Law Council
OF AUSTRALIA

Consultation on members' schemes of arrangement

Federal Court of Australia

8 June 2023

Telephone +61 2 6246 3788 • *Fax* +61 2 6248 0639
Email mail@lawcouncil.asn.au
GPO Box 1989, Canberra ACT 2601, DX 5719 Canberra
19 Torrens St Braddon ACT 2612
Law Council of Australia Limited ABN 85 005 260 622
www.lawcouncil.asn.au

Table of Contents

About the Law Council of Australia **3**
Acknowledgements **4**
Introduction **5**
Background **5**
Prior to the Vita Group Judgment **7**
Submissions in response to the Consultation Letter **8**
Annexure A—Responses to specific propositions **9**
Proposition 1: Evidence accompanying originating process 9
Proposition 2: Communications with ASIC 9
Proposition 3: Expert's reports 11
Proposition 4: Proposed chairperson 11
Proposition 5: Newspaper advertising 12
Proposition 6: Verification of matters in explanatory statement 12
Proposition 7: Member communications 13
Proposition 8: Evidence of dispatch and compliance 14
Proposition 9: Voter turnout 15
Proposition 10: Break-fees and exclusivity 16
Proposition 11: Foreign law advice 18
Proposition 12: Special purpose vehicles 20
Other suggestions 20

About the Law Council of Australia

The Law Council of Australia represents the legal profession at the national level, speaks on behalf of its Constituent Bodies on federal, national and international issues, and promotes the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world. The Law Council was established in 1933, and represents its Constituent Bodies: 16 Australian State and Territory law societies and bar associations, and Law Firms Australia. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Law Society of the Australian Capital Territory
- New South Wales Bar Association
- Law Society of New South Wales
- Northern Territory Bar Association
- Law Society Northern Territory
- Bar Association of Queensland
- Queensland Law Society
- South Australian Bar Association
- Law Society of South Australia
- Tasmanian Bar
- Law Society of Tasmania
- The Victorian Bar Incorporated
- Law Institute of Victoria
- Western Australian Bar Association
- Law Society of Western Australia
- Law Firms Australia

Through this representation, the Law Council acts on behalf of more than 90,000 Australian lawyers.

The Law Council is governed by a Board of 23 Directors: one from each of the Constituent Bodies, and six elected Executive members. The Directors meet quarterly to set objectives, policy, and priorities for the Law Council. Between Directors' meetings, responsibility for the policies and governance of the Law Council is exercised by the Executive members, led by the President who normally serves a one-year term. The Board of Directors elects the Executive members.

The members of the Law Council Executive for 2023 are:

- Mr Luke Murphy, President
- Mr Greg McIntyre SC, President-elect
- Ms Juliana Warner, Treasurer
- Ms Elizabeth Carroll, Executive Member
- Ms Elizabeth Shearer, Executive Member
- Ms Tania Wolff, Executive Member

The Chief Executive Officer of the Law Council is Dr James Popple. The Secretariat serves the Law Council nationally and is based in Canberra.

The Law Council's website is www.lawcouncil.asn.au.

Acknowledgements

The Law Council is grateful to the Business Law Section's Corporations Committee for leading the drafting of this submission. This submission takes into account input received from the New South Wales Bar Association.

Introduction

1. On 15 May 2023, the Federal Court of Australia (**FCA**) invited the Law Council of Australia to provide feedback on potential changes to the manner in which schemes of arrangement may be dealt with by the FCA (**Consultation Letter**).

2. The Law Council is grateful to the FCA for the opportunity to provide feedback on the proposals, and provides this submission in response to the Consultation Letter.

3. The Law Council notes that, on 19 May 2023, the New South Wales Supreme Court (**NSWSC**) published a revised version of its practice note which covers, among other things, schemes of arrangement (**NSWSC Practice Note**).[1] The NSWSC Practice Note was not preceded by a consultation process. Whilst there is a logic and benefit in having a consistent approach to schemes of arrangement between the FCA and each of the state Supreme Courts, the Law Council encourages the FCA not to simply copy the NSWSC Practice Note, as there are some important areas in which scheme practitioners would benefit greatly from clear guidance from the FCA.

Background

4. The Consultation Letter follows initial comments made on 22 March 2023 by Justice Jackman, at a case management hearing for the scheme of arrangement involving the proposed acquisition of ASX-listed Vita Group Limited by Practice Management Pty Limited and the subsequent related judgment, *Re Vita Group Ltd* [2023] FCA 400 (**Vita Group Judgment**).

5. As noted by Jackman J in the Vita Group Judgment (at [14]):

> *There has been considerable criticism in recent years by legal practitioners, and others professionally involved in corporate control transactions in Australia, concerning the evidentiary requirements at court hearings for schemes of arrangement. While much of that criticism has been informally expressed, it has occasionally been given more formal expression. For example, in the submission prepared by the Corporations Committee of the Business Law Section of the Law Council of Australia dated 6 June 2022, in response to a consultation paper published by the Department of Treasury in April 2022, entitled "Corporate control transactions in Australia: consultation on options to improve schemes of arrangement, takeover bids, and the role of the Takeovers Panel", the point was made (at p 30) that there is a significant amount of evidence and other materials required to be prepared and delivered to the Court ahead of the first and second court hearings, as described in Tony Damian and Andrew Rich's comprehensive work, Schemes, Takeovers and Himalayan Peaks (4th ed, 2021) at [5.11]. The Law Council's submission went on to say that this was not a legislative requirement, but rather a result of the practice and procedure that has emerged over many years, which should be streamlined. It was said that this would result in cost saving and the removal of unnecessary (and immaterial) materials having to be reviewed by the Court.*

[1] The Chief Justice of New South Wales, "Supreme Court Practice Note SC EQ 4", Supreme Court Equity Division—Corporations List, 19 May 2023 (see here). Schemes of arrangement are addressed at [24]-[26].

