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Director, Market Conduct Division
The Treasury
Langton Crescent
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By Email: takeoversregulation@treasury.gov.au

Dear Director

The Treasury - Consultation paper - "Corporate control transactions in Australia"

Allens is pleased to make this submission on Treasury's 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**).

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

In answer to Questions 1 and 2, we believe 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[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 Schedule 1 to this submission, 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;
- 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)

We also believe 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 Schedule 2 to this submission, include streamlining the Court process and amending the

[1] For example, the 3% creep rule (in item 9 of s611).

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.

Many of the criticisms concerning the current procedure relating to schemes of arrangement are matters that could be addressed by the Courts streamlining their proceedings. We understand that this issue has been taken up with the Courts by the Corporations Committee of the Business Law Section of the Law Council of Australia.

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

Our view is that there is *already* sufficient regulatory consistency between takeovers and schemes, once regard is given to the fact that they are quite different processes. In fact, 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, we do 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 announcement of the scheme; the date of the first court hearing; the date of the scheme meeting; 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. This would be effective, as the Panel clearly has jurisdiction over schemes, and is happy to use it (eg. in relation to matters such as break fees) prior to the first Court hearing. 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 is not clear, particularly where the pre-scheme acquisition is below 20%; and

(c) it is 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 What are your views on expanding the Takeovers Panel's powers to include approval of members' schemes of arrangement?(Discussion Questions 6 and 7)

Our view is that the current scheme of arrangement regime under Part 5.1 of the Corporations Act in relation to members schemes which effect a change in control is generally working very well. That regime has been used to effect hundreds of control transactions over many years, without any material complaint from market participants. In many respects, it is a model for other jurisdictions around the world which have far less efficient markets for corporate control.

We do not support a model where, in relation to members schemes which effect a change of control, the Takeovers Panel replaces the Court in the scheme process, and takes over the supervision and approval of such schemes, in the same way as the Court currently does. This is so for the following reasons:

4.1 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.[2] Also, trust schemes (i.e. most REITs and infrastructure vehicles) 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.

4.2 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 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 shareholder's proprietary rights should be abrogated), and its approach to takeover disputes is to focus on a speedy resolution so that the

[2] 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).

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.

4.3 The Panel is not set up and does not have the resources to perform this function

The Panel is not set up for, and does not have the resources to perform this function. The Panel comprises a small executive and 51 part time members (all of whom have other busy roles). Significant additional Commonwealth funding and resources would be required if the Takeovers Panel was to assume the role of the Court. 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).

4.4 If the Takeovers Panel simply replaces the Court, several important minority protections would be lost

If the Takeovers Panel simply replaces the Court (i.e. if the Takeovers Panel was to take over in full the supervision and approval of members schemes to effect a change of control), several important minority protections would be lost. These minority protections are discussed in more detail in section 5.3 below, but, for example, include the following:

- the Court's fairness discretion: the Court has a broad supervisory jurisdiction over schemes of arrangement and closely examines the fairness of any scheme. 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
- the 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. This obligation brings with it a serious obligation to be discharged by those legal representatives of the scheme proponents. 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.

4.5 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.[3] 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.[4]

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 (e.g. a series of hearings to approve the compulsory acquisition of shares). This would make the Panel look much more like a Court exercising judicial power, which may lead to renewed challenges to the validity of the Takeovers Panel under The Commonwealth of Australia Constitution Act.

[3] 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.

[4] *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.

4.6 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".[5] In this regard, the comments of Austin J in *Arakella v Paton*[6] 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 procedure must be ordained by statute".[7] 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".[8]

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.

4.7 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. We are likely to see further erosion of consistency of decision making if the number Panel members is significantly increased.

4.8 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 for identifying, and

[5] 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].
[6] [2004] NSWSC 13.
[7] [2004] NSWSC 13 at [137].
[8] Ford, Austin & Ramsay, *Principles of Corporations Law*, LexisNexis, at [24.036].

