A Practitioner's Guide to Corporate Law

A Guide to Basic
Procedures of Corporate Law
for Young Lawyers

A Project of the NSW Young Lawyers
Business Law Committee

www.lawsociety.com.au/yl/committees/business

A publication of the NSW Young Lawyers Business Law Committee

Second Edition

Publication Date: June 2007 ISBN: 0 9756002 3 0

Cover Design by Gregory Barlow, Graphic Designer, Law Society of NSW.

Disclaimer

The guide is prepared for general information purposes only. It is not intended to provide or substitute legal advice. NSW Young Lawyers, the Business Law Committee of NSW Young Lawyers, its members and sponsors accept no liability or responsibility for any misleading or deceptive statements or omissions from this document. No assurance, representation or warranty is made that this document is accurate, complete or current.

TABLE OF CONTENTS

Preface

NSW Young Lawyers is a division of the Law Society of New South Wales, representing law students and barristers and solicitors under the age of 36 years or in their first five years of practice. The NSW Young Lawyers Business Law Committee is one of the committees of NSW Young Lawyers. The committee focuses on all areas of law concerning business including corporate and commercial law, banking and finance, superannuation, taxation, insolvency and competition and trade practices.

Our first edition was well received and used by many Young Lawyers. In this Second Edition we have updated, consolidated and refined the Guide and added two chapters, Financial Services and Markets and Insolvency, Winding Up and Liquidation.

This Second Edition of **A Practitioner's Guide to Corporate Law** (the "Guide") has been prepared by the members of the NSW Young Lawyers Business Law Committee to assist young lawyers with fundamental terms, concepts and procedures of corporate law, namely under the *Corporations Act 2001* (Cth) (the "Act"). Our objective has been to provide important practical information concerning selected areas of corporate law in a format that is easily understood.

We have not endeavoured to produce a comprehensive and complete explanation of all relevant terms, concepts and procedures. Our aim has been to provide a source for those relatively inexperienced in corporate law to quickly acquire a basic understanding.

I wish to especially express my appreciation and thanks to:

(a) all members of the NSW Young Lawyers Business Law Committee who contributed and assisted with this guide;
(b) Ian Aldridge, Vice-Chair of the Business Law Committee;
(c) Tim James, the immediate past Chair of the Committee;
(d) Scott Alden, President of NSW Young Lawyers, and past Chair of the Committee;
(e) TressCox Lawyers for agreeing to launch this guide; and
(f) Poppy Drekis and the NSW Young Lawyers staff, for their continuing dedication to assisting the Committee.

On behalf of the Committee, I sincerely hope that you find this publication a useful resource for finding your way through the legal system in NSW.

Duncan Brakell
Chair, NSW Young Lawyers Business Law Committee, June 2007

1

Reservation of a company name

1.1 Important issues

- A name cannot be identical to a name already registered.
- The availability of a name can be checked by a search of the National Names Index on the Australian Securities & Investments Commission (ASIC) website.
- Names such as “XYZ Australia” and “XYZ International” are not identical but consider whether use of such a similar name could be misleading and deceptive under the *Trade Practices Act 1974* (Cth) (the "Trade Practices Act") and/or State *Fair Trading Acts* or passing off under common law.
- A reservation of a name can be renewed after the initial reservation period of 2 months.

1.2 Choice of name

A person or persons seeking to incorporate a company (the Applicant) may choose a name for that company (subject to that name being available see below). If a name is not chosen and specified in the application for incorporation (ASIC Form 410), the Australian Company Number assigned to the company will be recorded as the name of the company. For example, if a proprietary company is incorporated without a name and is assigned the Australian Company Number 000 000 000, the name of the company would be “ACN 000 000 000 Pty Ltd”.

The Applicant is not permitted to register a company under a name that:

(a) is identical (as determined by the Corporations Regulations) to the name of:

(i) a registered company;

(ii) a registered foreign body;

(iii) a registered business name;

(iv) a reserved company name; or

(v) is prohibited by the Schedule 6 of Corporations Regulations, for example, the unauthorised use of the terms “Bank” and “Olympic”.

