



ASIC

Australian Securities & Investments Commission

CONSULTATION PAPER 127

Schemes of arrangement: Statements under s411(17)(b)

December 2009

About this paper

This consultation paper seeks feedback on whether or not ASIC should give a statement under s411(17)(b) of the *Corporations Act 2001* if we are satisfied that a scheme meets our policy in Regulatory Guide 60 *Schemes of arrangement* (RG 60), but a member undertakes to us that they will object to the scheme on the basis that it has been proposed to avoid Ch 6 requirements.

About ASIC regulatory documents

In administering legislation ASIC issues the following types of regulatory documents.

Consultation papers: seek feedback from stakeholders on matters ASIC is considering, such as proposed relief or proposed regulatory guidance.

Regulatory guides: give guidance to regulated entities by:

- explaining when and how ASIC will exercise specific powers under legislation (primarily the Corporations Act)
- explaining how ASIC interprets the law
- describing the principles underlying ASIC's approach
- giving practical guidance (e.g. describing the steps of a process such as applying for a licence or giving practical examples of how regulated entities may decide to meet their obligations).

Information sheets: provide concise guidance on a specific process or compliance issue or an overview of detailed guidance.

Reports: describe ASIC compliance or relief activity or the results of a research project.

Document history

This paper was issued on 11 December 2009 and is based on the Corporations Act as at 11 December 2009.

Disclaimer

The proposals, explanations and examples in this paper do not constitute legal advice. They are also at a preliminary stage only. Our conclusions and views may change as a result of the comments we receive or as other circumstances change.

Contents

The consultation process	4
A Background	6
Statements under s411(17)(b)	6
Court's approval of a scheme	7
Objection by a member	7
Update of Regulatory Guide 60	8
B Our proposal on when we will give a statement under s411(17)(b)	9
Exercise caution and inform the court	9
C Regulatory and financial impact	12
Key terms	13

The consultation process

You are invited to comment on the proposals in this paper, which are only an indication of the approach we may take and are not our final policy.

As well as responding to the specific proposals and questions, we also ask you to describe any alternative approaches you think would achieve our objectives.

We are keen to fully understand and assess the financial and other impacts of our proposals and any alternative approaches. Therefore, we ask you to comment on:

- the likely compliance costs;
- the likely effect on competition; and
- other impacts, costs and benefits.

Where possible, we are seeking both quantitative and qualitative information. We are also keen to hear from you on any other issues you consider important.

Your comments will help us develop our policy on schemes of arrangement and when ASIC will issue a statement under s411(17)(b). In particular, any information about compliance costs, impacts on competition and other impacts, costs and benefits will be taken into account if we prepare a Business Cost Calculator Report and/or a Regulation Impact Statement: see Section C Regulatory and financial impact, p. 12.

Making a submission

We will not treat your submission as confidential unless you specifically request that we treat the whole or part of it (such as any financial information) as confidential.

Comments should be sent by 29 March 2010 to:

Claire LaBouchardiere
Senior Lawyer, Corporations
Australian Securities and Investments Commission
Level 18, No. 1 Martin Place
Sydney NSW 2000
facsimile: (02) 9911 5231
email: claire.labouchardiere@asic.gov.au

What will happen next?

Stage 1	11 December 2009	ASIC consultation paper released
Stage 2	29 March 2010 April 2010	Comments due on the consultation paper Updating of regulatory guide
Stage 3	May 2010	Regulatory guide released

A Background

Key points

The court must not approve a scheme of arrangement unless it is satisfied the scheme has not been proposed to avoid Ch 6 requirements, or ASIC gives a statement under s411(17)(b) that it has no objection to the scheme.

If ASIC gives a statement under s411(17)(b), the court is not required to consider whether a scheme has been proposed to avoid Ch 6 requirements.

