Takeovers Panel

GUIDANCE NOTE 15: LISTED TRUST AND MANAGED INVESTMENT SCHEME MERGERS

Overview

This Guidance Note deals with Panel review of a Trust Scheme i.e. an acquisition of a listed registered managed investment schemes pursuant to an amendment of the deed constituting the scheme following one or more votes of unitholders in the target scheme. There is no specific statutory framework for a Trust Scheme, as there is for schemes of arrangement between companies and their members, with its flexible but fair mechanism of voting by classes under the supervision of the Court.

The Panel confirms in the Guidance Note the decision by the sitting Panel in *Colonial First State Property Trust Group* [2002] ATP 15 that a Trust Scheme, properly conducted, is an acceptable alternative to a takeover bid under Chapter 6 of the Corporations Act, because such a scheme is consistent with the policies and protections afforded to unitholders under Chapter 6 (though using different machinery from a takeover bid).

Noting that a Trust Scheme has neither the prescriptive structure and process of a takeover bid nor the provision for court supervision of a scheme of arrangement, the Guidance Note recommends procedures to be followed and disclosures to be made to avoid the risk that a Trust Scheme will lead to unacceptable circumstances for the purposes of section 657A of the Act, by denying unitholders reasonable and equal opportunities to share in the benefits of the scheme or sufficient information to assess the merits of the scheme, or by inhibiting an efficient, competitive and informed market in interests in the target trust.

The procedures recommended resemble the class meetings used to approve schemes of arrangement. The information to be provided to unitholders is based on that required to be provided under a members' scheme of arrangement or the bidder's and target's statements under a takeover bid. Whether unitholders are treated equally should be assessed with regard to the clear standards set by Chapter 6 for takeover bids, but recognising the scope in a scheme process to treat different subclasses of unitholders differently, with the informed consent of meetings of those subclasses.

Legislation

15.1 Until March 2000, the takeovers provisions of the Corporations Act[1] (the **Act**) and its predecessors did not regulate[2] the acquisition of interests in listed managed investment schemes (**MIS**).[3] Part 5.1 of the Act, which provides for schemes of arrangement, has never applied to trusts.[4] Accordingly, takeovers of trusts were regulated by provisions in trust deeds and ASX Listing Rules, under the general law.

15.2 Trust deeds typically contained general powers of amendment that could be used to merge trusts by resolutions passed under section 601GC (**Trust Schemes**), without contravening the ASX Listing Rules. A decision by unitholders to amend a trust deed, under a power given in the deed, has been supported by the courts where it did not amount to a 'fraud on the power'.[5]

15.3 The CLERP Proposal Paper on Takeovers recommended that the scope of the takeovers regime be expanded to include listed trusts.[6] This was done by the CLERP Act. Acquisitions of units are now regulated by section 606 and a trust can now be acquired by way of a Chapter 6 takeover bid, followed by compulsory acquisition of outstanding units. However, it remains possible to merge trusts by Trust Schemes, subject to complying with the requirements of Chapters 5C and 6 and the general law.

15.4 A dispute over whether a Trust Scheme would give rise to unacceptable circumstances may lead to an application to the Panel, but similar issues may also arise in the context of an application to ASIC for a modification of the Act to facilitate a Trust Scheme or in an application for review of an ASIC decision to grant or refuse such a modification.

Transfer Schemes and relief from Item 7

15.5 One kind of Trust Scheme (a **Transfer Scheme**) involves two trusts merging by the transfer to one trust (the **acquirer**) of all of the issued units in another

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[1] Except where noted, statutory references in this paper are to the *Corporations Act 2001* and *Regulations*.

[2] Other than in respect of stapled securities and for downstream acquisitions of shares owned by MIS.

[3] Typically a listed MIS is a unit trust and to facilitate discussion this Guidance Note will refer to trusts, units and trust deeds, although the Guidance Note will also generally apply to other kinds of listed MIS and their constitutions and interests.

[4] A unit trust is not a company, foreign company or non-company to which Part 5.1 applies and unit holders are typically not members or creditors of the trustee. Other legal forms for a managed investment scheme might be able to be subject to a scheme under Part 5.1 if it would be a compromise or arrangement between a company to which the Part applies and some or all of that company's members or creditors.