6. There was universal commendation from the legal community for the approach taken by Jackman J in the Vita Group Judgment in relation to the rationalisation and streamlining of evidence in connection with schemes of arrangement.[2]

7. Jackman J's approach has also been endorsed by Beach J in the scheme of arrangement involving the $9.5 billion acquisition of OZ Minerals Limited by BHP Group Limited. At the second court hearing in that matter, Beach J remarked:

> *On 2 March this year, I made orders convening the scheme meeting. On 30 March, the solicitors for Oz Minerals sent an email to my chambers, attaching a transcript of a hearing before Jackman J on 22 March this year in the matter of VITA Group Limited. At that hearing, Jackman J made observations concerning practices and procedures that he, at least, intended to adopt for the first and second court hearings in relation to scheme matters, and I should be clear about that: members schemes, rather than creditors schemes. The solicitors for Oz Minerals in their email to my chambers of 30 March inquired as to whether I proposed to adopt similar procedures, contextually, of course, similar procedures in relation to the second court hearing, the first court hearing having already taken place.*
>
> *My chambers sent back an email to those solicitors, saying that I would adopt the processes that Jackman J had foreshadowed for, amongst other things, second court hearings. I just want to say on the record and to be clear that I propose to adopt his Honour's foreshadowed protocol for the first and second court hearings in future scheme matters that come before me. Of course, I'm not saying anything about the procedures that other judges may adopt concerning schemes. That, of course, is a matter for them.*[3]

8. The Law Council similarly commends both the FCA and Jackman J for taking a positive step toward implementing what are significant (and long overdue) reforms to the scheme of arrangement process. The Law Council congratulates the FCA on its leadership in this area.

9. A number of the evidentiary requirements imposed on scheme proponents do not add any substantive incremental value to the scheme process and have subsisted for too long without review and rationalisation.

---

[2] See, by way of example:

- 'Federal Court gets on the front foot to streamline the takeover scheme process', *Allens Linklaters,* (Web Page, 27 March 2023) (see here);
- 'Scheme hearings get a makeover: Federal Court introduces streamlined process for cheaper and more efficient approvals', *Clayton Utz*, (Web Page, 9 May 2023) (see here);
- 'Federal Court reforms schemes of arrangement', *Gilbert + Tobin* (Web Page, 23 March 2023) (see here);
- 'Major Scheme of Arrangement Reforms in Australia', *Herbert Smith Freehills* (Web Page, 24 March 2023) (see here);
- 'Federal Court of Australia's Scheme of Arrangement Reform: Streamlining Corporate Restructures and Takeovers via Scheme of Arrangement', *Squire Patton Boggs* (Web Page, April 2023) (see here);
- 'Leadership needed on corporate law reform', *The Australian*, 16 May 2023, page 21 (see here); and
- 'Federal Court Scheme Reforms' Himalayan Bites, Episode 9, *Herbert Smith Freehills* (LinkedIn, online video, May 2023) (see here).

[3] *In the matter of OZ Minerals Ltd*, final court hearing, 17 April 2023, Transcript, at 3-4. As at the time this Law Council submission was finalised, Beach J had not delivered his Honour's written judgment for the final court hearing.

Prior to the Vita Group Judgment

10. It is worth briefly recalling how a position was reached where so much evidence was produced.

11. Prior to the Vita Group Judgment, the quantum of evidence produced in connection with schemes of arrangement snowballed over the years. The primary reason for this was conservatism on the part of the solicitors and barristers acting on schemes of arrangement, including arising from incremental development, between cases and transactions, of new issues that could inform the Court's discretion. These new issues may not, in themselves, actually arise in each and every case and also be *material* in the sense that they could possibly result in refusal of the application at either court hearing. Often these have been addressed to prove a negative (i.e., the absence of such concern), or to satisfy a checklist as informs a general discretion.

12. Given the tight timetables and commercial drivers in most schemes of arrangement, scheme participants were not willing to risk an adjournment of the first or final court hearings caused by the absence of a particular piece of evidence. The common provisions in implementation agreements which would oblige proponents to appeal against a refusal to convene a scheme meeting or approve a scheme could result in a costly urgent appeal. Scheme participants have, as a result, erred on the side of conservatism in determining what evidence to lead: in short, they wanted to be prepared for all possible eventualities (despite the additional cost, and burden placed on the Court, of this).

13. In the context of the significant transaction values involved and risk to proponents of a scheme matter being delayed or having approval refused, the additional expense incurred by having solicitors preparing further affidavits and counsel settling them has been absorbed by scheme proponents.

14. There is scope for substantial variation between practices of Judges of the FCA and Judges of the State Supreme Courts as to what evidence is (and is not) necessary and important in connection with a scheme of arrangement. As a result, if a particular piece of evidence was tabled in one scheme, it tended to be tabled in the next scheme and if a judge took an interest in a particular aspect of a scheme this would frequently result in that aspect being the subject of evidence in the next scheme.

15. The concern of legal representatives to cover all matters led to them reviewing decisions, and the summaries of evidence in them, to discern requirements. Often judgments would refer favourably to practices or the desirability of leading evidence on certain topics. However, rarely, if ever, would a judge query whether certain evidence materially assisted the Court. These decisions then develop into a body of authority and across Federal and State Supreme Courts, for which these coordinate courts are obliged to follow unless satisfied such decisions are plainly wrong.[4]

16. Over time, this led to an expansion of the materials prepared and delivered to the Court in advance of the court hearings, which commonly ran into many lever arch folders of double-sided printing (often delivered to the Court very shortly before the court hearing), resulting in unnecessary costs for scheme proponents.

[4] *Australian Securities Commission v Marlborough Gold Mines Ltd* (1993) 177 CLR 485 at 492.

17. It may be noted that, on the 50th anniversary of the use of schemes of arrangement to effect change of control transactions in Australia,[5] for the first time the Court (in the Vita Group Judgment) articulated definitive guidance on what evidence is (and is not) necessary and important in connection with a scheme of arrangement. It can be recognised that the significant experience of Australian Courts across many hundreds of scheme matters, and the detailed examination of issues and principles in published decisions is likely a strong contributor to the Courts now being able, with some certainty, to identify key evidentiary requirements.

