

VPro Lawyers Newsletter
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COMPANY TAKEOVERS and DIRECTORS' RESPONSIBILITIES AND DUTIES

COMPANY TAKEOVERS

The recent takeover by Xtrata Holdings of the shares in MIM makes it clear that it is not only the Takeover Code which provides a mechanism for taking over public companies.

Schemes of Arrangement have gained increasing favour and acceptance. Although the end result is much the same, there are legal, tactical, procedural and financial differences between these procedures and, for that matter, other procedures, such as selective capital reductions.

Despite opposition, the court concluded in MIM's case, that the Scheme of Arrangement was a "true alternative to the way in which acquisitions may occur". This is a far cry from the position which prevailed some years back when it was almost impossible to secure the approval of ASIC to the Scheme of Arrangement procedure. Since then laws, procedures and attitudes have changed creating greater flexibility for company takeovers.

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DIRECTORS' RESPONSIBILITIES AND DUTIES

At a time of ever-increasing liability for directors, two aspects of the Corporations Act which provide some limited relief to directors are worth bearing in mind:

1. Business Judgement Rule

Directors must exercise care and diligence in discharging their

duties. However, the Business Judgement Rule provides that a director or other officer is taken to satisfy the requirements of care and diligence when making a business judgement (that is a decision to take or not take action in respect of the business operations of the company) if they:

- (a) make the judgement in good faith for a proper purpose;
- (b) do not have a material personal interest in the matter in question;
- (c) inform themselves about the matter in question to the extent they reasonably believe to be appropriate; and
- (d) rationally believe that the decision is in the best interests of the company (and this would be the case unless no reasonable person in the directors' position would hold that belief).

To take advantage of this rule, one should ensure that the business decision in question, and the deliberations leading up to it are well documented.

1. A Safe Harbour for Relying on Information or Advice

The Corporations Act also provides that if a director relies on information or professional or expert advice from an employee, professional advisor or expert (amongst others) and the reliance was made in good faith, and after making an independent assessment of the information or advice (including its reliability and the competence of the person giving the information or advice) the the director's reliance would be taken to be reasonable, unless the contrary is proved.

Once again, for a director to rely on this, it would be advisable to ensure that the reliance and the relevant circumstances are carefully documented.

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