ASIC
Australian Securities & Investments Commission

REGULATORY GUIDE 142

# Schemes of arrangement and ASIC review

**Part 5.1**

*Issued 4/8/1999*

*From 5 July 2007, this document may be referred to as Regulatory Guide 142 (RG 142) or Policy Statement 142 (PS 142). Paragraphs in this document may be referred to by their regulatory guide number (e.g. RG 142.1) or their policy statement number (e.g. PS 142.1).*

## Headnotes

*s411; s411(17)(b); s412; s413; s625; s995; s1330; reg 5.1.01; 7.12.02(b); 7.12.17; s127 ASIC Law; Pt 5.1 body; arrangement, Australian Taxation Office, capital reduction, compromise, creditors' scheme, members' scheme, merger, reconstruction, review of scheme documentation by ASIC, scheme; share splitting.*

*This guide should be read in conjunction with Regulatory Guide 60* Schemes of arrangement—s411(17) *(RG 60).*

## Contents



# Purpose

RG 142.1 Parties proposing a compromise or arrangement (scheme) under Pt 5.1 of the Corporations Law (Law) must lodge the terms of the proposed scheme and the draft explanatory statement with the Australian Securities and Investments Commission (ASIC). ASIC must be given an opportunity to examine this material prior to the Court hearing to convene the relevant scheme meetings. ASIC may make submissions to the Court in relation to the scheme and draft explanatory statement.

RG 142.2 This guide sets out ASIC's role under the scheme provisions in Pt 5.1, and discusses issues which may assist proponents of schemes of arrangement. However, this guide is not exhaustive of the concerns or issues that may be raised by either ASIC or the Court.

This guide is consistent with, and should be read with, Regulatory Guide 60 *Schemes of arrangement—s411(17)* (RG 60) on s411(17)(b).

### Pt 5.1 bodies

RG 142.3 Pt 5.1 regulates schemes involving the creditors of a Pt 5.1 body ("creditors' scheme") or a scheme of arrangement amongst the members of a Pt 5.1 body ("members' scheme"). Financial institutions (building societies and credit unions) are subject to s411 of the Law pursuant to s337 of the Financial Institutions Code. However, unit trusts are not directly subject to s411. In this guide all Pt 5.1 bodies are referred to as companies, and all section references are to the Corporations Law, unless otherwise stated.

## The role of ASIC

RG 142.4 ASIC has a significant role in schemes of arrangement, both in its role as set out in the Law and in the reliance placed on it by the Courts. ASIC's role is to assist the Court to review the content of scheme documents and the nature and functioning of the scheme, and in many cases, represent the interests of investors and creditors where ASIC may be the only party before the Court other than the applicant. ASIC also has a role in ensuring that all matters which are relevant to the Court's decision are properly brought to the Court's attention before it orders meetings or before it confirms a scheme.

### Public policy considerations

RG 142.5 In examining scheme documents ASIC will take into account the objectives specified in s1(2) of the ASC Law. In particular, ASIC will seek to balance the objectives of consumer protection and promoting investor confidence, with its other regulatory objectives of maintaining, facilitating and improving the performance of companies and administering the Law with minimal procedural requirements.

RG 142.6 Part of this balance includes ASIC's resource allocation to areas of corporate activity on the basis of investor and regulatory risk. Risk factors which attract higher resources/scrutiny include: takeover type member schemes, complex schemes, novel schemes, schemes of large size or value and schemes with high levels of public interest or significance. Lower or medium risk factors include: internal reconstruction schemes, simple creditors' schemes and small size schemes.

## Notification of summary application

RG 142.7 Under s411(2) ASIC must be given at least fourteen (14) days notice of the hearing of the application for orders convening meetings, unless it or the Court permits a shorter period. In appropriate cases, ASIC may consent to a shorter notice but it will do so infrequently, for example, in the case of some small and simple schemes.

## Complex, novel or uncertain issues

RG 142.8 In *Re Archaean Gold NL* (1997) 23 ACSR 143 at 148, Santow J noted that:

> "Schemes that are unopposed proceed effectively on an ex parte basis, through application by the proponents of the scheme. The Court in the nature of things must therefore rely on the proponents of the scheme to anticipate the disclosure that is properly required and to draw any elements of the scheme that are potentially problematic to the Court's attention."

It is appropriate for the proponents of a scheme to bring such issues to the attention of both the Court and ASIC. Questions of law which were the subject of counsel's advice would clearly be an example of issues which the proponents of a scheme should bring to ASIC and the Court's attention. (See also RG 142.11.)