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

5 What would be the advantages and disadvantages of a new procedure in Chapter 6, in addition to the scheme procedure in Part 5.1?

We are aware that some lawyers have called for the introduction of a new regime in Chapter 6 (which would be in addition to and not in substitution for members' schemes under Part 5.1) under which 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. ASIC would also have no pre-vetting role under this regime.

We do not support the introduction of such a new regime. It may save some incremental costs of the Court process in a scheme (e.g. barristers costs), but will result in the loss of some fundamental protections for target shareholders in a scheme process. The reasons we do not favour the introduction of such a new regime are as follows:

5.1 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 subject to supervision by a Court exercising a broad fairness discretion. 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.[9]

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.

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.

[9] 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.

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

5.2 The Panel is not the appropriate forum to supervise what is essentially a compulsory acquisition process

The Takeovers 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.

5.3 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:

(a) 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.[10] 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

[10] 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].

meeting(s).[11] 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.[12]

The final court hearing (where the Court considers whether to approve a scheme of arrangement) is no "rubber stamp" exercise either.[13] 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.[14] The Court has a broad "discretionary power"[15] as to whether to approve a scheme.[16] 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.[17]

As explained by Parker J in *Re Amcom Telecommunications Ltd (No 4)*[18]:

> "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."[19]

Similarly, in *Re Opes Prime Stockbroking Ltd (No 1)*[20], Finkelstein J observed:

> "there is a built-in safeguard against majority oppression in that the court is not bound by the decision of the meeting."[21]

The above observation has been cited with approval in *Re Sino Gold Mining Ltd*[22] and *Re Valmec Ltd*[23].

(b) 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).

[11] 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].
[12] See, for example, *Re Trust Co (Re Services) Ltd as responsible entity of VitalHarvest Freehold Trust* [2021] NSWSC 108 at [12].
[13] *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].
[14] *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].
[15] *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].
[16] *Re Permanent Trustee Co Ltd* (2002) 43 ACSR 601 at 603 [8].
[17] *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].
[18] [2015] FCA 720.
[19] [2015] FCA 720 at [31].
[20] (2009) 73 ACSR 385.
[21] (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].
[22] [2009] FCA 1277 at [53].
[23] [2021] WASC 420 at [42]

The court hearings in a scheme of arrangement provide an "independent forum"[24] 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*.[25]

(c) 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 required to bring to the Court's attention all matters that could be considered relevant to the exercise of the Court's discretions.[26]

This obligation brings with it a serious obligation to be discharged by scheme proponents.[27] 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 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 or not to vote at all.[28]

In this regard, the 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'.[29]

The 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.[30] Relevantly to the current debate, after consulting a number of individuals, companies and associations as well as the Government's Business Regulation Advisory Group, the 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".[31]

[24] *Arakella v Paton* (2004) 60 NSWLR 334 at 366 [137]. The Takeovers Panel is also an "independent forum".
[25] 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.
[26] 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].
[27] *Re Permanent Trustee Co Ltd* (2002) 43 ACSR 601 at 603 [7].
[28] Corporations Act , s411(3) and s412(1) (equivalent to s636 and s638 for takeover bids). 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].
[29] 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].
[30] 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].
[31] The Treasury, "Takeovers: Corporate control: a better environment for productive investment", CLERP Program – Proposals for Reform: Paper No. 4, 1997, at 53 [5.2].

5.4 Cost savings are overstated, and lose sight of the fundamental shareholder protections which would be lost

Under such a new regime, the proponents of the scheme would still need to prepare a scheme booklet, with presumably the same attention to accuracy and completeness of disclosure as is currently the case. The costs saved would be the legal costs (counsel's and the target's lawyers) of the two court hearings themselves.

