CHAPTER 4

FUNDRAISING

Outline of principal changes to fundraising

4.1 The provisions of the Bill relating to fundraising contain over 20 reforms to the Law. As the Explanatory Memorandum notes the reforms are designed to minimise the costs of capital raising while improving investor protection.[1] The changes include the following:

Prospectuses, profile statements & offer information statements

4.2 The Bill amends the Law to allow for short form prospectuses. Short form prospectuses will incorporate by reference documents lodged with the regulator, the Australian Securities and Investments Commission (ASIC).[2]

4.3 The Bill empowers the ASIC to authorise the use of profile statements for offers of securities of a particular kind. A prospectus though will still need to be prepared and lodged with the ASIC.[3]

4.4 If a corporation is issuing securities to raise $5 million or less it can use an offer information statement. This statement has a lower level of disclosure requirements than a prospectus and is intended to facilitate capital raising by small and medium enterprises.[4]

Pre-prospectus advertising

4.5 Advertising restrictions for issues of securities, which are already listed on the ASX, will be eased under the Bill. This will permit advertising for those securities before the prospectus is issued.[5]

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1 Explanatory Memorandum, para 1.5.

2 The introduction of shorter prospectuses gives effect to Recommendation 10 of the Wallis Inquiry. Issuers will be able to omit material that only professional analysts and advisers would be interested in.

3 Subsections 709(2) and (3) of the Bill.

4 Sections 709, 715.

5 Subsection 734(5)(a). The Explanatory Memorandum notes that "Relaxing the advertising restrictions for quoted securities will not compromise investor protection as information regarding the issuer and the nature of the securities is publicly available" (para 8.16).

Removal of Trade Practices overlap

4.6 The Federal Trade Practices Act and equivalent State Fair Trading laws dealing with misleading and deceptive conduct will no longer apply to securities dealings. Liability rules will be contained in the Law.[6]

Disclosure liability

4.7 The Bill clarifies who may be liable for a defective prospectus: the issuer of a prospectus, underwriters, the corporation itself, the directors and proposed directors may be liable in respect of the document as a whole. Others (including experts and professional advisers) will only be liable for statements in the prospectus made by them or based on their statements.[7]

Introduction of a uniform due diligence defence

4.8 The Bill introduces a uniform defence for persons involved in the issue of a prospectus. A person will not be liable if they made such enquires as were reasonable and believed, on reasonable grounds, that the prospectus did not contain any materially misleading or deceptive statements or omit any material matter.[8]

Small business fundraising

4.9 The Bill introduces specific provisions dealing with small-scale offerings to assist fundraising by small and medium enterprises.[9]

Removal of governmental immunity

4.10 Consistent with the CLERP proposal, the Bill removes the immunity of the Federal Government and its agencies from the fundraising provisions of the Law. [10]

4.11 The Bill will also allow companies to issue prospectuses in electronic form.[11]

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6 This reform originates in the Simplification Program (see Corporations Law Simplification Program, *Fundraising – Trade Practices Act,* s 52, November 1995, pp 18-21). The Wallis inquiry also examined this issue and similarly recommended that section 52 of the Act (and State Fair Trading provisions) should no longer apply. The Wallis inquiry concluded that the balance struck in the Corporations Law between positive disclosure obligations and liability for non-compliance was undermined by the superimposed *Trade Practices Act* liability (Financial Systems Inquiry, March 1997, pp 45-48).

7 Subsection 729(1).

8 Sections 731 and 732. Under the current law, different defences apply to different persons associated with the prospectus.

9 See subsections 708 (1)-(7). The provisions include a new fundraising mechanism for these enterprises: an Offer Information Statement (OIS). They will be able to raise up to $5 million by way of an OIS rather than a prospectus.

10 The CLERP Discussion Paper stated that "Maintenance of the current immunity for government fundraising would be inconsistent with the principles of competitive neutrality agreed by the Commonwealth, State and Territory Governments, arising out of the *National Competition Policy* report." (Proposal for Reform: Paper No. 2 Fundraising, p 68).