Provided that the name is not misleading or deceptive or regulated by another law (for example, laws regulating the use of the term “university”), the Applicant may choose a name that does not breach the above prohibitions. Companies are required to include in their name identifiers as to the type of company (for example, proprietary companies must include the expression “Pty Ltd” in their name).

1.3 Reserving the name

In order to preserve the availability of a company name, the Applicant may reserve that name for an initial period of two months. The reservation of names is administered by ASIC. The Applicant must complete and lodge with ASIC an ASIC Form 410. ASIC forms may be lodged in person at an ASIC Business Centre, by post or many can be lodged online. A lodgement fee is payable.

Extensions are available to an Applicant and must be made before the expiration of the original reservation. The first application for an extension of a further two month period can be made by lodging another ASIC Form 410 and paying an additional fee. For subsequent extensions, a letter explaining the reasons for the extension will generally be required.

The following details, among others, must be inserted in an ASIC Form 410:

(a) the name to be reserved;
(b) the type and class of company;
(c) the name and address of the applicant; and
(d) the purpose of the reservation of the name.

In the case of an extension:

(a) the reservation number; and
(b) the reason for the extension (for example, shareholder approval of a change of name of the company will be sought at the annual general meeting of the company).

1.4 References

Sections 147, 148 and 152 of the Corporations Act
ASIC website - How to Register a Company - www.asic.gov.au

2

The process of registration

2.1 Important issues

- Registration of a business name is different to the registration of a corporation.
- Registration of a business name allows a business to operate under the registered name.
- Registration of a corporation effectively brings the corporation into existence for the purposes of the *Corporations Act 2001* (Cth) (the "Corporations Act").
- A business name cannot be identical to a business or company name already registered. The availability of a name can be checked by a search on the National Names Index on the ASIC website. Business names are regulated by the Business Name Acts in each State.
- Registration of a company requires the lodgement of an ASIC Form 201 with ASIC.
- Upon registration, a company is issued an Australian Company Number.

2.2 Registering a business name

A person or entity (including individuals, associations and companies) may wish to conduct business under a particular name. If that name is not the name of the person or entity, it must be registered as a business name in the State and/or Territory of Australia in which the person or entity wishes to use that name. There is no national system for the registration of business names, although you can search them on the National Names Index on the ASIC website.

Additionally, as each business trading in Australia is required to have an Australian Business Number (ABN), you may search business names on the public register of businesses registered for an ABN on www.abr.business.gov.au.

The business name must not be:

(a) identical to the name of:
    (i) a registered company

(ii) a registered foreign body;
(iii) a registered business name; or
(iv) a reserved company name.

(b) a prohibited name; or

(c) misleadingly similar to the name of another entity or organisation.

The State and Territory Governments administer business name registrations. In New South Wales, the Department of Fair Trading administers the registration of business names under the *Business Names Act 2002* (NSW).

Irrespective of the registered business name, the full company name and ACN/ABN needs to appear on certain "public documents," "negotiable instruments" and the company's common seal and other seals, including any electronic forms of the above (see sections 123 and 88A of the Corporations Act).

2.3 Registration does not provide intellectual property

The registration of a business name does not give you ownership of that name or exclusive right over that name or part of that name. Protection in the form of a trademark from IP Australia will be required to do so. You could rely on the common law action of 'passing-off' for protection — however, in practice, this is harder to prove. Before applying for a business name, a trade mark search should be carried out to reduce the risk of the proposed business name infringing another person's registered trade mark. An online search can be carried out at IPAustralia: www.ipaustralia.com.au. Alternatively, IP Australia provides a business names search service for a fee, which results in a report showing any existing registered trademarks identical or substantially similar to the proposed business name.