Submissions in response to the Consultation Letter

18. The Law Council has set out its specific comments on each of the propositions in the Consultation Letter in Annexure A to this document. The Law Council also provides additional suggestions at the end of Annexure A for the FCA to consider.

19. The Law Council's overarching submission is that, whilst the intention behind the propositions in the Consultation Letter is to be strongly commended, several of these propositions could be couched in more definitive terms in order to ensure a clarity of expectation and understanding in the way contemplated by the FCA in the Vita Group Judgment.

20. The Law Council wishes to ensure that the document that is published by the FCA does not cause practitioners to (at least partially) return to any of the unnecessary practices and habits adopted prior to the Vita Group Judgment.

21. The Law Council once again expresses its gratitude to the FCA for the opportunity to provide submissions in response to the Consultation Letter's propositions.

[5] See *Re Castlereagh Securities Ltd* [1973] 1 NSWLR 624 for the first reported judgment involving the use of a scheme of arrangement to effect a change of control transaction.

Annexure A—Responses to specific propositions

Responses to each of the propositions put forward in the Consultation Letter are set out below. For the avoidance of doubt, the propositions have been inserted into this document in the blue highlighted text boxes.

Proposition 1: Evidence accompanying originating process

For the purpose of commencing proceedings and obtaining first and second court hearing dates, the supporting affidavit need only identify, in brief terms, the nature of the scheme and key dates, and annexe an Australian Securities and Investments Commission (**ASIC**) company search. The Court may be assisted if the proposed scheme or implementation deed is made available at that time, but it is not essential. Otherwise, the substantive supporting materials and submissions should be filed at least two days before the respective hearings. In general, direct evidence is preferable to information and belief.

The Law Council supports Proposition 1.

The Law Council notes that some practitioners prefer addressing additional issues in the supporting affidavit, which would otherwise be addressed in the main affidavit. It is understood that Proposition 1 allows for such a preference. The Law Council also understands that the reference to 'two business days' is not to act as discouragement for earlier lodgement of substantive materials.

Proposition 2: Communications with ASIC

The only statutory requirement that must be met regarding ASIC is satisfaction with s 411(2) of the *Corporations Act 2001* (Cth). Other communications with ASIC may be relevant to the disclosure of any issues that should be brought to the Court's attention. Whether such communications should be before the Court is a matter for the proponent's legal representatives, and may be case specific.

The Law Council is generally supportive of Proposition 2.

However, the Law Council is concerned that the language used in Proposition 2 may result in practitioners taking an overly conservative approach and returning to the previous practices that had developed before the Vita Group Judgment of including all correspondence between ASIC and the plaintiff's solicitors concerning the draft explanatory statement in evidence.

In this regard, the Law Council notes and endorses the following statement by Jackman J in the Vita Group Judgment (at [18]):

> *A practice has developed in recent years of providing a lengthy exhibit to a solicitor's affidavit containing all the correspondence between the plaintiff's solicitors and ASIC concerning the draft statement. I consider that practice to be wasteful and I commend the plaintiff in the present case for not following it. If there is a genuine issue which remains at the time of the first court hearing which must be brought to the Court's attention pursuant to the plaintiff's ex parte disclosure obligations, then that should be done by way of written or oral submissions.*

As the Court may be aware, where ASIC has no issues with any aspect of a scheme of arrangement, it will:

- ahead of the first court hearing, give the scheme company a letter in the form of Pro Forma 193 "Indication of intent under s 411(17)(b)"; and
- ahead of the final court hearing, give the scheme company a letter in the form of Pro Forma 190 "No objection under s 411(17)(b)".[6]

However, if ASIC does have an issue with a scheme of arrangement which is not resolved to its satisfaction ahead of the relevant court hearing, or if it considers that there are matters that should be drawn to the Court's attention, it may:

- decline to give its letter to the scheme company;
- outline its concerns in the letter that it gives to the scheme company;
- write to the scheme company asking it to draw the issue or matter to the Court's attention; or
- appear at the relevant court hearing as *amicus curiae.* If ASIC wishes to advocate for a particular position (thus exceeding the role of *amicus curiae*), it will be more appropriate for ASIC to formally intervene in the proceedings under subsection 1330(1) of the *Corporations Act 2001* (Cth) (**Corporations Act**).[7] If ASIC intervenes in a proceeding, subsection 1330(2) provides that ASIC will be taken to be a party to the proceeding and will have all the rights, duties and liabilities of such a party.[8] In some cases, ASIC may have an obligation to appear.[9]

The Law Council also notes that in the NSWSC Practice Note issued on 19 May 2023, the New South Wales Supreme Court has indicated that it is generally unnecessary to exhibit all correspondence with ASIC, where ASIC gives a statement indicating that it does not raise any objections to the scheme.

In light of the above, the Law Council would respectfully recommend that Proposition 2 be amended as follows:

> *The only statutory requirement that must be met regarding ASIC is satisfaction with s 411(2) of the Corporations Act 2001 (Cth). Other communications with ASIC may be relevant to the disclosure of any issues that should be brought to the Court's attention. Whether such communications should be before the Court is a matter for the proponent's legal representatives, and may be case specific. Ordinarily, where ASIC gives a statement indicating that it does not raise any objection to the scheme, it will not be necessary to exhibit communications between the plaintiff's solicitors and ASIC other than the ASIC statement. If there is a genuine issue which remains at the time of the first court hearing which must be brought to the Court's*

[6] ASIC outlines its usual process in Regulatory Guide 60, "Schemes of Arrangement", dated September 2020, at 26 [60.17]-[60.110].
[7] ASIC Regulatory Guide 60, "Schemes of Arrangement", dated September 2020, at 29 [60.118].
[8] See, for example, *Re Boart Longyear Ltd* [2019] FCA 62 at [87]. See also *Re Healthscope Ltd* [2019] FCA 542 (s 1330 is not specifically mentioned in the judgment).
[9] *Australian Securities Commission v Marlborough Gold Mines Ltd* (1993) 177 CLR 485 at 506. See also *Catto v Ampol Ltd* (1989) 15 ACLR 307 at 311-312 and 319.

attention pursuant to the plaintiff's ex parte disclosure obligations, then that should be done by way of written or oral submissions.

