DRAFT GUIDANCE NOTE

LISTED TRUST AND MANAGED INVESTMENT SCHEME MERGERS

Legislation

1. Until March 2000, the takeovers provisions of the Corporations Act[1] (the **Act**) and its predecessors did not regulate the acquisition of interests in listed managed investment schemes (**MIS**)[2]. 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.

2. Before March 2000, takeovers of trusts were regulated by provisions in trust deeds and ASX Listing Rules, and also under the general law. 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. Decisions by unitholders to amend trust deeds, under powers given in the deed, have been supported by the courts where they did not amount to a 'fraud on the power'[3].

3. Mergers and takeovers of trusts through amending the trust deeds are referred to in this Guidance Note as "Trust Schemes". Although Part 5.1 does not apply to trusts or Trust Schemes there are enough similarities between Trust Schemes and Part 5.1 schemes to draw a useful analogy between them.

4. The CLERP Act expanded the scope of the takeovers regime to include listed trusts. This means that trusts can now be acquired by way of a Chapter 6 takeover bid. 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.

5. 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.

6. The Panel considers that Trust Schemes come within the Panel's powers under Part 6.10.

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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] *Cachia v Westpac Financial Services Ltd* (2000) FCA 161, 33 ACSR 572.

Transfer Schemes and relief from Item 7

7. Section 606 of the Act now effectively prevents two trusts merging by a Trust Scheme which involves one trust acquiring all of the issued units in another trust (**Transfer Scheme**), unless the acquisition of units falls within one of the exemptions in section 611 or ASIC grants an exemption or modification from section 606.

8. Item 7 of section 611 (**Item 7**) enables the disinterested share or unitholders of a company or trust to approve an acquisition of shares or interests which would otherwise be prohibited by section 606. The resolution is ineffective if any person proposing to acquire, or dispose of, the securities to which the resolution relates votes in favour of the resolution.

9. 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[4], no unitholder would be able to vote for the resolution under the test of Item 7. An ASIC modification would be required to allow unitholders to vote for an Item 7 resolution under which they would dispose of their units.

10. ASIC states in PS 74.53 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 being applied similarly to listed trusts.

Redemption Schemes

11. As an alternative to a Transfer Scheme, two trusts can merge by redeeming all of the units in the target trust other than the units held by the acquirer, delisting the target trust and paying cash or issuing units in the acquirer as consideration for the redemption (**Redemption Scheme**). In this case there is no acquisition of units in the target trust while it remains listed and therefore there is no breach of section 606 and no requirement for an ASIC modification of Item 7[5].

Parity between Transfer and Redemption Schemes

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[4] 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).

[5] 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).

12. Transfer Schemes and Redemption Schemes, while following different procedures, have broadly the same effect on unitholders. 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 have their units compulsorily acquired if the scheme is approved. Different mechanisms with similar effect should be governed by similar policy and requirements[6].

Allowable Mechanisms for Merging Trusts

13. The Panel does not subscribe to the view that the extension of the takeovers chapter of the Act to cover listed 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;

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

    (c) not be a device to avoid the operation of, or any of the provisions of, Chapter 6[7].

14. Mergers and takeovers of companies can be effected by way of members' schemes of arrangement under Part 5.1. There has been a line of cases since *Re Bank of Adelaide*[8] and flowing through *Re ACM Gold Ltd & Mt Leyshon Gold Mines Ltd*[9], *Re Stockbridge Ltd*[10], *Re Archaean Gold*[11] and *Re Advance Bank Australia Ltd*[12] in which the Courts have decided that Chapter 6 is not a regulatory Everest i.e. there is no indication that takeovers or mergers of companies may only be conducted through Chapter 6. ASIC's Policy Statements 60 and 142 also support this proposition.

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

[7] 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 a requirement of Chapter 6A, not Chapter 6.

[8] (1979) 4 ACLR 393, reflected in what is now item 17 of section 611.

[9] (1992) 7 ACSR 231

[10] (1993) 9 ACSR 637

[11] (1997) 15 ACLC 382

[12] (1996) 22 ACSR 476

15. The Panel considers that similar policy arguments apply to Trust Schemes if they are approved by an appropriate majority of properly informed unitholders.

Application of Section 602 Principles

16. Both Redemption Schemes and Transfer Schemes are acquisitions of substantial interests that come within the terms of s657A(2). It would constitute unacceptable circumstances 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) unitholders affected by a Trust Scheme did not all have reasonable and equal opportunities to participate in any benefits accruing to unitholders under the scheme.

    Other factors may also constitute unacceptable circumstances.