Investor protection

4.12 As a result of the Wallis Inquiry, the regulation of Corporations Law, market integrity and consumer protection have been combined in a single regulator. Since 1 July 1998 the Australian Securities and Investment Commission (ASIC), formerly the Australian Securities Commission, has assumed a greater role in the protection of consumer interests in the securities and financial markets.

4.13 In his submission to the Committee, Mr Robin Brown stated that "much of the change the present bill would bring is soundly based" but expressed some reservations about the ability of the ASIC to promote consumer protection. He indicated that the ASIC, having no previous consumer protection experience in terms of administering fair trading laws, was not suited to the role of a consumer protector. To ensure consumer interests were protected at all times he recommended the appointment of a consumer protection commissioner within the ASIC. He stated:

> For agencies with critical consumer protection functions, such as the ASIC will have, there is ample precedent for legislation to provide for a commissioner with special expertise in consumer protection. While ASIC commissioners have doubtless some experience in protection of securities investors, the job will now involve looking after the interests of most citizens, a great many of whom do not have the level of sophistication, in terms of financial services, securities investors can usually be presumed to have…The Bill should be amended to include a provision on commissioners' expertise/experience similar to that in the TPA which might require an expansion of the number of commissioners by one.[12]

4.14 During a public hearing the ASIC told the Committee that it would be working closely with Australian Competition and Consumer Commission (ACCC) on consumer matters. It had already put in place transitional arrangements with the ACCC in regard to the transfer of staff and consumer protection responsibilities. The ASIC also indicated that it would make its needs known to the Government if resources to promote consumer protection were inadequate.[13] The Committee has also noted that the ASIC has established a broadly based Consumer Advisory Panel and has recruited experienced staff for its Office of Consumer Protection.

4.15 It is too early to asses the ASIC's performance in relation to its widened responsibilities for consumer protection. However, it appears to the Committee that the progress made to date is satisfactory and that no changes are required to the current Bill.

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11 Section 720.

12 Mr Robin Brown, Submission 4, p 4.

13 Mr Alan Cameron, Committee Hansard, 4 June 1998, CS4-CS7, CS24-CS27.

Sophisticated investors

4.16 Proposed section 708 sets out the circumstances where an offer does not need a disclosure document. Subsection 708(8)(c) excludes an offer if the offer is made through a licensed dealer and the licensed dealer is satisfied that the person to whom the offer is made is a sophisticated investor. The section reads:

> (c) the offer is made through a licensed dealer and the dealer is satisfied on reasonable grounds that the person to whom the offer is made has previous experience in investing in securities that allows them to assess:
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> (i) the merits of the offer; and
>
> (ii) the value of the securities; and
>
> (iii) the risks involved in accepting the offer; and
>
> (iv) their own information needs; and
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> (v) the adequacy of the information given by the person making the offer;

4.17 In its submission the Australian Institute of Company Directors said that this exclusion should not be included.

> …. by allowing offers to be made through licensed dealers in these circumstances it expands considerably the opportunity for unscrupulous operators to seek to push products which would now require a prospectus through investment advisers with the possible incentive of commissions. Naturally most investment advisers would discharge their responsibilities properly, however, given the very large number of licensed investment advisers, it would be difficult to adequately oversee the advisers' activities in this area.[14]

4.18 Similar views were expressed by the Australian Consumers Association.

> This proposal carries with it the potential for investors to be manipulated or otherwise misrepresented into a classification of "sophisticated" in an effort to circumvent disclosure obligations. Clearly, the introduction of this subjective threshold will signal a substantial increase in risk for investors.[15]

4.19 An important aspect of the Bill is that it is aimed at making fundraising easier and less costly, particularly for small to medium companies. This has entailed a careful balancing of the need to provide protection for those investors who need it with the need to facilitate fundraising by businesses. The Corporations Law creates a strong licensing regime for investment advisers. It also provides significant penalties for those advisers who act inappropriately. However, this provision does give considerable discretion to investment advisers to determine who is a 'sophisticated investor" and some review of the sanctions available may be warranted.

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14 Australian Institute of Company Directors, Submission 22a.

