

# TIMING ISSUES IN SCHEMES OF ARRANGEMENT

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Legal Briefings - By **Rodd Levy and Courtney Dixon**

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Tabcorp's recent high-profile combination with Tatts<sup>1</sup> illustrates the ability of parties to a scheme of arrangement transaction to press on despite uncertainties about timing for regulatory conditions to be satisfied.

## IN BRIEF

- Regulatory approval conditions can take significant time to satisfy, which can cause a range of issues for parties seeking to implement a scheme of arrangement. The Tabcorp / Tatts deal shows that it is possible to convene a scheme meeting without certainty as to the expected timing of satisfaction of the condition, provided target shareholders are kept properly informed by timely supplementary information.
- In some cases, it may be sufficient for target shareholders to have less time than that suggested in ASIC's policy to consider supplementary information before voting on a scheme of arrangement.
- If a court is made aware of the proposed release of further, limited supplementary information, it may not be necessary to return to court for approval to release that information.

## REGULATORY APPROVAL CONDITIONS

M&A transactions involving ASX-listed companies are frequently subject to foreign, regulatory or other conditions precedent to implementation. These approvals may include foreign investment approvals, anti-trust and competition approvals and industry-specific regulatory approvals. These conditions can take significant time to satisfy, particularly where overseas regulators are involved. The time frames can easily exceed the 3 to 4 months in which a scheme of arrangement could typically be implemented post announcement.

The timing issues lead to challenges of maintaining transaction momentum, keeping employees of the target engaged, protecting against interloper risk and, in the case of scrip transactions, trying to limit downward pressure on the share price of the bidder.

These challenges can be compounded where the timeline or even the likelihood of obtaining the regulatory approval is unclear or uncertain. This can arise with certain foreign investment approvals, which can be political or discretionary in nature, or subject to uncertain time frames, as was the case in the protracted competition approval process in the Tabcorp / Tatts transaction, where the Australian Competition Tribunal (**Tribunal**) authorisation was subject to judicial review.

In the Tabcorp / Tatts transaction, this gave rise to a number of issues.

## **CONVENING A SCHEME MEETING WITHOUT CLARITY AS TO THE EXPECTED TIMING OF SATISFACTION OF A REGULATORY APPROVAL**

### ***THE COMPETITION APPROVAL CONDITION PROCESS IN TABCORP / TATTS***

Tabcorp sought authorisation from the Tribunal to acquire Tatts after initially seeking informal clearance for the acquisition from the ACCC. The Tribunal authorised the transaction. However, the ACCC subsequently sought judicial review of the authorisation by the Full Federal Court. This gave rise to a question about whether the scheme booklet could be dispatched to Tatts shareholders or whether it should be held up pending the decision of the Full Court being handed down, the timing of which was necessarily uncertain.

Initially, ASIC stated a preference that the scheme booklet should not be dispatched and the scheme meeting not be convened until there was certainty as to the outcome of the Full Court's decision, whether the competition approval condition would be satisfied (or waived) and, accordingly, when the scheme approval court hearing would be held. This position seemed to be driven by a concern that the information in the scheme booklet could become stale and that the updating of this information by way of supplementary disclosure, would be potentially confusing for retail shareholders.

The parties' view was that dispatch should proceed and a scheme meeting scheduled for a date after the Full Court decision might be expected and, if necessary, the meeting could be postponed if the decision took longer. This course of action would have had the benefit of keeping the market informed (as a comprehensive scheme booklet would be released) and minimising time delays to the transaction timetable.

Ultimately, ASIC accepted this approach and the Supreme Court of Victoria (which had supervision of the scheme of arrangement) approved dispatch of the booklet, with a clear statement being included that the Full Court had not yet made a decision in respect of the judicial review applications, but that Tabcorp and Tatts remain confident that the authorisation will be upheld. Tabcorp said that it would announce to the ASX any material developments relevant to the Transaction in relation to the judicial review applications.