[5] *Cachia v Westpac Financial Services Ltd* (2000) FCA 161, 33 ACSR 572, also holding that the fraud on the power test applies in this context, rather than company law principles of oppression and fraud on the minority.

[6] Corporate Law Economic Reform Program Proposals for Reform: Paper No 4 *Takeovers – Corporate control: a better environments for productive investment*, 1997 at p43 - 47

trust (the **target**). Section 606 of the Act prohibits this unless the acquisition of units falls within one of the exemptions in section 611 or ASIC grants an exemption or modification under section 655A.

15.6 Item 7 of section 611 (**Item 7**) enables the **disinterested** unitholders of a trust to approve an acquisition of units in the trust which would otherwise be prohibited by section 606. A vote cast by any person proposing to acquire, or dispose of, the units to which the resolution relates, or any of their associates, is disregarded.[7]

15.7 As it stands, Item 7 could not be used to approve the transfer of all of the units in a trust. As all unitholders in the target trust would be transferring their units to the acquiring trust,[8] if any unitholder voted for the resolution, it would be ineffective. An ASIC modification would be required to allow any unitholder to vote for the Item 7 resolution approving the acquisition.

15.8 ASIC states in PS 74.53[9] that it may grant an exemption to Item 7 to allow shareholders in a company to vote for an Item 7 resolution under which all shareholders would transfer their shares. Shareholders who have a special interest in the transaction which they do not share with all shareholders would be excluded from the vote. Now that the takeovers regime has been expanded to include listed trusts, the policy is applied similarly to trusts.

Redemption Schemes

15.9 Under another kind of Trust Scheme (a **Redemption Scheme**), two trusts can merge by the target trust redeeming all of the issued units in that trust other than units held by the acquirer and paying cash or issuing units in the acquirer to the former unitholders in the target as consideration for the redemption. In this case, the target can be delisted before any units in the target trust are issued to the acquirer, avoiding any breach of section 606 and any requirement for an ASIC modification of Item 7.[10]

Parity between Transfer and Redemption Schemes

15.10 Both kinds of Trust Scheme, Transfer Schemes and Redemption Schemes, although having different implementation methods, follow similar procedures, with a resolution at a meeting being the centrepiece and have broadly the same effect on unitholders (except perhaps as regards taxation of

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[7] *Village Roadshow Ltd v Boswell Film GmbH* [2004] VSCA 16 per Callaway JA at [17], referring to corresponding words in paragraph 257D(1)(a) and to *Re Tiger Investment Company Ltd* (1999) 33 ACSR 438 at [40] which refers, however, to Listing Rule 14.11, not to paragraph 256C(2)(a) of the Act.

[8] Actually, the units would be transferred to the responsible entity or the custodian of the acquiring trust, to be held on trust under the trust deed: see sections 601FC(2) and 601FB(2).

[9] Last issued on 31 January 1994 , i.e. before Chapter 6 was expanded to cover acquisition of units in trusts.

[10] However, many MIS are "non-liquid schemes" (see section 601KA(4)) and are governed by Part 5C.6 of the Act. In those cases, a compulsory redemption as part of a Redemption Scheme will generally not be in accord with Part 5C.6 and would require ASIC relief under section 601QA from paragraph 601KA(3)(b).

the result of the transaction). In both cases, the unitholders in the target trust give up their units in that trust and receive cash or securities in a different entity as consideration. In both cases, dissenting unitholders will lose their units compulsorily if the scheme is approved. Different mechanisms with similar effect should be governed by similar policy and requirements.[11]

Allowable Mechanisms for Merging Trusts

15.11 The Panel does not subscribe to the view that the extension of the takeovers chapter of the Act to cover trusts means that a trust can now only be taken over under a takeover bid pursuant to Part 6.5. There is no basis to assert that a takeover of a trust may only be conducted by way of a Chapter 6 takeover just because takeovers of trusts are now regulated under Chapter 6. However, any merger should:

(a) be done through a mechanism which is clearly effective; and

(b) be done in a way that is harmonious with the principles and protections of Chapter 6.

