FEDERAL COURT OF AUSTRALIA

Vita Group Ltd, in the matter of Vita Group Ltd [2023] FCA 400

|  |  |
| --- | --- |
| File number(s): |  |
|  |  |
| Judgment of: | **JACKMAN J** |
|  |  |
| Date of judgment: | 1 May 2023 |
|  |  |
| Catchwords: | **CORPORATIONS** – scheme of arrangement – first Court hearing – application for orders under s 411 of the *Corporations Act 2001* (Cth) that company convene meeting of its members to consider scheme of arrangement – where the payment of a dividend is conditional or contingent – potential disenfranchisement of a member who has appointed a proxy but attends meeting virtually – court hearings for schemes of arrangement should be conducted in alignment with the overarching purpose of the civil practice and procedure provisions – evidentiary requirements for schemes of arrangement – whether Court approval required for communications with shareholders other than the explanatory statement – *ex parte* obligations of the plaintiff company in schemes of arrangement  |
|  |  |
| Legislation: | *Corporations Act 2001* (Cth) Pts 2G.2, 5.1, 9.5, ss 249Y, 254T, 260A, 411, 1319*Evidence Act* *1995* (Cth) s 79*Federal Court of Australia Act* *1976* (Cth) Pt VB, s 37M*Corporations Regulations 2001* (Cth) reg 5.1.01, Sch 8, cll 8303 and 8306*Federal Court (Corporations) Rules 2000* (Cth) rr 1.3, 2.4, 3.2, 3.3, 3.4*Federal Court Rules* *2011* (Cth) r 23*Jurisdiction of Courts (Cross-Vesting) Act 1993* (ACT) s 4*Trustee Act* *1925* (ACT) s 63 |
|  |  |
| Cases cited: | *Chellaram v Chellaram* [1985] Ch 409*Ewing v Orr Ewing* (1883) 9 App Cas 34*International Finance Trust Co Ltd v NSW Crime Commission* (2009) 240 CLR 319*Kumova v Davison (No 2)* [2023] FCA 1*National Commercial Bank v Wimborne* (1978) 5 BPR 11,958*Permanent Trustee Co Ltd v National Australia Managers Ltd* (unreported, Sup Ct, NSW, McLelland CJ in Eq, 3033 of 1994, 5 August 1994)*Re AGL Ltd* [2022] NSWSC 576*Re Andean Resources Ltd* [2010] FCA 1190*Re APN News & Media Ltd* [2007] FCA 770; (2007) 62 ACSR 400*Re Beyond International Ltd* [2022] NSWSC 1649*Re BTA Institutional Services Australia Ltd* [2009] NSWSC 1294*Re Central Pacific Minerals NL* [2002] FCA 239*Re Centro Retail Ltd* [2011] NSWSC 1321*Re Citadel Group Ltd* [2020] FCA 1580; (2020) 148 ACSR 598*Re Coates Hire Ltd (No 2)* [2007] FCA 2105*Re Constantinou* [2012] QSC 332; [2013] 2 Qd R 219*Re CSR Ltd* [2010] FCAFC 34; (2010) 183 FCR 358*Re Dion Investments Pty Ltd* [2013] NSWSC 1941*Re Dion Investments Pty Ltd* [2014] NSWCA 367; (2014) 87 NSWLR 753*Re GetSwift Ltd* [2020] FCA 1382*Re Hills Motorway Ltd* [2002] NSWSC 897; (2002) 43 ACSR 101*Re Investa Listed Funds Management Ltd* [2016] NSWSC 344*Re Isentia Group Ltd* [2021] NSWSC 910*Re Isentia Group Ltd* [2021] NSWSC 1069*Re Mirvac Ltd* [1999] NSWSC 457; (1999) 32 ACSR 107*Re Oz Minerals Ltd* [2023] FCA 197*Re Permanent Trustee Co Ltd* [2002] NSWSC 1177*Re ResApp Health Ltd* [2022] NSWSC 1353*Re RXP Services Ltd* [2021] FCA 38*Re Sienna Cancer Diagnostics Ltd*  [2020] FCA 899*Re Simavita Holdings Ltd* [2013] FCA 1274*Re Spark Infrastructure RE Ltd* [2021] NSWSC 1385*Re Spark Infrastructure RE Ltd* [2021] NSWSC 1564*Re Tabcorp Holdings Ltd* [2022] NSWSC 448*Re Tassall Group Ltd* [2022] NSWSC 1414*Re Think Childcare Ltd* [2021] FCA 1042*Re Uniti Group Ltd* [2022] FCA 671; (2022) 160 ACSR 602*Re Webb*; *Webb v Rogers* (1992) 57 SASR 193*Thomas A. Edison Ltd v Bullock* (1912) 15 CLR 679*Walsh & Company Investments Ltd* [2020] NSWSC 1746Damian T and Rich A, *Schemes, Takeovers and Himalayan Peaks* (4th ed, 2021)Law Council of Australia, Submission in response to Treasury consultation paper “Corporate control transactions in Australia: consultation on options to improve schemes of arrangement, takeover bids, and the role of the Takeovers Panel”, 6 June 2022 |
|  |  |
| Division: | General Division |
|  |  |
| Registry: | New South Wales |
|  |  |
| National Practice Area: | Commercial and Corporations |
|  |  |
| Sub-area: | Corporations and Corporate Insolvency |
|  |  |
| Number of paragraphs: | 44 |
|  |  |
| Date of hearing: | 28 April 2023  |
|  |  |
| Counsel for the Plaintiff: | Mr D F C Thomas SC |
|  |  |
| Solicitor for the Plaintiff: | Minter Ellison |
|  |  |
| Counsel for the Bidder: | Mr T E O’Brien |
|  |  |
| Solicitor for the Bidder: | Gilbert + Tobin |
|  |  |

ORDERS

|  |  |
| --- | --- |
|  | NSD 252 of 2023 |
| IN THE MATTER OF VITA GROUP LTD  |
|  | VITA GROUP LTDPlaintiff |

|  |  |
| --- | --- |
| order made by: | JACKMAN J |
| DATE OF ORDER: | 28 APril 2023 |

THE COURT ORDERS THAT:

1. Pursuant to s 411(1) of the *Corporations Act 2001* (Cth) (**Act**), the Plaintiff is to convene and hold a meeting of the ordinary shareholders of the Plaintiff (**Vita Shareholders**) (**Scheme Meeting**) to consider and, if thought fit, to approve (with or without modification) the scheme of arrangement (**Scheme**) proposed to be made between the Plaintiff and Vita Shareholders, the terms of which are set out in the document at Appendix 3 of the document comprising Exhibit P1 (**Scheme Booklet**).