15 Australian Consumers Association, Submission 36.

Recommendation

4.20 The Committee recommends that the legislation should clarify the sanctions applicable to a licensed dealer who breaches section 708(8)(c) and such sanctions should be given further consideration under CLERP 6.

Placements

4.21 The Australian Stock Exchange (ASX) has raised an issue with the Committee about the effects of the fundraising provisions which deal with the placement of securities with institutions.

4.22 The Corporations Law generally requires that where a body offers its securities for sale a disclosure document is required. This is aimed at ensuring that potential investors are able to make a fully informed decision about investing in those securities.[16] However, where the placement is made to sophisticated or professional investors the placement can be made without the need for such disclosure.[17] This provision is based on the presumption that these investors are better informed and therefore require less protection than other investors.

4.23 The current law contains provisions aimed at preventing issuers from avoiding the prospectus provisions by issuing securities to an intermediary under one of the exclusions; and the intermediary then on-selling the securities. Section 1030(1) of the current law deems that any document by which an offer for sale is made is a prospectus if an issue of securities is made for the purposes of resale. Section 1030(3) states that, unless the contrary is proved, the sale of the securities within 6 months is evidence that the securities were offered for the purpose of resale. Section 1030(1A) provides that an offer of securities through the ASX is not covered by these provisions.

4.24 The Bill also contains provisions aimed at preventing avoidance of the prospectus provisions. If an institution offers the securities it acquired in a placement for sale within 12 months after their issue, the Bill requires a disclosure document if none was provided at the time of the placement and the securities were issued with the purpose of having the securities resold by the person to whom they were issued.[18] In the absence of evidence to the contrary, the issuing body is assumed to have issued the securities with this purpose if the securities are offered for sale within 12 months of the issue.[19]

4.25 The ASX is concerned that these provisions will have the effect of discouraging institutional investors from participating in placements. While accepting

16 Section 707.

17 Section 708.

18 Section 707(3).

19 Section 707(4).

the need for an anti-avoidance provision, the ASX is concerned that the proposed provisions may go too far.[20]

> An intention to resell is invariably one factor in a decision to invest in quoted securities. Furthermore, although institutions may take placements with a long term view, flexibility is needed in managing portfolios. Accordingly, it may be the securities are sold within the 12 month period. We are concerned that the legislation should clearly allow placements in these circumstances, even where the entity is aware that the securities may be resold (unless the entity and the institution are acting in concert to avoid the disclosure regime). Otherwise, if an institution is at risk of needing to issue a disclosure document if the securities are sold within 12 months of the placement, our concern is that institutions will be reluctant to take placements, which would impede the ability of entities to raise capital.[21]

4.26 The ASX has suggested two possible approaches to addressing its concerns. Its preferred position is for an exception for on-market sales to be reintroduced. Alternatively it has suggested that the deeming provisions be clarified and the period during which deeming occurs be reduced.[22]

4.27 The views of the ASX have been supported by other parties. The Securities Institute of Australia have said, in relation to the removal of the section 1030(1A) exemption that:

> We believe removal of this exemption will cause a major dislocation of Australian markets, because institutions will not take up shares if they are unable to onsell within 12 months other than at a significant discount. As a result, corporations will be forced to raise funds through rights issues or, given the time delay associated with these, offshore placements.
>
> We do not believe the exemption should be removed, given the long standing practice of placements by listed entities, which are subject to the continuous disclosure requirements, and the failure to identify any abuse or shortcomings in the present system.[23]

4.28 The Investment and Financial Services Association also supports the ASX position:

> IFSA members support the re-introduction of the exemption for on-market sales. They would also support the proposal to clarify the deeming

20 Australian Stock Exchange, Submission 20.

21 Australian Stock Exchange, Submission 20.

22 Australian Stock Exchange, Submission 5c.

23 Securities Institute of Australia, Submission 9b.

> provisions and the reduction of the period during which the deeming occurs from 12 months to 6 months.[24]

4.29 The Australian Shareholders' Association has said that it is opposed to the ASX's proposed amendments. In its submission it referred to the anti-avoidance purpose of the existing section 1030 and the proposed sections 707(3) and 707(5). The submission went on to say that:

> So far as we are aware, not significant objection has been raised to proposed clause 707 or to the omission of provision corresponding to subsection 1030(1A) other than by the ASX.
>
> On the other hand, we are not aware of any strong lobbying for the extension of the period of six months referred to in section 1030 to 12 months.
>
> We would therefore not oppose the reduction of the period specified in clause 707 to six months.[25]

4.30 The Australian Investors Association does not support the ASX's position on this matter. In its submission it said that rather than being facilitated, the current level of non-prospectus capital raising should be cut back in favour of rights issues to existing shareholders.[26]

4.31 In correspondence with the Committee the Minister for Financial Services and Regulation, the Hon Joe Hockey MP, has indicated that the changes incorporated in the Bill arise from problems with the operation of the current legislation.

> A number of problems have been identified with the operation of current section 1030, including the potential for subsection 1030(1A), which provides an exemption from offers made on the ASX, to undermine the anti-avoidance purpose of section 1030.
>
> In addition, the Government questions whether the reforms would undermine the market for placements. In particular, an institution would be able to on-sell in the wholesale market without preparing a disclosure document (Bill section 708). In effect, this would create an 'upstairs market' for the trading of these securities within the 12 month period. This approach is broadly consistent with that in North American jurisdictions.
>
> These reforms also remove an inappropriate incentive for issuers to make placements and may therefore encourage issuers to make rights issues to existing shareholders. This would be welcomed by shareholder groups. A relaxation for placements for listed entities, as proposed by the ASX would, on the other hand, make rights issues less attractive and effectively

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24 Investment and Financial Services Association, Submission 12a.

25 Australian Shareholders' Association, Submission 20b, p 5.

26 Australian Investors Association, Submission 37.

> undermine the policy requirement that a disclosure document be prepared for a rights issue.[27]

4.32 In considering this matter the Committee was mindful of several factors. Firstly, although an on-market sale within 12 months would be problematical, the institutions would not be prevented from selling their securities. They would be able to re-sell the securities off-market to other sophisticated or professional investors under the provisions of proposed section 708. Under proposed section 741 the ASIC has extensive powers to exempt a person or class of person from the Law, or modify the Law regarding disclosure. This provides a second avenue through which any problems which arose could be addressed. Finally, the Committee is concerned that any general weakening of the legislation may have the effect of seriously undermining the disclosure regime. For these reasons the Committee has not been persuaded that the Bill should be amended.

New listings and investor protection

4.33 The ASX has also expressed concern about the possible results of allowing investors to return securities after unconditional permission for quotation has been given.

> The main concern in relation to floats is the extended circumstances in which investors can return securities in a float after they are issued, which in a worst case scenario could result in an entity having no business and being removed from the official list within a few weeks after listing. We are concerned that this runs the risk of there being serious damage to investor confidence and market integrity.[28]

4.34 Under the proposed legislation if a condition in a disclosure document is not met or the disclosure document is defective the person offering the securities is required to follow one of three procedures. They must either repay the money to the applicants; or make a further disclosure to the applicants and give them a reasonable opportunity to withdraw their application; or issue the securities, make a further disclosure and give the investor a reasonable opportunity to return the securities and be repaid.[29] If securities are issued in contravention of this section the investor has a right to return the securities within one month and have their application money repaid.[30] Similarly if the prohibition on securities hawking is breached the investor has a right to return the securities within 1 month and be repaid.[31]

4.35 The ASX is concerned about the possible effect of this right to return on new listings. If sufficient subscribers exercise the right to return their securities this could

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27 Minister for Financial Services and Regulation, the Hon Joe Hockey, Committee Correspondence.

28 Australian Stock Exchange, Submission 5b.

29 Section 724(2).

30 Section 737.

31 Sections 736 and 738.

reduce the spread of shareholders and make the newly listed entity unsuitable for listing within weeks of its being listed. Similarly if sufficient shareholders exercise this right the newly listed entity may be forced to dispose of core assets or use funds required for its operations making the entity unsuitable for listing.[32] The ASX acknowledges that this is a worst case scenario but is concerned that such an outcome could seriously damage investor confidence.