2.4 Registering a company

'Registration' is the term used in Chapter 2A of the Corporations Act to describe the process of registering a company with ASIC which, in effect, but not in law, 'creates' a company. In the past, the process of registration was referred to as 'incorporation'. A company has the legal capacity and powers of an individual: see section 124(1) of the Corporations Act. In order to obtain registration, it is necessary to:

(a) determine the type of company, for example, proprietary or public company;

(b) determine the proposed name, shareholders, director(s) and secretary, principal place of business and registered office of the company; and
(c) prepare and lodge with ASIC an ASIC Form 201. An ASIC Form 201 must contain:
    (i) the nominated State or Territory of registration;
    (ii) the proposed name for the company (if no name is specified, the name of the company will be its ACN);
    (iii) if the company to be incorporated is a public company which is to adopt a constitution, a copy of the constitution must accompany the form;
    (iv) the address of the proposed principal place of business of the company;
    (v) the address of the proposed registered office of the company;
    (vi) the proposed opening hours of the registered office for a public company (if they are not the standard opening hours i.e. 10am to 12 noon and 2 to 4 pm each business day);
    (vii) the identity of any ultimate holding company;
    (viii) the name, residential address, place of birth, date of birth and former name (if any) for each proposed director(s) and secretary (if any, a proprietary company does not require a secretary);
    (ix) the name and address of the proposed shareholder(s) (if a company, include ACN/ARBN/ABN); and
    (x) details of the securities to be issued to the proposed shareholder(s) including type and number and whether the consideration for the securities has been fully paid; and for a company limited by guarantee, the proposed amount of the guarantee that each member agrees to in writing.

A proprietary company must have at least one director and shareholder. A proprietary company is not required to have a secretary but if it does have a secretary. At least one secretary must ordinarily reside in Australia. The sole director may also be the sole shareholder and the secretary of the company.

A public company must have at least three directors. At least one director of a proprietary company must ordinarily reside in Australia. At least two directors and one secretary of a public company must ordinarily reside in

Australia. Each proposed director and secretary of the company must consent in writing to being appointed as a director and/or secretary of the company. The company must keep the consent with the company's records and must notify ASIC of the appointment.

The ASIC Form 201 must be signed by the person seeking registration of the company, for example, a person who consented to be a director, secretary or shareholder. If the applicant is a corporation, then at least one director or secretary is required to sign. If the applicant is acting in the capacity of "agent" for a natural person or a corporation, he/she may sign on their behalf and state their capacity as agent. The lodging fee for a public or proprietary company limited by shares is $800 and public company limited by guarantee is $330 (check ASIC website for current fees).

A company is assigned an Australian Company Number or ACN (being the unique nine digit number used to identify the company for the purposes of the Corporations Act) upon registration. A new registered propriety company limited by shares must have the words "Proprietary Limited" or "Pty Ltd" as part of its name. A proprietary company may adopt its ACN as its name; for example, the company's name might be "ACN 000 000 000 Pty Ltd".

A number of organisations sell "shelf companies" which are pre-registered companies with a prepared company register. Upon purchase of a shelf company, the owners of the shelf company transfer the shelf company to the purchaser and change the directors, secretary, shareholders, principal place of business and registered office of the shelf company. Purchasing a shelf company may be quicker than incorporating a company with ASIC. A prepared company register and constitution is generally supplied for the company, which ASIC does not provide.

2.5 References

NSW Department of Fair Trading www.fairtrading.nsw.gov.au
Corporations Act – Chapter 2A – Registering a Company
ASIC web site – How to register a company – www.asic.gov.au
IP Australia www.ipaustralia.gov.au

3

Appointment and removal of company officers

3.1 Important issues

- After incorporation, directors and secretaries may be appointed by a directors' or members' resolution (subject to the constitution, any shareholders' agreement and other binding documents).
- A person to be appointed secretary or director must consent in writing to the appointment. The company must keep the consent and must notify ASIC of the appointment.
- ASIC Forms 370 and 484 must be lodged with ASIC, by the person(s) resigning and by the company, respectively.
- It is important that directors and secretaries understand their rights, responsibilities and potential liability.
- Subject to limits specified by the Corporations Act, a director may seek an indemnity from the company for loss arising from being a director of a company.