2. The following documents be approved for distribution to Vita Shareholders, with distribution to occur in accordance with order 3:

(a) the Scheme Booklet substantially in the form set out in Exhibit P1; and

(b) the proxy form in respect of the Scheme Meeting (for Electing Postal Shareholders and Non Electing Postal Shareholders only (each as defined in order 3), substantially in the form of Exhibit P2 (**Proxy Form**)).

3. The documents in order 2 are to be provided to Vita Shareholders by sending on or before 5 May 2023:

(a) in the case of Vita Shareholders who have elected to receive shareholder communications electronically (**Email Shareholders**), an email which includes access by an embedded link to the following:

(i) an electronic copy of the Scheme Booklet;

(ii) an online portal or website that is accessible by Email Shareholders and which enables Email Shareholders to lodge their proxy for the Scheme Meeting and voting instructions online; and

(b) in the case of Vita Shareholders who have elected to receive hard copy communications (**Electing** **Postal Shareholders**) and whose registered address is in Australia, the following documents by pre-paid post addressed to the relevant addresses recorded in the Plaintiff's register:

(i) a letter in respect of the Scheme Meeting (**Electing Postal Shareholder Letter**), which encloses a printed copy of the Scheme Booklet;

(ii) a personalised single Proxy Form;

(iii) a reply paid envelope for the return of that Vita Shareholder’s Proxy Form; and

(c) in the case of Vita Shareholders who have not elected to receive electronic or hard copy communications (**Non Electing Postal Shareholders**) and whose registered address is in Australia, the following documents by pre-paid post addressed to the relevant addresses recorded in the Plaintiff's register:

(i) a letter in respect of the Scheme Meeting, which contains the address of a website which enables Non Electing Postal Shareholders to access a copy of the Scheme Booklet (**Non Electing Postal Shareholder Letter**);

(ii) a personalised single Proxy Form;

(iii) a reply paid envelope for the return of that Vita Shareholder’s Proxy Form; and

(d) in the case of Electing Postal Shareholders and Non Electing Postal Shareholders whose registered address is outside Australia, the following documents by pre-paid airmail post addressed to the relevant addresses recorded in the Plaintiff’s register:

(i) an Electing Postal Shareholder Letter or Non Electing Postal Shareholder Letter (as applicable);

(ii) a printed copy of the Scheme Booklet (for Electing Postal Shareholders only);

(iii) a personalised Proxy Form; and

(iv) a self-addressed envelope for the return of that Vita Shareholder’s Proxy Form.

4. Subject to these orders, the Scheme Meeting is to be convened, held and conducted in accordance with the provisions of:

(a) Part 2G.2 of the Act (save for any applicable replaceable rule) that apply to a meeting of the Plaintiff’s members; and

(b) the Plaintiff's Constitution that apply in relation to meetings of members and that are not inconsistent with Part 2G.2 of the Act.

5. Pursuant to r 3.3(2) of the *Federal Court (Corporations) Rules 2000* (Cth) (**Rules**), notwithstanding s 249Y(3) of the Act, the appointment of a proxy in respect of the Scheme Meeting shall not be revoked or suspended by the appointing ordinary shareholder of Vita (**Vita** **Appointor**) attending and taking part in the Scheme Meeting, but if the Vita Appointor votes on a resolution at the Scheme Meeting, the proxy is not entitled to vote as the Vita Appointor's proxy on that resolution and any such vote must not be counted in the results of the relevant poll.

6. The Scheme Meeting is to be held as a hybrid meeting and conducted in two parts simultaneously on Monday, 5 June 2023 commencing at 11.00am (Sydney time) with the physical venue of the Scheme Meeting at MinterEllison's offices at Level 22, Waterfront Place, 1 Eagle Street Brisbane, Queensland, 4000 and via an online platform that allows for remote participation as set out in the Notice of Scheme Meeting.

7. Vita Shareholders may vote at the Scheme Meeting by attending in person or by proxy, attorney or corporate representative (if applicable).

8. Paul Alexander Mirabelle, or failing him Gordon James Towell, be the chairperson of the Scheme Meeting.

9. The chairperson of the Scheme Meeting shall have the power to adjourn the Scheme Meeting to such time, date and place as he considers appropriate.

10. The Plaintiff may provide access to the Scheme Meeting for such other persons as it thinks fit.

11. Voting on the resolution to approve the Scheme is to be conducted by way of a poll.

12. A Proxy Form in respect of the Scheme Meeting will be valid and effective if, and only if, it is completed and received in accordance with its terms by 11.00am (Sydney time) on Saturday, 3 June 2023.

13. Pursuant to r 1.3 of the Rules, compliance with the following requirements of the Rules is dispensed with:

(a) r 2.4(1), to the extent that rule requires the affidavit filed with the Originating Process to state the facts in support of the process;

(b) r 2.15;

(c) r 3.2(b)(ii); and

(d) r 3.4 and Form 6.

14. The Plaintiff is to publish an announcement via the Australian Securities Exchange containing the substance of the matters set out in Form 6 of the Rules by no later than 5 June 2023.

15. The further hearing of the Originating Process in respect of the Plaintiff's application pursuant to s 411(4), and if necessary s 411(6), of the Act for approval of the Scheme, is adjourned to 9.15am (Sydney time) on 8 June 2023.