> In either case, the issues confronting the ASX will be whether to suspend quotation of securities and whether to remove the entity from the official list, both possibilities giving rise to the potential for a dispute. …. If as a result of the provision in the Corporations Law allowing the return of securities, the entity ceases to be suitable for listing, it should not have been admitted and it is difficult to see how it can remain listed.
>
> Also, if this happens, the Law creates an uneven playing field for investors. Initial subscribers who have exercised the right to have securities returned and have been repaid (either by the entity, or by directors under section 737(3)) receive preferential treatment to investors who acquired securities on market from other subscribers, and who are left with an investment in an entity that may be insolvent and may not longer be listed.
>
> The issues are of considerable concern to us, as we think they affect the integrity of the market.[33]

4.36 The ASX has said that its position on this issue is that there should be no right to return securities after unconditional permission for quotation has been given.[34]

> ASX's preferred position is that the relevant clauses should be amended so as to not apply if securities are quoted on the ASX. This involves a balancing of investors' interests, recognising that where securities are to be quoted, certainty in relation to the business and listing is more important than an individual's remedies.[35]

4.37 The Committee sought the views of the Australian Shareholders' Association (ASA) on the issues raised by the ASX. The ASA was generally in agreement with the ASX position. It concluded its examination of the issues by saying:

> We believe that the right of an investor to return securities which have not been traded is a valuable right which should be retained in the legislation. On the other hand we agree with ASX that this right needs to be balanced against the issues of investor confidence and market integrity.

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32 Australian Stock Exchange, Submission 5b.

33 Australian Stock Exchange, Submission 5b.

34 Australian Stock Exchange, Submission 5b.

35 Australian Stock Exchange, Submission 5c.

> Our preferred solution is therefore that any right to return newly issued securities to the company which issued the securities which may arise under clauses 724(2)(c), 737(1) or 738 of the Bill should cease once the securities have been admitted to quotation on a stock market of a securities exchange.[36]

4.38 In correspondence with the Committee the Minister for Financial Services and Regulation, the Hon Joe Hockey MP, has emphasised the Government's view that the change proposed by the ASX would lead to a reduction in investor protection.

> In the Government's view, the ASX presents a 'worse case' scenario which would occur only in rare circumstances. The Government is not aware of this scenario arising in the past. If such a scenario did occur, any risk to market integrity would in fact be reduced by the ASX suspending quotation. Further, any such risk is outweighed by the clear investor protection measure of ensuring that investors have a right to return securities which were issued on the basis of a materially deficient disclosure document.
>
> The Government would be concerned about any proposal to amend Bill section724(2)(c) so that it does not apply to securities that are to be quoted on a securities exchange. Whilst this amendment would address the concerns of the ASX, it would create an unjustifiable divergence between the treatment of listed and unlisted securities. This amendment would also diminish investor protection by removing a remedy currently available to investors.[37]

4.39 The right to return securities and receive a refund is a fundamental protection for investors and is consistent with other consumer protection provisions contained in the Bill and in other legislation. The Committee notes that if the scenario outlined occurred the ASX could act to minimise the problem by promptly suspending quotation and that the ASIC has extensive powers to grant an exemption or modification of the Law should it be necessary.[38] In light of these factors the Committee does not believe that the possible problem identified by the ASX is sufficient to justify watering down this protection. The Committee is not persuaded that it should support this proposal by the ASX.

4.40 The Investment and Financial Services Association has suggested that section 737(1), which gives a person the right to return securities where they have been issued in contravention of section724, should be amended.

> We also believe that as currently drafted Clause 737(1) causes difficulties. This is because if securities are allotted in breach of Clause 724 and trading occurs, the purchaser from the allottee will not be able to return the securities (even where the purchase occurred prior to the problem becoming

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36 Australian Shareholders' Association, Submission 20b, p 3.