3.2 Appointment and removal

As stated above, company officers are appointed upon incorporation of a company. After incorporation, an additional or new director or secretary may generally (subject to the constitution, any shareholders' agreement and other binding documents) be appointed by a directors' resolution or a members' resolution.

Prior to appointment, a person must consent in writing to being appointed as a director and/or secretary. The same person may act as both director and secretary of a company.

A director or secretary may either resign or be removed from office. A director or secretary may resign by written notice to the company. Generally, a director or secretary may be removed by a members' resolution.

3.3 ASIC notification by the company

ASIC must be notified of an appointment or resignation/removal of a director or secretary. An ASIC Form 484: Change of company details must be lodged with ASIC. An ASIC Form 484 must contain:

(a) for an appointment - the full name, residential address, date of birth, place of birth and date of appointment; and
(b) for a resignation or removal - the name of person who has resigned or been removed, the position resigned from or from which the person has been removed and the date of resignation or removal.

An ASIC Form 484 is required to be lodged within 28 days of the change of officers. A lodgement fee is not payable provided the form is lodged within 28 days of the appointment or resignation. Late fees are payable.

3.4 ASIC notification by the officer

An ASIC Form 370: Notification by officeholder of resignation or retirement must be lodged with ASIC by the person(s) resigning. An ASIC Form 370 must contain:

(a) company details;
(b) officeholder details; and
(c) resignation or retirement details.

An ASIC Form 370 must be accompanied by a copy of the letter of resignation.

3.5 References

Chapter 2D of the Corporations Act

4

Roles and duties of company officers

4.1 Important issues

- Directors manage the business and other affairs of a company.
- Directors have duties to exercise care and diligence, act in good faith, not to use their position or information obtained through their position improperly.
- Directors also have fiduciary duties and responsibilities to shareholders.

4.2 Company directors

Subject to the constitution of the company, any shareholders' agreement and other binding documents, the directors of a company through meetings of directors manage the business and other affairs of the company. A director must be at least 18 years old. A person must consent in writing to being appointed as a director.

4.3 Company secretary

Subject to the constitution of the company, any shareholders agreement and other binding documents, the company secretary generally completes administrative tasks for the company and the directors including taking minutes of directors' and members' meetings, maintaining the company register and completing and lodging ASIC forms. A company secretary is included within the section 9 definition of an 'officer' of the company and, as a result, has both specific responsibilities and responsibilities shared with the director(s) and other officers under the Corporations Act.

If a company does not have a secretary, the obligations of the secretary are assumed by the director(s) of the company. A company secretary's obligations may continue even after the company has been deregistered.

A company secretary must be at least 18 years old and must consent in writing to their appointment. The company must keep the consent and must notify ASIC of the appointment. A company secretary does not have the right or power to cast a vote at a meeting of directors.

4.4 Officers' duties

Officers of a company are subject to duties under the Corporations Act and other laws. Important duties include:

(a) to act in good faith;
(b) to act in the best interests of the company;
(c) to avoid conflicts between the interests of the company and the interests of the director;
(d) to not use information for personal gain or use information to the detriment of the company;
(e) to exercise due care and diligence;
(f) to prevent the company trading while it is unable to pay its debts;
(g) if the company is being wound up, to report to the liquidator on the affairs of the company; and
(h) if the company is being wound up, to help the liquidator (by for example, giving to the liquidator any records of the company that the director holds).

Breach of these duties may result in fines, orders for compensation, disqualification as a director or imprisonment. A director's obligations may continue even after the company has been deregistered.

