Hamilton Locke

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We refer to Consultation Paper 326 (the **Consultation Paper**) regarding Chapter 6 relief for share transfers using s444GA of the Corporations Act (s444GA Control Transaction) released in January 2020, and ASIC's call for submissions to the proposals therein. Hamilton Locke provides the below responses holistically to Proposals B1, B2 and B3 of the Consultation Paper.

Comments on current proposals

It is positive the regulator will no longer require an Independent Expert Report (**IER**) be prepared on both a *going concern* and *liquidation* basis. Further there should be no issue with the suggestion the materials are provided to the shareholders in advance of the section 444GA hearing. This will allow interested parties the opportunity to decide whether to appear (noting to date no section 444GA application has been successfully challenged by shareholders).

Our view

Based on our experience (including in *Re Mirabela Nickel Ltd*[1] (***Mirabela***) and in the sale of Black Oak Minerals Limited (Black Oak) to Ramelius Resources Limited), the following issues in our view require the most in-depth analysis and exploration by ASIC, especially in light of the objectives of Part 5.3A of the Act:

1. Whether the IER should be prepared in accordance with RG 111 (i.e. what level of information is required to be included and methodology adopted)?

2. Whether the IER should be prepared in accordance with RG 112 (i.e. precluding the administrator or another member of the administrators' firm or party associated with the firm from being the independent expert)?

The position adopted on these two questions will, in our experience, likely have a direct impact on the cost, time and success of any proposed 444GA Control Transaction. This in turn may impact the return available to creditors and the ultimate survival of the underlying business.

[1] [2014] NSWSC 836.

Independence

ASIC has expressed some concerns around bias (or at least the perception of it) if the IER is prepared by the administrators themselves.

Administrators are required, pursuant to section 436DA of the Act and the ARITA Code, to prepare a '*Declaration of Independence, Relevant Relationships and Indemnities*' (**DIRRI**) to establish independence shortly after appointment. Creditors and interested parties have an opportunity to raise concerns about independence at the first meeting of creditors or otherwise following the provision of the DIRRI.

We are not convinced an administrator's independence is somehow compromised or altered as a result of needing to undertake steps (including by preparing an IER) to implement a 444GA Control Transaction approved by creditors. Further, shareholders have and should be encouraged to take comfort from the fact they are owed duties by the administrators in their capacity as fiduciaries and officeholders.

Interestingly, ASIC itself acknowledges, in previous examples involving the granting of relief, an IER prepared by administrators was acceptable.

In the decision of Mirabela, for example, ASIC:

- consented to the administrators preparing an IER for the review of shareholders; and
- were satisfied their engagement did not affect their independence by preparing it.

Significantly, the Court saw no reason to interfere with ASIC's assessment. In this instance, allowing the administrators to prepare the IER resulted in cost-savings and a greater return to creditors.

Our suggested alternative approach

In our view there would be merit in ASIC exploring an alternative approach involving a regulatory guide which imposes additional information requirements for an administrator's report to be prepared pursuant to Rule 75-225(3) of the *Insolvency Practice Rules (Corporations) 2016* (**Report to Creditors**). Such additional requirements would only be required in circumstances where a DOCA proposal is put forward which involves a 444GA Control Transaction.

In such circumstances, the guidelines could stipulate the Report to Creditors ought to contain a valuation analysis which complies with or substantially complies with Regulatory Guide 111, in addition to ordinarily applicable standards.

In complying with such a requirement, administrators could elect, if appropriate and depending on the nature of the assets, to engage third party experts to assist in the preparation of that section of the report. Any such engagement would be disclosed, and the purpose of the engagement would be explained in the report. We appreciate this is not a perfect solution, however in our view, it balances the potentially competing interest of furthering Part 5.3 of the Act (i.e. maximising return to creditors or facilitating a continuation of the business) with protecting shareholders interests.

The Report to Creditors would then be issued to creditors in the ordinary course prior to the second meeting of creditors as well as to shareholders and ASIC (along with any required explanatory materials in due course).

The focus on a more robust Report to Creditors would have obvious benefits, including:

1. a streamlined process;
2. avoiding additional costs associated with a separate and stand-alone IER;
3. reduced likelihood of duplicating information across separate reports;
4. reduced delays often associated with commissioning a separate IER;

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5. ease of access to information for all parties (including unsophisticated investors); and
6. facilitation of efficient and effective corporate restructures.

If you would like to discuss further, please contact me via [redacted].

Yours faithfully

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