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USING AUSTRALIAN SCHEMES OF ARRANGEMENT TO ACQUIRE FOREIGN COMPANIES

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Legal Briefings – By **Andrew Rich** and **Malika Chandrasegaran**

The Federal Court of Australia has, for the first time, in the Redcliffe matter approved a members scheme of arrangement for the acquisition of a foreign incorporated company. We consider the implications of that decision.

SUMMARY

- The Federal Court of Australia has approved a members' scheme of arrangement in relation to the acquisition of an ASX-listed, but Papua New Guineau (**PNG**) incorporated, company.
- This is the first time an Australian court has approved a members' scheme in relation to a foreign incorporated company.
- However, the decision does not necessarily open floodgates for the use of Australian schemes to acquire foreign incorporated companies as each decision will turn on its own facts and circumstances, including whether there is a sufficient nexus of the foreign incorporated company to Australia, the lex situs of the shares and any requirements of the home jurisdiction of the foreign incorporated company.

On 23 March 2016, the Federal Court of Australia approved a members' scheme of arrangement in relation to Redcliffe Resources Limited (**Redcliffe**), a company incorporated in PNG and listed on the ASX, under which Northern Manganese Limited (**NTM**) would acquire all of the shares in Redcliffe.[1]

This represents the first time that a court in Australia (or England) has approved such a members' scheme of arrangement in relation to a foreign incorporated company.

We explore below the implications of the decision and whether it opens the floodgates for the Australian members' scheme of arrangement procedure to be used for the acquisition of other foreign incorporated companies.

JURISDICTION OF THE COURT

The starting point in the analysis is considering the basis upon which an Australian court has jurisdiction to consider a scheme of arrangement in relation to a foreign incorporated company.

The statutory scheme of arrangement regime contained in the *Corporations Act 2001* (Cth) (**Corporations Act**) operates in relation to a 'Part 5.1 body'. A 'Part 5.1 body' is defined in the Corporations Act as:

- a body corporate incorporated in Australia, or
- a foreign body corporate registered under the Corporations Act.

The second limb of the definition, on its face, expands the operation of the scheme of arrangement provisions beyond Australian companies to include foreign incorporated companies that are registered under the Corporations Act (noting that such registration is a pre-condition for a foreign incorporated company to carry on business in Australia).

Prior to the *Redcliffe* decision, the scope of the use of the second limb in the context of a members' scheme of arrangement was unclear.

Indeed, the following comments of the English High Court in *Re Drax Holdings Ltd* [2004] 1 WLR 1049 suggested that a court would be quite reluctant to accept jurisdiction in most cases:

"The court should not, and will not, exercise its jurisdiction [in relation to a members' scheme of arrangement] unless a sufficient connection with England is shown. Thus it is almost impossible to envisage circumstances in which the English court could properly exercise jurisdiction in relation to a scheme of arrangement between a foreign company and its members, which would essentially be a matter for the courts of the place of incorporation."

Accordingly, it was thought that, absent a very strong nexus between the foreign company and Australia, given that the relationship between a member of a company and the company itself is generally governed by the laws of the place of incorporation of that company, an Australian Court would be reticent in exercising jurisdiction in respect of a members' scheme of arrangement where a foreign company was the target.

THE REDCLIFFE DECISION

The decision in the *Redcliffe* matter represents the first example of where either an Australian or English court has exercised its jurisdiction in respect of a members' scheme of arrangement involving a foreign company as the target.

Redcliffe was incorporated in Papua New Guinea in 1988 and had been listed on the ASX for almost two decades. Redcliffe proposed a scheme of arrangement with its members under which NTM would acquire all the shares in Redcliffe in consideration for Redcliffe shareholders receiving shares in NTM.

In considering the scheme of arrangement, the Court was concerned about the ability of the scheme to bind and validly transfer all shares and operate against all members of Redcliffe as a registered foreign company and Part 5.1 body under the Corporations Act. The Court noted that this in turn depended on the proper law that regulated the validity of transfer of the shares, being the *lex situs* (ie the law of the place where the property is located).

The Court noted that what constitutes *lex situs* remains the subject of some controversy in private international law, as between:

- where the register on which the shares exist is kept,
- the place where the shares are situated where they could most effectively be dealt with having regard to business practice, and
- where the shareholders in question would be likely to choose a market and place of transfer when desiring to deal with the shares.

Redcliffe had share registers in both Australia and Papua New Guinea. However, Redcliffe had used the Clearing House Electronic Subregister System (**CHESS**) system through the ASX with an integrated sub-register managed by Link and effected transfers of shares through the ASX process (which was also permitted by the relevant Papua New Guinea regulations). In addition, over 90% of Redcliffe's shareholder base (who held over 90% of the issued shares in Redcliffe) had addresses in Australia.

In the circumstances, the Court accepted that under all three tests noted above, the *lex situs* of the shares was Australian law and that the valid transfer of the shares in Redcliffe was governed by Australian law. This was one of the reasons that the Court was prepared to exercise its jurisdiction in respect of the scheme of arrangement notwithstanding that the company in question was a foreign company.

WHERE TO FROM HERE?

The decision does not necessarily open floodgates for the use of Australian schemes of arrangement to acquire foreign incorporated companies as each decision will turn on its own facts and circumstances.

The foreign company will likely have to show that the *lex situs* of its shares is Australia and demonstrate a sufficient nexus to Australia. International conflicts of laws principles will also be relevant.

In addition, the legal and regulatory regime applicable in the home country of the foreign incorporated company will be highly relevant. For example, we understand that in the *Redcliffe* matter, the PNG Securities Commission provided Redcliffe with a waiver in respect of the application of the PNG Takeovers Code to the acquisition of Redcliffe by NTM.

It is, however, very encouraging to see that an Australian court, in appropriate circumstances, is prepared to exercise its jurisdiction to consider a scheme of arrangement in relation to a foreign incorporated company.

ENDNOTES

1. *Re Redcliffe Resources Limited* [2016] FCA 404.

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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