SUPREME COURT OF QUEENSLAND

CITATION:	*Re Queensland Professional Credit Union Ltd (No 2)* [2016] QSC 105
PARTIES:	**QUEENSLAND PROFESSIONAL CREDIT UNION LTD** ACN 087 651 045 (applicant)
FILE NO/S:	SC No 1836 of 2016
DIVISION:	Trial Division
PROCEEDING:	Originating Application
DELIVERED ON:	3 May 2016
DELIVERED AT:	Brisbane
HEARING DATE:	3 May 2016
JUDGE:	Bond J
ORDER:	**Delivered *ex tempore* on 3 May 2016:**

The orders of the Court are that:

1. **Pursuant to ss 411(4)(b) and 411(6) of the *Corporations Act 2001* (Cth), the Scheme of Arrangement between the applicant and its members, in the form contained in Attachment IV of the Scheme Booklet issued by the applicant and dated 11 March 2016, a copy of which is Exhibit DJ-15 of the affidavit of David Jacobson sworn 28 April 2016, is approved.**
2. **On or before 4 May 2016, the applicant shall lodge with the Australian Securities and Investments Commission a copy of the approved Scheme together with an office copy of these orders.**
3. **Pursuant to s 411(12) of the Act, the applicant be exempted from complying with s 411(11) of the Act in relation to the Scheme.**
4. **These orders be entered forthwith.**

CATCHWORDS:	CORPORATIONS – ARRANGEMENTS AND RECONSTRUCTIONS – SCHEMES OF ARRANGEMENT OR COMPROMISE – where minor irregularities in process of implementation of scheme – whether minor irregularities are procedural irregularities causing no substantial injustice – whether irregularities interfere with approval of scheme
	Corporations Act 2001 (Cth), s 411, s 412, s 1322
	Cleary v Australian Cooperative Foods Limited (No 2) (1999) 32 ACSR 701, cited
	Re HIH Casualty and General Insurance Ltd (2006) 57 ACSR 791, cited

Re Mercantile Mutual Insurance (Aust) Ltd (2002) 43 ACSR 676, cited
Re Queensland Professional Credit Union Ltd (No 1) [2016] QSC 73, cited
Re Seven Network Ltd (No 2) (2010) ACSR 587, cited
Re Seven Network Ltd (No 3) (2010) 267 ALR 583, cited
Re Signature Capital Investments Ltd [2016] FCA 385, cited

COUNSEL: J D McKenna QC for the applicant
D A Quayle for Auswide Bank Ltd

SOLICITORS: Bright Corporate Law for the applicant
King & Wood Mallesons for Auswide Bank Ltd

[1] This application concerns a proposed scheme of arrangement between the applicant (who I will refer to as YCU) and all of its shareholders.

[2] In my judgment *Re Queensland Professional Credit Union Ltd (No 1)* [2016] QSC 73, I addressed the nature of the scheme and identified its component parts. I refer to that discussion generally and will not repeat what I there wrote.

[3] I expressed the conclusion at page 11 that:

> Having regard to the following considerations, I do form the view that if the scheme achieves the statutory majority at the meeting of the members that I would be likely to approve it on the hearing of a subsequent application:
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> (a) the terms of the scheme appear to be inherently beneficial to the shareholders;
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> (b) the independent expert has concluded that the scheme is fair and reasonable in the interests of the members absent a superior proposal;
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> (c) all the directors of the applicant are also of the view that the scheme is in the best interests of the members and recommended the members support the scheme;
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> (d) there have been no competing offers that have emerged;
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> (e) there is no element of unfairness between the different types of members of the applicant; and
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> (f) there is no suggestion in the evidence that the recommendation of the directors has been influenced by external observations.

[4] There have been no changes since the time I formed that view that alter the position I there expressed.

[5] At that hearing I made orders, amongst other things, under s 411(1) of the *Corporations Act* ("the Act") convening a meeting of the shareholders on 18 April 2016 to consider and vote on the scheme and approving the explanatory statement required by s 412(1)(a) of the Act to be sent to YCU's shareholders.

[6] On 18 April 2016 the scheme was approved by 98.69% of shareholders present and voting at the scheme meeting (either in person or in proxy), and by 98.73% of the votes cast. That amounts to meeting the statutory majority requirements mentioned in s 411(4) of the Act.