4.5 Duties of public sector officers and directors of public sector corporations

The duties of officers in public sector corporations and authorities are usually found in the legislation establishing the corporation, and Subdivision A of Division 4 of the *Commonwealth Authorities and Companies Act 1997* (the "CAC Act"). Note that some legislation establishing government corporations and authorities allows the relevant Minister to issue directions to the company or authority, with which the directors must comply.

Some broad duties set out in the CAC Act are to:

(a) act with care and diligence;
(b) act in good faith;
(c) not misuse their position;
(d) not to misuse information; and
(e) comply with statutory duties.

Additionally, directors and officers must disclose any material personal interests, and there is a broad duty to act in the public interest.

Directors and officers should consider whether they are covered by the *Public Sector Employment and Management Act 2002* (NSW) as this Act imposes duties on public sector employees. Directors and officers should also check the relevant policies and directions issued by the NSW Audit Office which impact on their role as a director or officer.

Public sector directors and officers should also have regard to legislation which impacts on their business, such as the relevant financial administration legislation, freedom of information laws, the Public Sector Ombudsman, the Office of the Privacy Commissioner, the Independent Commission Against Corruption and the Audit Office. Directors and officers should also be aware of the Senate Estimates process (at a federal level), and the budgeting requirements of the relevant Treasury Departments (of a state and federal level).

4.6 References

Corporations Act – Chapter 2D – Part 2D.1
Commonwealth Authorities and Companies Act 1997 (Cth);
Financial Administration and Audit Act 1997 (Cth);
Public Authorities (Financial Arrangements) Act 1987 (NSW);
Public Sector Employment and Management Act 2002 (NSW);
Guide to better practice for public sector governing and advisory boards
http://www.audit.nsw.gov.au/guides-bp/OnBoard-April98.PDF

5

Holding a meeting of directors

5.1 Important issues

- Subject to the constitution, any shareholders' agreement and any other binding documents, directors may call a meeting by giving notice of the proposed meeting to every other director.
- A quorum (as specified by the constitution) is required for a directors' meeting.
- Subject to the constitution, a directors' resolution may be passed by a circular resolution provided each director signs the document containing the resolution or a copy of that document.
- Minutes of a directors' meeting must be recorded.

5.2 Notes on procedure

Generally, any directors of a company may call a meeting of directors by notice to every other director. The constitution of the company may specify the method and period of notice. A quorum of directors must be present for a meeting (as specified by the constitution, any shareholders' agreement and any other binding documents). A meeting may be held by those forms of technology (for example by telephone) permitted by the constitution of the company and consented to by all the directors of the company.

If also permitted by the constitution, or any shareholders' agreement and any other binding documents, resolutions by the directors of a company may be passed by a document (or a copy of that document) containing the resolution being circulated to each director and each director signing the document. The document must be signed by all directors and the resolution is passed on the date when the last director signs the document.

Minutes must be taken for all directors' meetings. The chairman of the meeting must sign the minutes and the minutes should be inserted into the Company Register of the company.

5.3 References

Corporations Act – Chapter 2G – Part 2G.1

6

Holding a meeting of members of a company

6.1 Important issues

- Directors may call a meeting of members.
- Notice periods in the Corporations Act apply.
- Subject to the constitution, the members of a proprietary company may pass a resolution by circulating to each member a document (or a copy of that document) containing the resolution and each member signing the document.
- The chair of an annual general meeting of a public company must allow a reasonable opportunity for the members at the meeting as a whole to ask questions about and make comments on the management of the company.
- Minutes of a meeting of members must be recorded.

6.2 Directors' power to calling a meeting of members

Generally, the directors of a company are provided with the power to call a meeting of members under the constitution of the company. However, the directors of a company must call and arrange for a meeting of members on the request of:

(a) members with at least 5% of the votes that may be cast at the meeting of members; or
(b) at least 100 members who are entitled to vote at the meeting of members.

It should be noted that, at the time of publication, the provisions above were subject to legislative review.