15.12 Mergers and takeovers of companies can be effected by way of members' schemes of arrangement under Part 5.1, provided the scheme is not a device to avoid compliance with any of the provisions of Chapter 6.[12] In a line of cases since *Re Bank of Adelaide*[13] and including *Re ACM Gold Ltd & Mt Leyshon Gold Mines Ltd*[14], *Re Stockbridge Ltd*[15], *Re Archaean Gold*[16] and *Re Advance Bank Australia Ltd*[17] the Courts have decided that Chapter 6 is not a regulatory Everest i.e. there is no requirement that takeovers or mergers of companies may only be conducted through Chapter 6. ASIC's Policy Statements 60 and 142 also support this proposition.

15.13 The Panel considers that similar policy arguments apply to properly constructed Trust Schemes if they are approved by appropriately constituted majorities of properly informed unitholders.

Application of Section 602 Principles

15.14 The Panel considers that Trust Schemes come within the Panel's powers under Part 6.10. Trust Schemes (whether Redemption Schemes or Transfer

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[11] *Catto v Ampol* (1989) 7 ACLC 717, per Kirby P at 720

[12] The different compulsory acquisition threshold applicable in the case of a Part 5.1 scheme of arrangement is not in general a basis for holding that a scheme of arrangement has been proposed for the purpose of avoiding the operation of any of the provisions of Chapter 6 (s411(17)(a)). This argument has not been accepted by the Courts, except in the special circumstances of *Re Hellenic & General Trust Ltd* [1975] 3 All ER 382, where a 13% shareholder objected to the scheme. The 90% threshold is now part of Chapter 6A, not Chapter 6.

[13] (1979) 4 ACLR 393, reflected in what is now item 17 of section 611.

[14] (1992) 7 ACSR 231

[15] (1993) 9 ACSR 637

[16] (1997) 15 ACLC 382

[17] (1996) 22 ACSR 476

Schemes) both affect the control of the target trust and involve acquisitions of substantial interests that come within s657A(2). Unacceptable circumstances would arise if the Trust Scheme had the effect of defeating the policies and protections of Chapter 6 and particularly if:

(a) the market in the control of the voting interests of the listed target trust was not efficient, competitive and informed;

(b) unitholders affected by a Trust Scheme:

(i) did not know the identity of the acquiring entity;

(ii) did not have a reasonable time to consider the proposal; or

(iii) were not given enough information to enable them to assess the merits of the proposal;

(c) any unitholders were excluded from participating fairly in the benefits accruing to unitholders, or were otherwise treated unequally, under the Trust Scheme, except where different treatment is approved by properly informed and constituted meetings of the relevant unitholders, including by any relevant meetings of subclasses of unitholders.

Other factors may also constitute unacceptable circumstances.

Parity between Trust Schemes and Schemes of Arrangement

15.15 The closest analogy to a Trust Scheme is a company members' scheme of arrangement under Part 5.1. There are limits to this analogy which are considered at [15.16] and [15.18].

15.16 Part 5.1 is a flexible, general-purpose regime. It does not set out detailed procedural requirements for mergers like those of Chapter 6 (although the disclosure requirements for members' schemes are modelled on those of the *Companies (Acquisition of Shares) Act 1980*, which is Chapter 6's ancestor). Instead, it relies on supervision by the Court and by ASIC. The lack of equivalent supervision in the case of Trust Schemes is a significant limitation on the analogy between company schemes of arrangement and Trust Schemes.

15.17 The Courts have applied the principle that a scheme of arrangement may not be used to enable any person to avoid compliance with a provision of Chapter 6[18] to support the application to schemes of arrangement and reductions of capital of policies and protections borrowed from Chapter 6 and adapted to fit the different mechanisms of Part 5.1 and of reductions.[19]

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[18] Subsection 411(17)

[19] *Archaean Gold*, *Catto v Ampol* (1989) 7 ACLC 717, *Nicron Resources Ltd v Catto* (1992) 10 ACLC 1186, *Re Ranger Minerals Ltd* [2002] WASC 207, 42 ACSR 582, 20 ACLC 1769,

