

THE BILLABONG SCHEME OF ARRANGEMENT - LAST-MINUTE PRICE INCREASE

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Legal Briefings - By **Rodd Levy**

The recent scheme of arrangement for Billabong International Ltd highlights the inherent flexibility of the scheme procedure and how, in some instances, changes can be made to the terms of the scheme on a very quick and simple basis.

IN BRIEF

- On the morning that the Billabong scheme was to be considered by shareholders, the bidder agreed a price increase.
- This was explained by the chairman and the meeting proceeded.
- The court approved the scheme with the amended price.

BACKGROUND

Billabong announced a scheme of arrangement in January 2018 under which Boardriders, Inc. (**Boardriders**) would acquire all of the shares in Billabong it did not already own at a price of \$1.00 per share.

The scheme was recommended unanimously by the directors of Billabong and supported by a report by an independent expert who concluded that the scheme was fair and reasonable and, therefore, in the best interests of shareholders.

After the scheme was announced, a number of shareholders, including fund manager Ryder Capital, made statements to Billabong and to the media that \$1.00 per share was too low and undervalued the company.

On the morning of the scheme meeting, just over 78% of proxy votes received were supportive of the scheme. This suggested that there were sufficient votes in favour to result in the scheme being approved, but this was not certain as Ryder Capital held a significant number of undirected proxies and it was not known if other shareholders present, who had not granted proxies, would vote their shares on the floor of the meeting.

Accordingly, to ensure success, Boardriders proposed an increase in the scheme consideration to \$1.05 per share. Non-binding discussions were held between Billabong and Ryder Capital and, it appears, Ryder was prepared to support the scheme on the amended terms.

There was a short adjournment of the scheme meeting while a deed amending the scheme implementation deed was executed and then the meeting was held. The scheme was supported by 95% of the votes cast. The scheme was subsequently approved by the court and became effective.

There are a number of interesting aspects arising from this transaction.

PROCEDURE FOR MODIFYING A SCHEME

It is well accepted that, given the strict legislative regime, it is not open for scheme shareholders to approve a scheme which is different in terms from the scheme which the court ordered at the first court hearing.

However, typically, the resolution put to shareholders seeks the approval of the scheme '*with or without modification*'. That give rise to the possibility of some changes being approved by shareholders at the scheme meeting, even if not subject to a formal resolution.

In this instance, the Billabong shareholders were asked to vote on the scheme of arrangement as originally proposed, but the chairman explained that Boardriders had agreed to pay additional consideration and that, at the second court hearing, the court would be asked to modify the scheme to provide for the increased price. The shareholders voted the scheme through on that basis.

It is noteworthy that the increase in the price was announced to the meeting without any prior consultation with, or approval by, the court. This is understandable given the last-minute nature of the change and that it was unquestionably better for shareholders.

At the second court hearing, the court relied on its power in section 411(6) of the Corporations Act to approve the scheme 'subject as such to alterations or conditions as the court thinks just'.

Relying on this power, the court approved a modification amending the definition of 'scheme consideration' from \$1.00 per share to \$1.05 per share.

TIMING ASPECTS

The transaction is a reminder that some changes to a scheme of arrangement can be agreed to at the last minute and need not delay the transaction.

In this case, Boardriders had proposed the price increase on the basis that the meeting would proceed as planned on the scheme meeting date originally scheduled. It was accepted by the parties and by ASIC that no additional information or time was needed by shareholders. The judge said:

“It is difficult to see what further information or what greater time would have been needed for the members to understand the significance of the increased consideration offered”.

In Billabong's case, it was clear that, given the proxy position (that is, 78% support), the scheme would have sufficient numbers to be approved at the meeting, even at the old price. Therefore, it was obvious that the higher price would have had equal, if not better, shareholder support.

However, in other situations where the acquirer is forced to increase the consideration in order to ensure the transaction is successful, it may not be open to proceed with the same timetable.

One example where a delay may be necessary is where the votes are running against the transaction. In that case, it may be necessary to adjourn the scheme meeting for a short period in order to solicit new proxies so that shareholders can change their votes in order for support for the scheme to be reflected in proxy votes.

Another example may be where the consideration includes shares in the acquirer. In that event, fresh disclosures may be required in a supplementary booklet to show the impact on the acquirer. That would almost inevitably delay the meeting if the change was made shortly before the vote.

PUBLIC STATEMENTS BY BOARDRIDERS

One other notable event in the Billabong transaction were the public comments made by Boardriders' chief executive officer a few days before the scheme meeting. These comments were widely reported in the Australian media.

The comments, which were not contained in the scheme booklet, suggested that Boardriders' parent company, which was a major shareholder and creditor of Billabong, would 'walk away' from the company if the scheme proposal failed. It was said that blocking the takeover may lead to 'insolvency', 'job losses' and 'potential liquidation'.

Perhaps realising that these statements may have given ammunition to objectors to the scheme, Boardriders then issued a corrective announcement to ASX the following day saying that shareholders 'should not place undue weight on statements appearing in the media (including in relation to the potential consequences of the transaction not proceeding)' and encouraging shareholders to review the information contained in the scheme booklet.

Given the scheme was overwhelmingly supported and no objections to the scheme were raised at the second court hearing, these remarks were not the subject of scrutiny by the court at the second court hearing.

However, this episode is a reminder that the legislative regime in the Corporations Act assumes that a scheme booklet as approved by the court when it convenes the meeting will be the primary source of information for shareholders to consider. Any departure from that, whether by the target company or by the acquirer, may therefore jeopardise the validity of the vote and great care must be taken before any such statements are made to the market.

CONCLUSION

The Billabong scheme of arrangement reinforces our long-standing view that the scheme of arrangement provisions can provide a great deal of commercial flexibility for scheme proponents.

** Herbert Smith Freehills acted for Ryder Capital in this matter.*

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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