MinterEllison

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Australian Securities and Investments Commission
Level 5, 100 Market Street
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Dear Sirs

Submissions in response to consultation paper 326 on Chapter 6 relief for share transfers using s444GA of the Corporations Act

We refer to ASIC Consultation Paper 326: Chapter 6 relief for share transfers using s444GA of the Corporations Act (**Consultation Paper**) inviting feedback about the circumstances in which ASIC will grant relief from Ch 6 for share transfers using s444GA of the Corporations Act. MinterEllison thanks ASIC for the opportunity to make these submissions.

MinterEllison's position is that valuations on a 'going concern' basis are irrelevant in circumstances where the only alternative for an insolvent company is liquidation. We agree with ASIC's proposal that valuations for the purpose of s444GA applications should be prepared solely on a liquidation basis in such circumstances.

MinterEllison does not agree with ASIC's position that an independent expert report should be required to be prepared in accordance with RG 112, nor that the administrator (or another member of the administrator's firm or party associated with their firm) should be precluded from being the independent expert.

We set out below MinterEllison's responses to the specific questions posed by ASIC in the Consultation Paper.

Please note that the views expressed in these submissions do not represent the views of MinterEllison's clients.

Responses to list of questions

B1Q1 – Do you agree that ASIC should require an IER to be prepared in accordance with RG 111 and that the IER and explanatory materials should be provided to shareholders before the hearing? If not, why not?

We agree with ASIC's proposal to include guidance in RG 6 about when ASIC will grant s606 relief to facilitate a s444GA transfer where the IER is prepared in accordance with RG 111, because we consider that:

(a) as the purpose of the administrator's report is to enable creditors to make an informed decision about the company's future, the administrator's report may not necessarily contain sufficient information to assist shareholders to make informed decisions about whether a proposed s444GA transfer would unfairly prejudice their interests; and

(b) an IER prepared in accordance with RG 111 provides a framework for the content of an expert report that is well suited to assisting shareholders to make informed decisions about whether a proposed s444GA transfer would unfairly prejudice their interests.

In the context of securities of a company to which Ch 6 applies, ASIC's proposal is consistent with market practice of providing an IER and explanatory materials to shareholders before the s444GA hearing so that they can consider whether to object to the application on a fully informed basis notwithstanding that they are not being given a vote on the proposed s444GA transfer.

B1Q2 – Are there situations where you consider the IER might be unnecessary? If so, please outline the circumstances.

We note the arguments against requiring an IER in addition to the administrator's report to creditors at paragraph 26 of the Consultation Paper. However, on balance, we agree with the arguments in favour of requiring an IER at paragraph 27 of the Consultation Paper.

B1Q3 – Do you consider that the administrator's report to creditors could be used instead of an IER? If so, on what basis? If not, why not?

We do not consider that the administrator's report to creditors could be used instead of an IER to satisfy ASIC's regulatory requirements in respect of an application for relief from relevant provisions of Ch 6 of the Corporations Act, because the administrator's report to creditors does not necessarily include a valuation of the company including any residual value in its shares prepared in respect of a proposed s444GA transfer.

An IER would contain a valuation of the company including any residual value in its shares prepared in respect of a proposed s444GA transfer.

We consider that it is important that the insolvent company's shareholders be provided with such a valuation because it:

(a) provides further information to the insolvent company's shareholders about the value of their shareholdings in a greater level of detail than the administrator's report to creditors; and

(b) provides a valuation of the shares for the purpose of assisting ASIC in determining an application for s606 relief.

B2Q1 – Do you agree with our proposal that an IER should only be prepared on a liquidation basis? If not, why not?

We strongly agree with ASIC's proposal that an IER should only be prepared on a liquidation basis as there is no basis for undertaking a valuation of the insolvent company on a 'going concern' basis where the insolvent company is not a going concern because its only alternative is liquidation. As noted at

paragraph 20 of the Consultation Paper, the Courts have specifically stated that they do not require a going concern valuation.[1]

B2Q2 – Should an independent expert consider, when performing a liquidation valuation, potential recoveries from voidable transactions and other matters as a result of the administrator's investigations? If not, why not?

Part 5.7B of the Corporations Act deals with recovering property or compensation for the benefit of creditors of an insolvent company[2]. We do not agree that the independent expert should necessarily consider recoveries from voidable transactions under Pt 5.7B and other matters as a result of the administrator's investigations, where such recoveries will solely be for the benefit of *creditors* and not shareholders in circumstances where the company is otherwise insolvent and will be put into liquidation.

This is not to say that there may be scenarios in which liquidation style recoveries may result in a return to creditors of 100 cents in the dollar, which, after the payment of post liquidation interest on creditor claims under s563B of the Corporations Act, may ultimately result in a return to shareholders.

In cases where recoveries may result in a return to shareholders, the independent expert should consider such recoveries, however the independent expert will need to carefully consider whether there is a reasonable basis for expecting that such potential recoveries will become actual recoveries.

In each case, the opinion of the expert needs to address the unfairness (or otherwise) of the prejudice which will be suffered by the members from the proposed transfer of their shares.

B2Q3 – Do you consider that a 'going concern' valuation of the business is relevant or useful for a company in administration? If so, why?

No.

B2Q4 – If you agree with the previous question, should ASIC refuse relief where the going concern value shows the shares have some value?

Not applicable.

B2Q5 – Are there other factors that we should take into account when considering whether to grant relief?