16. Liberty to apply is reserved.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

JACKMAN J

## Salient Features of the Scheme of Arrangement

1 This is an application for orders to convene a meeting of the members of Vita Group Ltd (**Vita**) to consider a scheme of arrangement between Vita and its members pursuant to s 411 of the *Corporations Act 2001* (Cth) (the **Act**).

2 Vita was incorporated on 1 March 2005 under the name Fone Zone Group Ltd, and changed its name to Vita Group Ltd on 3 April 2008. The business of Vita involves the sales and marketing of products and services relating to skin health and wellness and operates under a number of brands, including Artisan Aesthetics Clinics. On the last trading day before the proposed scheme was announced to the ASX on 15 March 2023, the market capitalisation of Vita was approximately $14 million and is currently approximately $24 million.

3 Under the terms of the proposed scheme of arrangement (**Scheme**), Practice Management Pty Ltd (**Bidder**), a subsidiary in the group of companies controlled by Sonic Healthcare Ltd, will acquire all of the issued Vita shares on the Implementation Date for total cash consideration of approximately $11 million. The Scheme Consideration is $0.06255 per Vita share. In addition, Vita is permitted by the Scheme Implementation Deed to declare and pay a fully franked dividend of up to $0.06425 per Vita share (**Permitted Dividend**) with no corresponding reduction in the Scheme Consideration.

4 The board of directors of Vita has announced an intention to declare a fully franked Permitted Dividend of up to $0.06425 per share if the scheme becomes effective no later than 30 June 2023. If the Permitted Dividend is declared and paid, the overall transaction will provide shareholders with a total value of $0.12680 per Vita share, comprising the Scheme Consideration of $0.06255 per share and the expected Permitted Dividend of $0.06425 per share. The letter from the Chairman included in the draft scheme booklet goes on to say that if the Vita board determines not to declare the Permitted Dividend or if the Permitted Dividend is declared but is lower than $0.06425 per share, Vita intends to seek Court approval for the release of a supplementary scheme booklet disclosing the implications of this for Vita shareholders. Such a supplementary disclosure is expected to include any changes to the recommendation of the Vita board on the Scheme as well as any changes to the opinion of the Independent Expert on the scheme. If that occurs, the Chairman says that it is likely that the scheme meeting would need to be postponed to a date determined by the Court. Further, the Chairman’s letter states that if there are any delays in the scheme timetable which emerge after the declaration of the Permitted Dividend (expected to be on or before 29 May 2023) and which would result in the Effective Date of the Scheme falling after 30 June 2023, the Vita Board will assess the implications of that delay in the context of the Permitted Dividend at that point in time having regard to the then prevailing circumstances. Any decision of the Vita Board in relation to the Permitted Dividend in that scenario may also be subject to supplementary disclosure with the approval of the Court.

5 Apart from the Permitted Dividend, the proposed scheme is an entirely conventional share acquisition scheme between the scheme company and its members. The terms of the Scheme and the content and format of the draft explanatory statement follow longstanding and conventional practice.

6 As I have indicated above, the Permitted Dividend is conditional on the Scheme becoming effective no later than 30 June 2023, but will not reduce the Scheme Consideration payable. The decision whether or not to declare the Permitted Dividend will be made by the Vita board and will be communicated to Vita shareholders by way of an ASX announcement in late May 2023 and by no later than 29 May 2023, which is five days prior to the last day on which proxies must be lodged for the scheme meeting. The Permitted Dividend will be partially funded by the Bidder under the terms of an agreed facility agreement dated 15 March 2023, representing $5,600,000 out of the amount of approximately $11,300,000 required to pay the Permitted Dividend.

7 In ASIC’s letter of 27 April 2023 confirming that it has received at least 14 days’ notice of the hearing of this application and has had a reasonable opportunity to examine the terms of the Scheme and the draft explanatory statement, ASIC has said that it wishes to reserve its position regarding the contingent nature of the Permitted Dividend. In that letter, ASIC says that under the proposed timetable, shareholders of Vita will be asked to vote on the Scheme before the Permitted Dividend has been paid. ASIC is concerned that this may result in shareholders not receiving the Permitted Dividend where there are delays in the Scheme timetable which emerge after the declaration of the Permitted Dividend, and which would result in the Effective Date of the Scheme falling after 30 June 2023. ASIC says that this would occur where the Vita board determines that it would not be appropriate to declare the Permitted Dividend having regard to the then prevailing circumstances. ASIC says that it understands that there are legal reasons, namely ensuring compliance with s 254T of the Act, for the conditionality of the Permitted Dividend. ASIC says that should the scheme be approved by shareholders, and should it appear that there may be delays in the Scheme timetable that result in the Effective Date of the Scheme falling after 30 June 2023, ASIC will consider what impact this may have had on voting on the Scheme.

8 As Mr Thomas SC, who appears for Vita, submits, the payment of contingent or conditional dividends in the context of members’ schemes of arrangement is not unusual, and is consistent with the constraints imposed by s 254T of the Act. Mr Thomas submits that where, as here, the contingent nature of the dividend is adequately disclosed to shareholders, the contingency is not a reason not to convene a scheme meeting. Mr Thomas points out that a large part of the contingency will be removed prior to the meeting given that the board’s decision to declare, or not declare, the Permitted Dividend will be communicated by an ASX announcement by no later than 29 May 2023, being five days before the closure of proxies. Mr Thomas points out that the contingent nature of the Permitted Dividend, being conditional upon the scheme becoming effective before 30 June 2023, is disclosed in multiple places in the scheme booklet. Mr Thomas also draws the Court’s attention to recent decisions in this Court which record without concern a Special Dividend or Permitted Dividend which is conditional upon the Scheme becoming effective: *Re Oz Minerals Ltd* [2023] FCA 197 at [30] (Beach J); *Re Think Childcare Ltd* [2021] FCA 1042 at [26] (O’Callaghan J).

9 I agree with those submissions. Provided that there is adequate disclosure, as there is in the present case, the contingency is not of a kind which would justify the Court declining to convene the meeting. Any further argument on the issue can occur at the second court hearing.

