



Australian Government
Takeovers Panel

Guidance Note 15 –Trust scheme mergers

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Background

1. This guidance note has been prepared to assist market participants understand the Panel’s approach to mergers by listed trusts and managed investment schemes.
2. The examples are illustrative only and nothing in the note binds the Panel in a particular case.
3. Part 5.1¹ does not apply to a typical managed investment scheme.²

Trust schemes

4. The acquisition of interests in listed managed investment schemes is regulated by s606.³ Accordingly, the acquisition of more than 20% is prohibited unless it falls within s611 or ASIC grants a modification or exemption.

¹ Arrangements and Reconstructions. References are to the *Corporations Act 2001* (Cth) unless otherwise indicated

² It is not a company, foreign company or non-company to which Part 5.1 applies. Holders are typically not members or creditors of the trustee

³ Because of the application of chapter 6 to managed investment schemes: see s604. They are also regulated by chapter 5C

5. It is possible to merge managed investment schemes using a trust scheme, which is usually effected by amendment of the constitution following one or more votes of holders in the target. There are generally two types:
 - (a) a redemption scheme: this involves the merger of managed investment schemes by one (target) redeeming all the interests of holders except interests held by the other (acquirer).⁴ Cash or interests in the acquirer may be paid to the former holders in the target as consideration for the redemption. Under a redemption scheme, the target can be delisted before any units in it are issued to the acquirer. This avoids breach of s606 and the need for ASIC modification of item 7⁵ and
 - (b) transfer scheme: this involves the merger of managed investment schemes by the transfer to one (acquirer⁶) of all the interests in the other (target). Transfer schemes cannot be implemented without a vote under s611 item 7. Under item 7,⁷ votes cannot be cast in favour by persons proposing to acquire or dispose of interests, so this requires an ASIC modification or exemption.⁸

Policy

6. Redemption schemes and transfer schemes follow similar procedures. They have a similar effect on holders (perhaps apart from tax consequences) through different mechanisms. The Panel considers that the principles in s602 and the other policies and protections of Chapter 6 should apply to trust scheme mergers and looks at the effect of a scheme against them.
7. A trust scheme is similar to a member's schemes of arrangement under Part 5.1. It is as flexible as a members' scheme of arrangement and, like a scheme of arrangement, there are no detailed procedural requirements similar to Chapter 6. Unlike a members' scheme of arrangement, a trust scheme is not supervised in the same way by the court or ASIC.⁹

⁴ A variation would involve the target issuing units to the acquirer, which may be done after the target is delisted to avoid a breach of s606

⁵ If the managed investment scheme is "non-liquid" (s601KA(4)) compulsory redemption would generally not meet Part 5C.6 and would require ASIC relief (s601QA)

⁶ Responsible entity of the acquirer would hold the interests: s601FC(2)

⁷ Item 7(a). See also *Village Roadshow Ltd v Boswell Film GmbH* [2004] VSCA 16

⁸ ASIC RG 74.53

⁹ In some situations judicial advice is sought as part of a trust scheme

8. The Panel does not hold the view that a managed investment scheme can be taken over only under a bid. However, it does hold the view that trust schemes should be governed by similar policies and protections¹⁰ as in Chapter 6. This is similar to the policy that courts apply when considering section 411(17) in connection with a members' scheme of arrangement.¹¹ Moreover, as there is no court or ASIC supervision, more direct and prescriptive protections for holders should be provided.

Unacceptable circumstances

Jurisdiction

9. The Panel considers that trust schemes involving listed managed investment schemes come within its powers under Part 6.10 because they affect control of the target¹² and involve acquisitions of substantial interests: s657A(2).

Section 602

10. To reduce the likelihood of a trust scheme giving rise to unacceptable circumstances the following should be considered.

Differential treatment

11. A trust scheme may provide that holders are to be treated differently.¹³ If it does, the scheme would be likely to be contrary to s602(c) unless the different treatment was approved by properly informed and constituted meetings of holders (and this may require meetings of sub-groups of holders).
12. Differential treatment may also create a collateral benefit. To address this:
 - (a) the acquirer can undertake that neither it nor its associates will acquire interests outside the scheme or, if acquired, it will increase the scheme consideration to match¹⁴ and

¹⁰ This formulation reflects the relationship between the policies in s602 and the procedures and prohibitions in the remainder of Chapter 6 (except Part 6.10). See also *Catto v Ampol* (1989) 7 ACLC 717, per Kirby P at 720

