Hamilton Locke

Corporate Restructure Schemes

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Introduction

For corporate groups considering an internal reorganisation, a restructure effected via section 413 of the Corporations Act 2001 (Cth) (**Corporations Act**) under a scheme of arrangement (**Corporate Restructure Scheme**) provides a flexible alternative to more orthodox approaches commonly adopted.

As is well known, the Corporations Act enables a corporation to enter into a scheme of arrangement with its creditors or members (or any class of them). Schemes of arrangement are commonly used to implement agreed mergers, as an alternative to the comparatively rigid mechanism of a takeover bid.

However, it is less well known that, schemes of arrangement can also be used to implement reconstructions. Under a Corporate Restructure Scheme, it is possible to transfer some or all of the assets and liabilities of the scheme company to another company, followed (where all, rather than some, of the assets and liabilities of the scheme company are transferred) by deregistration of the scheme company.

In recent years, several Australian companies, such as Telstra, Chevron, Lion Nathan, JP Morgan, and Barrick Gold, have successfully implemented Corporate Restructure Schemes.

This guide outlines the effect of a Corporate Restructure Scheme, examines the process involved and looks at some of the advantages of proceeding this way. A Corporate Restructure Scheme may also be used for arms' length restructures, as well as amalgamations, but this note will focus on their use in internal restructures.

What is the effect of a Corporate Restructure Scheme?

Section 413 of the Corporations Act gives the Court wide powers to make orders where the whole or any part of the undertaking or of the property of the transferring subsidiary (**Transferor**) is to be transferred to the receiving subsidiary (**Transferee**) under a scheme of arrangement. These orders may include orders approving the transfer to the Transferee of the whole or a part of the undertaking and of the 'property' or 'liabilities' of the Transferor, the continuation by or against the Transferee of any legal proceedings pending by or against the Transferor, the deregistration by ASIC (without winding up) of the Transferor and other matters.

The terms 'property' and 'liabilities' have broad definitions. For example, liabilities "includes duties of any description" and property "includes rights and powers of any description" and may be of a personal character.

Assets	Contracts	Employees	Real property	Statutory licences	Liabilities	Legal proceedings	De-registration
All assets of the Transferor are transferred to and vest in the Transferee, without the need for any further act or deed, including contracts and real property.	Contracts are transferred, even (depending on their terms) if they contain restrictions on assignment, such as an absolute prohibition on assignment or a prohibition on assignment without consent.	Employees and their benefits are transferred, although the Court expects evidence that there has been a consultation process undertaken with affected employees and applicable unions.	No conveyancing documents are required, but there are rules about lodging the court orders to register the transfer.	Subject to the statutory provision terms and any prescribed restrictions, statutory licenses are transferred without the need to involve the relevant issuing government authorities in the restructure.	All liabilities, whether present, unascertained, future or contingent, are transferred, even if they have not yet crystallised or been quantified. There is even precedent for transferring liabilities for potential personal injury claims, such as asbestos claims.	Any legal proceedings pending by or against the Transferor are continued by or against the Transferee, without the need for any further act or deed (other than an amendment of the record of the relevant court or tribunal).	The Transferor is deregistered by ASIC without winding up.

What is the procedure for a Corporate Restructure Scheme?

Due diligence
The Transferor undertakes detailed due diligence to investigate all assets and liabilities that are to be transferred, and any potential issues in doing so - for example, potential stamp duty exposure and relief, other revenue implications, required third party approvals, or where implementing a scheme may have unintended consequences.

Preparation of explanatory statement
An explanatory statement is prepared satisfying applicable disclosure requirements, which usually includes a creditor impact report prepared by a third party. The explanatory statement is a far less complex document than is required for takeover schemes.

ASIC review
The explanatory statement is lodged with ASIC for review. ASIC must be given a reasonable opportunity to review the explanatory statement before the first court hearing. ASIC must also be given at least 14 days' notice of the first court hearing.

First court hearing
The Transferor applies to the Court for an order convening a meeting of the members of the Transferor. This is known as the 'first court hearing'.

Registration of explanatory statement
The explanatory statement is registered with ASIC. This means that the explanatory statement becomes a public document.

Scheme meeting
The scheme meeting is held, with the scheme being approved by members with the requisite statutory majorities (majority by number present and voting and 75% of the votes cast). In the case of an internal group restructure, there is typically only a single member, making it a simple matter to hold the meeting on short notice.

Second court hearing
The second court hearing is advertised in a national daily newspaper. The Transferor applies to the Court for orders approving the scheme, transferring the assets and liabilities of the Transferor to the Transferee and deregistering the Transferor. This is known as the 'second court hearing'.

Restructure becomes effective
The court orders are lodged with ASIC, at which point the scheme becomes legally effective. However, the scheme is usually implemented at a later date, typically at a calendar month end after allowing time to do anything that needs to be done before the Transferor is deregistered, such as updating the PPSR. The transfer of any registered assets is registered.

Advantages of a Corporate Restructure Scheme

No creditor veto

As a Corporate Restructure Scheme is a members' scheme, creditors are not parties to the scheme and do not vote on the scheme. This means it is not possible for creditors, or a class of creditors, to veto the scheme. However, in approving the scheme, the Court will consider the interests of creditors and hence will require evidence about the affect of the scheme on creditors. Creditors may also seek leave to appear at either court hearing (although they are more likely to do so at the second court hearing, after it has been advertised) and express any concerns they may have about the treatment of creditors. However, this rarely happens, particularly if potential issues are identified in advance and appropriately addressed.

No transfer agreements or deeds required

It is not necessary to mechanically transfer all of the assets and liabilities of the Transferor to the Transferee. In particular it is not necessary to assign or novate each contract, avoiding the usually considerable effort and expense in doing so and avoiding the risk of the counterparty (or counterparties) seeking to re-negotiate or terminate the contract where their consent is required. This risk and the delays experienced in dealing with uncooperative counterparties should not be underestimated.

Efficient and defined timetable

The transfer does not 'drag-on' - it is finished on the implementation date. However, the cost and effort of implementing a Corporate Restructure Scheme (including preparing an explanatory statement and obtaining ASIC, member and Court approvals) needs to be balanced against the cost and effort of undertaking the restructure by more conventional means.

Advantages of a Corporate Restructure Scheme

Certainty of outcome

All assets and liabilities, whatever they might be (so long as they are otherwise capable of being transferred), are transferred, without the need to individually list or describe them. However, it is usual to identify the assets and liabilities to the greatest extent possible through due diligence so that any issues (e.g., registration issues) in transferring them can be identified in advance and appropriately addressed.

Flexibility

It is possible to transfer all or some of the assets and liabilities of a transferor company to one or more transferee companies. It is also possible to implement multiple concurrent schemes for complex group restructures.

Transfer of employees

It is possible to transfer contracts of personal service - i.e., employment contracts - which is an exception to the general rule.

No winding up required

At the end of the process the scheme company is, if this is incorporated as a term of the scheme, deregistered by ASIC without winding up. This means that a separate process to wind-up or deregister the scheme company is not necessary.

Broad powers

The powers of the court are broad and orders may expressly cover "such incidental, consequential and supplemental matters as are necessary to ensure that the restructure or amalgamation is fully and effectively carried out".

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