10 For completeness, Mr Thomas submits, and I accept, that the Permitted Dividend does not give rise to any issue of financial assistance for the purpose of s 260A of the Act being provided by Vita to assist the Bidder in acquiring the Vita shares. In the first place, neither the Bidder nor any of its associates has a relevant interest or voting power in any Vita shares and therefore will not receive the Permitted Dividend. Second, if Vita declares and pays the Permitted Dividend to its shareholders, it is not giving financial assistance to the Bidder to acquire the Scheme shares as the Bidder will be funding the Scheme Consideration and, in any event, no reduction in that amount will occur by reason of any Permitted Dividend being made. Accordingly, there will not be any benefit to the Bidder or any assistance in any form being provided by Vita to the Bidder in this instance. The Permitted Dividend therefore does not constitute financial assistance for the purposes of s 260A. Even where a permitted dividend or special dividend reduces the scheme consideration payable by the bidder, Beach J has held in a series of cases that there is no financial assistance for the purposes of s 260A: see *Re Citadel Group Ltd* [2020] FCA 1580; (2020) 148 ACSR 598 at [47]-[53]; *Re RXP Services Ltd* [2021] FCA 38 at [49]-[57]; *Re Uniti Group Ltd* [2022] FCA 671; (2022) 160 ACSR 602 at [50]-[61]; *Re Oz Minerals Ltd* [2023] FCA 197 at [7] and [18]. The present case is *a fortiori* as the Permitted Dividend will not reduce the Scheme Consideration.

11 On a separate matter, Vita proposes that an order be made to deal with the case where a Vita shareholder appoints a proxy, but then attends the meeting in person. Section 249Y(3) of the Act provides that a company’s constitution may provide for the effect that the member’s presence at a meeting has on the authority of a proxy appointed to attend and vote for the member, but if the constitution does not deal with this matter, a proxy’s authority to speak and vote for a member at a meeting is suspended while the member is present (**Default Rule**). Vita seeks an order overriding the Default Rule to reduce the risk that shareholders might unknowingly preclude their own proxy or attorney from voting simply because the shareholder is observing the conduct of the scheme meeting remotely by way of the audio-visual link. Such an order was made in *Re Sienna Cancer Diagnostics Ltd*  [2020] FCA 899 at [112]-[115] (Moshinsky J) and *Re GetSwift Ltd* [2020] FCA 1382 at [10]-[15] (Yates J). However, in both those cases the company’s constitution did deal with the effect that the member’s presence at the meeting has on the authority of a proxy appointed to attend and vote for the member, and thus the Default Rule did not apply by force of s 249Y(3). In the present case, the constitution of Vita does not deal with that matter. Accordingly, the Default Rule under section 249Y(3) comes into operation.

12 There seems to me to be a difficulty in using s 1319 of the Act to override the Default Rule in that the power conferred by s 1319 is expressed to be “subject to this Act”. Accordingly the Default Rule under s 249Y(3) is paramount to the power under s 1319. However, there is an alternative source of power to make the order conferred by r 3.3(2) of the *Federal Court (Corporations) Rules 2000* (Cth) (**Corporations Rules**), which provides relevantly that, unless the court otherwise orders, a meeting of members ordered under s 411 of the Act must be convened, held and conducted in accordance with the provisions of Pt 2G.2 of the Act that apply to the members of a company. Section 249Y(3) falls within Pt 2G.2 of the Act. Accordingly, r 3.3(2) of the Corporations Rules confers a power on the Court to “otherwise order” by making an order which would override the Default Rule. I propose to make that order, so as to prevent the risk of a member inadvertently becoming disenfranchised where a proxy has been appointed by the member who decides to attend the meeting online, but then the member neglects to vote personally.

13 The present application is notable for the efficient approach which has been taken to the evidence for the first court hearing. The legal representatives for Vita and the Bidder have made a fresh start to the approach taken to the preparation of evidence for members’ schemes of arrangement, and it is to that topic that I now turn.

## The Overarching Purpose

14 Section 37M of the *Federal Court of Australia Act* *1976* (Cth) (**Federal Court Act**)provides that the overarching purpose of the civil practice and procedure provisions is to facilitate the just resolution of disputes according to law, and as quickly, inexpensively and efficiently as possible. Section 37M(3) provides that the civil practice and procedure provisions must be interpreted and applied in the way that best promotes that overarching purpose. The reference to “civil practice and procedure provisions” includes not only the *Federal Court Rules* *2011* (Cth), but also theCorporations Rules. Although scheme of arrangement applications are usually conducted on an *ex parte* basis, without a contradictor, and thus may not in the typical case be regarded as “disputes”, I regard the overarching purpose identified in s 37M of the Federal Court Act as being equally applicable to the present context. Subsequent to the case management hearing in this matter to which I refer below, the Court has announced that it intends to publish a practice note or other communication concerning scheme of arrangement applications after consultation with various bodies. However, in the meantime, I am bound by s 37M(3) to apply the civil practice and procedure provisions in the way that best promotes the overarching purpose. The obligation in s 37M is expressed in language which is imperative and immediate. Part VB of the Federal Court Act does not contain empty rhetoric: *Kumova v Davison (No 2)* [2023] FCA 1 at [86] (Lee J).

15 There has been considerable criticism in recent years by legal practitioners, and others professionally involved in corporate control transactions in Australia, concerning the evidentiary requirements at court hearings for schemes of arrangement. While much of that criticism has been informally expressed, it has occasionally been given more formal expression. For example, in the submission prepared by the Corporations Committee of the Business Law Section of the Law Council of Australia dated 6 June 2022, in response to a consultation paper published by the Department of Treasury in April 2022, entitled “Corporate control transactions in Australia: consultation on options to improve schemes of arrangement, takeover bids, and the role of the Takeovers Panel”, the point was made (at p 30) that there is a significant amount of evidence and other materials required to be prepared and delivered to the Court ahead of the first and second court hearings, as described in Tony Damian and Andrew Rich’s comprehensive work, *Schemes, Takeovers and Himalayan Peaks* (4th ed, 2021) at [5.11]. The Law Council’s submission went on to say that this was not a legislative requirement, but rather a result of the practice and procedure that has emerged over many years, which should be streamlined. It was said that this would result in cost saving and the removal of unnecessary (and immaterial) materials having to be reviewed by the Court (p 30). It may be inferred from the contact details stated in the Law Council’s paper (on p 6) for any queries to be directed to two members of the committee, Mr Guy Alexander of Allens and Mr Andrew Rich of Herbert Smith Freehills, that those highly experienced practitioners in the field of schemes of arrangement were primarily responsible for the preparation of that submission.