In the past, where ASIC has been satisfied that a scheme meets our policy in Regulatory Guide 60 *Schemes of arrangement* (RG 60), but a member has undertaken to us that they will object to the scheme on the grounds that it has been proposed to avoid Ch 6 requirements, we have been cautious in giving a statement under s411(17)(b) as it may effectively disenfranchise the member making the objection.

We are reviewing our approach to giving statements under s411(17)(b) in these circumstances in conjunction with an update to our policy on schemes.

Statements under s411(17)(b)

- 1 The *Corporations Act 2001* (Corporations Act) provides that the court must not approve a scheme of arrangement unless:
 - (a) it is satisfied that the scheme has not been proposed for the purpose of enabling any person to avoid the operation of any of the provisions of Ch 6; or
 - (b) there is produced to the court a statement in writing by ASIC stating that ASIC has no objection to the scheme (see: s411(17)(b)). However, the court need not approve a scheme merely because ASIC provides such a statement.
- 2 ASIC is required under s411(17)(b) to decide whether we have any objection to the scheme. We are not required to determine or prove the purpose of the scheme. Our policy on when we will provide a statement under s411(17)(b) is set out in RG 60.
- 3 The primary question we will consider under s411(17)(b) is whether, having regard to the principles in s602 for takeovers, members are adversely affected by the transaction being implemented by way of a scheme rather than a takeover bid under Ch 6. For example, we will consider whether the standard of disclosure to, and treatment of, all members is equivalent to the standard that would be required by the disclosure requirements and the

principles in s602 relating to a takeover bid. We will not consider whether the purpose of the scheme is to avoid making the acquisition under Ch 6 for reasons that do not adversely affect members.

- 4 We will not provide a statement under s411(17)(b) until the second (or confirmation) court hearing because we will not be in a position to advise the court properly until we have had an opportunity to observe the entire scheme process.
- 5 We recognise, however, that the proponents of a scheme may reasonably wish for an indication of our views before committing to the expense of calling a meeting or printing the scheme documentation. We will therefore provide a letter before the first hearing indicating whether we propose to make submissions to the court, or intervene to oppose the scheme, at the first hearing.

Court's approval of a scheme

- 6 The courts have held that they are not required to consider whether a scheme has been proposed to avoid Ch 6 requirements if ASIC has provided a statement under s411(17)(b).

Note: See *Re GIO Australia Holdings Ltd* [1999] NSWSC 1276; *Re Hibernian Friendly Society (NSW) Ltd* (2002) 44 ACSR 2006; *Re Citect Corporation Ltd* (2006) 56 ACSR 663; *Re Coles Group Ltd (No 2)* [2007] VSC 523).

- 7 However, the courts have held that even if ASIC does provide a statement under s411(17)(b), an avoidance purpose is still a discretionary factor the court may consider when deciding whether to approve a scheme. The court will then weigh up the avoidance purpose against the fact that ASIC is of the view that members are not adversely affected by the transaction being implemented by way of a scheme rather than takeover bid. This may counter any adverse inference that would have been drawn by the existence of an avoidance purpose.

Note: See *Re Coles Group Limited (No 2)* [2007] VSC 523.

Objection by a member

- 8 Members have the right to object to a scheme at the second (or confirmation) court hearing. Sometimes, before the time that ASIC would usually give a statement under s411(17)(b), a member will undertake to ASIC that they will object to a scheme on the grounds that it has been proposed to avoid Ch 6 requirements.