¹¹ *Re Archaean Gold NL* (1997) 15 ACLC 382, *Catto v Ampol* (1989) 7 ACLC 717, *Nicron Resources Ltd v Catto* 10 ACLC 1186, *Re Ranger Minerals Ltd* [2002] 20 ACLC 1769

¹² Chapter 6 extends to listed managed investment schemes: s604

¹³ Relief by ASIC from s601FC(1)(d) may be necessary

¹⁴ This undertaking should apply at least from the date of the notice of meeting until the scheme is implemented or rejected. Note however, that adjustment of the scheme

- (b) the trust scheme should meet the following principles from Chapter 6:
 - (i) all interests in the relevant class, or the same proportion of each holding, should be acquired and on the same terms (excepting those already held or to be acquired on approved or exempted different terms)¹⁵
 - (ii) the 4-month minimum bid price rule¹⁶ and
 - (iii) no escalators, discriminatory conditions or unapproved collateral benefits.¹⁷

Disclosure

- 13. The notice of meeting should meet disclosure standards comparable (as applicable to the trust scheme¹⁸) to requirements under:
 - (a) the common law notice of meeting requirements¹⁹
 - (b) ss602(a) and 602(b)(i) and (iii)
 - (c) ss636 and 638²⁰
 - (d) s611 item 7²¹
 - (e) s411(3)²² and

consideration may require the documentation to be amended, limiting how close to the scheme meeting this could occur

¹⁵ ss618(1) and 619

¹⁶ ss621(3), (4) and (5) as modified by ASIC CO 00/2338. The date the scheme notice is sent to holders is treated as “the date of the bid” under s621

¹⁷ ss622, 623, 627, 628 and 651A. Benefits include those given to the responsible entity of the target or a related body in exchange for giving up management rights over the target. Benefits would require disclosure, and perhaps also approval if a related party transaction or listing rule requirement applied. See also s253E. The date the scheme notice is sent to holders is treated as the start of the “offer period” under s623. The “offer period” is treated as ending immediately after the meeting. As for s629, see paragraph 29(b)

¹⁸ The standards are not a Procrustean bed (ie one size fits all)

¹⁹ All information needed to fully and fairly to inform holders of the nature of the proposed resolutions and enable them 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

²⁰ All the information known to bidder (target) which holders of bid class securities and their professional advisers would reasonably require to make an informed decision whether to accept the bid

²¹ All the information (not already disclosed) 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

²² 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

- (f) if securities or managed investment products are offered, Part 6D.2 or Part 7.9.²³
- 14. The standards involve overlap and, of course, information need not (and should not) be repeated to satisfy each.
- 15. The standards would normally require the scheme notice to include:
 - (a) a statement of the effect of the scheme on the responsible entity of the target, its related bodies and their directors, if different to holders in general
 - (b) the voting intentions of the responsible entity of the target, its related bodies and their directors
 - (c) from each of the directors of the responsible entity for the target, either:
 - (i) a recommendation as to how holders should vote, giving the reasons or
 - (ii) the reasons why a recommendation is not made
 - (d) any voting exclusions
 - (e) any collateral transactions or benefits proposed or already provided and
 - (f) a statement of whether (and how) the scheme would not comply with Chapter 6 (were it a bid on similar terms).²⁴
- 16. As well, there should be proper disclosure of:
 - (a) securities being retained by the acquiring entity, its related bodies and their nominees
 - (b) any differential treatment of holders in the scheme
 - (c) how and why the classes have been constituted
 - (d) the reasons for the voting exclusions (if any) and
 - (e) the approvals required to implement the scheme.
- 17. Disclosures made on behalf of the acquirer should be clearly identified as such and state that the acquirer consents to those statements being included in the form and context in which they appear.

proposal which is within the knowledge of the directors and has not already been disclosed to the members. It must also include the information in Schedule 8 to the Corporations Regulations

²³ See ss636(1)(g) and (ga), Class Order 01/1543, ASIC RG 60 at [60.7-60.8]

²⁴ *Ranger Minerals* at [45] (scheme of arrangement); *Nicron* at 235 (reduction of capital)

18. If missing, corrective or updating information is required, it should be given to ASX by supplementary notice with a copy to ASIC as if ss643 and 644 applied.²⁵

Independent expert

19. The scheme notice should also contain a report by an independent expert.
20. Although an expert's report is only required in a bid (scheme) if the acquirer and the target have a shared director or the acquirer has over 30% voting power in the target (in a class),²⁶ the requirement in all cases for a trust scheme is supported by practice, the absence of judicial or ASIC scrutiny, and the fact that every trust scheme is recommended by the responsible entity of the target even though it has an interest because its management rights are affected.
21. The report should state:
- (a) whether, in the expert's opinion, the terms of the trust scheme are fair and reasonable for the holders of the target other than the acquirer and its associates²⁷
 - (b) the expert's reasons for forming that opinion (taking into account acquisitions by the acquirer and its associates in the past 4 months) and
 - (c) the particulars required by s648A(3).