### *Reverse takeovers*

RG 142.9 ASIC considers that a "reverse takeover" conducted by way of a scheme of arrangement is often likely to raise uncertain issues. ASIC encourages a person proposing such a scheme to consult with ASIC very early in the planning stage. ASIC's initial criteria are that a reverse takeover is likely in a scheme where:

(a) consideration for the members of the company proposing the scheme (the "target" company) is shares in the "offeror" company; and any of

(b) the market capitalisation of the "target" is larger than the "offeror";

(c) a shareholder of the "target" is likely to be the largest shareholder of the enlarged "offeror"; or

(d) the relative shareholdings of members of the "offeror" are likely to be materially affected by the scheme.

## Review of scheme documents

### *Time for review — contentious issues*

RG 142.10 The Court must be satisfied that ASIC has had reasonable opportunity to examine the terms of the proposed scheme and draft explanatory statement, and to make submissions to the Court. Therefore, the proposed scheme and the draft explanatory statements must be served on ASIC within a reasonable time before the hearing of the application (in almost all cases, the 14 day period referred to in s411(2) is a minimum).

RG 142.11 It is an inappropriate waste of the Court's time and resources, and those of the company and ASIC, for matters to be raised before the Court which could have been resolved between the company and ASIC. Companies should ensure that they provide ASIC with adequate time to consider the scheme and its documentation. They should raise with ASIC any novel issues or areas of uncertainty in the scheme arrangements or documentation. For example, ASIC expects that any matter or issue relating to the scheme on which a company sought counsel's or other expert's advice would always be clearly raised with ASIC at or before the time of lodgment of the draft documentation.

RG 142.12 Adequate time is especially important in the cases of very large or complex schemes. If ASIC has not had adequate time to consider the scheme or its documentation it will ask the Court to adjourn any application or hearing to call the scheme meetings or to confirm the scheme.

### *Compliance with the Law*

RG 142.13 ASIC will examine the scheme documentation to ensure that it complies with the provisions of s411 of the Law. Although s411 is widely or liberally construed, it cannot be used in certain circumstances, for example, for the purpose of avoiding the takeover procedures in Chapter 6 of the Law, or for an unlawful scheme *(Re: Northumberland Insurance Co Ltd (No 3)* (1977) 3 ACLR 15).

RG 142.14 When reviewing the scheme documents prior to the initial Court hearing, ASIC will also consider the appropriateness of any condition to which the operation of the scheme is subject. There must be adequate disclosure of any such condition in both the explanatory statement and the scheme documents.

RG 142.15 It is preferable that a precise termination date for a scheme be specified in the scheme documents. Where it is not possible

to specify the termination date the scheme documentation should include clear provisions dealing with the termination of the scheme, including how the termination date is to be determined.

### *False, misleading or deceptive material*

RG 142.16 Subsection 412(8), in relation to members' schemes and the common law in relation to creditors' schemes, requires that the scheme documentation not contain any material that is false or misleading. Section 995 also applies to schemes.

RG 142.17 A number of judicial decisions emphasise the need for candour and completeness in the disclosure of information in scheme documentation. For example in *Phosphate Co-operative Co of Australia Ltd v Shears & Anor (No 3)* (1988) 6 ACLC 1046 the Court stated that:

> "[T]he important issue about disclosure in the explanatory statement is that it should disclose all information that would tend to influence a sensible member's or creditor's decision on whether the scheme is in his interests."

In *Re Pheon Pty Ltd* (1986) 4 ACLC 669 at 689 the Court observed that "the scrutiny of the Commission should ensure full and fair disclosure..."

## s411(17)(b) — Avoidance of takeover provisions

RG 142.18 Subsection 411(17) is intended to prevent the proponents of schemes using them to avoid the takeover provisions in Chapter 6 of the Law. The Court may not approve a scheme unless either it is satisfied that the scheme is not a takeovers avoidance device, or ASIC provides a statement in writing that it has no objection to the scheme.

RG 142.19 Regulatory Guide 60 sets out ASIC's policy basis for considering an application for a statement under s411(17)(b). ASIC is concerned to ensure that takeovers that operate by way of schemes of arrangement operate, and are regulated, in a manner which is harmonious with the provisions of Chapter 6. This requires that members receive all material information that they need for their decision, members receive reasonable and equal opportunities to share in the benefits provided under the scheme, and the meetings are properly conducted. ASIC will not provide a statement under s411(17)(b) unless the scheme and its explanatory statement meet these conditions.

