



Supreme Court of Victoria

Practice Note SC CC 9

Members' schemes of arrangement

1. INTRODUCTION

- 1.1 The Chief Justice has authorised the issue of the following Practice Note.
- 1.2 This Practice Note was developed by the Committee for the Harmonisation of Rules of the Council of Chief Justices of Australia and New Zealand and has been adopted by the Supreme Court of Victoria.¹ This Practice Note is issued in order to address recent differences in scheme practice and recognises that consistency in Australian Courts' approach is beneficial to all parties involved in schemes of arrangement.
- 1.3 This practice note is concerned solely with members' schemes of arrangement.

2. DEFINITIONS

- 2.1 In this Practice Note:

Act means the *Corporations Act 2001* (Cth)

ASIC means the Australian Securities and Investments Commission

Rules means the *Supreme Court (Corporations) Rules 2013* (Vic)

3. COMMENCEMENT

- 3.1 This Practice Note will apply to all relevant proceedings in the Corporations List from 1 November 2023. Attention is also drawn to r 16.6 of the Rules.

4. MEMBERS' SCHEMES OF ARRANGEMENT

- 4.1 The Court recognises that the process for approval of schemes of arrangement is intended to be as simple as possible and the Court is supportive of simplification so far as it is consistent with the Court's statutory responsibilities and binding authority. Scheme proponents may proceed on the basis that,

¹ The Harmonisation Committee has had regard to submissions received in a consultation process undertaken by the Federal Court of Australia in formulating this Practice Note.

subject to the applicable duties in such an application, which has an ex parte character:

Form of affidavits

- (a) The Court encourages the simplification of affidavit evidence led in respect of scheme hearings, consistent with proof of compliance with the applicable statutory requirements. There is no mandated form for scheme affidavits.
- (b) The Court will generally be prepared to dispense with the requirement under r 2.4(1) of the Rules for the initial affidavit filed in support of the application to state the facts in support of the Originating Process, where that will be addressed by later evidence. It is ordinarily sufficient for that affidavit to identify, in brief terms, the nature of the scheme and key dates, and annex a 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.
- (c) The consent of the chair and alternate chair of the scheme meeting can be proved by evidence led on information and belief. Parties should give careful attention to and disclose any conflicts affecting the chair or alternate chair in such evidence.
- (d) It is not necessary to file a separate affidavit from an independent expert verifying his or her report that is included in the explanatory statement for the scheme or confirming its compliance with the Harmonised Expert Witness Code of Conduct. However, in a contested scheme hearing, an expert report may not be admitted as expert evidence unless the expert witness has been provided with and complied with the Harmonised Expert Witness Code of Conduct.
- (e) It is not necessary to exhibit all correspondence between the scheme proponent's solicitors and ASIC to an affidavit read at the second Court hearing, where ASIC gives a statement indicating that it does not raise any objection to the scheme. If a scheme proponent wishes to make submissions as to ASIC's position on matters outside the scope of ASIC's statement to be provided to the Court, those submissions should be supported by evidence. Any material issue to be brought to the Court's attention pursuant to ex parte disclosure obligations enlivened by any concerns or substantive issues raised by ASIC with a scheme proponent should be addressed by submissions and, if necessary, affidavit evidence of any relevant facts.

Notice of the second Court hearing

- (f) The Court will be prepared to dispense with the publication of a notice of the second Court hearing in a newspaper, if notice can be given by an announcement made on the Australian Securities Exchange or by an announcement on the scheme proponent's website if it is not listed. A newspaper advertisement would only be required if the scheme

proponent has reason to think that neither of those mechanisms would be effective to bring the scheme to the attention of its securityholders.

Matters to be addressed in evidence

- (g) The appropriate verification of matters in the explanatory statement is an important component of satisfying the Court that it should order that a scheme meeting be convened at the first Court hearing and then approve the scheme at the second Court hearing. The Court expects a scheme proponent to lead evidence at the first Court hearing concerning due diligence and verification processes in respect of the explanatory statement. Direct evidence from a company officer or legal representative with personal experience with the verification process should be sufficient.
- (h) The Court expects a scheme proponent to lead evidence at the first Court hearing concerning any break fee as a percentage of the implied equity value of the scheme proponent and the general nature and length of any exclusivity provisions. Submissions as to these matters need not be extensive if the amount of the break fee and the nature and length of the exclusivity provisions do not raise novel issues.
- (i) 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 of dispatch of the explanatory statement to securityholders. The Court expects a scheme proponent to lead evidence at the second Court hearing of the dispatch of scheme documents in accordance with the Court's orders. That evidence may include evidence on information and belief and need not be extensive, but should disclose any issues with compliance with those orders. Evidence of the use of technology at scheme meetings is not required, unless any issue in that regard needs to be brought to the Court's attention.
- (j) In addition to evidence that the scheme was approved by the requisite statutory majorities, the Court expects a scheme proponent to lead evidence at the second Court hearing as to voter turnout at the scheme meeting(s), being the number or percentage of members who attended the scheme meeting, in person or by proxy, as compared to the total number of members of the scheme company.

Shareholder communications

- (k) The Court expects that the Court's approval should be sought for a supplementary explanatory statement to be sent to securityholders in a scheme. The Court also expects that the nature of the scheme proponent's intended communications with securityholders should be disclosed at the first Court hearing. Parties may also wish to continue the existing practice of drawing the Court's attention to material communications to securityholders after the first Court hearing, at least by a communication to the chambers of the judge hearing the

application, to reduce the risk of difficulties arising at the second Court hearing.

- 4.2 The Court's approach to substantive issues arising in scheme applications will necessarily be guided by the existing and developing case law, for example as to communications by a scheme proponent to its securityholders, proof of due execution of a deed poll by a foreign bidder and proof of financial arrangements supporting bids by special purpose bidding vehicles.
- 4.3 The following matters are noted for the assistance of practitioners:
- (a) Recent case law has not required foreign law evidence of enforceability of a deed poll in a foreign jurisdiction. Evidence of due execution of a deed poll should only be necessary if a real uncertainty or issue exists in that respect.
 - (b) Where a special purpose vehicle with minimal assets is to acquire securities of substantial value under a scheme, a risk of a scheme not completing is likely to be material to securityholders, irrespective of the fact that their securities are not transferred to that special purpose vehicle until the consideration is paid. Disclosure of such a risk is also important to maintaining a fully informed market. Evidence should be led at the first Court hearing of the availability of the funding or other financial support on which the special purpose vehicle will rely to complete the scheme.
- 4.4 When making an order under subsection 411(1) of the *Corporations Act* the Court will require that the explanatory statement or a document accompanying the explanatory statement prominently display a notice in the following form or to the following effect:

"IMPORTANT NOTICE ASSOCIATED WITH COURT ORDER
UNDER SUBSECTION 411(1) OF CORPORATIONS ACT 2001 (Cth)

The fact that under subsection 411(1) of the *Corporations Act* 2001 (Cth) the Court has ordered that a meeting be convened and has approved the explanatory statement required to accompany the notices of the meeting does not mean that the Court:

- (a) has formed any view as to the merits of the proposed scheme or as to how members/creditors should vote (on this matter members/creditors must reach their own decision); or
- (b) has prepared, or is responsible for the content of, the explanatory statement."

- 4.5 Nothing in this practice note is intended to limit the obligation on a scheme proponent to lead evidence to discharge its responsibility to make full and fair disclosure to the Court of matters which may be material to the ex parte orders which are sought in respect of a scheme of arrangement.

Vivienne Macgillivray
Executive Associate to the Chief Justice
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