17. This Guidance Note sets out guidelines on applying the principles in section 602 to prevent unacceptable circumstances occurring in relation to a takeover of a trust under 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.

Parity between Trust Schemes and Schemes of Arrangement

18. The closest analogy to a Trust Scheme is a company members' scheme of arrangement under Part 5.1. As part of deciding whether unacceptable circumstances exist in relation to a Trust Scheme, the Panel will consider whether the relevant requirements of the Act and Regulations and ASIC policy for a members' scheme of arrangement have been applied by analogy as far as applicable in the specific circumstances.

19. 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.

20. Part 5.1 also contains a principle that a scheme of arrangement may not be used to enable any person to avoid compliance with a provision of Chapter 6 (subsection 411(17)). The Courts have applied this principle to support the application to schemes of arrangement of the policies of Chapter 6, adapted to fit the different mechanism of Part 5.1[13].

21. The cases and ASIC's Policy Statements indicate that the detailed requirements of Chapter 6 provide guidance in respect of good practice under the less fully articulated provisions covering schemes of arrangement and reductions of capital[14]. In the absence of court supervision, this specific guidance is particularly useful to fill in the detail of section 601GC, the general provision concerning the procedure for amending trust deeds.

Scrutiny of documents

22. The explanatory statement for a scheme of arrangement is examined by the Court and registered by ASIC. In contrast, there is no statutory requirement for a routine review of the notice of meeting and other documentation for a Trust Scheme[15]. The guidelines in this Guidance Note regarding voting, the provision of an independent expert's report, disclosure and compliance with the policies of Chapter 6 are designed to counterbalance this lack of statutory supervision of Trust Schemes.

Independent expert

23. The Panel expects, as does the market, that the documentation for a Trust Scheme will 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 and sets out the particulars required by subsection 648A(3).

24. If the acquirer has acquired units in the target trust in the 4 months prior to the target posting the notice of the scheme meeting, the expert should also say whether the value of the consideration which holders will receive under the scheme is equal in value to the highest consideration given by the acquirer for units in the target trust during that period.[16] Where non-cash consideration is being offered under the bid, the expert should value the non-cash consideration as at a date which is as near as possible to the date that the notice of meeting is posted. The valuation date may be up to 5 business days before the notice of meeting is posted, in accordance with the policy set out in ASIC PS 163.10.

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[13] *Archaean Gold, Re Ranger Minerals Ltd* (2002) 42 ACSR 582, 20 ACLC 1769, [2002] WASC 207

[14] *Catto v Ampol* (1989) 7 ACLC 717, *Nicron Resources Ltd v Catto* (1992) 10 ACLC 1186

[15] In the case of an Item 7 resolution, there is no express requirement for the company or responsible entity to lodge the meeting documents, however ASIC encourages companies to do so (PS 74.62)

[16] See subsection 636(2)

Voting

25. 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.

26. 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[17].

27. 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.

28. 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.[18] 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.

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

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

    (b) units held by the responsible entity of the target trust and its associates (except related fund managers, discussed in paragraph 31); and

    (c) units held by any person excluded from voting by section 253E or other provisions of the Act or the Listing Rules.

30. 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.

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[17] In any particular case, Item 7 will apply as modified by any ASIC instrument.

[18] *Re Hellenic & General Trust Ltd*, discussed in footnote 7.

31. 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 it is a related body. Such a unitholder may be exposed to a conflict between:

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

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

    In such 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 duty, 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*.

32. 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 the previous paragraph.

Disclosure

33. The notice of meeting for a Trust Scheme effectively corresponds with the explanatory statement for a scheme of arrangement, or both the bidder's statement and the target's statement for a takeover bid under Chapter 6. Accordingly, consistent with subparagraph 602(b)(iii), the notice of meeting should contain equivalent (although not necessarily identical) disclosure to that which would have been included in those documents.

34. In addition, the common law disclosure requirements apply to the notice of meeting; they require the notice of meeting to disclose all information as will fully and fairly inform holders of the nature of the proposed resolutions and such information as will enable holders to judge for themselves whether to attend the meetings and vote for or against the proposed resolutions. [19]

35. Similarly, under Item 7, unitholders must be given all the information known to the acquirer and the target that holders of interests under the target trust and their professional advisers would reasonably require to make an informed

[19] See *Bulfin's Limited v Bebarfald* (1938) 38 SR (NSW) 423 at 440; *Fraser v NRMA Holdings Limited* (1995) 55 FCR 452 at 466.

assessment whether to vote in favour of the scheme, which has not already been disclosed to the holders[20]. A notice which complies with these policies will be consistent with section 602(b)(iii).