## Registration of documents

RG 142.20 Consistent with the reliance placed on it by the Courts under the scheme provisions, ASIC has a positive obligation to assure itself of the content of documents before registration. ASIC may not register a copy of the explanatory statement unless the statement appears to comply with the Law and ASIC is of the opinion that the statement does not contain any matter that is false in a material particular or materially misleading in the form or context in which it appears (s412(8)). ASIC will not register an explanatory statement until after it has been approved (or not objected to) by the Court under s411(1) or ( 1A).

RG 142.21 Registration is only required for schemes which do not include a compromise between a company and its creditors, see s412(6). ASIC would reject as an artifice, any scheme which tried to combine a members' scheme and an option-holders' scheme into one scheme to avoid the requirement of s412(6).

### *Publication of documents*

RG 142.22 ASIC will place all explanatory statements lodged with it, or registered by it, onto ASIC's public database. It will not do this until the statements are either registered under s412(6), or approved by the Court for dispatch to members and/or creditors under s411(1) or (1A).

## Regulation 5.1.01 — Waiver of the disclosure provisions

RG 142.23 Paragraph 411(3)(b) and s412(1)(a)(ii) require explanatory statements to contain information prescribed by Reg 5.1.01 and Schedule 8 of the Corporations Regulations, unless ASIC allows otherwise. ASIC may impose conditions on any waiver of compliance with parts of the prescribed disclosure requirements.

### *Option holders*

RG 142.24 For example, although they are treated as contingent creditors, the information which option holders would require when considering whether or not to approve a scheme is much closer to the information required by members. ASIC will consider applications to waive the creditor scheme information requirements for schemes involving option holders if the scheme explanatory statement contains information suitable for a members' scheme.

RG 142.25 ASIC will waive compliance in the form set out in Pro Forma [PF 191].

### *List of option holders*

RG 142.26 Clause 1(c) of Pt 2 of Schedule 8 (clause 8201(c)) requires the explanatory statement to set out and list the name of all known scheme creditors together with the debts owed to the creditors. ASIC may waive this requirement for schemes in relation to option holders. Under s170 and s173, option holders may obtain information on the names of other option holders, who will be persons with like interest whom the option holders should be able to communicate with in the event that they do not support the "creditors'" scheme. Information about other creditors would not appear relevant to an option holder's decision. ASIC will require the option holders' explanatory statement to set out clearly the option holders' rights under s170 and s173.

RG 142.27 Any ASIC relief will be in the form set out in Pro Forma [PF 192].

### *Convertible note holders*

RG 142.28 The information needed by convertible note holders is generally much closer to that needed by creditors However, the equity conversion rights of convertible notes mean that an explanatory memorandum for a scheme which involves convertible note holders may need to contain information suitable for both creditors and members. The appropriate information will depend on the particular scheme.

RG 142.29 Regulatory Guide 51 sets out how an applicant should make their application. ASIC will look to the approach it takes in Superseded Policy Statement 57 [SPS 57] and RG 60 in relation to the exemptions from compliance with Pts A and B of s750 of the Law.

## Consent to an expert report

RG 142.30 Clause 3 of Pt 3 of Schedule 8 (clause 8301) provides that if the other party to the proposed scheme has a prescribed shareholding in the company (as defined in clause 6 of Pt 3 of Schedule 8) (clause 8306), or a director of any corporation that is the other party to the scheme is a director of a company subject to the scheme, the explanatory statement must be accompanied by a copy of a report made by an expert who is not associated with the corporation that is the other party. The expert must state whether or not, in their

opinion, the proposed scheme is in the best interest of the members of the company the subject of the scheme and set out their reasons for that opinion.

RG 142.31 Clause 5 of Pt 3 (clause 8305) requires that if the expert report contains:

(a) a forecast of the profits or profitability of the company; or

(b) a statement that the market value of an asset or assets of the company or of a related company differs from an amount at which the value of the asset(s) is shown in the books of the company or related company,

the report must not accompany the statement except with the consent in writing of ASIC and in accordance with such conditions (if any) as ASIC states. In Regulatory Guide 75 *Independent experts reports to shareholders* (RG 75) ASIC sets out the requirements for such a report. ASIC has published its policy on forecasts in Superseded Practice Note 67 [SPN 67] and Regulatory Guide 12 *Valuation reports and profit forecasts* (RG 12). The principles set out in this guide apply to schemes of arrangement. ASIC will not consent to an expert report which does not comply with those documents.