15.18 The Panel has adopted a similar policy in relation to Trust Schemes. In the absence of supervision by the Court and ASIC, which ensures that all interests are heard, balanced and protected on a case-by-case basis, however, the Panel regards it as appropriate for protections for unitholders to be provided in a more direct and prescriptive way. For this purpose, more of the provisions in Chapter 6 should be applied by analogy to a Trust Scheme than may be appropriate for a Part 5.1 scheme between a company and its members, which will be reviewed by ASIC and the Court. Specific guidance in this area is particularly useful to fill in the detail of section 601GC, the general provision concerning the procedure for effecting a merger by amending trust deeds, which is the basis for Trust Schemes.

15.19 To this extent, the Panel does not consider that the observations of Parker J in *Re Ranger Minerals*[20]concerning the extent to which Part 5.1 schemes should include or be governed by provisions included by analogy with Chapter 6 apply with the same force to Trust Schemes. This approach does not confine Trust Schemes to simple transactions comparable with takeover bids. On the contrary, the inherent flexibility of the mechanism should continue to be used to deal with multiple classes of securities, demergers and so on, with appropriate protections such as tailored disclosure, expert reports and voting exclusions.

Panel guidance for a Trust Scheme

15.20 The rest of this Guidance Note sets out guidelines on applying the principles in section 602 to prevent unacceptable circumstances occurring in relation to a Trust Scheme. Conducting a Trust Scheme contrary to these guidelines may constitute unacceptable circumstances whether it is a Transfer Scheme or a Redemption Scheme.

General Disclosure Requirement

15.21 The common law disclosure requirements apply to the notice of meeting for a Trust Scheme (**Scheme Notice**), which is first of all a notice of a meeting under section 601GC.[21] In addition, the Scheme Notice for a Transfer Scheme must comply with Item 7 of section 611[22] and any Scheme Notice corresponds in function with the explanatory statement for a members'

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[20] at [36]

[21] They require it to disclose all information the information needed fully and fairly to inform unitholders of the nature of the proposed resolutions and to enable unitholders to judge for themselves whether to attend the meeting and vote for or against the proposed resolutions: see *Bulfin's Limited v Bebarfald* (1938) 38 SR (NSW) 423 at 440; *Fraser v NRMA Holdings Limited* (1995) 55 FCR 452 at 466.

[22] Under item 7, unitholders must be given all the information known to the acquirer and the target that holders of units in the target trust and their professional advisers would reasonably require to make an informed assessment whether to vote in favour of the scheme, which has not already been disclosed to the holders.

scheme of arrangement[23] and both the bidder's statement and the target's statement for a takeover bid under Chapter 6.[24]

15.22 Consistently with paragraph 602(a) and subparagraph 602(b)(iii), the Panel (and indeed the market as a whole) expects the Scheme Notice to contain disclosure equivalent (although not necessarily identical) to the disclosure which should be made in those documents. [25]

Specific Disclosures

15.23 The Panel considers that the general disclosure principles mentioned in [22] require the Scheme Notice to disclose the following matters:

(a) where securities or managed investment products are offered as part of the consideration, the information required by the prospectus provisions in Part 6D.2 or the product disclosure statement provisions in Part 7.9;[26]

(b) equivalent specified information to that which would be required in a bidder's statement or an explanatory statement for a members' scheme of arrangement,[27] as if the transaction were a takeover bid or scheme of arrangement on similar terms, with any adaptations necessary because the target (and generally the acquirer) is a trust and the transaction is a merger by a vote to amend a trust deed;[28]

(c) a statement of the effect of the scheme (together with any collateral transactions) on material interests of the responsible entity of the target trust, its related bodies and their directors, so far as that effect is different from the effect on the interests of holders in general;[29]

(d) the respective voting intentions of the responsible entity of the target trust, its related bodies and their directors and a clear recommendation

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[23] Under subsection 411(3) of the Act and clause 8302(i), this must explain the effect of the proposal, the interests of the directors and the effect of the proposal on those interests and any information which is material to a decision whether to agree to the proposal which is within the knowledge of the directors and has not already been disclosed to the members. It must also include the specific information prescribed in Schedule 8 to the Regulations.