6.3 Notice requirements

Notice of a meeting of members must be given in writing to every member entitled to vote at the meeting and to each director and auditor. At least 21 days notice must be given for a meeting of members of a company. At least 28 days notice must be provided for a publicly listed company. The

constitution, any shareholders' agreement and any other binding documents may specify a longer period.

Except for publicly listed companies, a company may call on shorter notice:

(a) an annual general meeting, if all the members entitled to attend and vote at the annual general meeting agree beforehand; or
(b) any other general meeting, if members with at least 95% of the votes that may be cast at the meeting agree beforehand.

A company cannot call an annual general meeting or other general meeting on shorter notice if it is a meeting to remove a director under section 203D of the Corporations Act, appoint a director in place of a director removed under that section or remove an auditor under section 329 of the Corporations Act. However, the members may consent to shorter notice of a meeting.

6.4 Multiple venues

A company may hold a meeting of its members at 2 or more venues using any technology that gives the members as a whole a reasonable opportunity to participate.

6.5 Voting

Voting at a meeting is generally by a show of hands unless a poll is demanded. Members are generally permitted to appoint up to 2 proxies in writing to represent and vote on behalf of a member at a meeting.

6.6 Circulating resolutions

If also permitted by the constitution, any shareholders' agreement and any other binding documents, resolutions by all the members of a proprietary company may be passed by a document (or a copy of that document) containing the resolution being circulated to each member and each member signs the document. The document must be signed by all members and the resolution is passed on the date when the last member signs the document.

6.7 Minutes

Minutes of a meeting must be taken, signed by the Chairman of the meeting and inserted into the Company Register of the company.

6.8 References

Corporations Act – Chapter 2G – Part 2G.2 and 2G.3

7

Issue of securities by a company

7.1 Important issues

- The Corporations Act generally prohibits the issue of securities except pursuant to a disclosure document or one of the exceptions to the general prohibition.
- Disclosure documents include prospectuses, offer information statements and profile statements.
- Disclosure documents must be lodged with ASIC.

7.2 Disclosure documents

The Corporations Act prohibits a company or a person from offering securities for issue or sale unless the company or person prepares and issues a "disclosure document" (being a prospectus, offer information statement or profile statement).

The information contained in a disclosure document must be worded and presented in a clear, concise and effective manner (section 715A). There are three types of disclosure documents: a prospectus (including short-form prospectus), an offer information statement and a profile statement.

7.3 Prospectus

A prospectus is a document inviting individuals or entities to subscribe for and acquire securities in a company. It must provide the reader with all material and relevant information that the company possesses after reasonable inquiries which would assist possible investors in making a decision whether to subscribe for securities in the company. The preparation, content and issue of a prospectus are regulated by the provisions of the Corporations Act.

The steps in the preparation and issue of a prospectus include:

(a) review of the company to ensure an appropriate structure and operations for the issue of the securities pursuant to the prospectus;

(b) identification of all material information for inclusion in the prospectus;
(c) preparation of financial reports, audited accounts and projections or forecasts (if necessary) for inclusion in the prospectus;
(d) drafting of the prospectus;
(e) verification of the prospectus;
(f) approval of the prospectus by directors;
(g) lodgement of the prospectus with ASIC;
(h) public exposure period; and
(i) printing and issue of the prospectus.

Note that in the case of a short-form prospectus, the prospectus may simply refer to certain material already lodged with ASIC. The reference must however, identify the document already lodged or the part of the document that contains the information, and inform the prospective shareholders of their right to obtain a copy of the document.

7.4 Offer Information Statements

A company is allowed to raise up to a total of $5 million by issuing summarised prospectuses known as offer information statements. An offer information statement (OIS) must contain:

(a) the name of the company and the nature of the securities;
(b) a description of the company's business;
(c) an explanation of why the funds are being raised and what the funds are to be used for;
(d) an explanation of the risks involved in investing in the securities;
(e) a statement of all amounts payable in relation to the securities, including any fee, commission or charge;
(f) a statement that the OIS has been lodged with ASIC and that ASIC is not responsible for the content and the OIS;
(g) a statement that the OIS is not a prospectus and therefore has lower level of disclosure requirements;
(h) a statement that investors should obtain professional advice prior to making an investment; and
(i) a copy of the most recent financial report for the company (specific requirements apply for financial statements).

