CHAPTER 10

Miscellaneous issues

Anti-hawking

10.1 The Financial Planning Association of Australia Limited (FPA) and the Australian Bankers' Association (ABA) were critical of the anti-hawking provisions in the *Corporations Act 2001* (the Act).[1]

10.2 One of their criticisms was that the provisions failed to clarify when the nexus between the unsolicited personal contact and the offer to issue or sell a financial product had been broken. In particular, this related to the interpretation of 'because of' in the provision.

10.3 The ABA also argued that the provisions drew no distinction between unsolicited contacts where there was no existing customer relationship and those where there was. It referred to an example where a bank might telephone an existing customer before a term deposit was due to mature and ask the customer for instructions on reinvestment upon the maturity of the deposit. The ABA said that while this approach benefited the customer, it would still be an unsolicited contact.

10.4 The Committee accepts the criticisms made by the FPA and ABA about difficulties in the interpretation of the anti-hawking provisions. However, it notes that ASIC has recently addressed the most commonly raised difficulties with the provisions in its recent publication, *The hawking provisions—an ASIC guide*. The Committee further notes that the questions raised by the FPA and ABA are clarified in ASIC's guide.

10.5 Freehills commented that the 'no contact' rules in subsection 992A(3) appeared to apply to both managed investments and other financial products whereas section 992A in its entirety appeared not to apply to managed investments. Freehills suggested that regulations should clarify this.[2]

10.6 In relation to Freehills' comments, the Committee notes ASIC's Class Order 02/641 *Hawking—securities and managed investments* issued on 31 May 2002. This clarifies that section 992A as a whole does not apply to securities or interests in a managed investment scheme.

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1 Submissions 4 and 22 respectively.

2 Submission 7, p. 3.

Anti-hawking—cold calling

10.7 On 18 June 2002, Senator Stephen Conroy gave notice to disallow the regulation prescribing the times during which financial services licensees were permitted to telephone consumers (the cold-calling hours). The disallowance motion was withdrawn on 16 September 2002.

10.8 At the hearing on 7 August 2002, the Committee sought information from the Department of the Treasury regarding its amendments by regulation to the times when financial services licensees could telephone consumers (the cold-calling hours). The Department responded that:

> We received several submissions on the early draft on the cold-calling hours. Those submissions suggested that there did not seem to be any reason why the government should adopt hours that differed from the accepted industry standard for direct marketing, which were agreed by state and federal ministers.[3]

The Committee's views

10.9 The Committee notes that paragraphs 992A(3)(a) to (e) impose the following limitations on unsolicited telephone calls to ensure consumers are adequately protected:

- the person cannot be contacted if he or she is listed on a 'No Contact/No Call' register;
- the person must be given an opportunity to be placed on the register and select the time and frequency of future contacts;
- the person must be given a Product Disclosure Statement (PDS) before becoming bound to acquire a financial product and must be clearly informed of the importance of using the information in the PDS; and
- the person must be given the option of having the information in the PDS read out to him or her.

10.10 In addition, subsection 992A(4) provides the consumer with a right of return and refund within certain limits where there has been a breach.

10.11 Finally, the Committee notes the protection offered by the legislative prohibitions on unconscionable conduct, misleading or deceptive conduct and harassment or coercion.[4]

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3 *Committee Hansard,* 7 August 2002, p. 256.

4 See sections 12CA-12CC of the *Australian Securities and Investments Commission Act 2001* (ASIC Act) and section 991A of the *Corporations Act 2001*—unconscionable conduct; sections 12DA-12DB of the ASIC Act and sections 1041E–1041H of the Act—misleading or deceptive conduct; and section 12DJ of the ASIC Act—harassment or coercion.

10.12 In the circumstances, the Committee is not persuaded that the regulation adopting the direct marketing industry standard for cold-calling should be amended. The Committee is satisfied that there are sufficient consumer protection mechanisms in place.

Telephone monitoring of takeovers

10.13 Following significant opposition to the telephone monitoring provisions inserted into the Financial Services Reform Bill 2001, the Committee, in its report on the Bill tabled in August 2001, recommended that the Government should remove the provisions and consider other regulatory options. This recommendation was not followed.

10.14 During the current inquiry, the International Banks and Securities Association of Australia (IBSA) submitted that:

> …we believe that the takeovers telephone monitoring provisions in the FSR Act are defective…and should be struck out…There is no discernible public benefit from this addition to one of the most highly regulated parts of securities business, while the associated costs are significant.
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> The general policy objective would be to improve the flow of information to retail shareholders during the takeover period. However, the telephone monitoring provisions in the Corporations Act are counterproductive for small shareholders, as at least some banks are restructuring their operations to minimise contact with them that might involve a requirement to tape calls during takeovers. This is being done to avoid the legal complexities and operational costs of complying with the recording requirement.[5]

10.15 While IBSA conceded that the regulation 6.5.01 went some way towards improving the application of the main provisions, it claimed that regulations could not ameliorate the flawed framework of the law itself. The flaws identified by IBSA were that the Act:

- was inconsistent in its coverage—provisions only covered telephone calls during the bid period and not during the period between the announcement of a bid and service of the bidder's statement in an off-market bid;
- did not clarify what might constitute an 'invitation' to shareholders to call to discuss a bid;
- imposed prescriptive and impractical recording requirements that would entail significant cost; and
- failed to take into account that it was not possible to record calls made to shareholders on mobile phones.