[24] Under paragraph 636(1)(m) and section 638, the target or the bidder, respectively, must provide all of the information known to them which holders of bid class securities and their professional advisers would reasonably require to make an informed decision whether to accept the bid.

[25] The analogies of these provisions should not be followed slavishly. For instance, where their requirements are modified under ASIC policy, comparable adjustments should be made, whether or not the relevant policies and class orders are mentioned in this Guidance Note. Although these disclosures are here described by analogy to several broadly corresponding documents, the Panel does not suggest that the required material should be repeated or that the Scheme Notice should contain a part corresponding to each of those documents.

[26] Paragraphs 636(1)(g) and (ga), as modified by Class Order 01/1543: see for example ASIC Policy Statement 60 at [60.7] to [60.8].

[27] The information that would be required by paragraphs 636(1)(a), (b), (d), (f), (h), (i), (j), (k) and (l) and clause 8308 (as relevant).

[28] Compare section 604.

[29] Compare section 628, paragraph 411(3)(a) and clause 8302.

from each of the directors of the responsible entity for the target trust as to how unitholders should vote and their reasons for the recommendation or why a recommendation is not made;[30]

(e) any voting exclusions or restrictions arising from [15.26]–[15.33];

(f) any transactions or benefits which are collateral to the Trust Scheme, especially if they involve unequal treatment of unitholders or affect the interests of the responsible entity of the target trust, its related bodies and their directors;[31]

(g) whether and how the scheme would not comply with any of the policies and protections of Chapter 6, if the transaction were a takeover bid on similar terms;[32] and

(h) undertakings:

(i) by the acquirer and target that they will give missing, corrective and updating information to the ASX by supplementary notice (with a copy to ASIC), as if sections 643 and 644 applied;[33] and

(ii) by the acquirer regarding collateral benefits that are referred to at [15.34]-[15.35].

15.24 The disclosures discussed above, and any other statements made on behalf of the acquirer, should be clearly identified in the Scheme Notice as being made by the acquirer. In addition, the Scheme Notice should state that the acquirer consents to those statements being included in the form and context in which they appear.

Independent expert

15.25 The Scheme Notice should also contain a report by an independent expert that states whether, in the expert's opinion, the terms of the Trust Scheme are fair and reasonable for the unitholders of the target trust, gives the expert's reasons for forming that opinion (taking into account prices paid by the acquirer for units previous to the Trust Scheme[34]) and sets out the particulars required by subsection 648A(3). This requirement is more stringent than the

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[30] Compare subsection 638(3) and paragraph 8301(a). This does not apply to the associates discussed at [15.32].

[31] Unitholders are entitled to be informed of any side deals, and to assume that there are none of which they have not been told.

[32] For this purpose, Chapter 6 standards are a benchmark, not a Procrustean bed. Disclosure of divergences from Chapter 6 standards was recommended in *Re Ranger Minerals Ltd* (2002) 20 ACLC 1769 at [45] (scheme of arrangement) and in *Nicron Resources NL v Catto* (1992) 8 ACSR 219 at 235 (reduction of capital).

[33] Cleary v Australian Co-operative Foods Ltd (1999) 32 ACSR 701.

[34] Paragraphs 636(1)(h) and (i) and subsection 636(2).

corresponding requirements for bids and schemes of arrangement,[35] but it is supported by practice, by the fact that every Trust Scheme is recommended by the responsible entity, which (because its management rights are affected) has an interest in the outcome different from that of any other unitholder, and by the absence of judicial or ASIC scrutiny.

Voting

15.26 A Trust Scheme generally requires a resolution under section 601GC to amend the trust deed, which requires a 75% majority of the votes cast. Section 601GC itself does not exclude any unitholder from voting, but certain statutory and ASX Listing Rules exclusions may apply, depending on the circumstances, to exclude some unitholders from voting.

15.27 A Transfer Scheme also requires a resolution under Item 7, which requires a 50% majority of the votes cast. Item 7 excludes vendors, acquirers and their respective associates from voting in favour of the resolution. They may vote against it.[36]

15.28 Members of a company vote on a members' scheme of arrangement in classes specified by the Court when it orders the scheme meetings. Members whose interests are affected in the same way by the scheme vote together. Since the scheme requires approval by each class, associates of the bidder cannot override non-associated holders to approve the scheme.