37 Minister for Financial Services and Regulation, the Hon Joe Hockey, Committee Correspondence.

38 Section 741.

> known to the market). In our opinion, the solution is to amend Clause 7373(1) to allow 'anyone' holding the security to return it either within a 'reasonable period' or within a period of ten business days.[39]

4.41 The Committee considers that there is considerable merit in this proposal. However, this proposal would be a significant change and the Committee is reluctant to recommend that it be adopted in the absence of wider consultation with interested parties.

4.42 Another approach which has been suggested by the ASX is that sections 724(2)(b) and 724(2)(c) be amended so that a fixed time limit is set for the return of securities instead of the 'reasonable opportunity' provided for in the Bill. The ASX has indicated that although this is not its preferred approach, it would address concerns about the uncertainty of the period of time during which securities can be returned.

4.43 The ASX has suggested that the fixed period should be one month. This would be consistent with section 738 which allows securities issued or transferred in breach of the hawking provisions contained in section 736 to be returned within one month. In commenting on this suggestion the Investment and Financial Services Association have said that:

> IFSA members are of the view that the words 'reasonable period are preferable to fixing a period of one month. They believe that in a number of circumstances, a period of one month would be too long, which would disadvantage issuers and some investors.
>
> If a period is to be fixed we suggest that ten business days would be sufficient.[40]

4.44 The Committee considers that setting a fixed minimum period for the return of securities would give all of the interested parties greater certainty in the application of the law. Although a period of one month would be consistent with the hawking provisions, the circumstance under which section 724(2) operates are different from those under the hawking provisions. Investors who have the opportunity to return securities under section 724(2) are prompted to consider what action they should take by the receipt of the documents required under section 724(3). Whereas investors who have acquired securities in contravention of the hawking provisions may not become aware of their position for some time. For this reason the Committee considers that it would be reasonable to set a shorter timeframe in section 724 than is specified in section 738. Although IFSA has suggested a fixed period of 10 days the Committee can see no reason for preventing an offerer from allowing a longer period if they wish to do so.

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39 Investment and Financial Services Association, Submission 12a.

40 Investment and Financial Services Association, Submission 12a.

Recommendation

4.45 The Committee recommends that sections 724(2)(b) and 724(2)(c) be amended to replace the term 'reasonable opportunity' with a minimum period of 10 working days.

Releasing funds to allow completion of contracts

4.46 The Bill provides that a person offering securities under a disclosure document must hold application monies in trust until the securities are issued or transferred to the applicants.[41] Further, under the Bill securities cannot be issued or transferred until after unconditional permission for quotation is given.[42] This means that the ASX cannot make completion of a contract for an entity to acquire a major asset using those monies a condition of quotation. These provisions are consistent with the current law.

4.47 The ASX considers that the law may lead to problems where the monies are intended to be used for the purchase of major assets essential to the operations of the company being floated. The funds become available to the entity only after unconditional permission for quotation has been given. If they are not then used for the acquisition of the assets the investors are left with a non-marketable investment. The ASX has suggested that this problem could be addressed by amending section 722 to allow funds to be released from trust in order to meet the last unsatisfied condition of quotation.

4.48 In its submission to the Committee the Australian Shareholders' Association agreed with the ASX's view that it should be able to make completion of the acquisition of a major asset a condition of quotation.

> We agree that ASX should be able to make completion of a contract for an entity to acquire a major asset a condition of quotation where the funds have been raised for the purpose of that acquisition.
>
> We also agree that clause 722 of the Bill and its predecessor, subsection 1031(6) of the existing law, provide an important element of investor protection.
>
> We suggest that the appropriate sequence of events would be:
>
> 1. Issue securities
>
> 2. Release funds to complete acquisition of asset
>
> 3. Admit securities to quotation

41 Section 722(1).

42 Section 723(3).

> The most convenient way to achieve this result may be to amend subclause 723(3) of the Bill to provide that securities may be issued on the grant of conditional admission to quotation. Subclause 737(1) would then be amended as indicated above to provide that if the securities are not subsequently admitted to quotation the applicants have the right to return the securities and to have their application money repaid. [43]

4.49 In correspondence with the Committee the Minister for Financial Services and Regulation, the Hon Joe Hockey, has said that this proposal would add unnecessary complexity to the provisions to deal with one-off cases. Those cases which have arisen under the current law are infrequent and have been dealt with by the ASX obtaining undertakings from the company.[44] The Committee has not been persuaded that any amendment to the legislation is required in this regard.