[7] YCU now seeks an order pursuant to s 411(4)(b) of the Act approving the scheme.

[8] Before an order approving a scheme can be made:

(a) first, the jurisdiction requirements to attract s 411 must be satisfied;

(b) second, the procedural requirements for the Court to make the convening order must be satisfied;

(c) third, the Court must order the convening of a meeting of relevant members;

(d) fourth, the meeting must be validly convened; and

(e) fifth, the meeting must approve the scheme by the specified statutory majorities.

[9] At the first hearing, to which I have already made reference, I was satisfied that the first two requirements had been met, and I made the relevant convening order, which satisfies the third requirement. The fourth and fifth requirements concern the scheme meeting. I am satisfied that the resolution was passed with the requisite majority. There are some matters, however, about which I should make specific observation.

The significance of minor amendments made to the scheme booklet

[10] On 11 March 2016 in conformity with r 3.5 of the *Corporations Proceedings Rules* (Qld) a sealed copy of the convening order was lodged with ASIC. Later that day ASIC confirmed that it had completed registration of the scheme booklet but raised two minor matters which it noted were matters which YCU might wish to attend to in the version of the scheme booklet provided to members. Those minor amendments were effected.

[11] The result was that before sending to the scheme booklet to Computershare (which was the organisation which was responsible for putting together the packages to be sent to members) two amendments were made to the scheme booklet, namely –

(a) the words "as a whole" were inserted at the end of the title of the graph on page 14; and

(b) on pages 16 and 50 the note below the share price graph was changed to say "Auswide Bank share price at 9 March 2016 was $4.84".

[12] I am satisfied that those changes do not result in any departure from the requirements of the order which I made, which required that the document remain substantially in the form approved by me. I am also satisfied that the alterations are not such that would require reconsideration by me of my reasons for making orders convening a meeting: cf *Re Mercantile Mutual Insurance (Aust) Ltd* (2002) 43 ACSR 676 at [4].

Breach of s 412(6)

[13] I move to mention another matter. Section 412(6) of the Act requires, relevantly:

> …the body must not send out an explanatory statement pursuant to subsection (1) unless a copy of that statement has been registered by ASIC.

[14] The result of the amendments which were made to the scheme booklet was that the document registered by ASIC is not precisely the same document as the document which was sent to members because the document registered does not have the two minor amendments to which I have made reference, and the document sent to members did. Literally, a copy of "that statement" has not been registered by ASIC, and s 412(6) has not been complied with. Senior counsel on behalf of YCU submitted that I should conclude that s 412(6) was complied with. I do not think that the language permits of that course. However, I do not think that matters.

[15] Senior Counsel for YCU submitted that even if I was minded to conclude there was a technical non-compliance with s 412(6) of the Act I should conclude that the breach was not jurisdictional in that it was not identified as such in s 411(4). By "not jurisdictional" I take the submission to mean that it was not something that the legislature must have intended would operate as a condition precedent to my jurisdiction to make the approving order referred to in s 411(4). I agree with that submission.

[16] I was also invited, if I agreed with that submission, to conclude that the lack of identity in the minor respects to which I have made reference between the document registered and the document sent to members should be regarded as a procedural irregularity pursuant to s 1322(2) which would not invalidate the scheme meeting. I agree with that submission.

[17] For completeness I should also advert to the fact that the submission was made that even if I was persuaded that it was not merely a procedural irregularity I have power under s 1322(4) to make an order if I conclude that it is just and equitable to do so, declaring that a scheme meeting would not be invalid merely by reason of the contravention. For completeness I indicate that I would have concluded - if I had thought it was necessary so to do - that it was just and equitable to make such an order and would have made such an order.

Failure to comply with s 249K

[18] I should further note that there was a further minor procedural irregularity that arose because of the timing of the copy of the scheme booklet and notice of meeting being sent to YCU's auditor in satisfaction of s 249K of the Act. It was sent on 31 March, which resulted in a failure to comply with s 249K in that the notice given to the auditor was not provided in the same way that a member of the company was entitled to receive notice. I regard s 1322(2) as applying to this consideration.

Minor irregularities in service of scheme material on members

[19] The evidence before me demonstrates that there was due dispatch of the requisite documents to members recorded on YCU's member register with some minor complications.