No.

B3Q1 – If we proceed with Proposal B1, we propose that the IER should be prepared consistent with the principles in RG 112. In our view, this would preclude the administrator (or another member of the administrator's firm or party associated with their firm) being the independent expert. Do you agree with this view? If not, why not?

We do not agree with ASIC's proposal that an IER for the purposes of proposed s 444GA transfers should be prepared consistent with the principles in RG 112, because we consider that:

(a) the administrator may act as an independent expert, provided that they express the view that their engagement as administrators did not impair their independence in preparing the expert report;

(b) it is consistent with market practice that the administrator can prepare the IER in respect of a proposed s444GA transfer, in appropriate circumstances;[3]

(c) the administrator and their firm are best placed to prepare the IER, because they already have the information needed to undertake the task, readily to hand; and

[1] See e.g. *Re Ten Network Holdings Ltd (subject to a deed of company arrangement) (recs and mgrs apptd)* (2017) 123 ACSR 253 at [72]; *Re Paladin Energy Ltd (subject to deed of company arrangement)* [2018] NSWSC 11 at [7]; *Re OrotonGroup Limited (subject to deed of company arrangement)* [2018] NSWSC 1213 at [28].
[2] See e.g. *Great Investments Ltd v Warner* (2016) 243 FCR 516 at [128].
[3] See by way of recent example, *Re Tucker (as deed administrator of Black Oak Minerals Ltd (ACN 124 374 321) (subject to deed of company arrangement) (in liq))* (2019) 134 ACSR 472 at [25], [51]-[52].

(d) mandating that an IER be prepared by a totally separate expert engaged in all cases would cause delay and additional costs for the company and its stakeholders in circumstances where it is insolvent and available funds should be used more efficiently.

It is usual that the administrator can state his or her extensive experience and familiarity with the company's assets, operations and financing arrangements (and the likely consequences if the proposed DOCA including the s444GA transfer is not entered) based on his or her role as an administrator, and is generally best placed to provide shareholders with an assessment of value.

The Consultation Paper posits that the administrators cannot provide an IER which is independent because they are or agents of the commissioning party. This is true, but in point of principle overlooks that:

(a) the report is to be subject to review by the Court and potential challenge at the hearing of the application, which is free to make its own determination on a case by case basis; and

(b) the administrators are already subject to obligations to be and be seen to act independently[4] and their conduct is subject to separate review by the Court.[5]

We consider it is appropriate for the administrator to prepare an IER in circumstances where:

(a) The administrator states that he or she is of the opinion that:

(i) there is otherwise no actual or perceived conflict of interest;

(ii) there is otherwise no actual or perceived threat to independence;

(iii) he or she has had no prior involvement with the company, its directors or any related party that would preclude the engagement from being accepted (including that they have not provided any strategic advice to the company or any of its creditors or shareholders); and

(iv) there is no other reason why the engagement could not be accepted.

(b) The administrator (or another member of the administrator's firm or party associated with their firm) has sufficient expertise, experience, specialised knowledge and resources to prepare the expert report.

To the extent that the administrator (or another member of the administrator's firm or party associated with their firm) does not have the necessary technical expertise in assessing the value of certain assets, then they should engage experts with the relevant specialised technical knowledge to assist them with a separate valuation of such property and assets.

(c) The shareholders would not receive lesser quality information from the administrator than they would from a totally separate independent expert.

(d) The IER otherwise complies with RG 111.[6]

B3Q2 – Do you agree that the concepts of independence should be based on RG 112? If not, what other standards should be applied?

We do not agree that the concepts of independence should be based on RG 112, because the administrator may, in our view, act as an independent expert in preparing the relevant IER in accordance

[4] See, e.g., paragraph 3.1 of the *ARITA Code of Professional Practice: Insolvency Services* (approved on 16 September 2019, effective from 1 January 2020).
[5] Section 90-10 of Schedule 2 to the Corporations Act.
[6] See ASIC's regulatory guidance in RG 74, [RG 74.29]-[RG 74.37], [RG 74.40].

with the applicable Court expert witness codes of conduct[7] and also in accordance with requirements applicable to professional accountants in respect of providing forensic accounting and valuation services.[8]

B3Q3 – Do you believe that another member of the administrator's firm or party associated with the administrator's firm (or their advisory/consulting arm), who has not been involved in the administration, should be allowed to prepare an 'independent expert' report? If so, why? If not, why not?

As above, we do not agree with ASIC's proposal that an administrator needs to comply with the RG 112 concepts of independence. For the reasons set out in our answers to B3Q1 and B3Q2 above, we consider it that in appropriate circumstances (in addition to the administrator) another member of the administrator's firm or party associated with the administrator's firm (or their advisory/consulting arm), who has not been involved in the administration, should be allowed to prepare an IER.

Yours faithfully
MinterEllison

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[7] See e.g. Expert Witness Code of Conduct in Schedule 7 of the *Uniform Civil Procedure Rules 2005* (NSW); Harmonised Expert Witness Code of Conduct at Annexure A to the Expert Evidence Practice Note dated 25 October 2016 published by the Federal Court of Australia.
[8] See e.g. Accounting and Professional Ethics Standards Board *APES 215 Forensic Accounting Services, APES 225 Valuation Services, APES 110 Code of Ethics for Professional Accountants* (the professional code of practice of the Institute of Chartered Accountants in Australia and New Zealand, CPA Australia and the Institute of Public Accountants).