Admission to quotation

4.50 Under the current law, where a prospectus states that the securities will be quoted on a securities exchange, an entity is able to issue the securities and a vendor able to transfer securities before unconditional permission for quotation is given. However, if unconditional permission for quotation is not given the issue is void.[45] This has allowed the ASX to follow the practice of including as a condition of quotation the issue or transfer of the securities.

4.51 Under the new provisions, where a disclosure document states that the securities will be quoted on a securities exchange, the exchange must give unconditional permission for quotation before the securities are issued or transferred.[46] This means that the ASX will be unable to follow its previous practice and that the legislation could result in securities being listed and traded before they are issued.

4.52 To address this problem the ASX has indicated that it is likely that it will follow the practice of giving unconditional permission for quotation but will require the securities to be issued or transferred before commencing actual quotation. This could, however, raise the question as to whether, in substance, unconditional permission for quotation has been given. The ASX has said that it would prefer to revert to the current position.

4.53 In its submission to the Committee the Australian Shareholders' Association also indicated that some refinement of the proposed legislation was required.

> Under subsection 1031(1) of the existing law it is possible for securities to be issued prior to the grant of permission for the securities to be listed for quotation. We believe that the position under proposed subsection 723(3) is

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43 Australian Shareholders' Association, Submission 20b, p 4.

44 Minister for Financial Services and Regulation, the Hon Joe Hockey, committee correspondence.

45 Section 1031(1).

46 Sections 723(3) and 625(3).

> preferable, viz that the securities should not be issued until they have been admitted to quotation.
>
> On the other hand we believe that the legislation should be amended to make it clear that ASX can grant conditional admission to quotation. This would ratify what appears to be ASX's existing practice. As indicated in 2 above, we suggest that subclause 723(3) be amended to provide that securities may be issued on the grant of such conditional admission and that subclause 737(1) be amended to provide for the return of the securities and the repayment of the application money if the securities are not in fact admitted to quotation.[47]

4.54 The Committee considers that either the proposal put forward by the ASX or that of the ASA would be reasonable ways of addressing this issue. The Committee finds the ASX proposal to be more attractive as it will be consistent with current practice. It does not appear to the Committee that the proposal would lead to any significant reduction in investor protection or would undermine in any way the objectives of the legislation.

Recommendation

4.55 The Committee recommends that the Bill be amended to revert to the position under the current law on the quotation of securities. An issue of securities should be void if the disclosure document states that the securities will be quoted on a securities exchange and the securities are not admitted for quotation. The Bill should also require the return of application monies to investors under those circumstances.

Delay between lodgement and offer

4.56 In its submission the Securities Institute of Australia expressed concern about the proposal in the draft legislation to provide a 14 day period between lodgement of a disclosure document and an offer of securities. The Institute described this as a retrograde step which would put Australian companies at a commercial disadvantage.[48] These draft provisions have been significantly altered in the Bill in a manner which appears to adequately address the Institutes concerns. The effect and rationale for the new provision is set out in the Explanatory Memorandum.

> … a person offering non quoted securities will not be allowed to accept an application for the issue or transfer of the securities until 7 days after lodgment of the disclosure document with ASIC (proposed subsection 727(3)). ASIC may extend this 7 day period to a maximum of 14 days. The 7 to 14 day period gives ASIC and the market an opportunity to consider the disclosure document before the commencement of subscriptions for the securities on offer. Where the disclosure document was defective, the

47 Australian Shareholders' Association, Submission 20b, p 4.

48 Securities Institute of Australia, Submission 9. See Corporate Law Economic Reform Program, Draft Legislative Provisions, section 28, p 42.

market could draw it to the attention of ASIC or aggrieved parties could, if appropriate, seek injunctions preventing the fundraising.

The 7 to 14 day period will not apply to a person offering quoted securities. These securities already have an established market price and are subject to the continuous disclosure regime.[49]

49 Explanatory Memorandum, paras 8.68-69.