16 In light of those concerns and the obligation on the Court under s 37M of the Federal Court Act, I took the unusual step of conducting a case management hearing in this matter on 22 March 2023, shortly after the originating application was filed. On that occasion, I outlined the manner in which the first and second court hearings might be approached, in a manner consistent with the overarching purpose of the civil practice and procedure provisions referred to above. It is fundamental to the rule of law that judicial decision-making be predictable, and the case management hearing provided an appropriate opportunity in advance of the first and second court hearings for that desideratum to be satisfied. The fact that the scheme company is relatively small by comparison with many other scheme companies makes that approach particularly appropriate in the present case. I have divided the issues which arise in terms of evidentiary requirements into three sections below, dealing in turn with requirements under the Act, requirements under the Corporations Rules and requirements imposed by the Courts themselves.

## Corporations Act Requirements

17 Section 411(2) of the Act provides as follows:

The Court must not make an order pursuant to an application under subsection (1) or (1A) unless:

a) 14 days notice of the hearing of the application, or such lesser period of notice as the Court or ASIC permits, has been given to a ASIC; and

b) the Court is satisfied that ASIC has had a reasonable opportunity:

i) to examine the terms of the proposed compromise or arrangement to which the application relates and a draft explanatory statement relating to the proposed compromise or arrangement; and

ii) to make submissions to the Court in relation to the proposed compromise or arrangement and the draft explanatory statement.

18 Ordinarily, as in the present case, ASIC provides a letter shortly before the first court hearing stating that it has had a reasonable opportunity to consider the explanatory statement and, in the usual case, does not raise any objections to the draft explanatory statement. From time to time, the letter will contain a statement of objection or other issue raised by ASIC to be resolved by the Court. That letter is typically sufficient to comply with the statutory requirement in s 411(2) to which I have referred. A practice has developed in recent years of providing a lengthy exhibit to a solicitor’s affidavit containing all the correspondence between the plaintiff’s solicitors and ASIC concerning the draft statement. I consider that practice to be wasteful and I commend the plaintiff in the present case for not following it. If there is a genuine issue which remains at the time of the first court hearing which must be brought to the Court’s attention pursuant to the plaintiff’s *ex parte* disclosure obligations, then that should be done by way of written or oral submissions. The issue concerning the Permitted Dividend, to which I have referred above, provides a good example, and it was properly raised by Vita’s legal representatives in their written submissions before they had received ASIC’s letter of 27 April 2023. It is neither necessary nor desirable for the Court to be given all the correspondence which has passed between the plaintiff’s solicitors and ASIC.

19 An independent expert’s report is routinely required under the *Corporations Regulations 2001* (Cth), reg 5.1.01 and Sch 8, cll 8303 and 8306. This report appears sufficiently as an attachment to the draft explanatory statement. The independent expert’s report is not expert opinion evidence under s 79 of the *Evidence Act* *1995* (Cth): *Re Beyond International Ltd* [2022] NSWSC 1649 at [20]-[23] (Black J). As such, there is no need for a separate affidavit from the independent expert verifying that report, nor is there any need to comply with r 23 of the *Federal Court Rules 2011* (Cth) concerning expert evidence. In this application, the plaintiff has departed from what has become the usual practice in recent years of obtaining such an affidavit from the independent expert, and again the plaintiff is to be commended for omitting that unnecessary aspect of the evidence. I note that the position may be different in some creditors’ schemes of arrangement where the expert’s report is also deployed to prove certain facts or opinions established by it, such as the impending insolvency of the scheme company and the likelihood of solvency after the scheme is implemented.

## Requirements under the Corporations Rules

20 The plaintiff has filed a short formal affidavit accompanying the originating process, containing a recent ASIC search (carried out within 7 days before the originating process was filed), as required by r 2.4(2) of the Corporations Rules. Although r 2.4(1) requires an originating process to be supported by an affidavit stating the facts in support of the process, that is preceded by the words “Unless the Court otherwise directs”. I have directed that the initial formal affidavit need not go beyond annexing the recent ASIC search, given that later affidavits filed before the first Court hearing contain the facts in support of the originating process, and I otherwise dispense with compliance with r 2.4(1).

21 Rule 3.2 of the Corporations Rulesrequires the plaintiff to file an affidavit stating the names of the persons who have been nominated to be the chairperson and alternate chairperson of the scheme meeting, and that each person nominated:

i) is willing to act as chairperson; and

ii) has had no previous relationship or dealing with the body, or any other person interested in the proposed compromise or arrangement, except as disclosed in the affidavit; and

iii) has no interest or obligation that may give rise to a conflict of interest or duty if the person were to act as chairperson of the meeting, except as disclosed in the affidavit.

22 Contrary to the usual practice in recent years, r 3.2 does not require an affidavit by each of the proposed chairperson and alternate chairperson themselves. There is no reason why the evidence required by r 3.2 cannot be given on information and belief in either the main affidavit or in a separate affidavit relied upon at the first court hearing, that hearing being interlocutory in nature. It has frequently been a considerable inconvenience for the proposed chairperson and alternate chairperson to make affidavits themselves in relation to those matters, rather than simply providing information and belief to another person to make the relevant affidavit. Further, pursuant to r 1.3 of the Corporations Rules, I dispense with the unnecessary (and sometimes onerous) requirement under r 3.2(b)(ii) that the affidavit must state that those nominated have had no previous relationship or dealing with the body, or any other person interested in the proposed compromise or arrangement, except as disclosed in the affidavit. In the present case, the main affidavit is made by the proposed chairperson, Mr Mirabelle, who has deposed to his own willingness and lack of conflicts in acting as chairperson of the meeting, and has also proved by way of information and belief that the proposed alternate chairperson, Mr Towell, is willing to act and does not have any conflict.