RG 142.32 Any ASIC consent will be in the form set out in Pro Forma [PF 194].

## Internal reconstructions

RG 142.33 For some internal reconstructions of companies within a group structure the only persons who will be required to vote will be other companies within the group. ASIC will normally waive compliance with clause 3 of Pt 3 of Schedule 8 (clause 8303) if no person other than a member company of the group will be required to vote on the scheme. If the members of the holding company are required to vote, ASIC may waive the requirements of clause 3, subject to suitable alternative information being provided. ASIC will examine applications for relief more closely if the scheme is likely to raise jurisdictional or taxation issues for members. The onus will be on the applicant to satisfy ASIC that there are no such material issues, or that the information which is provided to members will be adequate.

RG 142.34 ASIC will waive compliance in the form set out in Pro Forma [PF 195].

## A scheme to remove minority shareholders

RG 142.35 A scheme is one of a number of methods which may be used to remove minority shareholders (expulsion scheme). The general principles relating to eliminating minorities apply as much to schemes as they do to other methods, such as compulsory acquisition following a successful takeover or a selective reduction of capital.

RG 142.36 The Court and ASIC will be concerned to ensure that any scheme has the informed and un-coerced approval of those who may be adversely affected by it. This is most important in an expulsion scheme where the scheme has very different effects on different classes. In deciding whether to provide a statement under s411(17)(b), register an explanatory statement, make submissions to the Court, or intervene in the proceedings of an expulsion scheme, ASIC will consider whether minority shareholders are adequately informed and fairly treated (although it was concerned with a different process, the High Court decision in *Gambotto & Anor v WCP Limited & Anor* (1995) 16 ACSR 1 may be a handy guide for review of fairness and disclosure in cases where minorities are to be expropriated). This consideration will involve examining whether:

(a) all relevant information has been disclosed to minority shareholders;

(b) the consideration to be received by minority shareholders is fair, insofar as fairness is determined by minority shareholders receiving reasonable and equal opportunity to share in the benefits which will flow to the majority shareholder by virtue of the scheme proceeding; and

(c) there is equity (but not necessarily identity) in the treatment of different classes ie any differences in consideration which different classes receive are proportionate to the value of their securities or interests in the company.

RG 142.37 Whether the consideration is fair will depend on factors such as the company's assets and liabilities, the market value of the company's securities, past and likely future dividends and the nature of the corporation and its likely future. In addition, following the decision of the Supreme Court of New South Wales in *Melcann Limited v Super John Pty Limited & Anor* (1995) 13 ACLC 92, any special benefit that will be obtained by the majority shareholder following the acquisition of the minority shareholders' shares will also be relevant in determining whether the consideration is fair.

RG 142.38 The explanatory statement of an expulsion scheme should disclose any available material information on the following matters:

(a) the purpose or purposes of the scheme;

(b) the reasons for rejecting alternative means of achieving that purpose;

(c) the reasons for concluding that the consideration will be fair to those affected;

(d) information regarding the current and historical market prices of the shares;

(e) the net book value of the assets;

(f) the value of the company both as a going concern and on liquidation;

(g) any reports or appraisals prepared in relation to the scheme;

(h) either possible capital gains tax implications, or advice to members to seek taxation advice;

(i) any special benefit(s) that will accrue to the majority shareholder following acquisition of minority shareholders' shares; and

(j) any other material information known to the proponent or directors and relevant to making a decision on the scheme proposed.

The proponent of this type of scheme will often be best placed to assist in providing this information to the company for inclusion in the explanatory statement.

RG 142.39 Frequently, the ability of the directors of the company to provide adequate independent information and advice to minority shareholders in expulsion schemes may be questioned, by minority shareholders or by the Court. This is because in most cases, the directors will be the nominees of the shareholder which is proposing the scheme in order to gain full ownership of the company. Where the adequacy or independence of information is questionable, the scheme resolution may be invalid. See *Re Albert Street Properties Ltd* (1997) 23 ACSR 318.