7.5 Profile Statements

A profile statement is a short statement prepared and issued to inform people of an offer pursuant to a prospectus. A prospectus must be prepared in order to permit the issue of a profile statement.
A profile statement must:

(a) identify the company and the nature of the securities;
(b) state the nature of the risks involved in investing in the securities;
(c) give details of all amounts payable in respect of the securities;
(d) state that a person given the profile statement is entitled to a copy of the prospectus free of charge;
(e) state that the profile statement has been lodged with ASIC and ASIC takes no responsibility for the contents of the profile statement; and
(f) state the expiry date of the profile statement. The expiry date must not be later than 13 months after the date of the prospectus.

7.6 Exceptions to disclosure requirements

There are a limited number of exceptions to this prohibition. The exceptions for the issue of securities by a company include:

(a) small scale offerings;
(b) offers to professional investors;
(c) offers to sophisticated investors; and
(d) offers relating to takeovers.

7.7 Small scale offerings – the 20 issues in 12 months rule

A company is not required to provide prospective investors with a disclosure document if the company makes “personal offers” to subscribe for or acquire securities and these personal offers result in no more than 20 people subscribing or acquiring securities in any 12 month period and no more than $2 million being raised. A “personal offer” is described under the Corporations Act as an offer that may only be accepted by the person to whom the offer is made and the person is likely to be interested in the offer because of: the previous contact between the parties; some professional or

other connection between the persons; or statements or actions by that person that indicate they are interested in the offer of that kind.

7.8 Professional investors

The following persons are considered to be "professional investors" and, as a result, offers of securities to such persons are not required to be accompanied by a disclosure document:

(a) a person who is licensed or exempt dealer or investment adviser and is acting as principal; or
(b) a body registered under the Life Insurance Act 1995; or
(c) a body registered under the *Financial Corporations Act 1974*; or
(d) a regulated superannuation fund, an approved deposit fund, a pooled superannuation trust, or a public sector superannuation scheme within the meaning of the *Superannuation Industry (Supervision) Act 1993* if the fund, trust or scheme has net assets of at least $10 million; or
(e) a terminating building society within the meaning of the *Financial Corporations Act 1974*; or
(f) a friendly society within the meaning of the *Life Insurance Act 1995*; or
(g) a person who controls at least $10 million (including any amount held by an associate or under a trust that the person manages) for the purpose of investment in securities.

7.9 Sophisticated investors

The following persons are considered to be "sophisticated investors" and, as a result, offers of securities to such persons are not required to be accompanied by a disclosure document:

(a) an offer for subscription of securities of a value of at least $500,000 by a person;
(b) an offer made through a financial services licensee where the licensee is satisfied on reasonable grounds that the investor has previous experience in investing in securities; or
(c) an offer to a person holding a certificate from a qualified accountant no more than 6 months old that the person has gross income over the previous two years of at least $250,000 or net assets of at least $2.5 million. It is

important to note that the Corporations Regulations may deal with how net assets are to be determined and valued and/or how gross income is to be calculated.

7.10 Offers of securities to people associated with the body

A company is not required to issue disclosure documents in relation to offers made to a prospective investor who is a senior manager of the body or related body, or their spouse, parent, child, brother or sister, or a body corporate controlled by a person who is a senior manager or spouse, parent, child, brother or sister.

7.11 Offers relating to takeovers

Disclosure is not required if the offer of securities represents consideration for an offer to acquire securities under a takeover bid pursuant to Chapter 6 of the Corporations Act provided that the offer is accompanied by the bidder's statement.