23 Rule 3.4 of the Corporations Rules requires that the plaintiff must publish a notice of the hearing of the application for an order approving a proposed compromise or arrangement in the form of Form 6. The rule does not in terms require publication in a newspaper, although the practice has continued to be followed of publishing such a notice in a newspaper which is circulated throughout Australia. In my opinion, a much more appropriate means of publication of such a notice would be by way of ASX announcement (or by announcement on the company’s website if the company is not listed). I have indicated to the plaintiff that I am prepared to dispense with compliance with r 3.4 (pursuant to the power conferred by r 1.3), provided that the details for the second court hearing and for the process of opposing the approval of the compromise or arrangement, together with the name and address for service of the plaintiff as contemplated by Form 6, are set out in the ASX announcement. There is no need to follow the linguistic style of Form 6 in doing so.

## Requirements imposed by the Courts

### Break Fees and Exclusivity Provisions

24 The evidence for the plaintiff in recent years has included evidence concerning the negotiations for break fees and exclusivity provisions to the effect required by the judgment of Lindgren J in *Re APN News & Media Ltd* [2007] FCA 770; (2007) 62 ACSR 400 at [55] as follows:

(a) that the no-shop and break fee provisions are the result of normal commercial negotiation, and explaining, at least briefly and in general terms, the factual basis for that statement;

(b) the directors of the target company, or at least those directors of it who are not affiliated with the offeror, believe that the provisions do not operate against the interests of offeree shareholders, and that in fact it was in the interests of such shareholders that the directors agreed to the inclusion of the provisions in the merger implementation agreement; and

(c) in the case of the break fee, explaining, by reference to calculations based on the evidence before the court, the percentage that the break fee represents (i) of the “equity value” of the target company, calculated in accordance with para 7.18 of the Takeovers Panel’s Guidance Note 7, and (ii) of the scheme consideration (although Lindgren J said that that explanation may be conveyed in a submission by reference to evidence before the court).

25 With the passage of time over the last fifteen years or so since that judgment was given, break fee provisions and exclusivity provisions have become so conventional that it is unlikely that they are heavily negotiated. In the usual circumstances where both the target and the bidder are represented by experienced lawyers, there may be no resistance to the first draft put forward of such provisions, in circumstances where they follow conventional language. In terms of the quantum of the break fees, the Takeovers Panel’s rule of thumb (that 1% of the value of the plaintiff’s shares implied by the scheme consideration is not coercive) has actually served to keep break fees down, and to protect the target against much larger demands for break fees from bidders, who often enjoy superior bargaining power in that regard. It is not typically a case of break fees increasing to the 1% ceiling by reason of the guidance provided by the Takeovers Panel, but rather the figure of 1% serving to reduce break fees by arming the target with an effective and self-sufficient response to higher demands by the bidder. In this regard, I do not see any justification for requiring evidence from the bidder giving a breakdown of out-of-pocket expenses to justify the break fee.

26 In the present application, the plaintiff has not given the kind of evidence which was once thought desirable by Lindgren J, nor has it provided a breakdown of costs in order to justify the break fee. I do not regard the omission of such evidence as presenting any difficulty in making orders at this first court hearing. It is sufficient for the main affidavit to indicate in a single sentence the percentage which any break fee payable by the scheme company to the bidder represents of the value of the company’s shares implied by the scheme consideration. Mr Mirabelle has done that, proving that the break fee of $110,000 which may become payable by Vita is approximately 1% of the total equity value of Vita of approximately $11 million implied by the scheme consideration.

### Proposed Communications by Scheme Company to Shareholders

27 An important issue has emerged in recent years concerning formal Court approval being given in relation to proposed communications by the scheme company with its shareholders after the first court hearing and before the scheme meeting. The line of cases began unexceptionally with Emmett J’s reasons in *Re Coates Hire Ltd (No 2)* [2007] FCA 2105 at [6], where his Honour held that where the Court orders that an explanatory statement in a particular form be sent to shareholders, the document should not be accompanied by any further document that has not itself been approved by the Court. That reasoning, with respect, is undoubtedly correct, because such an additional document is part of the same dispatch as the explanatory statement.

28 However, in *Re Centro Retail Ltd* [2011] NSWSC 1321 at [11], Barrett J extended that reasoning to include any proposal for later supplementation of the approved explanatory statement. Barrett J treated Emmett J’s statement in *Re Coates Hire Ltd (No 2),* which was concerned only with the initial dispatch of the explanatory statement, as applying with equal force to any proposal for later supplementation of the approved explanatory statement. His Honour stated: “Because the meeting is convened in accordance with an order of the court and the court has approved the explanatory statement, the court-approved ‘message’ should not be interfered with by unilateral supplementation by the company.” Barrett J observed that s 411(1) of the Act did not confer power to deal with such later material (at [13]-[14]), but found that s 1319 was an available source of power: [15]-[16]. In the earlier case of *Re Hills Motorway Ltd* [2002] NSWSC 897; (2002) 43 ACSR 101 at [15], Barrett J said that it was a fundamental premise of Pt 5.1 of the Act that the documents ordered by the Court to go to shareholders should be the only vehicle for communicating the substantive message relevant to members’ decision making.