Proposition 3: Expert's reports

An expert's report as provided to members is not an expert's report that falls within the expert evidence practice note (**GPN-EXPT**). It does not need to be verified by an expert. Nor does there need to be a statement that it conforms with the Harmonised Expert Witness Code of Conduct.

The Law Council supports Proposition 3.

The Law Council notes that this is not a total prohibition to use of the expert's report as expert evidence in the proceeding if the need arises, if the expert has conformed with the Harmonised Expert Witness Code of Conduct. Jackman J noted in the Vita Group Judgment that possibility for creditors' schemes ([19], final sentence). Similarly, a contested members' scheme may require a proponent to rely upon their expert report if an objector takes issue with valuation.

Proposition 4: Proposed chairperson

The role of chair is significant. Generally a solicitor's affidavit verifying that the proposed chair is willing and able to act will suffice. However, conflict issues must be considered carefully and if there is no reason why the proposed chair cannot depose to matters personally then they should do so.

The Law Council supports Proposition 4, save for the last sentence.

This is because, on one reading, the last sentence contradicts the second sentence in that it suggests that the chair should depose to the matter of whether they are willing and able to act. Given the cautious approach taken by practitioners in this area of the law, it is submitted that that qualification is likely to be applied in most cases and will undermine the efficiency sought to be achieved by this proposition.

The Law Council assumes that the last sentence was actually only intending to address the scenario where there is a conflict of interest, however this is not clear from the drafting.

The Law Council notes and endorses the following statement by Jackman J in the Vita Group Judgment (at [22]):

> *Contrary to the usual practice in recent years, r 3.2 does not require an affidavit by each of the proposed chairperson and alternate chairperson themselves. There is no reason why the evidence required by r 3.2 cannot be given on information and belief in either the main affidavit or in a separate affidavit relied upon at the first court hearing, that hearing being interlocutory in nature. It has frequently been a considerable inconvenience for the proposed chairperson and alternate chairperson to make affidavits themselves in relation to those matters, rather than simply providing information and belief to another person to make the relevant affidavit. Further, pursuant to r 1.3 of the Corporations Rules, I dispense with the unnecessary (and sometimes onerous) requirement under r 3.2(b)(ii) that the affidavit must state that those nominated have had no previous relationship or dealing with the body, or any other*

> *person interested in the proposed compromise or arrangement, except as disclosed in the affidavit. […]*

The Law Council also notes that it is not uncommon for directors to have a potential interest in the approval of the scheme by reason of the vesting of performance rights and other incentives which are conditional on the scheme becoming effective. Those interests must be disclosed in the explanatory statement,[10] and their existence will already have been the subject of verification.

In these circumstances, it is respectfully submitted that it is unnecessary to require the proposed chair to provide a separate affidavit addressing the particular question of conflict.

In light of the above, the Law Council would respectfully recommend that Proposition 4 be amended as follows:

> *The role of chair is significant. Generally a solicitor's affidavit verifying, on information and belief, that the proposed chair or alternate chair is willing and able to act, and addressing the other matters in rule 3.2 of the Federal Court (Corporations) Rules 2000, will be sufficient to satisfy that rule.*

Proposition 5: Newspaper advertising

Advertising by newspaper is not considered necessary when effective electronic notice options now exist. A change to r 3.4 of the *Federal Court (Corporations Rules) 2000* (Cth) to reflect this may be appropriate. Otherwise, dispensation from compliance will normally be granted upon request.

The Law Council supports Proposition 5.

For listed scheme companies, the rule could provide optionality for use of the announcements platform for the recognised securities exchange and display on the company's website.

Proposition 6: Verification of matters in explanatory statement

Whether there has been appropriate verification of matters in the explanatory statement is an important component of satisfying the Court that there is nothing evidently misleading in the explanatory statement. Due diligence and verification must be undertaken in any event. Evidence as to these steps should be provided. How evidence is provided is a matter for legal representatives to determine.

The Law Council supports Proposition 6.

The Court need only be satisfied to a *prima facie* level[11] as to disclosure and absence of misleading statements. The applications to the Court under section 411 of the

[10] See, for example, *Re Villa World Ltd* [2019] NSWSC 1207 at [31]; *Re Pacific Energy Ltd* [2019] WASC 443 at [71]; *Re QMS Media Ltd* [2019] FCA 2172 at [88]; *Re Mainstream Group Holdings Ltd* [2021] FCA 948 at [9]; *Re Japara Healthcare Ltd* [2021] FCA 1150 at [72]; *Re Intega Group Ltd* [2021] NSWSC 1434 at [22]; *Re Australian Pharmaceutical Industries Ltd* [2022] FCA 103 at [35] and [43]-[46]; *Re Huon Aquaculture Group Ltd* [2021] FCA 1170 at [35]; *Re Over The Wire Ltd* [2022] FCA 26 at [42]; *Re Link Administration Holdings Ltd* [2022] NSWSC 650 at [21].

[11] *Re NRMA Insurance Ltd (No 1)* [2000] NSWSC 82 at [3].

Corporations Act do not involve the final determination of whether any particular matter of disclosure has been misleading.

As a result, the approach of verification evidence attaching substantial documentary evidence (such as verification drafts, verification packs, board committee resolutions and the like) is not necessary. Direct evidence from a company officer or legal representative with personal experience with the verification process should be sufficient.

Proposition 7: Member communications

The Court's attention should be drawn to any formal communication with members made prior to or at the scheme meeting. There are a range of other communications that might occur with members. It is for the proponent's legal representatives to carefully consider whether communications have occurred and whether they are of a nature that should be disclosed.

