

ATTACHMENT A

Report by Corporations Law Simplification Task Force (September 1996) - Section 52 Trade Practices Act and Dealings in Securities

1. Executive summary

The Task Force recommends that conduct in relation to fundraising, takeovers and other dealings in securities be governed by the Corporations Law and not by the provisions in Part V of the Trade Practices Act (which include section 52), nor by the equivalent provisions in the Fair Trading Acts of each State and Territory.

The Corporations Law imposes rigorous disclosure obligations for prospectuses and takeover documents, which are designed to ensure that all material information is obtained and disclosed to investors. Furthermore, the Law provides for:

- court injunctions and other remedial orders in relation to prospectuses or takeover documents which are false or misleading or which omit material matter (these remedies are available irrespective of the amount of care exercised in preparing the documents);
- heavy criminal penalties for issuing defective prospectuses or takeover documents (with a defence based on reasonable inquiry); and
- liability to compensate persons who suffer loss as a result of defective prospectuses or takeover documents (subject to reasonable inquiry and due diligence defences).

The Task Force proposals on fundraising and takeovers for the Third Corporate Law Simplification Bill retained this approach, but proposed that the general prohibition in section 995 against misleading or deceptive conduct in relation to dealings in securities be expressly confined to dealings other than those regulated under the specific provisions on prospectuses and takeover documents.

The essential effect of the proposed amendments of the Trade Practices Act would be limited. The existing liability to compensate for loss that arises from misleading or deceptive statements in a prospectus or takeover document which could not have been avoided even by making reasonable inquiries and exercising due diligence would be removed.

The Task Force recommendations are made following extensive consultation with interested parties about the current law and how it should be reformed.

The reasons for the Task Force recommendations are:

- The defences under the Corporations Law, which are based on making reasonable inquiries and ensuring due diligence, achieve a reasonable balance between the interests of investors and the interests of those raising capital.
- Applying the Trade Practices Act, which imposes liability regardless of the amount of care exercised, undermines the operation of these defences and upsets this balance.
- Investing in securities necessarily involves the voluntary assumption of risks which issuers cannot eliminate completely by making exhaustive inquiries.
- Excessive liability for those involved in fundraising and takeovers potentially increases the costs for Australian business of engaging in this conduct.

- If a choice has to be made between the Corporations Law and the Trade Practices Act regimes, the overall level of investor protection under the Corporations Law is preferable to that provided under the Trade Practices Act.
- Duplication between regulators would be avoided by giving the Australian Securities Commission (ASC) sole responsibility for conduct in relation to securities dealings.
- The Corporations Law regime is consistent with international practice.