We understand that those incremental costs may appear high in the context of a scheme for a small market cap company, but, as discussed above, there are real integrity benefits in having court oversight of the scheme, and having the scheme company's counsel confirm to the court ahead of despatch that the disclosure is adequate and that any other issues have been addressed. Also, court supervision of the scheme is the price that the scheme proponents pay if they want to use the scheme process to compulsorily acquire a target shareholder's shares.

5.5 There is no evidence to suggest that having the Panel determine disclosure and voting issues in relation to a scheme will result in more consistent outcomes than the courts

The proponents of the new regime have argued that if a disclosure issue is tested in the Panel, the parties are more likely to get a more consistent result than if the matter were tested before the court. The fact is that there are a handful of judges around Australia who hear most scheme applications versus 50 part-time members of the Panel. As we have seen in other areas of the Panel's jurisdiction (like association cases), there is not always consistency of thinking or approach on issues.

5.6 Risk of material delays to the process

Having the Panel determine disclosure and voting issues after the notice of meeting and explanatory statement have been despatched to shareholders will increase the risk of material delays, which may kill some deals. Yes, there would be a few days saved by not going through the court process (usually the period between coming out of ASIC and the first court hearing is a few days only), but if there is a dispute, it will take much longer to resolve before the Panel than the court. Most complaints around disclosure or voting on schemes are dealt with by the court almost immediately. When hearing the dispute, the court has the benefit of having reviewed the disclosure at the first hearing. Compared with this, the average time to establish a sitting Panel on a matter is around one week, with an average of three weeks to resolve matters. Therefore, there is an increased risk of delays if the Panel is determining disclosure and voting issues after despatch.

5.7 Potential increase in tactical proceedings

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. 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;[32] and
- the submission of a Takeovers Panel application to challenge a transaction will cause (at least) weeks of delay to a transaction,[33] thus exposing schemes to market risks.

[32] 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].
[33] 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).

Once the Court has approved a scheme of arrangement and its orders have been lodged with ASIC (thus causing the scheme to become "effective"[34]), 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.[35] This has resulted in significant delays (sometimes years of delay), significant Court time and resources being consumed 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;[36]
- 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;[37]
- objectors can appeal a judicial review judgment to the Full Court and even the High Court;[38] 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.[39]

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

[34] Corporations Act, s411(10).
[35] 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**).
[36] 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).
[37] 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.
[38] 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.
[39] 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.

- 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;[40]
- the judicial review hearings have been up to 4 days in length; and
- judicial review applications also involve ancillary listings that occur prior to the hearing of the judicial review application itself. [41] There were, for example, 11 ancillary listings for the judicial review application[42] in relation to the decision in *Chaudhri v Takeovers Panel* [2011] FCA 148.[43] These proceedings were ultimately withdrawn before the hearing regarding the judicial review application.

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.

6 Advance rulings (Discussion Questions 9-12)

We support the introduction of an advance rulings power, but note 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 to given 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.

[40] *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.
[41] Comprised listings such as 'administrative listings', case management or directions hearings, mentions, notice of motions and interlocutory hearings.
[42] See WAD329/2011.
[43] 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.

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.

7 General (Discussion Question 13)

As discussed above, 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 our 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.

Yours sincerely

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Schedule 1 Proposed Changes to the Current Takeover Regime

We propose 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 into the law.
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 regardless be protected 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.[44] It is noted that the Takeovers Panel has not expressed any concerns with escalator agreements.[45] This is not a new recommendation. There have been repeated calls over many years for the abolition of the prohibition on escalator agreements.[46]
3	Align the collateral benefits rule (s623) and the Panel's	The collateral benefits rule in s623, and the approach taken to its operation and enforcement by the Takeovers Panel,[47] need to be aligned. It makes no sense (and materially increases the regulatory burden) for certain

[44] For examples of pre-bid acceptance agreements, see *Re Advance Property Fund* [2000] ATP 7 and *Re Alpha Healthcare Ltd* [2001] ATP 13.
[45] See *Re GoldLink IncomePlus Ltd (No 2)* [2008] ATP 19 and *Re Normandy Mining Ltd (No 4)* [2001] ATP 31 at [41]-[42].
[46] 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].
[47] See Takeovers Panel, Guidance Note 21, "Collateral Benefits", First Issue, 14 April 2008.