### ***SUPPLEMENTARY SCHEME BOOKLET - KEEPING TATTS SHAREHOLDERS, THE MARKET AND OTHER REGULATORY BODIES UPDATED***

In schemes of arrangement, once the scheme booklet has been dispatched and before the scheme meeting is held, the disclosure regime requires supplementary information to be released if the target becomes aware of a significant new matter having arisen that would have otherwise been required to be included in the booklet if it had arisen before the first court hearing.

After Tatts dispatched its scheme booklet in early September 2017, there were various developments in relation to the competition approval condition (including the judicial review application being upheld and the matter being remitted for redetermination by the Tribunal). This meant that Tatts postponed the scheme meeting date twice, with the scheme meeting finally being held on 12 December 2017 nearly three months after the originally scheduled date of 18 September 2017.

On 22 November 2017 the Tribunal affirmed its original decision to authorise the transaction. Less than a week after the decision, Tatts released its supplementary scheme booklet which detailed the Tribunal's authorisation of the transaction, the proposed waiver of the competition condition (and the risks that carried) and the recent trading performance for each of Tabcorp and Tatts. The Court reviewed and approved the dispatch of the supplementary scheme booklet.

The transaction was subject to a right of each party to terminate the transaction if it was not unconditional by 31 December 2017. This sunset provision, and the impending Christmas / New Year break, meant that speedily securing Tatts shareholder approval was critical.

ASIC's policy is that it will generally be appropriate for target shareholders (including those voting by proxy) to have at least 10 days to consider any supplementary material before being required to vote on a scheme of arrangement. That would have pushed out implementation into the Christmas period, so an earlier scheme meeting date of 12 December 2017 was targeted, on which Tatts would also hold its annual general meeting.

At the hearing to seek Court approval to dispatch the supplementary scheme booklet, Tatts acknowledged that, having regard to printing and postage processes, it was likely that the majority of Tatts shareholders would receive the hard copy of the booklet *less than* 10 days before the 12 December scheme meeting. Notably though, the booklet was to be released on ASX - and therefore would be public -14 days before the scheme meeting.

Tatts submitted various reasons as to why less than 10 days was appropriate, including that the information would be public via ASX 14 days before the meeting, the substantial public interest in the transaction meant that it was likely that there would be media coverage of the new information, the proxy cut-off timing was pushed back to allow maximum voting time, and there were very real timing implications, including the sunset provision and the co-ordination of the scheme meeting on the date of the Tatts AGM. ASIC was supportive and the court accepted that less than 10 days was sufficient in this instance.

### ***OBTAINING THE COURT'S IMPRIMATUR TO RELEASE FURTHER SUPPLEMENTARY INFORMATION - COMMITTING TO UPDATE SHAREHOLDERS AND THE MARKET BY A SPECIFIC DATE***

Informing the Court of the prospect of further disclosure being made to target shareholders, but without returning to Court to seek approval to release that subsequent disclosure, is relatively novel.

One of the unresolved issues at the time of the dispatch of the supplementary booklet was whether the ACCC or any other intervenor in the Tribunal proceedings would seek further judicial review of the matter, which could potentially affect the timing again and, separately, whether the Supreme Court would approve the scheme if a review application was outstanding.

To deal with this without having to send a further supplementary booklet to shareholders and without having to return to Court, at the Court hearing where approval was sought for the dispatch of the supplementary scheme booklet, Tatts confirmed that it would place advertisements in two newspapers seven days before the scheme meeting indicating whether the competition condition had been waived. Tatts ultimately announced the waiver of the competition condition to ASX, on its own website, sent a letter to its shareholders, and published notices in newspapers seven days before the scheme meeting and again on the day before the scheme meeting.

The scheme was then approved by shareholders and the Court.

## **COMMENTARY**

The Tabcorp / Tatts transaction is another good example of the pragmatic approach that the Court is prepared to take (in appropriate circumstances) to deal with timetable and information uncertainties. The transaction shows that such uncertainties will not necessarily require a transaction to be completely put on hold pending their resolution.

## **ENDNOTES**

1. Rodd Levy and Courtney Dixon led the Herbert Smith Freehills M&A team advising Tabcorp on its acquisition of Tatts by way of scheme of arrangement.





## 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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