29 I accept that s 1319 could be used for this purpose, but in my view the fact that it is only the explanatory statement which is referred to in s 411(1) and (1A) is significant. Part 5.1 does not, as Barrett J acknowledged, deal with or even confer power on the Court to approve, other communications. For that purpose, the Court needs to have resort to s 1319, which appears in Pt 9.5 of theAct*.*

30 The practice has developed of the plaintiff putting before the Court for formal approval any documents proposed to be used in communications with shareholders (and others such as proxy advisers), so that the Court maintains oversight of such communications, consistently with the reasoning of Barrett J in *Re Centro Retail Ltd.* A useful list of such cases is provided by Black J in *Re Tassall Group Ltd* [2022] NSWSC 1414 at [32]. That case dealt with the script for a proposed outbound call campaign, which Black J regarded as requiring Court approval, as distinct from a shareholder information line taking incoming calls, in that the scheme company seeking to initiate an engagement with a shareholder which has not sought to engage appeared to his Honour to involve a greater practical risk of distorting, or distracting attention from, the information provided in the scheme booklet than a response to incoming shareholder questions. His Honour had decided in *Re ResApp Health Ltd* [2022] NSWSC 1353 that approval was unnecessary in relation to a shareholder information line receiving inbound calls. In the event, Black J approved the outbound call script in circumstances where it did not travel beyond the information in the scheme booklet, presented information in a balanced manner, drew attention to advantages and disadvantages of the scheme and encouraged shareholders to read the scheme booklet in its entirety.

31 In *Re Tabcorp Holdings Ltd* [2022] NSWSC 448 at [22], Black J approved a presentation to be given to some of Tabcorp’s larger shareholders and released on the ASX. In *Re Investa Listed Funds Management Ltd* [2016] NSWSC 344, Brereton J approved an ASX announcement for a trust scheme between the first and second court hearings, applying *Re Centro Retail Ltd* by reason of the close analogy between trust schemes and company schemes under s 411; see to similar effect *Walsh & Company Investments Ltd* [2020] NSWSC 1746 at [66] (Black J). However, Court approval has not usually been sought for ASX announcements between the first court hearing and the scheme meeting, even where they contain updated financial statements, unless the independent expert has changed his or her opinion: see *Re Andean Resources Ltd* [2010] FCA 1190 at [26] (Jagot J).

32 It is difficult to reconcile all these decisions with the strictness of the reasoning of Barrett J. However, that reasoning is open to a more fundamental objection. If there is a principle that the documents ordered by the Court to go to shareholders should be the only vehicle for communicating the substantive message relevant to members’ decision-making, then that principle must find its source, whether expressly or impliedly, in Pt 5.1 of the Act. In my view, the question ought to be approached as a matter of statutory construction of Pt 5.1, in which, as I have said, the only document identified for approval by the Court is the explanatory statement, and by implication any supplementary explanatory statement if one is required. Even if one reads Pt 5.1 brimful with spirit and intent, in my opinion, there is nothing in Pt 5.1 which requires the scheme company to seek Court approval for its communications with shareholders and others between the first court hearing and the scheme meeting unless a supplementary explanatory statement is required. The scheme company is to be at its own risk concerning such communications with shareholders, including as to whether they are misleading, and whether they may potentially jeopardise Court approval at the second court hearing. Accordingly, in my opinion it is neither necessary nor desirable for the Court to consider whether it should approve such subsequent communications, unless a supplementary explanatory statement is required.

33 Despite the fact that I have taken a different view from some distinguished company judges of the Supreme Court of New South Wales in relation to this issue, the judgments of that Court on the point do contain very useful guidance for the scheme company in terms of the approach that should be taken to subsequent communications with shareholders in order to minimise or negative the risk of misleading conduct which might jeopardise Court approval at the second court hearing. Black J, in particular, has usefully stated that no difficulty arises where the content of the proposed presentation largely mirrors that contained, in more detail, in the scheme booklet and where it prominently directs recipients to read the scheme booklet before making any voting decision in respect of the proposed merger: *Re Tabcorp Holdings Ltd* at [22]. Further, a degree of advocacy is permissible in communications with shareholders given that the explanatory statement invariably contains a recommendation, provided that such advocacy is fair and honest: *Re Investa Listed Funds Management Ltd* [2016] NSWSC 344 at [5] (Brereton J); *Re AGL Ltd* [2022] NSWSC 576 at [42] (Black J). Those statements in my opinion contain valuable guidance for scheme companies in deciding for themselves what communications should be made with scheme shareholders and others in advance of the scheme meeting.

34 Mr Mirabelle’s affidavit proves that Vita has engaged a shareholder services advisory firm to act as the point of contact for any Vita shareholders who have questions or complaints about the Scheme or disclosure in the scheme booklet. That firm has been engaged to provide information which reflects the information contained in the Frequently Asked Questions section in the scheme booklet, and the employees of that firm will be instructed not to depart from the information in the scheme booklet in any material way during those inbound calls. In my opinion, that evidence constitutes sufficient disclosure to the Court. Vita has not sought formal Court approval or orders for those communications and, as set out above, I regard that as the correct approach to adopt.

35 For completeness, the same approach should be followed in trust schemes (such as *Re Investa Listed Funds Management Ltd*), in which the trustee of a managed investment scheme proposes an amendment to the constitution of the trust by way of a two-stage process closely modelled on s 411 scheme procedure: see *Re Mirvac Ltd* [1999] NSWSC 457; (1999) 32 ACSR 107 at [34]-[49] (Austin J). The Federal Court has jurisdiction to give judicial advice under s 63 of the *Trustee Act* *1925* (ACT), pursuant to s 4(1) of the *Jurisdiction of Courts (Cross-Vesting) Act 1993* (ACT). That is so irrespective of whether the proper law of the trust is the law of the Australian Capital Territory: *Re Webb*; *Webb v Rogers* (1992) 57 SASR 193 at 195-6 (King CJ); *Permanent Trustee Co Ltd v National Australia Managers Ltd* (unreported, Sup Ct, NSW, McLelland CJ in Eq, 3033 of 1994, 5 August 1994); *Re BTA Institutional Services Australia Ltd* [2009] NSWSC 1294 at [5] (Brereton J); and *Re Dion Investments Pty Ltd* [2013] NSWSC 1941 at [32]-[37] (Young AJ). (The point was not the subject of comment by the Court of Appeal in the last case: *Re Dion Investments Pty Ltd* [2014] NSWCA 367; (2014) 87 NSWLR 753.) Typically in the case of the listed managed investment schemes which are likely to be the subject of trust schemes, there will be a significant number of members who are resident in the ACT, and there may also be business operations conducted by the responsible entity and trustee of the managed investment scheme in the ACT. There will therefore typically be the kind of connection with the ACT to which King CJ referred in *Re Webb* at 195. There is also a line of authority to the effect that, as a matter of general principle, the Court has *in personam* jurisdiction over any trustee which comes before it, whether by submitting to its jurisdiction or by being served in proceedings before it: *Ewing v Orr Ewing* (1883) 9 App Cas 34 at 40-41 (Lord Selborne LC), 45-46 (Lord Blackburn); *Chellaram v Chellaram* [1985] Ch 409 at 426-7 (Scott J); *National Commercial Bank v Wimborne* (1978) 5 BPR 11,958 at 11,982 (Holland J); *Re Constantinou* [2012] QSC 332; [2013] 2 Qd R 219 at [11] (Dalton J); *Re Dion Investments Pty Ltd* at [34]-[36]. This is not the appropriate occasion to explore the outer limits of that principle, or how it operates in the context of cross-vested jurisdiction.

