

SOME COMMENTS ON THE SCHEME OF ARRANGEMENT AS AN "AFFECTED TRANSACTION" AS DEFINED IN THE *COMPANIES ACT* 71 OF 2008

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SUMMARY

A scheme of arrangement involving a regulated company and its shareholders is defined as an "affected transaction" in the *Companies Act* 71 of 2008. Although scheme of arrangements, which can be used to achieve a takeover of a company, are a common occurrence, the Act provides no definition of such schemes. The importance of knowing what actually constitutes a scheme of arrangement becomes apparent when it is noted that section 121 of the Act provides that any person making an offer which if accepted would result in an affected transaction is obliged to comply with all the relevant reporting and approval requirements in the Act, as well as the Takeover Regulations, unless the Takeover Regulation Panel has granted an exemption. Giving effect to an affected transaction is prohibited, unless the Panel has issued a compliance certificate or granted an exemption. The article comments generally on the definition of a scheme of arrangement as an affected transaction, highlighting the elements of a scheme of arrangement. Specific consideration is given to transactions which include a re-acquisition by the company of its own previously issued securities and when such a re-acquisition on its own would be considered to be a scheme of arrangement and an affected transaction. Comment on the obligation to appoint an independent expert to report on the scheme and the relevance, if any, of the solvency and liquidity of the company embarking on a scheme of arrangement is included. Finally, consideration is given to the need to have a scheme of arrangement approved by a special resolution and the potential exclusion of certain voting rights. The article exposes a number of difficulties with the interpretation of the applicable provisions and suggests that these need to be revisited by the legislature for clarification.

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