15.29 In the Panel's view, it would be unacceptable for a Trust Scheme to be approved by the votes of unitholders who are associated with the acquirer, if it was opposed by non-associated unitholders.[37] Since section 601GC itself does not provide for any votes to be excluded or for unitholders to vote by classes, the resolution itself needs to be conditional on it receiving approval by an appropriately constituted majority.

15.30 For this purpose, the resolution should be subject to a condition that it would have been passed even if any votes cast in favour[38] of the resolutions which were attached to the following units were not counted:[39]

(a) units held by the acquiring entity and its associates;[40]

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[35] Section 640 and clause 8303, which apply where the acquirer and the target have a shared director or the acquirer has over 30% voting power in the target (or, under clause 8303, in a class of voting shares in the target) i.e. where the target may not be sufficiently independent of the acquirer.

[36] On the meaning of the voting restriction, see the decision of Victorian Court of Appeal in *Village Roadshow Limited v Boswell Film GmbH* [2004] VSCA 16 at [15]-[18]. In any particular case, Item 7 will apply as modified by any ASIC instrument.

[37] Re Hellenic & General Trust Ltd, discussed in footnote 9.

[38] Compare item 7 of section 611, paragraphs 256C(2)(a) and257D(1)(a), *Re Tiger Investment Company Ltd* (1999) 33 ACSR 438, and *Village Roadshow Ltd v Boswell Film GmbH* [2004] VSCA 16.

[39] The Scheme Notice should mention these exclusions ([15.22(e) above] and say that these votes will be disregarded in determining whether the condition has been satisfied and hence whether the resolution is effective, if passed.

[40] Using the definition in section 12.

(b) units held by the responsible entity of the target trust and its associates (except related fund managers, discussed in [15.32]-[15.33]);

(c) units held by any person excluded from voting by section 253E or other provisions of the Act or the Listing Rules (these units should not be voted for or against the resolution, except as permitted by the Act or Rules); and

(d) units held by a person who is treated differently under the Trust Scheme from the general body of unitholders (but the agreement of any such person to the Trust Scheme needs to be obtained separately).

15.31 Since Item 7 and Part 5.1 allow interested parties and their associates to vote against a proposal, the Panel has no objection to these parties being allowed to vote against the resolutions to give effect to a Trust Scheme, except where the Act or the Listing Rules require them not to vote at all.

15.32 A unitholder that is a responsible entity, a superannuation fund trustee or a life insurance company (in relation to its statutory fund), and which holds units subject to fiduciary or statutory duties owed to persons other than the responsible entity and its group may be an associate of the bidder or of the responsible entity of the target, because one controls the other or they are under common control.[41] Such a unitholder may be exposed to a conflict between:

(a) its interests as a unitholder or its obligations to its investors; and

(b) interests or duties arising out of its relationship with the bidder or target.

In these cases, the Panel does not object to votes being cast by that unitholder in respect of those units that are held subject to the fiduciary or statutory duties, unless a specific prohibition applies. The Panel expects the unitholder to comply with section 601FC(3) or the covenants in subsection 52(2) of the *Superannuation Industry (Supervision) Act 1993*.

15.33 The votes of unitholders who have interests which are affected by a Trust Scheme other than interests they share with all unitholders (or who are associated with a bidder or target) should be separately recorded so that the impact of their votes on the overall result can be assessed by a Court or Panel which is considering whether to prevent implementation of the scheme. This applies particularly to related fund managers, mentioned in [15.32].