### Miscellaneous Matters

36 The plaintiff has departed from another practice which has developed recently, namely to give evidence of the plan for dispatch of the explanatory statement and other materials once they are approved at the first court hearing. In my opinion, such evidence is otiose. The orders made at the first court hearing are self-explanatory, and do not need evidence of the proposed procedures to be followed by the scheme company or its share registry.

37 A further topic concerns the proposed manner of conducting the scheme meeting. This became common practice during the Covid-19 pandemic, given the novelty of the technology which was typically adopted for scheme meetings during that period. In my opinion, there is no longer any need for such evidence, given the familiarity which is now widely enjoyed in relation to that technology, and the plaintiff has not provided such evidence in relation to the hybrid scheme meeting, which will be held both in person in Brisbane and also remotely by way of audio-visual link.

38 I note that the Bidder in the present case is an Australian company. Accordingly, this application is not the appropriate occasion to consider the correctness or otherwise of the practice of proving by way of expert evidence the due execution of the deed poll by a foreign bidder required by *Re Simavita Holdings Ltd* [2013] FCA 1274 at [44] (Farrell J).

39 The cash required by the Bidder to pay the Scheme Consideration is the subject of an unconditional and irrevocable undertaking by the Bidder’s parent company to make that cash available from its existing cash reserves. Accordingly, these proceedings do not raise for consideration the correctness or otherwise of the proposition that evidence is required at the second court hearing concerning the likelihood of the bidder satisfying any remaining conditions between the second court hearing date and the implementation date to fund the payment of the scheme consideration: see *Re Isentia Group Ltd* [2021] NSWSC 910 at [14] and [2021] NSWSC 1069 at [13]-[14]; *Re Spark Infrastructure RE Ltd* [2021] NSWSC 1385 at [31]-[33] and [2021] NSWSC 1564 at [16]-[29].

## Sufficiency of the Plaintiff’s Evidence in the Present Case

40 Having departed from much of the unnecessary and inefficient practice which has developed in recent years, the evidence adduced by the plaintiff consisted of the following:

(a) a short formal affidavit annexing the ASIC company search;

(b) the main affidavit of Mr Mirabelle (of about 10 pages) giving evidence of the constitution (with a copy annexed), the business and the capital structure of Vita, the scheme implementation deed (with a copy annexed), the board’s deliberations and decision-making concerning the Permitted Dividend, the process of verifying the information provided by Vita contained in the explanatory statement, the date when the draft explanatory statement was provided to ASIC, the willingness and ability of the chairperson and alternate chairperson to act at the scheme meeting, and the percentage of the break fee in relation to the implied value of the company’s shares;

(c) the tender of the draft scheme booklet, together with all its appendices, and the proxy form;

(d) the tender of the letter from ASIC confirming that it has had a reasonable opportunity to consider the terms of the scheme and the draft explanatory statement (and also raising the issue referred to above concerning the Permitted Dividend); and

(e) an affidavit from the Bidder (of about 5 pages) proving the process of verifying the information in the draft explanatory statement which was provided by the Bidder, and also proving execution of the deed poll by the Bidder.

41 In my opinion, that evidence is sufficient for the court to convene the scheme meeting and approve the dispatch of the explanatory statement. The question which the court must deal with is whether the arrangement proposed is of such a nature and is cast in such terms that, if the arrangement receives approval by the statutory majority at the relevant meeting, the Court would be likely to approve the arrangement on the hearing of any application that is unopposed, including the need to ensure that there is sufficient disclosure to those who will be affected by the arrangement of its details and effect: *Re Central Pacific Minerals NL* [2002] FCA 239 at [8] (Emmett J); cited with approval by the Full Court in *Re CSR Ltd* [2010] FCAFC 34; (2010) 183 FCR 358 at [12] (Keane CJ, Finkelstein and Jacobson JJ).

42 In other cases, there may be a need for further evidence in order to fully discharge the responsibility of the plaintiff in an *ex parte* hearing of bringing to the Court’s attention all matters that are material to the exercise of its discretion: *Re Permanent Trustee Co Ltd* [2002] NSWSC 1177 at [7] (Barrett J), citing *Thomas A. Edison Ltd v Bullock* (1912) 15 CLR 679; and see *International Finance Trust Co Ltd v NSW Crime Commission* (2009) 240 CLR 319 at [131]-[133] (Hayne, Crennan and Kiefel JJ). Often, however, such matters would not require further evidence but merely reference in written or oral submissions by the plaintiff at the hearing.

43 Finally, I note that the written submissions for the plaintiff were commendably succinct (being about 7 pages), focusing on topics where a significant issue arose. In nearly all scheme applications, those submissions should not exceed 10 pages. I regard the practice of referring extensively in lengthy written submissions to uncontroversial propositions of law to be contrary to the duty of the parties to act consistently with the overarching purpose imposed by section 37M of the Federal Court Act.

## Orders

44 Accordingly, I make orders convening the scheme meeting, approving the explanatory statement, and other related matters in accordance with the draft orders provided to me.

|  |
| --- |
| I certify that the preceding forty-four (44) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Jackman. |

Associate:

Dated: 1 May 2023