

EMAILING TAKEOVER DOCUMENTS

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Legal Briefings - By **Rodd Levy and Jason Jordan**

Takeover documents have sent by email to target shareholders for the first time in an Australian takeover.

IN BRIEF

- Unlike other shareholder communications, the law requires formal takeover documents to be sent in hard copy to shareholders.
- Emailing takeover documents saves considerable expense, time and resources.
- For recommended transactions (such as the Healthscope transaction) where the target company sends the email obviating the need for the email addresses to be given to the bidder, ASIC may be willing to grant relief to permit email despatch.

The Healthscope transaction marks the first time that despatch of a bidder's statement or a target's statement has been permitted by email.

For most readers, this may be surprising given that email has been the standard method of business communication for many years and shareholders have routinely received other formal documents under the Corporations Act by email. For example, email distribution of notices of meeting and annual reports has been permitted since 2004.

However, in the takeovers world, things move more slowly. In fact, the Corporations Act requires that all formal takeover documents, such as bidder's statements, target's statements and notices of variation, are despatched by mail or by courier, just as it has since the 1960s.

Therefore, the fact that ASIC has, for the first time, granted a specific modification to the rules to permit the emailing of takeover documents is significant. It may lead to a change in normal practices.

BACKGROUND

There were a number of factors which meant that the Healthscope transaction, which combines a scheme of arrangement with a concurrent takeover bid by Brookfield in a single integrated booklet, was well suited to relief being granted.

First, Healthscope has approximately 25,000 shareholders. Approximately 45% of them had elected to receive documents electronically. Despatch by email would therefore cut down significantly the number of booklets which had to be printed. The final booklet was 340 pages, so this environmentally friendly initiative represented a great saving of expense, time and resources.

Second, the recommended nature of the transaction meant that Healthscope, as target company, was willing to facilitate the distribution of the bidder's statement on behalf of Brookfield by using the email addresses held by Healthscope. In this way, the email addresses of Healthscope shareholders did not have to be disclosed to Brookfield

Third, courts have been permitting email distribution of scheme booklets since around 2011. If the relief had not been granted, the usual court order would have been futile as the scheme booklet included the takeover document.

CONDITIONS TO RELIEF

ASIC granted the relief on certain conditions:

- the relevant shareholder must have given Healthscope his or her email address and agreed to receive notices of meetings and proxy forms (not just annual reports and other shareholder statements) by email;
- given the court would be reviewing the booklet due to the scheme of arrangement, the court had to make the usual order permitting that booklet to be despatched by email;
- the email had to contain a link to an electronic copy of the booklet that was in a form that allowed the text to be searched by computer;
- if there was a bounce back, a hard copy had to be despatched;
- the holder had the right to request a hard copy booklet via an online portal or website; and
- the holder could accept the offer through the online portal or website (something which

is another first in the Australian market).

COMMENTARY

Granting the relief has enabled a great deal of printing expense, time and trees to be saved and enabled the document to be delivered to the shareholder in the form which most suited each individual shareholder, according to the preferences they had given the company for communications. It also meant that the relevant shareholders received the transaction booklet much quicker than they would have if it had been sent to them by post.

In undertaking the exercise, it should be remembered that this was a recommended transaction and Healthscope was despatching the booklet (which included the bidder's statement) on behalf of Brookfield. This meant that there was no need for Brookfield to be given the email addresses itself. These remain confidential to Healthscope.

While the relief was granted in connection with the concurrent scheme of arrangement, it suggests that ASIC may be willing to extend the relief to other takeover bids which are not undertaken in conjunction with a scheme of arrangement.

ASIC should be congratulated on embracing email technology for this purpose.

Surely it is time now for law reform to require target companies to provide email registers to bidders in all takeover scenarios and to enable both bidder's statements and target's statements to be sent by email to target shareholders in all takeovers. At the very least the law could provide for the target to send the bidder's documents on behalf of the bidder if there is any lingering sensitivity about email addresses being handed over.

KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.



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