Voting

22. A trust scheme generally requires a special resolution under s601GC to amend the constitution. No holders are excluded from voting by s601GC.
23. If the trust scheme is a transfer scheme, an ordinary resolution under s611 item 7 is also required. Acquirers and their associates are excluded by item 7 from voting in favour of the resolution (they may vote against it).²⁸ ASIC RG 74 expounds the principle that the vote should be only by those holders who will not gain from the transaction (other than as ordinary members) and who are not acting in concert with those who will.²⁹ This would capture vendors.

²⁵ *Cleary v Australian Co-operative Foods Ltd* (1999) 32 ACSR 701

²⁶ s640; Schedule 8 clause 8303

²⁷ It is also not uncommon for the expert to opine on whether the transaction is in the best interests of holders

²⁸ On the meaning of the voting restriction, see *Village Roadshow* at [15]-[18]

²⁹ ASIC RG 74.51

24. If other statutory or ASX Listing Rule approvals are required, voting exclusions may apply.
25. In a members' scheme of arrangement, for example, only members whose interests are affected by the scheme in the same way vote together. The Panel would expect the holders voting on a trust scheme to be constituted into appropriate classes with appropriate voting exclusions.
26. The trust scheme should be subject to a condition that it will only be approved if the resolution is passed disregarding any votes cast in favour³⁰ by:
 - (a) the acquirer and its associates
 - (b) the responsible entity of the target and its associates (other than related fund managers)³¹
 - (c) any person excluded from voting under another statutory or listing rule approval requirement (these units should only be voted against the resolution if permitted by the statute or listing rules) and
 - (d) any person who should be treated differently under the trust scheme from the general body of holders (agreement to the trust scheme by such person needs to be obtained separately).
27. Interests voted but disregarded, and interests of related fund managers voted, should be separately recorded so their impact on the result can be assessed.
28. Votes may be cast in favour³² in respect of interests held subject to fiduciary or statutory duties owed to 'independent' persons (eg, a responsible entity, a superannuation fund trustee or a life insurance company) even though the holder may be an associate of the acquirer. The Panel expects the holder to comply with s601FC(3) or s52(2) of the *Superannuation Industry (Supervision) Act 1993*.

Defeating conditions

29. Trust schemes should:

³⁰ Eg, ss256C(2)(a) and 257D(1)(a). See *Re Tiger Investment Company Ltd* (1999) 33 ACSR 438, *Village Roadshow*

³¹ Section 253E provides that the responsible entity and its associates cannot vote (other than on a resolution for the removal of the RE) if they have an interest other than as a member. The purpose of the provision is to remove the potential for a conflict of interest arising: see *Southern Wine Corporation Pty Ltd (in liq) v Perera* (2006) 33 WAR 174. This has been extended to include voting of units even though the effect is to disenfranchise other schemes that are members: *Everest Capital Ltd (as trustee of the EBI Income Fund) v Trust Company Ltd and Others* (2010) 77 ACSR 371, particularly at [114]

³² unless a specific prohibition applies

- (a) if applicable, include a condition along the lines of s625(3) and
- (b) not include a condition that would, in a bid, contravene ss627 or 629.

Enforceability

- 30. Any undertakings given in relation to a trust scheme to meet the policies and protections of Chapter 6 or Part 5.1 must be capable of direct enforcement by holders (eg, as in a deed poll in their favour).³³

Withdrawal and right not to proceed

- 31. Applying the policy of s631, the Panel expects that, if a person announces a trust scheme, the person will proceed and be able to meet their obligations under it.
- 32. However, it may not give rise to unacceptable circumstances to withdraw from a trust scheme after it is announced, if the withdrawal:
 - (a) is timely (and announced in a timely way) and
 - (b) is based on a prescribed occurrence³⁴ or a condition included when the trust scheme was first announced.

Remedies

- 33. The Panel has a wide power to make orders (including remedial orders) if a trust scheme gives rise to unacceptable circumstances, including cancelling agreements.

Publication History

First Issue 7 April 2004

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³³ *Archaean Gold*

³⁴ ss652C(1) and (2)