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Federal Court of Australia's Scheme of Arrangement Reform

Streamlining Corporate Restructures and Takeovers via Scheme of Arrangement

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Justice Jackman of the Federal Court of Australia has signalled the implementation of a more streamlined process for applicants seeking the Federal Court's approval of a scheme of arrangement. His Honour noted that he had consulted to confirm that the proposed reforms were generally supported by the Justices of the Federal Court as a whole.

The proposal includes significant reductions in the evidence that is required to be produced to the Federal Court, as well as reduced requirements relating to approvals of shareholder communications. We consider that these reforms may lead to significant legal costs savings for scheme of arrangement applicants, making scheme approvals cheaper, more efficient and more timely.

The proposed streamlined process will apply to applications for the Federal Court's approval of schemes of arrangement moving forward. It is anticipated that some of the Australian State Supreme Courts may follow suit in adopting this streamlined process.

Background

In a recent Federal Court hearing in respect of a scheme of arrangement to effect a takeover of an ASX-listed company, Vita Group Limited (Vita Group), Justice Jackman noted the need for a more streamlined process for seeking the Federal Court's approval of schemes.

At the first case management hearing of Vita Group's scheme, Justice Jackman noted, "I think the time has come to apply the overarching purpose under section 37M of the Federal Court of Australia Act 1976 (Cth) (FCA Act) with some vigour to schemes, to ensure that they are conducted cheaply, efficiently and quickly."

For some time, section 37M of the FCA Act has provided that the overarching purpose of the Federal Court's civil practice and procedure provisions is to facilitate the just resolution of disputes according to law and as quickly, inexpensively and efficiently as possible. Justice Jackman's express urging for that overarching purpose to apply to the process for seeking the Federal Court's approval of schemes is new, novel and refreshing.

Justice Jackman's approach is contextualised by His Honour's extensive and practical experience with schemes and prior to his appointment at the Federal Court, His Honour's leading scheme practice at the bar.

This development comes at a time when the role of the courts in connection with approving schemes has been the subject of debate. A public consultation was undertaken by the Commonwealth Treasury in 2022 enquiring whether the Takeovers Panel should assume the role of the courts in connection with approving schemes and what changes could be made to improve the efficiency of implementing schemes. Thirteen submissions were received in this public consultation, including two confidential submissions. While varying views were offered regarding whether the Takeovers Panel should assume the role of the courts in connection with approving schemes, there was a general acceptance that reform should occur to make the process for approving schemes more cost efficient by reducing the evidentiary burden placed on applicants in court applications to approve a scheme of arrangement.

As at the date of publication, we understand that a new Federal Court Practice Note is currently being drafted to ensure that all Justices of the court apply Justice Jackman's streamlined process. Even ahead of that publication, there has already been some adoption of the streamlined process, with Justice Beach of the Federal Court recently stating that he intended to follow the streamlined process in the *Oz Minerals Ltd* scheme of arrangement approval application (Federal Court proceeding number VID47/2023).

Reforms to the First Court Hearing

Justice Jackman stated that only three affidavits ought to be filed and relied upon at the first court hearing, namely:

1. An affidavit from the target company in support of the Federal Court (Corporations) Rules 2000 (Cth) originating process annexing a recent company search of the target company in accordance with those rules
2. A "major" affidavit from the target company providing a broad overview of the scheme and associated transactions, explaining the verification undertaken by the target company in respect of the disclosures to be made to target shareholders in connection with their vote, presenting other matters to satisfy the court as to ASIC's position in respect of the scheme, and proposing the chair and alternate chair of the scheme meeting
3. An affidavit from the bidder explaining the verification process undertaken in respect of the disclosures about the bidder to be made to target shareholders in connection with their vote

His Honour considered that it would no longer be necessary to provide the following evidence on affidavit for the first court hearing:

- An affidavit on behalf of the company/business maintaining the target company's share registry
- The manner of undertaking of the scheme meeting (e.g. in person, online or some hybrid arrangement and the details of each such meeting type)
- The negotiations of any break fee and exclusivity provisions, with that information instead being included in the broad overview of the scheme and associated transactions included in the "major" affidavit for the first court hearing
- Communications between the target company's lawyers and ASIC
- An independent expert affidavit verifying its report to be included in the disclosures to be made to target shareholders in connection with their vote
- The background of the negotiations of the transaction and/or a statement of belief that the proposed scheme is in the target shareholders' best interests
- The proposed newspaper advertisement providing notice of the members' scheme meeting
- Affidavits from both the proposed chairperson and the alternate chairperson of the scheme meeting detailing their ability and willingness to act, and that they have no conflict of interest in acting impartially in chairing the scheme meeting

Further, His Honour recommended that written submissions for the first court hearing should not exceed 10 pages (except in rare cases), and the submissions should not contain lengthy citations of uncontentious or well-settled propositions of law.

Justice Jackman stated that this streamlined process would not extinguish or diminish the obligation of counsel to discharge the target company's *ex parte* obligations, namely bringing to the court's attention any subject or information material to the court's determination of the scheme.

Reforms to the Second Court Hearing

His Honour stated that only one affidavit ought to be filed and relied upon by the target company for the second court hearing. That affidavit should annex:

- A poll report from the scheme meeting showing that the scheme resolution was passed by the required statutory majorities of target shareholders
- An ASX announcement made by the target company containing the content of Form 6 (which gives notice of when and where the second court hearing will be held)
- Certificates confirming the satisfaction of any conditions precedent to the scheme
- ASIC's no objection letter (if applicable)

Notably, under the proposed streamlined process, if the content of Form 6 is dispersed via an ASX announcement prior to the second court hearing, a newspaper publication giving notice of when and where the second court hearing will be held is no longer necessary.

His Honour considered that it would no longer be necessary to provide the following evidence on affidavit for the second court hearing:

- The dispatch of the scheme booklet
- The process of collating and counting proxy forms to determine proxy votes for, against and in abstention of the resolutions put to the scheme meeting
- Conditionality of the funding of the bidder
- The figures bearing upon target shareholder participation in the scheme meeting (usually expressed in percentages)
- What was stated and discussed at the scheme meeting (including questions and answers)
- Whether an intention to appear by a party objecting to approval of the scheme is received

Proposed Reforms to Shareholder Communications

Seeking the court's approval for communications to be made to target shareholders is often a tedious and time-consuming component of the scheme process. Justice Jackman has noted that, in his view, it should no longer be necessary for the target company to seek approval from the court for every communication with target shareholders, other than in respect of a substantive supplementary disclosure to target shareholders.

Key Takeaways

We expect that these proposed reforms implemented by the Federal Court, by virtue of Justice Jackman's views, will improve the efficiency and reduce costs of the process for seeking the court's approval of schemes.

The new streamlined process is subject to a general qualification that more evidence may be required to be put before the court in certain circumstances. The evidence required will be decided on a case-by-case basis by the scheme company consulting with its legal advisors, having regard to *ex parte* obligations to bring to the court's attention any subject or information material to the court's determination of the scheme.

While there is still public discussion as to whether the Takeovers Panel should assume the role of the court in connection with approving schemes, this reform certainly improves the efficiency of the court and should be widely welcomed by M&A practitioners and scheme proponents alike.

While it is anticipated that some of the Australian State Supreme Courts may adopt this streamlined process, in those states where the streamlined process is not adopted, we expect that the Federal Court will become the court forum of choice for scheme of arrangement approval applications in that particular state.

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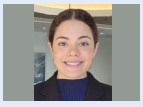

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