



MEMO

To: Board of Directors
From: Company Secretary
Subject: **SCHEME OF ARRANGEMENT**

Chapter 6 of the Corporations Act governs take-overs, of which Section 606 generally prohibits the acquisition by 'a person' of greater than 20% of the shares in a company having more than 50 shareholders unless the person is able to take advantage of one of the exceptions in s611 of the Act including if they make a take-over bid for the [whole of the] company or they gain shareholder approval [to acquire that percentage].

A common procedure these days in the utilisation of the exceptions available under the Act is to rely on Item 17 of s611 which exempts a take-over (acquisition of shares in a company) if it is achieved through a "**scheme of arrangement**" that is approved by the court.

A scheme can be structured such that the outcome is that one person holds all of the voting shares in a company. A scheme can also be used to restructure the assets and/or share capital of a company.

The court when making its decision on a scheme must not, under s411(17), approve the scheme unless:

- (a) it is satisfied that the arrangement has not been proposed for the purpose of enabling the person to avoid the take-over provisions of Chapter 6 of the Act;
or
- (b) there is produced to the court a written statement ('certificate') from ASIC stating they have no objection to the arrangement.

One way of convincing the court to approve the proposal is to demonstrate that there is some feature or result of the scheme which could not have been easily achieved through the Chapter 6 exceptions yet warrants consideration for approval.

Differences to a Take-over Bid

The important differences between a scheme and a 'regular' take-over are:

- a scheme requires a shareholders' meeting to vote on the proposal whereas a take-over bid merely allows shareholders to accept or reject an offer to them to sell their shares



- a scheme also requires the court's approval – twice (firstly, to approve the convening of a scheme meeting then, following the meeting, to approve the scheme itself)
- there is structural flexibility with a scheme – a number of different ends may be achieved in the one transaction. Complex mergers with many interdependencies are well suited to the scheme procedure; for example, part of a company could be demerged to existing shareholders while the other part is transferred to an acquirer or the scheme may involve a buy-back and a return of franking credits
- in a scheme if the required majorities of shareholders approve the acquisition, all shareholders are obliged to sell – the required majorities are:
 - 50% of shareholders (i.e., by number) who vote must be in favour
 - 75% of votes (i.e., shares voted) must be in favour

and shareholders/votes include proxies

- in a take-over non-accepting shareholders are only obliged to sell if the bidder reaches 90% and proceeds to a compulsory acquisition.

The scheme of arrangement is often favoured because the threshold/s necessary to gain 100% of the target company may be considered easier to achieve – but others do not necessarily agree with this approach (eg, they might find it hard to get 50% of shareholders across the line even if they believe they can easily get 75% of the votes – or vice versa).

But note, if the scheme is not approved – by shareholders and/or the court – then the bidder company gets nothing.

ASIC Considerations

Under s411(17), the question of whether the scheme has been proposed for the purpose of avoiding the operation of any provision of Chapter 6 does not arise if ASIC gives its certificate under s411(17)(b).

The factors that guide ASIC in deciding whether to give that certificate are set out in ASIC Regulatory Guide 60. The Guide states that ASIC will not give its certificate unless shareholders receive equivalent (although not necessarily identical) treatment and protection under the scheme to that which they would receive under a take-over. This requires the scheme documentation to comply in all material respects with the disclosure requirements for a bidder's statement and for the scheme to provide essentially the same protections as are provided to shareholders in a 'regular' Chapter 6 take-over bid.

However, even where these requirements are satisfied and ASIC has no objection to the target company's scheme information memorandum going to shareholders, it is



apparently ASIC's policy not to provide its s411(17)(b) certificate at the first court hearing (at which the company seeks to obtain orders convening the scheme shareholders' meeting). Instead, ASIC generally waits until the second court hearing (at which the target company seeks court approval for the scheme) so that ASIC can be assured that the scheme meeting has been properly convened, held and resolved in favour of the scheme.

Shareholders' Meeting

In calling a shareholders' meeting a target company will most usually produce a Scheme Booklet which sets out in great detail all the relevant issues, the scheme timetable, the independent expert's report, copies of relevant scheme documentation between the parties, and so on, such that shareholders have sufficient information on which to make a voting decision at the meeting.

Sample shareholder resolution (included in the Booklet – for voting on at the meeting):

"That pursuant to and in accordance with section 411 of the Corporations Act, the arrangement proposed between _____ Resources Limited and the holders of its fully paid ordinary shares, designated the "Scheme", as contained in and more particularly described in the Scheme Booklet accompanying the notice convening the meeting, is agreed to and the Board of Directors of _____ Resources Limited are authorised to agree to such alterations or conditions as are thought fit by the Court, and subject to approval of the Scheme by the Court, to implement the Scheme with any such alterations or conditions."

Once shareholders have approved the scheme, and the decision is endorsed by the court, the bidder can move to implement the scheme, pay all shareholders and acquire their shares.

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The comments in this memo reflect some commercial aspects and observations on the matter experienced or observed by the writer in practice as he understands them. The information is given as a guide only and does not represent a definitive or legal view of any of the issues raised, covered or referred to and the reader is urged to seek his own professional advice on all aspects of, or pertaining to, this and any related matter.