Item	Proposed change	Description of the change
	position on collateral benefits	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 "reasonable basis" to believe that they will be able to perform their takeover payment obligations.[48] The Panel has made it clear that whether a bidder has "reasonable basis" is to be assessed *objectively* and will depend on the circumstances of each case.[49] 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.[50] 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. We consider that law reform is appropriate to remove the inconsistency between the Panel's position and s631(2)(b).[51]
5	Remove requirement for notices of variation to be posted to shareholders (s650D(1)(c))	Consistent 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

[48] Takeovers Panel, Guidance Note 14, "Funding arrangements", Third Issue, dated 26 November 2015.
[49] Takeovers Panel, Guidance Note 14, "Funding arrangements", Third Issue, dated 26 November 2015, at 4 [10].
[50] *Australian Securities and Investments Commission v Mariner Corporation Limited* [2015] FCA 589 at [249].
[51] 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
		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)). Consistent 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 policy need or basis.
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 the 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 the 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.[52] 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.[53]

[52] See ASIC Corporations (Minimum Bid Price) Instrument 2015/1068 and ASIC Regulatory Guide 9, at Part D.
[53] UK Takeover Code, rule 11.1 (noting that under the UK Takeover Code, the concept of "offer period" commences upon announcement of a takeover offer).

Item	Proposed change	Description of the change
		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 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.[54] 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[55] and Hong Kong.[56] 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).[57]

[54] 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].
[55] UK Takeover Code, rules 2.5 and 2.7.
[56] Hong Kong Takeovers Code, rules 3.5 and 3.7.
[57] 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

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 pre-conditions are not fulfilled, a bidder should not be at risk of committing a criminal offence in such circumstances.[58]

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.[59]

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 spectra 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

[58] 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]).

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

Item	Proposed change	Description of the change
		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, 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 here.
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[60]). 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.[61] 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.[62] 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 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.

[60] Corporations Act, s612(f).
[61] ASIC Regulatory Guide 9, "Takeover Bids", dated September 2020, at Part N.
[62] ASIC Regulatory Guide 9, "Takeover Bids", dated September 2020, at [9.667]-[9.668].

Item	Proposed change	Description of the change
		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,[63] 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).
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"[64] 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

[63] If the target was not listed, notice would be given to the target and ASIC and included on a nominated webpage of the bidder.
[64] The "20% rule" itself is contained in s606 of the Corporations Act.

Item	Proposed change	Description of the change
		ASIC[65] and the Takeovers Panel[66] 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.[67] 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.[68] 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, 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.[69] However, 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	***More frequent acceptance updates*** If the target is listed, the bidder must publicly announce every 1% or greater movement in its voting power.[70] This promotes the efficient, competitive and informed market principle.

[65] ASIC Regulatory Guide 60, "Schemes of arrangement", dated September 2020, at 12 [60.37]-[60.39].
[66] Takeovers Panel, Guidance Note 1, "Unacceptable Circumstances", Sixth Issue, dated 11 July 2018, at 5-6 [18] and 11 [32(b)] (footnote 51).
[67] 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**).
[68] 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].
[69] See ASX Listing Rule 7.2, Exceptions 6 and 7. See also the definition of "reverse takeover" in ASX Listing Rule 19.12.
[70] Corporations Act, s671B(1).

Item	Proposed change	Description of the change
	acceptances (s654C); and a dedicated webpage for takeover documents	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%.[71] 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 data base. In addition, access to the documents on ASIC's data base is not free and there are often delays in ASIC uploading documents onto its data base. 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 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.[72] 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

[71] Corporations Act, s654C.
[72] 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].

