



**ASIC**

Australian Securities & Investments Commission

**REPORT 254**

# **Response to submissions on CP 127 Schemes of arrangement: Statements under s411(17)(b)**

September 2011

## **About this report**

This report highlights the key issues that arose out of the submissions received on Consultation Paper 127 *Schemes of arrangement: Statements under s411(17)(b)* (CP 127) and details our responses to those issues.

### 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.

### Disclaimer

This report does not constitute legal advice. We encourage you to seek your own professional advice to find out how the Corporations Act and other applicable laws apply to you, as it is your responsibility to determine your obligations.

This report does not contain ASIC policy. See Regulatory Guide 60 *Schemes of arrangement* (RG 60).

## Contents

<b>A</b>	<b>Overview/Consultation process</b> .....	<b>4</b>
	Responses to consultation .....	4
<b>B</b>	<b>When we will give a statement under s411(17)(b)</b> .....	<b>5</b>
	Our proposal .....	5
	Summary of responses .....	5

## A Overview/Consultation process

- 1 In Consultation Paper 127 *Schemes of arrangement: Statements under s411(17)(b)* (CP 127), we consulted on whether or not ASIC should give a statement under s411(17)(b) of the *Corporations Act 2001* (Corporations Act) 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 grounds that it has been proposed to avoid Ch 6 requirements.
- 2 We proposed that in these circumstances, we will:
  - (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.
- 3 This report highlights the issues that arose out of the submissions received on CP 127 and our responses to those issues.

### Responses to consultation

- 4 We received two responses to CP 127. These were from Minter Ellison Lawyers and the Law Council of Australia. We are grateful to the respondents for taking the time to send us their comments. Copies of these submissions are on the ASIC website at [www.asic.gov.au/cp](http://www.asic.gov.au/cp) under CP 127.
- 5 Neither of the submissions agreed with our proposal in CP 127. Both were of the view that ASIC should give a statement under s411(17)(b) in the circumstances described above. However, they noted that the situation might be different where the objection relates to the matters ASIC takes into account when deciding whether to give a statement under s411(17)(b).
- 6 In light of the submissions, we have not adopted our original proposal. We have instead updated our guidance in RG 60 to provide that if an objection relates to the matters that we take into account when deciding to give a statement under s411(17)(b), we will consider the objection before deciding whether to give the statement. For more detail, see the remainder of this report.

## B When we will give a statement under s411(17)(b)

### Key points

Based on feedback to our consultation, we have not adopted our original proposal in CP 127.

Instead, we have updated our guidance in RG 60 to provide that if an objection relates to the matters that we take into account when deciding whether to give a 'no objection' statement under s411(17)(b), we will consider the objection before deciding whether to give a statement.

### Our proposal

- 7 In CP 127, we proposed that where we are satisfied that a scheme meets our policy in RG 60, but a member undertakes to us that they will object to the scheme on the grounds that it has been proposed to avoid Ch 6 requirements, we will:
- (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.
- 8 The rationale for our proposal to withhold a statement under s411(17)(b) in these circumstances was that this will ensure that the member's objection 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.
- 9 In contrast, if ASIC gives a statement under s411(17)(b), the court can, but need not, take into account the member's objection about Ch 6 avoidance in its overall discretion in approving the scheme. In other words, our concern was to ensure that objecting members were not disenfranchised.

### Summary of responses

- 10 Neither of the submissions agreed with our proposal in CP 127. Both submitted that ASIC should give a statement under s411(17)(b) in the circumstances set out in paragraph 7.

- 11 The main reasons for the respondents' view are summarised below:
- (a) It was submitted that our proposed approach was inconsistent with the policy in RG 60. RG 60 states that ASIC does not prefer takeovers over schemes and will give a 'no objection' statement under s411(17)(b) where we are satisfied that members are not adversely affected by a transaction being implemented by way of a scheme as opposed to a takeover. To withhold a 'no objection' statement under s411(17)(b) on the basis of a member's objection on the grounds of Ch 6 avoidance, rather than the question of whether RG 60 had been complied with, would therefore be inconsistent with this policy.
  - (b) ASIC must make a determination one way or another; it cannot simply abdicate. As a matter of policy, ASIC must always give a 'no objection' statement unless we decide to oppose the scheme at the second court hearing. This position was submitted to be consistent with the recommendation by the Corporations and Markets Advisory Committee in their report dated December 2009 that s411(17)(a) be repealed.
  - (c) By giving a 'no objection' statement under s411(17)(b), ASIC will not disenfranchise objectors as the objector can raise the issue at the second court hearing. The court can still take into account avoidance purposes as part of its overall discretion. The only consequence if ASIC gives a statement is that the court is no longer mandated by s411(17)(a) to refuse to approve the scheme if an avoidance purpose exists.
  - (d) Our proposed approach provides an opportunity for greenmailers to block a scheme after the parties have incurred significant time and costs.
  - (e) Our proposed approach of appearing at the second court hearing to tell the court the 'outcome of our review of the explanatory statement and the scheme' is unsatisfactory and the purpose of doing so is unclear as it does not affect the court's ability to approve the scheme under s411(17)(b).
  - (f) Our proposed approach is unsatisfactory because if the 'no objection' statement is withheld, the court is mandated by s411(17) to refuse to approve the scheme if it finds a purpose on the part of any person of avoiding any provision of Ch 6.
- 12 Both respondents acknowledged the situation may be different if, before the second court hearing, an objector made a factual case which had not been previously known to us and which raised doubt about whether the scheme does in fact comply with RG 60. In those circumstances, the respondents submitted that ASIC may wish to hear the objector's evidence before making a final decision on a statement.

*ASIC's response*

We have not adopted our original proposal in CP 127. Instead, we have updated our guidance in RG 60 to provide that where we are satisfied that a scheme meets our policy in RG 60, we will not withhold a 'no objection' statement under s411(17)(b) merely because a member intends to object to a scheme.

However, if the member's objection relates to the matters that we take into account when deciding to give a 'no objection' statement under s411(17)(b), we will consider the evidence of the objector before deciding whether to give such a statement. The matters that we take into account are set out in RG 60 (e.g. whether members are adversely affected by the transaction being implemented by way of scheme instead of takeover, or there are public policy concerns).

Our updated guidance in RG 60 is relevant not only to whether we will give a 'no objection' statement under s411(17)(b), but also to whether we would give a letter of indication of intent under s411(17)(b) (before the first court hearing) and what we might say in that letter.