The Law Council has some concerns that Proposition 7, as currently drafted, may cause scheme proponents to return to the overly conservative, and unnecessary, previous practice of putting before the Court for formal approval any documents *proposed to be used* in communications with members (and others, such as proxy advisers), so that the Court maintains oversight of such communications.[12]

In this regard, the Law Council notes and endorses the following statement by Jackman J in the Vita Group Judgment (at [32]):

> *[…] If there is a principle that the documents ordered by the Court to go to shareholders should be the only vehicle for communicating the substantive message relevant to members' decision-making, then that principle must find its source, whether expressly or impliedly, in Pt 5.1 of the Act. In my view, the question ought to be approached as a matter of statutory construction of Pt 5.1, in which, as I have said, the only document identified for approval by the Court is the explanatory statement, and by implication any supplementary explanatory statement if one is required. Even if one reads Pt 5.1 brimful with spirit and intent, in my opinion, there is nothing in Pt 5.1 which requires the scheme company to seek Court approval for its communications with shareholders and others between the first court hearing and the scheme meeting unless a supplementary explanatory statement is required. The scheme company is to be at its own risk concerning such communications with shareholders, including as to whether they are misleading, and whether they may potentially jeopardise Court approval at the second court hearing. Accordingly, in my opinion it is neither necessary nor desirable for the Court to consider whether it should approve such subsequent communications, unless a supplementary explanatory statement is required.*

A supplementary explanatory statement is required in circumstances where new information emerges after the original explanatory statement is published that is material to the decision of members in deciding how to vote on the proposed scheme or whether to attend the scheme meeting (either in person or by proxy).[13]

[12] See the Vita Group Judgment at [30].
[13] See, for example, *Re Australian Foundation Investment Company Ltd* [1974] VR 331 at 337-338; *Cleary v Australian Co-operative Foods Ltd (No 2)* (1999) 32 ACSR 701 at 711 [26]-[27]; *Re Jessel Trust Ltd* [1985]

The Law Council assumes that Proposition 7 is also concerned with the possibility of bringing certain material communications that *have been made* by the scheme company to its members to the Court's attention at the final court hearing. However, the Law Council considers that this could be made clearer with some redrafting (as set out below).

In light of the above, the Law Council would respectfully recommend that Proposition 7 be amended as follows:

> *There are a range of communications that might occur with members after the explanatory statement is published. Ordinarily, it is neither necessary nor desirable for the Court to consider whether it should approve communications that might occur with members prior to or at the scheme meeting, unless a supplementary explanatory statement is required. It is for the proponent's legal representatives to carefully consider the communications that have occurred and whether they are of a nature that should be disclosed to the Court at the final court hearing.*

Proposition 8: Evidence of dispatch and compliance

As the Court is asked to convene the meeting, it is important that there be some evidence as to the manner in which notices are to be sent. At the approval stage, there should be evidence that orders as to notice have been complied with. It is not necessary to provide evidence of the use of technology in the conduct of scheme meetings. Evidence of compliance may include information and belief and need not be extensive.

The Law Council is generally supportive of Proposition 8, but does not agree that it is necessary for there to be evidence as to the *manner* in which notices are to be sent.

There can be no question that the requirement of proof of dispatch, as set out in the authorities remains. The document that the FCA is proposing to publish could not change the established law. Dispatch to members is important to ensure they have been informed and made aware of the explanatory statement, the scheme meeting and their entitlement to vote or lodge a proxy, and to exercise their rights and be informed of arrangements likely affecting their rights.

However, the Law Council considers that some matters of proportionality as to the *extent* of the evidence may be addressed in Proposition 8 and that the matters referred to in the first and second sentences of Proposition 8 could be clarified.

It is also relevant to note that the orders that the Court will make at the first court hearing are usually very prescriptive as to the manner in which the explanatory statement (which includes the notice of meeting) is to be sent to members.

The Law Council notes and endorses the following statement by Jackman J in the Vita Group Judgment (at [36]):

> *The plaintiff has departed from another practice which has developed recently, namely to give evidence of the plan for dispatch of the*

BCLC 119 at 124; *Re GIO Australia Holdings Ltd* (1999) 33 ACSR 283 at 285 [7]-[12]; *Cleary v Australian Co-operative Foods Ltd (No 3)* (1999) 32 ACSR 701 at 745 [51]; *Re NRMA Ltd* (2000) 33 ACSR 595 at 602-603 [19]; *Re MB Group plc* [1989] BCLC 672 at 680; *Re Bulong Nickel Pty Ltd* (2003) 21 ACLC 191 at 193 [5]; *Re HIH Casualty and General Insurance Ltd* (2006) 57 ACSR 791 at 816 [91]; *Re Centro Retail Ltd and Centro MCS Manager Ltd in its capacity as responsible entity of Centro Retail Trust* [2011] NSWSC 1321 at [8]; *Re TISO Blackstar Group PLC* [2020] EWHC 3535 (Ch) at [3].

> *explanatory statement and other materials once they are approved at the first court hearing. In my opinion, such evidence is otiose. The orders made at the first court hearing are self-explanatory, and do not need evidence of the proposed procedures to be followed by the scheme company or its share registry.*

The Law Council considers that the previous practice before the Vita Group Judgment under which an officer of the scheme company's share registry would put on a lengthy affidavit for the final court hearing that outlined in great detail all the steps that they took to ensure compliance with the Court's orders regarding despatch is unnecessary. Instead, the Law Council considers that the main affidavit for the final court hearing should simply include a statement by the deponent on information and belief as to compliance with the Court's orders regarding the dispatch of the explanatory statement. If there has been any aspect of non-compliance, this should be drawn to the Court's attention in that affidavit.

