support the establishment of regulatory consistency between takeovers and schemes. However, the scheme and takeover processes are different, and in our experience the current system generally works well.

In relation to disclosure requirements in schemes, we consider that there is already considerable consistency with takeovers. For example, ASIC Regulatory Guide 60 notes that "*[w]e consider that for schemes where an essential part of the overall transaction is that members accept shares in the acquiring company, disclosure in the explanatory statement should meet the requirements of a bidder's statement for a scrip bid.*"[4]

Given the nature of the scheme process, we query the benefits of extending certain rules from the Chapter 6 takeover provisions to schemes (such as the rule against collateral benefits) - as this could result in limiting the structural flexibility of schemes which parties have become accustomed to (for example, unlike a takeover, a scheme would allow a flexible structure where different forms of consideration could be provided to different categories of shareholders, subject to separate class and voting requirements).

The role of the Takeovers Panel in relation to schemes

Discussion Questions

6. What are your views on expanding the Takeovers Panel's powers to include approval of members' schemes of arrangement? What form (if any) should such a power take? Should a separate regime be established for members' schemes of arrangement for the purposes of a change in corporate control?

7. If the Takeovers Panel were to take on some or all of the Court's functions for a scheme of arrangement, what difference to efficiency and costs could this make? For example, if the Chapter 5 scheme of arrangement mechanism was retained and a new procedure was added to Chapter 6 (allowing a target to convene a scheme meeting, not requiring formal approval from the Court, and enabling any party to raise a dispute with the Panel as they can for takeovers), what would be the advantages and disadvantages of such a change?

8. If the Takeovers Panel were to be given a formal review role for schemes, such as is currently performed by the courts what, if any, changes might be required to:

[4] RG 60.68.

- 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?

Response to questions 6 to 8

In our view, there could be merit in removing or reducing the Court's involvement in relation to members' schemes of arrangement which are relatively straightforward in nature. We consider that this has the potential to bring cost and time savings for parties, particularly for small to medium sized transactions where parties are typically more cost conscious.

A potentially efficient way of doing this would be to establish a new shareholder approved transaction within the existing Chapter 6 takeover provisions rather than changing the existing scheme process under Chapter 5. This is primarily because we consider that there are likely to be certain transactions such as schemes involving complex aspects, demergers and reconstructions where the existing Court supervised scheme procedure is either required as a matter of law or otherwise the appropriate procedure in the circumstances.

The disclosure document under the new transaction could potentially be subject to an exposure period which would enable interested parties to raise any concerns with ASIC (or the Takeovers Panel) for consideration so that these matters could be addressed prior to the despatch of the disclosure document. For example, the exposure period could run from the date that the disclosure document is lodged with ASIC for review (at which point it could be made more broadly available) and provide 7 days' notice for interested parties to advise concerns/comments to the target company and ASIC.

We are generally open to the idea of expanding the Takeovers Panel's role in relation to schemes beyond resolving disputes raised by parties at the present time.

Advance rulings

Discussion Questions

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

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

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

	and in what circumstances should that consultation occur?
12.	What impact would the provision of an advance ruling power have on the use of the Takeovers Panel as a dispute resolution forum?

Response to questions 9 to 12

We support the introduction of a form of advance ruling in relation to takeovers and schemes of arrangement (and potentially other change of control scenarios).

Assuming that the Panel retains its existing core function as a dispute resolution forum, we consider that ASIC would likely be best placed to exercise an advance rulings power.

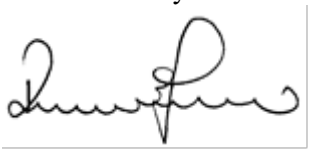
The Takeovers Panel could potentially have the power to review advance rulings made by ASIC, which would supplement its existing power under section 656A to review ASIC decisions whether to grant exemptions or modifications to Chapter 6 or Chapter 6C.

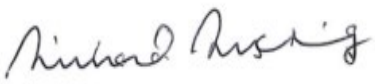
In relation to consultation with interested parties and other stakeholders prior to the making of an advance ruling, we envisage that this could potentially present issues in practice, for example in relation to providing advance rulings in a timely fashion and in maintaining confidentiality. Such consultation may be required in order for an advance ruling to be binding. That said, we think market participants could still benefit from receiving a written "in principle" non-binding indication of ASIC or the Panel's views in relation to a course of action. We understand that a similar approach is adopted by the New Zealand Takeovers Panel where prior consultation is not possible.

* * *

We would welcome the opportunity to discuss our submission and our views on any other element of Australia's takeovers regulation framework in greater detail.

Yours sincerely





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