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5 Submission 19, p. 4.

The Committee's views

10.16 The Committee appreciates that this issue does not fall squarely within its terms of reference. However, the Committee agrees that the provisions in the Act, notwithstanding the modifying effects of regulation 6.5.01, need to be revisited to determine whether they are imposing requirements on industry without an equivalent benefit to consumers.

Recommendation

The Committee recommends that the Government review the telephone monitoring provisions with a view to removing them from the Corporations Act altogether.

Inconsistencies and navigational challenges in the legislation

10.17 A recurring comment in submissions and evidence given at the hearings was that the Act and regulations presented quite significant 'navigational' challenges which would inevitably lead to increased costs for consumers. Inconsistencies between the Act and the regulations were also referred to.

10.18 With regard particularly to the navigational difficulties presented by the legislation, the Australian Stock Exchange Limited (ASX) commented that:

> We note that the structure of the Act and Regulations at present makes full comprehension of relevant concepts in the Act difficult and may result in users not applying all relevant provisions. For example it is hard to navigate the regulation regarding insider trading provisions where some significant provisions are made through modification provisions, located in different parts of the Act, as opposed to being included in regulations with other insider trading provisions. Such a disjointed approach makes full comprehension of provisions in the Act unwieldy. Perhaps at a later stage of review consideration could be given to including notes to the regulations with relevant cross-references.[6]

10.19 IBSA identified what it considered were shortcomings in the interaction between the Act and regulations. These were that:

- while the Act was intended to set a broad framework within which the regulations would 'flesh out' the detail, this was not always the case. The result was that the regulations represented a level of detail superimposed on already detailed legislation;
- the application of the Act and the regulations was not always consistent and created confusion and uncertainty; and

6 Submission 15, p. 3.

- the regulations in combination with sections of the Act could override other sections of the Act for all purposes which called into question why the Act itself was not amended.[7]

10.20 At the hearing, on 23 May 2002, Freehills commented that the complexities of the legislation would lead to increased operational and regulatory costs in the financial services sector which would ultimately be passed on to consumers.[8]

The Committee's views

10.21 While the Committee accepts the comments made about the practical difficulties posed by the legislation as a whole, the Committee nonetheless considers that the complexity and volume of the regulations is to some degree a reflection of their function, namely, to provide the detail for the extensive regulatory framework created by the FSR Act. However, the Committee agrees that there are inconsistencies and anomalies that should be addressed.

10.22 In this regard, the Committee notes that the Department of the Treasury continues to 'fine-tune' the legislation as problems and inconsistencies are identified. The Committee is satisfied that this more evolutionary process is preferable to a wholesale re-arrangement or overhaul and is not persuaded that the Committee's intervention at this stage is necessary. It does, however, take this opportunity to underline the need for legislation, as far as possible, to be user-friendly and accessible to all members of the community.

10.23 The Committee notes in particular the suggestion by the ASX that 'notes to the regulations with relevant cross-references' would be helpful.

Matters outside the inquiry's terms of reference

10.24 As noted earlier, a number of difficulties with the Act were referred to during the course of the inquiry. As these fell outside the inquiry's terms of reference, the Committee did not examine these. The main areas of concern were whether:

a) the drafting of section 916B would have unintended payroll tax consequences;

b) it was appropriate for the disclosure obligations regarding units in listed trusts to be different from those applying to securities;

c) there were problems with the implementation of the cooling off and transaction confirmation provisions for investor directed portfolio services because of features not contemplated by the legislation;

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7 Submission 19, p. 6.

8 *Committee Hansard*, 23 May 2002, pp. 21–22.

d) the on-sales disclosure requirements in subsections 707(3) and (4) and 1012C(6) and (7) of the Act were proving difficult to interpret and implement.

10.25 The Committee notes that, with regard to the on-sale disclosure provisions referred to, ASIC released a discussion paper on 28 June 2002 to examine proposals for ongoing relief from these provisions. The Committee further notes ASIC's comments that it is confident relief can be given from the provisions in certain circumstances without defeating their anti-avoidance legislative purpose.[9] Given ASIC's comments, it may be that this issue is capable of resolution without legislative intervention.

10.26 However, with regard to the other matters, the Committee considers that the Department of the Treasury may wish to pursue these.

Senator Grant Chapman
Chairman

9 ASIC's discussion paper is entitled, *Disclosure for on–sale of securities and other financial products*. The closing date for public comment was 8 August 2002. ASIC has extended the interim relief from these provisions to 11 December 2002 to allow time for consideration and comment on the proposals. See ASIC Media and information release 02/235 *ASIC releases discussion paper on disclosure for on-sale of financial products,* 28 June 2002.