In light of the above, the Law Council would respectfully recommend that Proposition 8 be amended as follows:

> *As the Court is asked to convene the meeting, it is important that the orders that are made at the first court hearing specify the manner in which the explanatory statement is to be dispatched to members. At the final court hearing, there should be evidence that the orders as to dispatch have been complied with. Evidence of compliance may include information and belief and need not be extensive. It is not necessary to provide evidence of the use of technology in the conduct of scheme meetings.*

The Law Council also draws attention to the alternative possibility of reliance on subsection 75-15(2) of the Insolvency Practitioner Rules, which provides "*[i]n the absence of evidence to the contrary, a statement in accordance with the approved form by the person convening a meeting (or a person acting on his or her behalf) is sufficient proof of the notice having been sent to a person at the address specified for that person in the notice".*[14]

In any event, either means of proving compliance is preferable to the practice that existed before the Vita Group Judgment of adducing extensive evidence explaining the steps taken to mail, email and courier the materials in accordance with the Court's orders.

Proposition 9: Voter turnout

Evidence as to voter turnout should be provided. Such evidence should be readily available and straight forward.

It is unclear whether the reference to evidence of "voter turnout" in Proposition 9 refers to:

[14] The same provision used to be in reg 5.6.13 of the *Corporations Regulations 2001* (Cth) (**Corporations Regulations**) which has previously been used as a means of proving service of the scheme booklet upon members: see *Re The Trust Company Limited* [2013] NSWSC 1947 at [3]; *Re Tower Australia Group Limited* [2011] FCA 432 at [6]; Malcolm Oakes SC "The Two Court Hearings and Managing Meetings in Schemes of Arrangement", K Dharmananda, A Papamatheos and J Koshy (eds) (2010). The former practice was that the Corporations Regulations would be dispensed with at the first court hearing, save for reg 5.6.13, so that it could be utilised to prove dispatch at the final court hearing: see T Damian and A Rich, *Schemes, Takeovers and Himalayan Peaks*, Fourth Edition, The University of Sydney, 2021, at 248-249; and the many cases making such a dispensation order such as *Re Diversa Limited* [2016] FCA 1284.

(a) evidence as to the level of attendance at the scheme meeting (that is, evidence of the percentage of members who attended the scheme meeting, in person or via proxy, as compared to the total number of members of the scheme company); or

(b) evidence as to the scheme being approved by the requisite statutory majorities under subparagraph 411(4)(a)(ii) of the Corporations Act.

Assuming that Proposition 9 is referring to the point in paragraph (a) above, the Law Council notes and endorses the following statement by Jackman J at the management hearing on 22 March 2023 which was held ahead of the first court hearing in the Vita Group Ltd scheme. His Honour stated (Transcript, at 6):

> *Another topic which has become rather popular in recent years is evidence of shareholder participation by way of percentages, by number of shares and headcount of those who cast a vote. In my view, it's completely unnecessary. I regard it as being irrelevant whether the voter turnout was high, low or middling. And I'm not troubled at all by any degree of apathy or indifference by shareholders. I don't need that kind of evidence of shareholder participation.*

Accordingly, if Proposition 9 is referring to the point in paragraph (a) above, the Law Council would respectfully submit that Proposition 9 be amended as follows:

> *Evidence should be provided as to the level of attendance at the scheme meeting (that is, evidence of the percentage of members who attended the scheme meeting, in person or via proxy, as compared to the total number of members of the scheme company). Such evidence may be readily obtained from a comparison of the poll report and the member register of the scheme company.*

If, however, Proposition 9 is referring to the point in paragraph (b) above (that is, a requirement to adduce evidence of the scheme having been approved by the requisite statutory majorities), the Law Council would respectfully submit that Proposition 9 be amended as follows:

> *Evidence that the scheme of arrangement has been approved by the requisite majorities of members required under s 411(4)(a)(ii) the Corporations Act 2001 (Cth) should be provided and may be readily obtained in the form of the poll report.*

If Proposition 9 is intending to refer to the points in both paragraphs (a) and (b) above, then Proposition 9 should be re-written as a combination of both of the Law Council's suggestions above.

Proposition 10: Break-fees and exclusivity

Generally such arrangements fall outside the scope of the scheme itself and within ASIC and Panel take-over parameters. There should be disclosure to the Court of the extent to which any such matters impact the members. For example, there should be disclosure of the quantum of a break fee and whether its payment is triggered by the members failing to agree to the proposed scheme; and there should be disclosure of an exclusivity provision that prevents the scheme proponent from entertaining an alternative offer. Otherwise the level of disclosure is a matter for legal representatives to consider, and is fact dependent.

The Law Council is generally supportive of Proposition 10.

The Law Council notes and endorses the following statement by Jackman J in the Vita Group Judgment (at [24]–[26]):

> *The evidence for the plaintiff in recent years has included evidence concerning the negotiations for break fees and exclusivity provisions to the effect required by the judgment of Lindgren J in Re APN News & Media Ltd [2007] FCA 770; (2007) 62 ACSR 400 at [55] as follows:*
>
> a) *that the no-shop and break fee provisions are the result of normal commercial negotiation, and explaining, at least briefly and in general terms, the factual basis for that statement;*
> b) *the directors of the target company, or at least those directors of it who are not affiliated with the offeror, believe that the provisions do not operate against the interests of offeree shareholders, and that in fact it was in the interests of such shareholders that the directors agreed to the inclusion of the provisions in the merger implementation agreement; and*
> c) *in the case of the break fee, explaining, by reference to calculations based on the evidence before the court, the percentage that the break fee represents (i) of the "equity value" of the target company, calculated in accordance with para 7.18 of the Takeovers Panel's Guidance Note 7, and (ii) of the scheme consideration (although Lindgren J said that that explanation may be conveyed in a submission by reference to evidence before the court).*
>
> *With the passage of time over the last fifteen years or so since that judgment was given, break fee provisions and exclusivity provisions have become so conventional that it is unlikely that they are heavily negotiated. In the usual circumstances where both the target and the bidder are represented by experienced lawyers, there may be no resistance to the first draft put forward of such provisions, in circumstances where they follow conventional language. In terms of the quantum of the break fees, the Takeovers Panel's rule of thumb (that 1% of the value of the plaintiff's shares implied by the scheme consideration is not coercive) has actually served to keep break fees down, and to protect the target against much larger demands for break fees from bidders, who often enjoy superior bargaining power in that regard. It is not typically a case of break fees increasing to the 1% ceiling by reason of the guidance provided by the Takeovers Panel, but rather the figure of 1% serving to reduce break fees by arming the target with an effective and self-sufficient response to higher demands by the bidder. In this regard, I do not see any justification for requiring evidence from the bidder giving a breakdown of out-of-pocket expenses to justify the break fee.*
>
> *In the present application, the plaintiff has not given the kind of evidence which was once thought desirable by Lindgren J, nor has it provided a breakdown of costs in order to justify the break fee. I do not regard the omission of such evidence as presenting any difficulty in making orders at this first court hearing. It is sufficient for the main affidavit to indicate in a single sentence the percentage which any break fee payable by the scheme company to the bidder represents of the value of the company's shares implied by the scheme consideration.*