[20] There were 4091 members on the register to whom packages were sent by Computershare on 18 March 2016. The reason for the difference between that number and the 4094 recorded on the register on 22 December 2015 was that three members had resigned during the period. Although they were made aware that by resigning they would not be eligible for the benefits arising from the merger implemented by the scheme of arrangement and the steps that would flow consequent upon its approval, they nevertheless chose to do so.

[21] It seems to me that YCU did comply with its obligation to dispatch a scheme booklet as had been required by my order (which – at least implicitly - required service on the member's registered address). The evidence does reveal that, however, there were some members entitled to receive the scheme booklet who may not have received one within the timeframe contemplated. It seems to me that adequate steps were taken to deal with the circumstances that arose. Specifically, the following occurred: of the 4091 packages sent a total of 15 were returned and thus were not received by the intended recipient, at least initially. Thirteen shareholders telephoned the appropriate person within YCU, who was the company secretary, Mr Barnard, to advise that they had not received the scheme booklet, and 60 shareholders notified a change of address. That only aggregates to a very small proportion of the members, namely 2.15%. Those 73 persons were dealt with in this way: YCU notified Computershare of the information for those persons, and Computershare provided the packages of scheme documentation to YCU, who then took steps to bring the material to the members' attention.

[22] I move to a further point. Consequent upon a number of persons calling YCU to query their eligibility to participate in the scheme, YCU determined that four people were found to be eligible but had - by administrative error - been omitted from the register with the result that nothing had been sent to them. Those persons were reinstated on the register and scheme booklets were sent to each of them by express post on 1 April 2016.

[23] It seems to me that in sending the material to the four additional shareholders on 1 April, which was four days after the time period that was required by strict compliance with my order, there has been an irregularity in YCU's compliance with the order I made.

[24] However, as I have been invited to do, I form the view that it was merely a procedural irregularity causing no substantial injustice. I conclude pursuant to s 1322(2), that the irregularity does not invalidate the scheme meaning.

Change to circumstances described in the scheme booklet

[25] There was a change to circumstances described in the scheme booklet that occurred between the dispatch of the material and the convening of the meeting.

[26] The first paragraph of section 8.2 of the scheme booklet, as dispatched, stated, relevantly:

> Following the Merger Proposal being implemented, Auswide Bank initially intends to continue operating two separate ADIs (i.e. Auswide Bank and YCU). Auswide Bank will in the future seek APRA's approval to consolidate the separate ADIs and transfer the business of YCU into Auswide Bank when it considers it appropriate to do so.

[27] Subsequent to the dispatch of the scheme booklet to YCU shareholders, YCU was informed by Auswide that it intended to consolidate YCU's business into Auswide's business immediately after the implementation date and not to continue to operate YCU as a separate entity and ADI for up to six months. Obviously enough, at the time of the meeting it was no longer the case that Auswide would do that which is referred to in the scheme booklet, that is, initially intend to continue operating two separate ADIs. YCU was informed that the decision had been made after discussions with APRA.

[28] The authorities required that any additional material information be provided to shareholders in a timely way to allow them the opportunity to consider and respond to the information. In this regard, see *Cleary v Australian Cooperative Foods Limited (No 2)* (1999) 32 ACSR 701 at 712 [30] per Austin J and *Re Seven Network Ltd (No 2)* (2010) ACSR 587 at [12] per Jacobson J.

[29] Light has been shed on the concept of materiality in a slightly different context in *Re HIH Casualty and General Insurance Ltd* (2006) 57 ACSR 791 per Barrett J at [81], who observed:

> At the heart of the disclosure requirement is a concept of materiality. In other words, anything which, if known and appreciated, has the capacity to influence a creditor's decision and judgment whether to vote one way rather than the other (and, indeed, whether to participate at all) must be made known as part of the explanation called for by section 412.

[30] It seems to me that the observations apply with equal force to the sort of scheme of arrangement with which I am tasked to consider. The change to the implementation timetable was not, in my view, material. I accept the submission advanced to me that it could not rationally affect a member's decision whether to vote one way or another, or whether to participate at all. The scheme booklet in the paragraph which I have quoted put the shareholders on notice that YCU would be merged into Auswide whenever it considered it appropriate to do so, and that, obviously, encompassed the possibility that the merger would occur in the short term. It is still going to happen after the scheme is implemented and that will mean that it is after the YCU shares have been transferred to Auswide and after the scheme consideration has been advanced to YCU's pre-implementation shareholders.