RG 142.40 In such cases, the directors should also consider providing an independent expert's report with the explanatory statement if one is not already required under s411(13) or Schedule 8. The report should provide a valuation of the shares. In addition, the report should state whether, in the opinion of the expert, the scheme is

fair and reasonable to the minority shareholders whose shares are being expropriated and to the continuing shareholders in that it strikes a balance between the interests of those two groups. The report should also set out the reasons for that opinion. Further details of the principles and matters which should be considered by the person preparing the report are set out in Regulatory Guide 75 *Independent expert reports to shareholders* (RG 75). The standards that ASIC expects such reports to meet are set out in RG 12.

## Other disclosure issues

### *Advantages and disadvantages of the proposal*

RG 142.41 Consistent with ASIC policy and Court decisions in the cases decided in relation to NRMA (*Fraser and Another v NRMA Holdings Ltd and Ors* (1994) 14 ACSR 656, and subsequent cases), the explanatory statement of a scheme should include a clear, prominent statement of, and comparisons of, the advantages and disadvantages of proceeding with or rejecting the scheme.

### *Identification of participants*

RG 142.42 ASIC will review scheme documents to ensure that they identify the criteria and the date for determining the persons who are to participate in the scheme, who is entitled to vote at the meeting of scheme participants and who will be bound by the scheme if it is approved by the Court. In particular, for creditors' schemes regard should be paid to the definition of the terms "creditor", "participating creditor" and "scheme creditor".

### *Classes of participants*

RG 142.43 One area of significant concern to ASIC and the Courts is the class structure of the classes of person who are to participate in a scheme. A scheme must be considered and voted upon by each separate class of participant affected by the scheme. Proposers of schemes should look to the extensive case law on the issue.

RG 142.44 ASIC is concerned to ensure that the determination of classes for voting on a scheme is fair and equitable between those classes having regard to their rights and obligations with respect to the company and the effect of the scheme on them.

RG 142.45 Where a scheme does involve separate classes ASIC expects that the division of classes will be clearly specified in the

scheme document and disclosed in the explanatory statement, together with an explanation of why the divisions have been drawn.

## Voting

RG 142.46 The Law does not prohibit the proponent or its associates ("interested parties") who hold target shares or target securities from voting in respect of an acquisition. However, if the vote is to demonstrate approval by the remaining shareholders:

(a) the interests of interested parties should be fully disclosed; and

(b) interested parties should either not vote in favour of the resolution to approve the scheme, or should vote in a separate class.

Where interested parties vote in the same class as other members or creditors because they have a divergent commercial interest which falls short of requiring they meet as a separate class, voting should be by ballot and the ballot should be retained by the company, or an audited record of the voting should be retained. This will assist the Court in determining whether or not to approve the scheme.

## Proxy schemes

RG 142.47 ASIC notes the decision of Santow J in *Advance Bank (Re Advance Bank Australia* (1996) 22 ACSR 476, and *Re Advance Bank Australia Ltd (No 2)* (1997) 22 ACSR 513) concerning the use of a scheme of arrangement to approve a deemed granting of proxy votes by members of the company in relation to later meetings or resolutions. Santow J approved the Advance scheme of arrangement on the basis, inter alia, that the later resolutions would have passed without reliance on the deemed proxies. ASIC considers that this is an indication that putting such deemed proxy arrangements in place may be both pointless and misleading. Their validity is likely only to be allowed when the relevant resolutions would have passed without reliance on the proxies.

## Scheme administrator

RG 142.48 In many cases a scheme administrator will be appointed to administer the scheme. However, this is not a requirement of the Law.

RG 142.49 ASIC will consider whether a scheme administrator should be appointed. It may be appropriate to require an administrator, for example, where the scheme is implemented over an extended

period of time and it requires payment of the scheme consideration by instalments.

RG 142.50 An administrator should be contractually bound by the scheme document to discharge the functions and duties imposed upon him/her. A copy of the instrument appointing the scheme administrator may be annexed to the explanatory statement or the explanatory statement should disclose how the scheme administrator is bound and on what terms.

RG 142.51 The basis of remuneration of the scheme administrator should be disclosed, particularly where the fees are to be above any pre-determined scale, such as that prescribed by the Insolvency Practitioners Association.

## Other third parties

RG 142.52 Some schemes are part of transactions which depend on third parties doing things. For example, in takeover type schemes, the acquiring company will not be a party to the scheme, but it will likely provide the consideration for the cancellation of the target shares. ASIC will look to ensure that third parties in these situations are legally bound to perform those obligations, for example, by the third party becoming contractually bound to provide the benefits (*Re Advance Bank Australia*). Thus, where a secured creditor is to surrender its security, an appropriate release should be executed. ASIC will require that any such documentation be appropriately identified and referred to in the explanatory statement. Depending on the significance of the arrangement to the scheme, it may be necessary to submit relevant documentation to ASIC for its consideration and, in certain cases, annex such material to the explanatory statement.