- 9 In the past, we have taken the view that if a member undertakes to us that they will object to a scheme on the grounds that it has been proposed to avoid Ch 6 requirements, we should be cautious in providing a statement under s411(17)(b), even if we are satisfied that the scheme meets our policy in RG 60. This is because in providing that statement ASIC may effectively disenfranchise the member raising the objection, as the court is no longer required to consider whether a scheme has been proposed to avoid Ch 6 requirements. However, this view has not been part of ASIC's published policy.
- 10 ASIC is of the view that it is open to us to withhold a statement under s411(17)(b) in these circumstances until the objection has been considered by the court. This is consistent with our policy of not providing a statement under s411(17)(b) until we have had an opportunity to observe the entire scheme process.
- 11 Of course, if we are not satisfied that a scheme meets our policy in RG 60 (either following our review or because of matters brought to our attention by an objecting member), we will not give a statement under s411(17)(b) regardless of whether or not there is an objecting member. The real issue is where ASIC is satisfied that the scheme meets our policy in RG 60, but there is a member who intends to object on the grounds that the scheme has been proposed to avoid Ch 6 requirements. In practice, this situation does not often arise.

Update of Regulatory Guide 60

- 12 We have recently published an updated version of RG 60. In the updated guide, we note that we are consulting on whether we should give a statement under s411(17)(b), where we are satisfied that a scheme meets our policy in RG 60, but a member undertakes to us that they will object on the grounds that the scheme has been proposed to avoid Ch 6 requirements.
- 13 This is the purpose of this consultation paper.

B Our proposal on when we will give a statement under s411(17)(b)

Key points

ASIC is reviewing our policy on giving a statement under s411(17)(b) where we are satisfied that a scheme meets our policy in RG 60 but a member undertakes to us that they will object on the grounds that the scheme has been proposed to avoid Ch 6 requirements.

We seek feedback on the approach we should take in these circumstances.

Exercise caution and inform the court

Proposal

- B1** Where ASIC is satisfied that a scheme meets our policy in RG 60, but a member undertakes to us that they will object on the grounds that a scheme has been proposed to avoid Ch 6 requirements, we propose to:
- (a) exercise caution in giving a statement under s411(17)(b); and
 - (b) if we decide to withhold a statement, inform the court about the outcome of our review of the explanatory statement and the scheme.

Your feedback

B1Q1 If ASIC is satisfied that a scheme meets our policy in RG 60, but a member undertakes to us that they will object on the grounds that a scheme has been proposed to avoid Ch 6 requirements, which of the following approaches do you think we should take and why:

- (a) withhold a statement under s411(17)(b)?
- (b) withhold a statement under s411(17)(b), but inform the court about the outcome of our review of the explanatory statement and the scheme?
- (c) exercise caution in giving a statement under s411(17)(b)?
- (d) exercise caution in giving a statement under s411(17)(b), and if we decide to withhold a statement, inform the court about the outcome of our review of the explanatory statement and the scheme?
- (e) give a statement under s411(17)(b)?

Your feedback (continued)

B1Q2 If ASIC were to exercise caution in giving a statement under s411(17)(b), what factors do you think that we should take into account in deciding whether or not to give a statement? For example, do you think we should take into account:

- (a) our views of the strength of the member's objections (in other words, should ASIC be more inclined to give a statement if the member's objections appear vexatious)?
- (b) the level of member support of the scheme (in other words, should ASIC be less inclined to give a statement if the scheme has been approved by members by a narrow margin)?
- (c) any other factors?

Rationale

- 14 The rationale for ASIC withholding a statement under s411(17)(b) is that this will ensure that the member's objections about Ch 6 avoidance will not be given less weight than might be the case if ASIC provided a statement. Without a statement, the court can only approve the scheme if it is satisfied that the scheme has not been proposed to avoid Ch 6 requirements.
- 15 In contrast, if ASIC gives a statement under s411(17)(b), the court can, but need not, take into account the member's objections about Ch 6 avoidance in its overall discretion in approving the scheme. If it does take into account those objections, the court will need to balance the member's objections against ASIC's views in the statement.
- 16 The rationale for giving a statement under s411(17)(b), or withholding a statement but informing the court about the outcome of our review of the explanatory statement and the scheme, is that in both cases the court will have the benefit of our review and our views on whether a member is disadvantaged by the transaction being implemented by way of a scheme as opposed to a takeover bid. If we give a statement under s411(17)(b), the court can, but need not, take into account the member's objections about Ch 6 avoidance in its overall discretion in approving the scheme. If we withhold a statement, the court can only approve the scheme if it is satisfied that the scheme has not been proposed to avoid Ch 6 requirements.
- 17 Rather than giving or withholding a statement under s411(17)(b) in all circumstances, an alternative approach is for ASIC to exercise caution in deciding whether or not to give a statement. This involves weighing up all relevant factors before making a decision about whether or not to give a statement. These factors include:

