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VOTING INTENTION STATEMENTS: ASIC'S SUSPICION BOILS OVER

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Legal Briefings – By **Andrew Rich**

ASIC has recently reminded market participants of its general suspicion of voting intention statements in schemes of arrangement. In the two schemes of arrangement considered in this article, ASIC required the votes of the person making the voting intention statement to be tagged. We suggest the real question for the Court and ASIC ought to be whether the relevant shareholder will receive a collateral benefit in exchange for making the statement.

IN BRIEF

- ASIC is generally suspicious of voting intention statements.
- In two recent schemes, ASIC has required the votes of the shareholder that have given voting intention statements to be tagged, thus putting them at risk of being discounted or disregarded by the Court.
- The mere fact a shareholder has made a voting intention statement should not, without more, require their votes to be tagged.
- The real question for the Court and ASIC ought to be whether the relevant shareholder will receive a collateral benefit in exchange for making the voting intention statement.

INTRODUCTION

It is not uncommon in schemes of arrangement which are being used to effect takeovers to find substantial holders in the target publicly stating that they intend to vote in favour of the scheme of arrangement, in the absence of a superior proposal. These are colloquially referred to as “voting intention statements”. Such statements fulfil a valuable role in schemes of arrangement, as they provide useful information to other target shareholders and can help facilitate an auction for control.

THE APPROACH OF THE COURTS AND ASIC

The courts have made it clear that voting intention statements are not class creating.[1] However, by way of contrast, ASIC has made it clear that it generally dislikes such statements and is frequently suspicious of the circumstances in which shareholder intention statements have been obtained. ASIC has previously stated that shareholder intention statements should be “discouraged”.[2]

ASIC’s views have more recently manifested themselves in the context of schemes of arrangement involving Unity Mining Limited and Tawana Mining Limited. We discuss those decisions below.

In each of these cases, ASIC convinced the Court that the appropriate approach was for the Court to require the votes of the shareholders that gave intention statements to be “tagged” so that the Court could examine, at the final court hearing, whether the scheme would still have been approved if the votes of those shareholders had been excluded. In other words, ASIC invited the Court to discount or even disregard the votes at the final court hearing if they were determinative in the outcome of the vote.

UNITY MINING

In *Re Unity Mining Ltd (No 3),*[3] the bidder (Diversified Minerals Pty Ltd (**Diversified**)) had a relevant interest in around 13.7% of the shares in the target, Unity Mining Ltd (**Unity**). The proposed consideration was originally 2.9 cents per share. On 14 March 2016, Brahman Pure Alpha Pty Ltd (**Brahman**) announced it had acquired a relevant interest in 18.2% of the shares in the target and, on 18 March 2016, Brahman indicated that it intended to vote against the scheme. On 4 April 2016, Diversified and Unity agreed an increase in the consideration to 3.2 cents per share.

On 12 April 2016, Brahman informed Unity that, if the consideration was increased to 3.3 cents per share by 10.00am on 13 April 2016, it would vote its shares in favour of the scheme. On 13 April 2016, Unity announced that the consideration had been increased to 3.3 cents per share.

Having investigated the above developments, ASIC informed the Court:

- following a period of discussions with Brahman, Diversified indicated to Unity that it would not agree to increase the consideration offered under the scheme unless Brahman made a public statement of its voting intentions;

- the stipulation that the statement must be made publicly was related to the application to such statements of ASIC's truth in takeovers policy;

- Unity's advisors prepared a draft of the Brahman letter which was modified by Brahman's advisors prior to being signed and returned; and

- the Brahman letter was forwarded by Unity to Diversified together with a letter seeking Diversified's agreement to increase the consideration offered under the scheme, in reliance on the Brahman letter.

ASIC explained to the Court that it was concerned that the overall circumstances suggested an understanding as to Brahman's future conduct was formed that went beyond what was permitted having regard to the respective holdings of Brahman (19.5%) and Diversified (13.7%). In other words, ASIC was suggesting that there may have been a breach of the 20% rule in s606(1) of the *Corporations Act* 2001 (Cth).

As a result of ASIC's concerns, Unity agreed to tag any votes cast by Brahman at the meeting and ASIC reserved the right to request, at the final court hearing, that the Court disregard the votes cast by Brahman in the event that Brahman's votes were determinative of the outcome of the vote.