Item	Proposed change	Description of the change
		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.[73] 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.[74] Accordingly, some applicants consider they have 'nothing to lose'[75] by making an application to the Takeovers Panel – if they are successful, they get what they want and, if they are not successful, they are no worse off.[76] 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 to it. In FY21, the average number of days between an application and a decision from the Panel was 21.5 days[77] – an extremely long period in any change of control transaction.[78] 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;[79] • frivolous, vexatious or without substance;[80] or • being used for an ulterior motive or as a delaying tactic to prevent a takeover from going ahead.[81]

[73] Corporations Act, s657D(1) and s675D(2)(d).
[74] Takeovers Panel, Guidance Note 4, "Remedies General", Sixth Issue, dated 30 January 2017, at [25].
[75] Except, perhaps, in respect of paying their own costs if they have used external legal counsel to represent them.
[76] They are not a risk of a cost order being made against them.
[77] Takeovers Panel, Annual Report 2020-21, at 5.
[78] The Treasury had expected takeover disputes to 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]).
[79] *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].
[80] *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].
[81] *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
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. 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.[82] 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).

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

Schedule 2 Proposed Changes to the Current Scheme of Arrangement Regime

We propose the following changes 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.[83] CAMAC's final report contained a number of sensible law reform recommendations.[84] None of those recommendations were 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.[85] 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 considered relevant to the exercise of the Court's discretions.[86] 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. We understand that the Corporations Committee of the Business Law Section of the Law Council is engaging with the Courts on this.	Not considered
2.	Re-write the disclosure requirements	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	Agree[92]

[83] Corporations and Markets Advisory Committee, "Members' schemes of arrangement", Discussion Paper, June 2008.
[84] Corporations and Markets Advisory Committee, "Members' schemes of arrangement", Report, December 2009.
[85] 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.
[86] 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]).
[92] 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
	and repeal Schedule 8 of the Corporations Regulations	have received had the transaction been effected by way of a takeover bid.[87] 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 indeed the requirement. 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.[88] 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[89] and the independent expert's report requirement[90] 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). However, we consider this requirement should be extended to expressly require disclosure of material information in the possession of the bidder and its directors.[91]	
3.	Introduce a stand-alone liability and defence regime	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[93]) are subject to a stand-alone liability and defence	Agree[97]

[87] See section 3 of our submission for a further discussion in relation to this issue.
[88] 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).
[89] Corporations Regulations, Schedule 8, rule 8301.
[90] Corporations Regulations, Schedule 8, rule 8306.
[91] 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].
[93] See Corporations Act, Part 6D.3.
[97] 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
	for directors and officers	regime which operates to the exclusion of the general misleading or deceptive conduct provisions.[94] Significantly, the takeover liability regime contains defences to liability, including the so-called "due diligence defences".[95] 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.[96]	
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.[98] The Court has the power to dispense with the head count test.[99] However, despite the existence of this power, we believe 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".[100] However, as share splitting can be so difficult to prove, this power is unlikely to completely remove the temptation to engage in share splitting.[101] 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 takeover	Agree[112]

[94] Corporations Act, Chapter 6B.
[95] Corporations Act, s670D. The "due diligence" defences are also available in the case of fundraising documents (see Corporations Act, s730-s733).
[96] 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].
[98] Corporations Act, s411(4)(a)(ii).
[99] 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).
[100] Explanatory Memorandum to the *Corporations Amendment (Insolvency) Bill 2007* (Cth), at 57 [4.179]-[4.181].
[101] 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).
[112] 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

bid provisions do not contain an equivalent member agreement threshold to the head count test.[102]

Those with the overwhelming economic interest in the target should have the largest say on the outcome of the scheme.[103]

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*[104]:

> "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."[105]

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.[106] 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.[107]

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 applicable to takeover bids contained a 75% head count requirement.[108] The existence of

[102] See s661A(1)(b) (for takeovers), s256C(1) (equal capital reductions) and s256C(2) (selective capital reductions) of the Corporations Act.
[103] 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.
[104] *Re PCCW Ltd* [2009] HKCFI 243.
[105] *Re PCCW Ltd* [2009] HKCFI 243 at [15].
[106] 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.
[107] 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.
[108] See s701(2)(c) of the pre-13 March 2000 version of the *Corporations Law*.