[31] The result is the change bears no connection to YCU's pre-implementation shareholders' interests *qua* shareholders. The interest of those persons as customers is similarly unaffected because, as I have already mentioned, the scheme booklet at paragraph 5.9 expressly

disclosed that Auswide reserved the right to amend the terms and conditions of any financial product where permitted to do so at any time after the implementation and that is occurring.

[32] For these reasons, I accept the submission put to me that a supplementary explanatory statement was not required and there is no reason to withhold approval of the scheme under s 411(4)(b).

Should the scheme be approved?

[33] The evidence reveals that between dispatch of the material to which I have referred and the scheme meeting, YCU did not receive any relevant complaints from any member regarding the proposed scheme or the convening of the scheme meeting. There has been no further offer for shares in YCU made by any third parties during this period.

[34] The scheme meeting took place as required on 18 April 2016. Statutory majorities were obtained, as I have already mentioned.

[35] The implementation of the scheme was conditional upon a number of conditions precedent being satisfied or waived, and the material before me demonstrates that that has occurred.

[36] In accordance with the orders that I made on 10 March 2016, YCU published a notice of the Court hearing for approval of the scheme in The Australian newspaper on 21 April 2016. The material before me reveals that YCU has not been notified by any person of any intention to appear at the hearing of this application to oppose approval of the scheme, and when this matter was called today no one else appeared for that purpose.

[37] The final requirement, therefore, to be considered on the application before me is whether I should grant my approval to the scheme.

[38] The relevant considerations have been addressed in *Re Seven Network Ltd (No 3)* (2010) 267 ALR 583 at [31] to [45] per Jacobson J, which I will quote below.

> **The legal principles**
>
> [31] The principles which govern the exercise of the court's discretion to approve a scheme are well settled. The court has a discretion whether to approve a scheme, and is not bound to approve it merely because it has previously made orders for the convening of meetings or, as I said earlier, because the statutory majorities have been achieved: *Re NRMA Ltd (No 2)* (2000) 156 FLR 412; [2000] NSWSC 408 at [22] (*Re NRMA Ltd (No 2)*). Santow J there referred to a passage from a well-known text on takeovers and reconstructions, in which it was said that the court's jurisdiction is supervisory; it is concerned to be satisfied that there has been an absence of oppression, and that the compromise or arrangement is one which is capable of being accepted.
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> [32] It has been said on many occasions that the court will usually approach the task upon the basis that the members are better judges of what is in their commercial interests than the court. Santow J said in *Re NRMA Ltd (No 2)* at [23], citing earlier authority:
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> > "After all, it is their (the members') money which is at stake."
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> [33] The Corporations and Markets Advisory Committee (CAMAC) recently observed, at para 3.5.2 of its December 2009 Report:
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> > "It is not the role of the court to usurp the decision of shareholders by imposing its own commercial judgment on the scheme, nor to satisfy itself that no better scheme could have been devised."
>
> These observations were supported by authorities, including *Re NRMA Ltd (No 2)*.
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> [34] CAMAC referred to English authority for the proposition that a favourable resolution at a meeting is only "a threshold" to be met before the court can approve the scheme: *Re BTR plc* [2000] 1 BCLC 740 at 747 (*Re BTR*). The considerations referred to in that case as going against the approval were stated as follows:

> "But if the court is satisfied that the meeting is unrepresentative, or that those voting in favour at the meeting have done so with a special interest to promote which differs from the interest of the ordinary independent and objective shareholder, then the vote in favour of the resolution is not to be given effect by the sanction of the court."

The passage was quoted by CAMAC at footnote 160, on p 49 of its report.

[35] CAMAC set out a list of considerations which the courts have taken into account as informing their discretion whether or not to approve a scheme. Five of the principles are relevant. The first is whether the shareholders have voted in good faith and not for an improper purpose: *Re Foundation Healthcare Ltd (No 2)* (2002) 43 ACSR 680; [2002] FCA 973.

[36] Second, whether the proposal is fair and reasonable so that an intelligent and honest man or woman who was a member of the relevant class, properly informed and acting alone might approve it: *Fowler v Lindholm* (2009) 178 FCR 563; 259 ALR 298; [2009] FCAFC 125 at [79] (*Fowler*).