The result of the voting was such that, even if Brahman's votes were disregarded, the scheme would still have been approved by shareholders. Accordingly, the Court did not have to consider the matter further. Although ASIC did not object to the Court approving the scheme, ASIC informed the Court that its concerns may still remain and that it was still at liberty to take whatever steps it wished to take in view of its concerns about whether there was or was not a breach of the 20% rule in this case. The Court concluded by noting that whether or not there was a breach of the 20% rule it should not let that issue stand in the way of the scheme being approved by the Court.

Later commenting on the Unity matter, ASIC publicly cautioned market participants that:

"We will continue to closely analyse shareholder intention statements to ensure that parties do not obtain any relevant interests that would result in a breach of s606 of the Corporations Act".[4]

ASIC's concerns flared up again in connection with the scheme of arrangement involving the proposed acquisition of Tawana Resources NL (**Tawana**) by Alliance Mineral Assets Ltd (**AMAL**).

In this case, the bidder (AMAL) had no relevant interest in shares in the target. However, target shareholders having an interest in approximately 35.9% of the target shares had confirmed to the target their intention to vote in favour of the scheme, in the absence of a superior proposal.

ASIC raised concerns in relation to this issue. The scheme booklet disclosed that ASIC suspected there may have been a breach of the 20% rule resulting from the shareholder intention statements:

"ASIC has advised that it has concerns that the voting intention statements given by the Relevant Shareholders [...] may constitute arrangements between AMAL and the Relevant Shareholders such that AMAL would be treated under the Corporations Act as having a relevant interest in the Tawana Shares held by the Relevant Shareholders. This would result in AMAL having a relevant interest in more than 20 per cent of all Tawana Shares which would constitute a breach of section 606 of the Corporations Act.

Accordingly, ASIC has advised that it is reserving its position regarding whether votes cast by a Relevant Shareholder should be disregarded. Tawana has agreed with ASIC to "tag" any such votes cast at the Scheme Meeting so that these votes can be separately recorded. This will enable ASIC, and if necessary the Court, at the Second Court Hearing to consider whether the resolution to be considered at the Scheme Meeting, if approved by the requisite majorities, would have been approved even if these votes were to be disregarded".

Despite ASIC's concerns, the Court (sensibly) made orders convening the scheme meeting. The issue will, no doubt, be further discussed at the final court hearing on 2 October 2018.

COMMENTARY

It would be a concern if the default position of ASIC and the Courts becomes that the votes of any shareholders who make voting intention statements are to be tagged. That approach may cause voting intention statements to 'go underground' (that is, not be publicly disclosed).

The Courts have accepted that the mere fact a shareholder makes a statement that they intend to vote in favour of a scheme in the absence of a superior proposal (or enters into a voting agreement to the same effect), is not class creating. However, if the votes of the relevant shareholder are tagged and the scheme would not have been approved if its votes were disregarded, this is the very outcome that would have occurred if the shareholder had been in separate class.

If a voting intention statement:

- is expressed as being given in the absence of a superior proposal (thus does not prevent an auction for control developing);
- fairly disclosed to shareholders; and
- complies with the Takeovers Panel's Guidance Note 23 ("Shareholder intention statements"), including:
    - disclosure of the identity of, and number of shares held by, the shareholders making the statements; and
    - consent being obtained from the shareholders making the statement,

then it may be said that such statement is not inconsistent with the 'Eggleston principles' and ASIC and the Court should not, absent special circumstances, require the votes of those shareholders to be tagged.

If, however, a shareholder who makes a voting intention statement will receive a collateral benefit (or, more precisely, a "net benefit") from the bidder – which benefit is not available to other shareholders – in exchange for making the statement, then this ordinarily would justify a tagging of their votes and the Court discounting or even disregarding their votes. This would be consistent with the approach taken by the Courts in other contexts in schemes of arrangement both in Australia and in the United Kingdom and is the real question that the Courts and ASIC should be focusing on.

ENDNOTES

1. See, for example, *Re Gerard Lighting Group Ltd* [2012] FCA 941 at [6] and *Re Pulse Health Ltd* [2017] NSWSC 651 at [13]-[14].
2. Letter from ASIC to the Takeovers Panel dated 17 September 2015. This letter was written in response to the public consultation process undertaken by the Takeovers Panel prior to the publication of Takeovers Panel, Guidance Note 23, "Shareholder

intention statements", First Issue, 11 December 2015.

3. [2016] VSC 831.

4. ASIC Report 489, "ASIC regulation of corporate finance: January to June 2016", dated August 2016, at 35 [170] (ASIC discusses the Unity Mining Ltd matter more broadly in that report at 34-35 [162]-[170]).

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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