- (a) our perception of the strength and relevance of the member's objections about Ch 6 avoidance (in other words, we will be more inclined to give a statement if the member's objections appear vexatious); and
- (b) the level of support for the scheme (in other words, we will be less inclined to give a statement if the scheme has been approved by members by a narrow margin).

18 However, the disadvantages of this approach are that:

- (a) scheme proponents and participants will not have certainty of knowing what approach ASIC will take if there is an objecting member; and
- (b) it may be difficult for us to identify and assess the relevant factors in deciding whether or not to give a statement under s411(17)(b) (e.g. the strength and relevance of the member's objections).

In any case, it is arguably for the court, not ASIC, to assess the strength of a member's objections.

19 Some scheme proponents may be concerned that if ASIC's published policy is to withhold a statement under s411(17)(b) until a member's objections have been resolved by the court, it will encourage 'greenmailers' (i.e. members who object to a scheme on value grounds) to manufacture arguments that a scheme has been proposed to avoid Ch 6 requirements. We think that if this is the case, the court can quickly dismiss such objections.

20 Another option is for ASIC not to formalise our policy at this stage. The key advantage of this approach is that it would allow our policy to be informed by actual circumstances in which members wished to raise Ch 6 objections. The key disadvantage of this approach would be uncertainty for scheme proponents and participants.

C Regulatory and financial impact

- 21 In developing the proposals in this paper, we have carefully considered their regulatory and financial impact. On the information currently available to us we think they will strike an appropriate balance between:
- (a) giving certainty to scheme proponents; and
 - (b) ensuring that objecting members are not disenfranchised.
- 22 Before settling on a final policy, we will comply with the requirements of the Office of Best Practice Regulation (OBPR) by:
- (a) considering all feasible options;
 - (b) if regulatory options are under consideration, undertaking a preliminary assessment of the impacts of the options on business and individuals or the economy;
 - (c) if our proposed option has more than low impact on business and individuals or the economy, consulting with OBPR to determine the appropriate level of regulatory analysis; and
 - (d) conducting the appropriate level of regulatory analysis, that is, complete a Business Cost Calculator report (BCC report) and/or a Regulation Impact Statement (RIS).
- 23 All BCC reports and RISs are submitted to the OBPR for approval before we make any final decision. Without an approved BCC report and/or RIS, ASIC is unable to give relief or make any other form of regulation, including issuing a regulatory guide that contains regulation.
- 24 To ensure that we are in a position to properly complete any required BCC report or RIS, we ask you to provide us with as much information as you can about our proposals or any alternative approaches:
- (a) the likely compliance costs;
 - (b) the likely effect on competition; and
 - (c) other impacts, costs and benefits.

See 'The consultation process'.

Key terms

Term	Meaning in this document
ASIC	Australian Securities and Investments Commission
Ch 6	A chapter of the Corporations Act (in this example, numbered 6)
Corporations Act	<i>Corporations Act 2001</i> , including regulations made for the purposes of that Act
proponents	The parties proposing the scheme
Pt 5.1 (for example)	A part of the Corporations Act (in this example, numbered 5.1)
s411 (for example)	A section of the Corporations Act (in this example numbered 411)
scheme	A compromise or arrangement that gives rise to a scheme of arrangement under Pt 5.1 of the Corporations Act
statement or statement under s411(17)(b)	A statement in writing by ASIC under s411(17)(b) stating that ASIC has no objection to a particular scheme