36. In particular, as a subset of the general disclosure requirements for the notice of meeting for a Trust Scheme, the notice should contain:

    (a) a statement as to whether the requirements of Chapter 6 have been complied with, so far as they are capable of applying to a merger by a vote to amend a trust deed;

    (b) a statement of any material interests of the responsible entity of the target trust, its related bodies and their directors and a statement of the effect of the scheme (together with any collateral transactions) on those interests, so far as that effect is different from the effect on the interests of holders in general[21];

    (c) the respective voting intentions of the responsible entity of the target trust, its related bodies and their directors;

    (d) undertakings by the acquirer and target that they will give missing, corrective and updating information to the ASX by supplementary notice, as if sections 643 and 644 applied[22]. A copy of that supplementary notice should also be provided to ASIC; and

    (e) a clear recommendation as to how unitholders should vote from each of the directors of the responsible entity for the target trust and reasons for the recommendation or reasons why a recommendation is not made[23].

37. In addition, on the analogy of subsection 636(1) and paragraph 411(3), the notice of meeting should contain the following specific disclosure with such adaptations as are necessary because the target (and generally the acquirer) is a trust:

    (a) the information that would be required in a bidder's statement by paragraphs 636(1)(a), (b), (d), (f), (h), (i), (j), (k) and (l) (as relevant) if the acquirer were making a takeover bid for the target on similar terms; and

    (b) the information prescribed in Schedule 8 to the Regulations, with such adaptations as are necessary[24].

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[20] Item 7; compare paragraph 411(3)(b), section 638, paragraph 636(1)(m) and subsection 256C(4).
[21] Compare section 628, paragraph 411(3)(a) and clause 8302.
[22] *Cleary v Australian Co-operative Foods Ltd* (1999) 32 ACSR 701
[23] Compare subsection 638(3) and paragraph 8301(a).
[24] Compare paragraph 411(3)(b) and regulation 5.1.01.

38. Where securities or managed investment products are offered as part of the consideration, the Panel expects that the notice of meeting will also comply with either the prospectus provisions in Part 6D.2 or the product disclosure statement provisions in Part 7.9. This is analogous to the position in relation to takeover bids and schemes of arrangement[25].

39. The statements discussed above, and any other statements made on behalf of the acquirer, should be clearly identified in the notice of meeting as being made by the acquirer. In addition, the notice of meeting should state that the acquirer consents to the inclusion of those statements in the form and context in which they appear.

Collateral Benefits

40. Any collateral transactions, and especially ones that involve inequality of treatment, should be disclosed in the notice of meeting. Unitholders are entitled to be informed of any side deals, and to assume that there are none of which they have not been told.

41. The acquirer should undertake in the notice of meeting that it will either:

    (a) increase the consideration under the scheme to match consideration given for units in the target acquired outside the scheme, or

    (b) not acquire any units outside the scheme from the date of the notice of meeting until the scheme is implemented or rejected[26].

42. The notice of meeting should also contain statements that 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 – other than securities to be retained by the acquiring entity, its related bodies and their nominees);

    (b) subsections 621(3), (4) and (5) as modified by ASIC CO 00/2338 (4-month price rule)[27]; and

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

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[25] Paragraphs 636(1)(g) and (ga), see for example ASIC Policy Statement 60 at paragraphs [7] to [8].

[26] 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.

[27] *Re Ranger Minerals Ltd*

The date on which the notice of meeting is dispatched to holders should be treated as the date of the offer for the purposes of applying subsections 621(3), (4) and (5) and section 623.

Recording telephone calls

43. 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. In the case of Trust Schemes, the telephone calls that should be recorded are:

    (a) calls made by the acquirer or the responsible entity to unitholders to discuss the scheme; and

    (b) calls made by unitholders to the acquirer or the responsible entity in response to an invitation to discuss the scheme.

    All such telephone calls from the date that the Trust Scheme is announced until the scheme is implemented or rejected should be recorded.

Withdrawal and right not to proceed

44. 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).

Conditions

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

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

Enforceability

47. 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 unitholders. For example, the acquirer might give those undertakings in a deed poll in favour of the unitholders [28].

Liability

48. Chapter 6B, which prescribes civil liability and criminal sanctions for an entity or an individual in relation to a Chapter 6 takeover, does not apply to a Trust Scheme. However, a range of criminal and civil sanctions would apply in respect of the notice of meeting for the scheme (see sections 1041E, 1041H, 1308, 1309). The effect of these provisions is broadly analogous to Chapter 6B, but with no equivalent of the defences available in section 670D.

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[28] *Re Archaean Gold NL* (1997) 15 ACLC 382.