Item	Proposed change	Description of the change	CAMAC's position
		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.[109] 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".[110] 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."[111]	
5.	Give ASIC broad modification and exemption powers	Parliament has bestowed a "wide discretionary power"[113] on ASIC to modify, or exempt a person from, the takeover provisions in Chapters 6 and 6A of the Corporations Act.[114] 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.[115] ASIC has no power to grant relief from any of the provisions in Part 5.1 of the Corporations Act. 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,[116] any challenges to a decision of ASIC to exercise such powers should be heard in	Disagree[118]

[109] 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.
[110] Report by the Legal Committee of the Companies and Securities Advisory Committee, "Compulsory Acquisitions", January 1996, at [2.35] (see Recommendation 7).
[111] 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].
[113] *ASIC v DB Management Pty Ltd* (2000) 199 CLR 321 at 341-342 [47].
[114] Corporations Act, s655A, s673 and s669.
[115] 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.
[116] Corporations Act, Part 6.10.
[118] 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 Takeovers Panel (not the Administrative Appeals Tribunal, as is currently the case with ASIC's limited powers).[117]	
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.[119] 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.[120] 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.[121] 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: "Entities which perform substantively the same role should *prima facie* be subject to similar regulation."[122] 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.[123]	Agree[127]

[117] 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].
[119] Corporations Act, s604. These provisions do not apply to registered managed investment schemes that are not listed on a prescribed exchange.
[120] 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.
[121] *Re Spark Infrastructure RE Ltd* [2021] NSWSC 1385 at [26].
[122] The Treasury, "Takeovers – corporate control: a better environment for productive investment", CLERP Program – Proposals for Reform: Paper No.4, 1997, at 45.
[123] 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].
[127] 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
		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.[124] 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 of seek judicial advice in connection with trust schemes, could simply be folded into the scheme of arrangement process.[125] This would further streamline the process and reduce costs.[126]	
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 ensure 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.[128] ASIC and the Takeovers Panel have accepted that a scheme of arrangement is an appropriate mechanism for effecting a change of control transaction.[129] 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).	

[124] For discussion on "trust schemes", see Takeovers Panel, Guidance Note 15, "Trust Scheme Mergers", Second Issue, 6 May 2011.
[125] 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].
[126] 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].
[128] 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.
[129] 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].

Item	Proposed change	Description of the change	CAMAC's position
		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".[130] 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.[131] This power is only available if the scheme of arrangement involves a "reconstruction" or an "amalgamation".[132] 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 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.[133] Such orders effect a "statutory novation" under which "the transferee company steps for all purposes into the shoes of the transferor".[134] 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	Not considered

[130] Treasury Consultation Paper, at 7.
[131] 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].
[132] 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].
[133] *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].
[134] *Re TSB Nuclear Energy Investment UK Ltd and Toshiba Nuclear Energy Holdings (UK) Ltd* [2014] EWHC 1272 (Ch) at [10].

Item	Proposed change	Description of the change	CAMAC's position
		transfer. If it could do so, this would frustrate the effect of the Court's order. In our view, s413(1) should be amended to make it clear that a counterparty cannot terminate a contract in such circumstances.[135] ***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) should be amended to make it clear that it can be used to effect transfers of statutory licences.[136] ***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".[137] This became an issue in *Equatorial Mining Pty Ltd v Antofagasta Investment Company Ltd*[138] where the Court was forced to take a commercial approach and found a convoluted way around this issue. This should not have been necessary.	

[135] 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."

[136] 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.

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

[138] [2013] FCA 1452.