RG 142.53 Any disclaimer, release or indemnity provided to the scheme administrator or any other person participating or otherwise involved in the scheme will be considered by ASIC to ensure that it does not unnecessarily erode the effect of the scheme.

## Solvency of company subject to a creditors' scheme[1]

RG 142.54 The Courts have indicated on a number of occasions that they are reluctant to allow a "hopelessly insolvent company" to

[1] ASIC notes that creditors' schemes are far less common since the introduction of Pt 5.3A (Company Administration) of the Law.

survive and to avoid being wound up. The position of future creditors is important: *Re Denistone Real Estate Pty Ltd* (1970) 3 NSWR 327. Where the company proposes to continue trading, the scheme documents should discuss the solvency position of the company : *Re Egnia Pty Ltd (in liq)* (1991) 9 ACLC 1,561.

RG 142.55 Related to the question of post scheme solvency is the issue of the continuation of the company's business. ASIC will consider whether the continuation of the business may result in a breach of the Law by the directors or the company, such as a breach of s588G: *Re Avram Investments Pty Ltd* (1992) 10 ACLC 1583 at 1586.

RG 142.56 The application for convening a creditors' meeting should address the issues of solvency and continuation of the company's business and, where appropriate, these issues should be disclosed in the explanatory statement.

## Scheme involving other prescribed procedures

RG 142.57 ASIC will examine the proposed scheme of arrangement to determine whether the proposal involves an arrangement containing a provision which is inconsistent with an express or implied provision of the Law. In cases where a scheme involves another procedure under the Law the scheme will not excuse compliance with the law relating to that procedure: *Re Australian Consolidated Press* (1994) 14 ACSR 639.

RG 142.58 A scheme cannot be used to do a thing for which a specific procedure is laid down by the Law, although it can often be combined with that procedure. Examples of situations where the Law provides a specific power or procedure, are:

(a) changing the status of a company (Pt 2B.7 of the Law): *ASC v Marlborough Gold Mines Limited NL* (1993) 10 ACSR 230; and

(b) amending the constitution of a company (s136);

(c) changing a company's name: *Re Oceanic Steam Navigation Co Ltd* [1939] Ch 41; and

(d) reducing the capital of a company (s256B): *Re Land & Concrete Pty Ltd & Ors and the Companies Act* (1979) CLC 40-584.

## Restrictions on offering of securities

RG 142.59 Regulation 7.12.02(b) provides that Divisions 2 (the prospectus provisions) and 3A (secondary trading in unquoted

securities) of Pt 7.12 do not have effect in relation to a primary offer or invitation in relation to a compromise or arrangement approved by a Court under s411(1). Regulation 7.12.17(e) excludes the operation of s1078 (the share hawking prohibition) from scheme of arrangement documents sent by post.

RG 142.60 However, it is important that the explanatory statement disclose any limitations on, or requirements for, the secondary trading in securities issued under the scheme, which arise under the Law.

### Share splitting

RG 142.61 ASIC has made public statements on its views on share splitting devices in the context of takeovers. ASIC considers that similar devices employed by proponents or opponents of a scheme would likewise be objectionable.

RG 142.62 ASIC would generally advise a Court that it would have no objection to orders sought under, say s1319 or another provision, which ensured that a corporate action or decision was not determined by shareholders who lacked even a minimum economic interest, as shareholders, in the corporate future of the company. ASIC would generally advise the Court that in its view, in a modern listed company, a reasonable proxy for a minimum economic interest is a marketable parcel of shares. (See ASX BR 3.6.2A for the current usage of “marketable parcel”.)

### Taxation considerations

RG 142.63 The lack of prescription under the scheme provisions may assist in facilitating useful taxation advantages. Where ASIC believes that a scheme of arrangement may involve a significant reduction in the taxation liabilities of the company which is the subject of the scheme, or the scheme’s proponents, ASIC may require evidence that the applicant has informed the Australian Taxation Office (ATO) of the proposed scheme. Subject to s127 of the ASC Law (dealing with confidentiality) ASIC may raise matters concerning taxation with the ATO.