[37] The third is whether the plaintiff has brought to the attention of the court all matters that could be considered relevant to the exercise of the court's discretion: *Re Permanent Trustee Co Ltd* (2002) 43 ACSR 601; [2002] NSWSC 1177 at [7] (*Re Permanent Trustee*).

[38] The fourth, and related consideration, is whether there has been full and fair disclosure of all information material to the decision: *Re NRMA Ltd (No 2)* at [30].

[39] The fifth is whether minority shareholders would be oppressed by the scheme: *Re Ranger Minerals Ltd; Ex parte Ranger Minerals Ltd* (2002) 42 ACSR 582; [2002] WASC 207.

[40] A further consideration has been said to be whether the scheme offends public policy. See, for example, *CSR Ltd, Re of CSR Ltd* (2010) 265 ALR 703; 77 ACSR 592; [2010] FCAFC 34 at [51]–[56].

[41] CAMAC went on to cite an observation by the Takeovers Panel that the courts have taken the view that where there is no contradictor they must be more careful about their scrutiny of disclosure mechanisms and fulfil the role of a contradictor.

[42] It is true that the courts endeavour to carefully scrutinise the material, but as I said in my earlier judgment, and as CAMAC itself observed, the court is heavily reliant on counsel to bring to its attention those features of the scheme that require attention. That is particularly so where, as here, the transaction is between related parties and the scheme booklets for the share scheme and the TELYS3 scheme each run to approximately 500 pages.

[43] The court also relies on the role of ASIC, to which I referred in my first judgment at [15]. In my opinion, it is not the court's role, even on an ex parte application, to fulfil the role of contradictor. In that respect I depart from the observations made by the Takeovers Panel. The court's jurisdiction is supervisory, but it is to be understood in light of what I said above, and in my first judgment at [13].

[44] The authorities support the proposition that it is not the court's task to determine whether the scheme is intrinsically fair to members. It should not take sides on contested matters going to the commercial merits of the scheme: *Re NRMA Ltd (No 2)* at [23]; see also R P Austin, I M Ramsay *Ford's Principles of Corporations Law* (13th Edition, LexisNexis Butterworths, 2007) p 24.160.

[45] The same seems to me to apply in relation to ex parte applications. The obligations of full disclosure on counsel are well established. As I said in my first judgment, it is significant that CAMAC did not suggest any amendment to the existing procedures; see [58] of my first judgment.

[39] His Honour's summary of the principles has subsequently been adopted numerous times, most recently in *Re Signature Capital Investments Ltd* [2016] FCA 385 per Farrell J. The principles are satisfied in the present case.

[40] First, because of the reasons I mention in my first judgment as to why I would be likely to approve the scheme.

[41] Second, because 55.8% of shareholders voted at the scheme meeting either by proxy or in person. Although that means that 44.2% of the remaining shareholders did not participate in the scheme meeting, it seems to me to be inappropriate that they ought to be presumed to be antagonistic to the scheme.

[42] I have adverted to there being some minor irregularities in the process that occurred since my first order and that I regard those irregularities in a way that does not interfere with my ability to approve the scheme. The third point to mention is that only 2.15 % of members might have encountered difficulties in their receipt of the scheme booklet and appropriate steps were taken to address this consideration.

[43] Fourth, the result is that the scheme has received overwhelming support from those of YCU's shareholders who voted and it remains the case that no superior proposal has emerged.

[44] I mention the additional point that, although there was a change to the implementation timetable subsequent to the scheme booklet being sent to members, I do not regard that change as being material requiring an additional explanatory memorandum to be provided to these shareholders.

[45] Section 411(17) requires me not to approve a scheme unless, amongst other things, there is produced to the Court a statement in writing by ASIC stating that ASIC has no objection to the scheme. Such a letter has been produced to me. By letter of 30 April, the delegate of ASIC wrote to the directors of YCU, advising that, under s 411(17)(b) of the Act, ASIC had no objection to the proposed scheme. The letter also noted that submissions would be made regarding the changes that occurred to the scheme between the time which it was registered and dispatch of the scheme to members, and I have already adverted to those matters.

[46] For all of these reasons, it seems to me to be appropriate to make an order approving the scheme under s 411(4)(b). I make an order in terms of the draft which has been provided to me as initialed by me and placed with the papers.