Russell McVeagh

Schemes of arrangement in New Zealand

A brief guide

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Introduction

Schemes of arrangement are a powerful tool available to New Zealand companies. In essence, the Companies Act 1993 empowers the New Zealand courts to assist companies in making orders to effect complex arrangements, amalgamations, or compromises.

Two features of the New Zealand legislation stand out – the variety of transactions that can be implemented by a scheme of arrangement, and the wide discretion available to the High Court.

This short guide discusses the key aspects of the scheme of arrangement legislation, as well as a brief overview of developments which have made the scheme of arrangement an attractive alternative for implementing takeovers.

A versatile power

The High Court has jurisdiction to approve an "arrangement or amalgamation or compromise" on such terms and conditions as the Court sees fit, and to order that the arrangement be binding on "such other persons or classes of persons as the Court may specify". The Court has adopted an extremely broad approach to what types of transaction can be implemented in this way.

The Court is also entitled to make orders that effectively override other procedural or substantive obligations set out in the Companies Act, or the constitution of the company. As far as we are aware, the power available to the New Zealand courts is therefore broader than in other jurisdictions.

The Companies Act also empowers the Court to make ancillary orders for the purpose of giving effect to an arrangement. Such orders can include, for example, orders transferring property (including rights, liabilities and contracts), issuing shares, or liquidating a company.

This broad jurisdiction means the courts have been prepared to effect a wide variety of transactions by way of scheme of arrangement. This includes:

- Takeovers
- Company restructures, including large-scale "demergers"
- Returns of capital
- Transfers of business.

Russell McVeagh has market-leading schemes expertise, and has acted on each of the examples given above on a variety of transactions.

A broad discretion

Schemes of arrangement require court approval. Despite the broad flexibility of the powers under the Companies Act, the courts have adopted a commercial approach, with one High Court Judge noting that the Court's powers are not paternalistic, and require a fair and sensible appreciation of commercial considerations.

The test adopted in New Zealand for determining whether to approve a scheme of arrangement is well established (the principal case dates back to 1944). The Court will assess whether the arrangement is such that an intelligent and honest person of business, voting as a shareholder in respect of their interest, might reasonably approve it. This assessment is supplemented by an overall consideration of whether the arrangement is fair and equitable.

A flexible process

In addition to the "honest and intelligent person of business" test, the Court will also need to be satisfied that the company has followed an appropriate process, in particular that both the Court and shareholders have sufficient information as to whether to approve the scheme.

Along with broad powers to approve a variety of transactions, the Court has a wide discretion to make orders determining the process to be followed. This includes making orders as to the form and content of information provided to shareholders regarding the scheme, orders for meetings of shareholders to approve the arrangement (including whether different shareholders must vote on the scheme's approval in separate interest classes), and orders regarding the rights of opposition for persons who may appear and be heard by the Court when it considers whether to approve the scheme of arrangement.

Applicants will usually (but not always) seek such procedural orders as an initial step (the "initial orders"), before seeking the approval of shareholders and the formal approval of the Court (the "final orders"). In this regard, the New Zealand approach is broadly similar to the two-step court process adopted in Australia and England. It is important to note that the courts consider it up to the applicants to get the process right. Regardless of whether initial orders are sought or not, the Court can reconsider the adequacy of the process followed by the applicants in determining whether to grant the application.

"Takeover schemes" an attractive alternative

Under New Zealand law, a takeover of a widely-held company must be conducted in accordance with the New Zealand Takeovers Code. However, since amendments to the Companies Act were enacted in 2014, schemes of arrangement provide an attractive alternative to an offer under the Code. In particular, whereas a "Code offer" requires that an offeror must obtain 90 percent of the voting rights in the company before it may compulsorily acquire the remaining 10 percent, such restrictions do not apply in the scheme context.

However, a takeover by way of scheme of arrangement is not without restriction. Under the amended Companies Act, the arrangement must receive the approval of 75 percent of the votes of shareholders (in each interest class) entitled to vote and voting on the resolution, as well as a simple majority of the shares held by shareholders entitled to vote. Further, the applicant(s) must either file a statement from the Takeovers Panel indicating that the Panel has no objection to an order being made, or the Court must be satisfied that the shareholders of the company will not be adversely affected by the use of the scheme of arrangement provisions rather than the Code.

Although the Court is not required to approve a scheme simply because the Panel has no objection to it, this makes early engagement with the Panel important. In addition, transaction timetables should factor in a meaningful period for the Panel to review the documents. The Panel will generally also require disclosure and an independent adviser's report that is in substance equivalent to what would be provided in a transaction under the Code.

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