## ASIC Court appearances

RG 142.64 ASIC will not normally appear unless it considers that:

(a) it may be able to assist the Court or provide the Court with its views, while having no specific items or issues it wishes to raise, and not opposing the scheme;

(b) there are issues, especially questions of law, which ASIC considers should be raised before the Court and the parties may not raise those issues adequately;

(c) the proponents have not given ASIC adequate time to consider the scheme documents; or

(d) it opposes calling the scheme meeting or confirmation of the scheme.

RG 142.65 Where ASIC opposes the scheme it will intervene in the hearing under s1330 of the Law.

### Second or subsequent hearing-approval of scheme

RG 142.66 ASIC will ordinarily not appear at the confirmation hearing if it has no objection to the scheme. However, if it considers that further matters have arisen which should be raised with the Court it will appear at this hearing. For example, ASIC may have concerns with the conduct of the meetings or that some aspects of the scheme require alteration, or the imposition of conditions, under s411(6).

## Lodgment requirements

RG 142.67 Proponents of a scheme should send two copies of the relevant documents, including any supporting material and Court process, to:

The Director
Commercial Programmes Division
ASIC Regional Office

in the jurisdiction/registry in which they propose to commence the Court application no less than 14 days before the initial application to the Court. Lodgment of the explanatory statement should be accompanied by the appropriate prescribed fee. Any application for waiver, consent under Schedule 8 or request for a statement under s411(17)(b) should be addressed at that time, with appropriate reasons to support the application, together with the prescribed fee.

# Costs and fees of ASIC

## Costs

RG 142.68 ASIC is entitled to costs where it intervenes in the proceedings under s1330 whether at the first or subsequent hearing(s).

RG 142.69 ASIC will seek costs when it intervenes in a proceeding under s1330. It will seek to recover costs associated with its participation in the proceeding after intervention.

RG 142.70 Those costs will be assessable on the basis of the scale of costs for the relevant Court. However, they will not include those costs associated with normal work done prior to the intervention, for example, perusal of draft explanatory statements, provision of a s411(17)(b) statement, or appearance in Court to advise the Court that ASIC has no objection to the proposed scheme of arrangement.

### *Criteria for seeking costs*

RG 142.71 Examples of the circumstances when ASIC may apply for costs include cases where costs have been incurred due to:

(a) the novelty or complexity of the scheme and/or the documentation involved, and the proponent having failed to make adequate allowance for the unusual complexity in providing the documentation to ASIC, and for example, ASIC having been forced to appear to seek adjournment of the hearing;

(b) the requirement for additional resources when ASIC has been compelled to appear to ensure that all material matters are brought to the attention of the Court; or

(c) litigation as a result of the persistence of the applicant to have the scheme approved when the applicant knows or ought reasonably to have known that a Court would not approve the proposed scheme, for example, where the proposal involves an unlawful scheme or the purpose of the proposal is to avoid the takeover provisions in Chapter 6.

### *South Australia and the Northern Territory*

RG 142.72 ASIC considers that the criteria which would cause it to seek costs would constitute special circumstances under Rule 71 of the Corporations (South Australia) Rules and Rule 82 of the Supreme Court (Companies) Rules, respectively.

## Fees

RG 142.73 In relation to a scheme the following fees items are applicable (at August 1998) under the Corporations (Fees) Regulations:

(a) Item 40 for: any act that ASIC is requested to do by a person:

  (i) registration under s412(6),

  (ii) consent to an expert report under clause 5 of Pt 3 of Schedule 8 of the Corporations Regulations, and

  (iii) exemption under reg 5.1.01,

(b) Item 41 for a statement under s411(17)(b);

(c) Item 42 for examination/lodgment of explanatory statement.

## ASIC action

RG 142.74 ASIC has a number of options available to it where it considers that:

(a) the standard of disclosure to, and treatment of, members is not commensurate with the standard that would be required by the disclosure requirements and the Eggleston principles; or

(b) that the information provided to shareholders about the proposed compromise or arrangement is otherwise unfair or misleading.

RG 142.75 ASIC may:

(a) appear on an application under s411 (for example, it may appear under s411(2)(b)(ii));

(b) take action for breach of directors' duties;

(c) seek orders under s246AA;

(d) seek injunctions or prosecutions for prohibited conduct under Pt 7.11 Div 2 of the Law;

(e) seek orders under s1004; and/or

(f) make application to the Corporations and Securities Panel for a declaration of unacceptable conduct.