Collateral Benefits

15.34 The acquirer should undertake that either:

[41] Paragraph 12(2)(a)

(a) it will increase the consideration under the scheme to match the consideration it (or an associate) gives for units in the target it acquires outside the scheme; or

(b) neither it nor an associate will acquire any units outside the scheme from the date of the notice of meeting until the scheme is implemented or rejected.[42]

15.35 The acquirer should undertake that, subject to securities being retained by the acquiring entity, its related bodies and their nominees and to differential treatment of unitholders which is inherent in the scheme, fully disclosed and approved at meetings with appropriate voting exclusions, the scheme will (as far as practicable) comply with the following sections, as they would apply if the acquirer were making a takeover bid for the target on similar terms:

(a) subsection 618(1) and section 619 (scheme relating to all securities in the relevant class, or the same proportion of each holding, on the same terms);

(b) subsections 621(3), (4) and (5) as modified by ASIC CO 00/2338 (4-month price rule);[43] and

(c) sections 622, 623, 627, 628[44] and 651A (i.e. no escalators, collateral benefits or discriminatory conditions).

The date on which the Scheme Notice is sent to holders will be the date of the bid for the purposes of applying subsections 621(3), (4) and (5) and the first date of the bid period (which will end immediately after the meeting) for the purposes of applying section 623.

Conditions

15.36 It would generally be unacceptable for an acquirer to seek to rely on breach of a condition which would substantively contravene section 627 or section 629 if that condition were included in a takeover bid.

15.37 Trust Schemes must contain or be subject to a condition along the lines of subsection 625(3) where it would be applicable.

Enforceability

15.38 The acquirer should ensure that the undertakings that are discussed in this guidance note, and any other undertaking that is made by the acquirer in relation to the Trust Scheme, are capable of direct enforcement by the

[42] An adjustment of the scheme consideration (eg in response to a higher, rival bid) might require the documentation to be amended, depending on the circumstances. The time required to amend the documentation would limit how close to the meeting such an adjustment could occur.

[43] Cf, however, Re Ranger Minerals Ltd

[44] Including benefits given to the responsible entity of the target or a related body in exchange for giving up management rights over the target.

unitholders. For example, the acquirer might give those undertakings in a deed poll in favour of the unitholders .[45]

Recording telephone calls

15.39 Given the analogy between takeovers under Chapter 6 and Trust Schemes, it is appropriate that a similar approach be adopted between these mechanisms in relation to the issue of tape recording telephone calls.[46] In the case of Trust Schemes, the telephone calls that should be recorded are those made after the Scheme Notice has been sent until the scheme is implemented or rejected:

(a) by the acquirer or the responsible entity to unitholders (except wholesale holders)[47] to discuss the scheme; and

(b) by unitholders who are not wholesale holders to the acquirer or the responsible entity in response to an invitation to discuss the scheme.

Withdrawal and right not to proceed

15.40 In general, the Panel would be prepared to consider an application for a declaration of unacceptable circumstances based on the policy of paragraph 602(a) and sections 1041E, 1041F, 1041G and 1041H, if a person announced a Trust Scheme but failed to proceed with it without good reason, or could not meet their obligations under the Scheme. In doing so, the Panel would apply the policy underlying section 631 of the Act (to the extent it is applicable). It would not constitute unacceptable circumstances to withdraw from a Trust Scheme after it is announced, provided that:

(a) announcement of the withdrawal is timely;

(b) the parties comply with the policy of sections 602 and 1041E - 1041H (and section 631 by analogy); and

(c) the withdrawal is based on a prescribed occurrence (see subsections 652C(1) and (2)) or on a condition that had been clearly announced when the Trust Scheme was first announced (see the Panel's Guidance Note on Frustrating Actions for discussion of clear and early disclosure of conditions in takeovers and mergers).

Liability

15.41 In considering appropriate orders if unacceptable circumstances exist in relation to a Trust Scheme, a Panel may take into account the criminal and civil sanctions which would apply in respect of the notice of meeting for the

[45] *Re Archaean Gold NL* (1997) 15 ACLC 382.
[46]The Panel considers that the observations of Barrett J in *Re Hills Motorway Ltd (*2002) 43 ACSR 101 at [14]-[19] should be seen as applying in the circumstances of a court-supervised scheme and not to a Trust Scheme.
[47] As defined in subsection 648J(4) and Corporations Regulation 6.5.01.

Trust Scheme (see sections 1041E, 1041H, 1308, 1309). These provisions are broadly analogous to Chapter 6B (which applies to takeover bids but not Trust Schemes) but with no equivalent of the defences available in section 670D.

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