The Law Council also notes that the Takeovers Panel has issued a Guidance Note on break fees and exclusivity arrangements.[15] The Courts and ASIC have generally followed and endorsed the approach taken in that Guidance Note. In relation to break fees, the Panel's guidance is that, in the absence of other factors, a break fee payable by a target not exceeding 1 per cent of the equity value of the target is generally not unacceptable.

In light of the above comments from Jackman J, and the nature of the guidance issued by the Takeovers Panel, the Law Council respectfully recommends that Proposition 10 be amended as follows:

> *Generally break fee and exclusivity arrangements fall outside the scope of the scheme itself and within guidance issued by the Takeovers Panel. There should be disclosure to the Court at the first court hearing of the quantum of a break fee (and of the percentage that it represents of the equity value of the scheme proponent) and whether its payment is triggered by the members failing to agree to the proposed scheme; and there should be disclosure in the explanatory statement of an exclusivity provision that prevents the scheme proponent from entertaining an alternative offer. Otherwise the level of disclosure in the explanatory statement is a matter for legal representatives to consider, and is fact dependent.*

Proposition 11: Foreign law advice

In general, foreign law advice conforming to GPN-EXPT is unnecessary. However, disclosure of advice received does not impose an additional burden as it will have already been received by the company. Whether it should be disclosed is a matter for legal representatives to consider in each case.

The Law Council is generally supportive of the first sentence of Proposition 11.

The Law Council assumes that the foreign law matters that Proposition 11 is referring to are those set out below.

If the deed poll that is given in connection with a members' scheme of arrangement is executed by a foreign company, the Court has indicated that it is likely to expect evidence (which is usually in the form of an affidavit[16]) from a foreign lawyer in the relevant foreign jurisdiction to the effect that:

- the deed poll has been duly executed under the applicable laws of the country of incorporation of that foreign company;[17]
- the deed poll constitutes a legal, valid and binding obligation of that foreign company; and
- members will be able to enforce the deed poll against that foreign company according to its terms,[18]

---

[15] Takeovers Panel, Guidance Note 7 - the current issue of this Guidance Note is Number 4, dated 11 February 2010 (see here). However, it is expected that the Takeovers Panel will issue an updated version of this Guidance Note in the near future in response to its public consultation process (see here). Whilst there will be changes to the Guidance Note, the Law Council is expecting that the general substance of the Guidance Note will not change in any significant respect.

[16] *Re Intega Group Ltd* [2021] NSWSC 1707 at [10].

[17] It seems that this has been the key matter that the Court has been concerned with (see *Re Sundance Energy Australia Ltd* [2019] FCA 1944 at [46].

[18] *Re Simavita Holdings Ltd* [2013] FCA 1274 at [44]; *Re Biosceptre International Ltd* [2013] FCA 1429 at [21]; *Re Atlassian Corporation Pty Ltd (No 2)* [2014] FCA 60 at [4]; *Re David Jones Ltd* [2014] FCA 530 at [18]; *Re*

(a **Foreign Lawyer Affidavit**).

This has been described as a matter of 'best practice'.[19] The Courts have explained that there is, however, no need for that evidence to be included in the explanatory statement.[20]

The Foreign Lawyer Affidavit might also, as a matter of prudence, provide the proof of the foreign law requirements for execution (by source documents such as legislation or case authority or commentaries), so as to allow the Australian Court to apply that foreign law in the ordinary way.[21]

The above said, the Law Council notes the following statement by Jackman J at the management hearing on 22 March 2023 which was held ahead of the first court hearing in the Vita Group Ltd scheme. His Honour stated (Transcript, at 5):

> *And, now, another topic I don't think arises in this case—the bidder is an Australian company, I think, not a foreign bidder, so this case won't raise for consideration the correctness or otherwise of [Re Simavita Holdings Ltd [2013] FCA 1274 at [44]] requiring a foreign law opinion on deal execution of the deed poll, so that will await another day.*

At the first court hearing for the scheme of arrangement involving the $1.9 billion acquisition of Blackmores Limited by Kirin Holdings Company, Limited (a foreign company), Senior Counsel for Blackmores noted that Blackmores had not led evidence of a foreign lawyer. Jackman J made it clear that the Court did not require or expect such evidence. It was noted and agreed that:

- such opinions are generally so heavily qualified as to be practically worthless;
- the utility of such opinions is questionable because they assume all the relevant factual questions which ultimately inform the opinion; and
- such opinions come at a not insubstantial (and unnecessary) cost. [22]

The Law Council considers that:

- whether foreign law advice should be obtained by the scheme company is a matter for the scheme company and its lawyers to consider in each case taking into account all the facts and circumstances;
- it would be an exceptional case where any such foreign law advice needed to be disclosed in the explanatory statement; and

---

Atlantic Gold NL [2014] FCA 697 at [34]; *Re Staging Connections Group Ltd* [2015] FCA 1012 at [44]-[48]; *Re National Australia Bank Ltd* [2016] VSC 62 at [70]-[71]; *Re Onthehouse Holdings Ltd (No 2)* [2016] FCA 1242 at [4(8)]; *Re Rubik Financial Ltd (No 2)* [2017] FCA 493 at [10]; *Re Seymour Whyte Ltd* [2017] FCA 1009 at [28]; *Re Medical Australia Ltd (No 2)* [2017] FCA 1429 at [17]; *Re Amcor Ltd* [2019] FCA 346 at [18]; *Re Bis Finance Pty Ltd; Re Artsonig Pty* Ltd [2017] NSWSC 1713 at [45]; *Re Sirtex Medical Ltd* [2018] FCA at 1315 at [53]; *Re Kangaroo Resources Ltd* [2018] WASC 327 at [52]; *Re Beadell Resources Ltd* [2018] WASC 410; (2018) 133 ACSR 600, [76]; *Re Spicers Ltd* [2019] FCA 731 at [27]-[28]; *Re DuluxGroup Ltd* [2019] FCA 961 at [13]; *Re Wellcom Group Ltd* [2019] FCA 1655 at [63]; *Re 3P Learning Ltd* [2020] NSWSC 1573 at [14]; *Re PetroNor E&P Ltd* [2021] WASC 426 at [51]-[53]; *Re Afterpay Ltd* [2021] NSWSCS 1435 at [46].

[19] *Re Sirtex Medical Ltd* [2018] FCA at 1315 at [53]. See too *Foreign Corporations (Application of Laws) Act 1989* (Cth), s 9(1), 9(3)(h).

[20] *Re Colorpak Ltd* [2016] VSC 834 at [3].

[21] For example, *Allstate Life Insurance Co v Australia and New Zealand Banking Group Ltd (No 6)* (1996) 64 FCR 79 at 84; *Bosanac v Commissioner of Taxation* [2018] FCA 946 at [99]-[100]; *Virgin Aviation TM Ltd v Alaska Airlines Inc* [2023] EWHC 322 (Comm) at [62(2)].

[22] *In the matter of Blackmores Limited*, first court hearing, 8 June 2023, Transcript, at 26. As at the time this Law Council submission was finalised, Jackman J had not delivered his Honour's written judgment for the first court hearing.

- a Foreign Lawyer Affidavit should generally not be required (noting that members are already adequately protected from performance risk issues by the requirement the target shares not be transferred to the bidder until after the bidder has paid for those shares[23]). That is a matter of some practical significance, since the costs of obtaining foreign law advice in the context of a change of control transaction can be high, and they are magnified in cases where the bidders comprise a consortium of parties from different jurisdictions and each of those parties executes the deed poll.

In light of the above, the Law Council respectfully recommends that Proposition 11 be amended as follows:

> *Generally, the Court does not expect a scheme proponent to obtain foreign law advice, or to put on evidence, relating to the execution, binding nature and enforceability of the deed poll that has been signed by a foreign person. However, in circumstances where the scheme company considers in a particular case that such advice is required and the scheme company considers it appropriate for the advice should be provided to the Court, foreign law advice conforming to GPN-EXPT is unnecessary.*

Proposition 12: Special purpose vehicles

Where the acquirer is a special purpose vehicle, management of performance risk may be demonstrated by the terms upon which scheme consideration will be exchanged. In general, evidence of financial capacity is not necessary. Otherwise, the level of disclosure is a matter for legal representatives, and depends on the facts of the scheme.

The Law Council supports Proposition 12.

Other suggestions

Scheme proponents are expected to bring to the Court's attention all matters that could be considered relevant to the exercise of the Court's discretion.[24] This obligation, which applies equally at the first and the final court hearings, brings with it a serious obligation to be discharged by scheme proponents. One example of this is that if a scheme proponent fails to comply with any aspect of the Court's orders from the first court hearing,[25] this must be drawn to the Court's attention. It is not just all such relevant features of the scheme of arrangement itself that must be drawn to the attention of, and that will be taken into account by, the Court, but also the commercial and factual context of the scheme of arrangement.[26] It is the experience of the Law Council that the solicitors and counsel who represent scheme participants take these obligations very seriously.

---

[23] See, T Damian and A Rich, *Schemes, Takeovers and Himalayan Peaks*, Fourth Edition, The University of Sydney, 2021, at 591-602 [5.5.2].
[24] See, for example, *Re Marketeers Pty Ltd* [1982] Qd R 93 at 96; *Re Archaean Gold NL* (1997) 23 ACSR 143 at 148; *Re Permanent Trustee Co Ltd* (2002) 43 ACSR 601 at 603 [7]; *Re Healthscope Ltd* [2010] VSC 367 at [9]; *Re Airtrain Holdings Ltd (No 2)* [2013] FCA 377 at [11]; *Re Diversa Ltd (No 3)* [2016] FCA 1284 at [4]; *Re Afterpay Ltd* [2021] NSWSC 1709 at [14].
[25] For an example of such orders, see the orders published in *Re Vita Group Ltd* [2023] FCA 400.
[26] See, for example, *Re BAT Industries plc*, Unreported, Chancery Division, Neuberger J, 3 September 1998, at 6 (using the version of the judgment appearing at 1998 WL 1076712); *Re Steinhoff International Holdings NV* [2021] EWHC 184 (Ch).

The Law Council considers that it would be helpful:

- if the document that is generated by the FCA at the end of this consultation process reminds practitioners that the important *ex parte* obligations continue to apply in connection with schemes of arrangement; and
- if that document contained a general statement as to the purpose and intent of the document.

In this regard, the Law Council recommends that the document generated by the FCA at the end of this consultation process should contain a general statement to the following effect (somewhere at the start of the document):

> *The processes of the Court in connection with schemes of arrangement are intended to be as simple as possible and the Court is generally supportive of simplification so far as it is consistent with the Court's statutory responsibilities and binding authority.*
>
> *Nothing in this document is intended to be inconsistent with, or to derogate from, the obligation on a scheme proponent to table evidence in order to fully discharge the responsibility of the scheme proponent in an ex parte hearing of bringing to the Court's attention all matters that are material to the exercise of the Court's discretion*.[27]

[27] A similar statement to that in the first paragraph in this general statement appears in the NSWSC Practice Note at [25].