7.12 References

Corporations Act – Chapter 6D
ASIC Policy Statements on the ASIC website www.asic.gov.au

8

Listing on the Australian Securities Exchange

8.1 Important issues

- In order to list on the Australian Securities Exchange (ASX), an entity must satisfy both the criteria for admission to the official list (including the profit or the assets test) and the criteria for official quotation of the relevant securities.
- Ongoing obligations include continuous disclosure of all material information, periodic disclosure of financial information and a prohibition on issuing more than 15% of total issued ordinary securities in any 12 month period without shareholder approval.
- A company may apply for an exemption or modification to the ASX Listing Rules. www.asx.com.au.
- The ASX does not review prospectuses for compliance with the ASX Listing Rules or the Corporations Act.

8.2 Australian Securities Exchange

Australian Securities Exchange Limited (ASX) is the company that operates and governs the participation of listed companies and financial products on the Australian Securities Exchange. It is a listed public company (on the ASX) governed by a board of directors. It is not a government instrumentality or enterprise. Its rules concerning conduct are contained in the ASX Listing Rules and the ASX Business Rules. The ASX is subject to regulatory control by ASIC.

In order to become a listed entity, a company or managed investment scheme must be admitted to the official list and the entity's securities must be granted official quotation. There are different criteria for both admission to the official list and official quotation. It will be necessary for the entity to satisfy both criteria for the entity to become listed.

8.3 Criteria for admission to the official list

An entity (except an exempt foreign entity or a debt issuer – separate conditions apply) must satisfy the following criteria in order to be admitted to the official list:

(a) an appropriate structure and operations regime approved by ASX;
(b) a constitution approved by ASX;
(c) a prospectus or Product Disclosure Statement lodged with ASIC and issued to investors (except where an exemption is obtained for the use of an information memorandum);
(d) if the entity is a foreign entity, the entity must establish an Australian securities register (or subregister) and appoint an agent for service of process in Australia;
(e) if the entity is a trust, it must be a registered managed investment scheme and the responsible entity must not be under an obligation to allow a security holder to withdraw from the trust;
(f) securities which are granted official quotation;
(g) an entity must have at least:
    (i) 500 holders of the main class of securities, with each such holding having a value of at least $2,000; or
    (ii) 400 holders of the main class of securities, with each such holding having a value of at least $2,000 and non-related parties holding at least 25% of the main class of securities;
(h) satisfaction of either the profits test or the assets test.
    (i) the profit test requires:
        - the entity to be a going concern;
        - the entity to have conducted its main business activity for the past three full financial years;
        - the entity to provide to ASX audited financial statements for the past three full financial years and a pro-forma balance sheet reviewed by an auditor or independent accountant;
        - the entity to have aggregated profit from the past three full financial years of at least $1 million;
        - the entity to have consolidated profit from continuing operation for the previous 12 months of at least $400,000; and

- a statement from the directors of the entity that they have made enquiries and nothing has come to their attention to suggest that the entity is not continuing to earn profit from continuing operations.

(ii) the assets test requires an entity to have net tangible assets (NTA) of at least $2 million, after deducting the cost of raising capital, or market capitalisation of at least $10 million. In addition, the entity must:

- for investment entities, at the time of admission, have an NTA of at least $15 million after deducting the costs of fundraising or be a pooled development fund and have an NTA of at least $2 million after deducting the cost of fundraising;
- have less than half the entity's total tangible assets in cash or a form readily convertible to cash; or
- if more than half of an entity's total tangible assets are in cash or a form readily convertible into cash, commitments consistent with the entity's business objectives to invest or spend the proportion of net tangible assets in excess of 50% which are in a form of cash or readily convertible to cash. The commitments must be contained in the prospectus, product disclosure statement or information memorandum or a statement given to the ASX;
- provide a statement that the entity has enough working capital to carry out its stated objectives; and
- working capital of at least $1.5 million for the first full financial year after listing, or if it is not, it would be at least $1.5 million if the entity's budgeted revenue for the first full financial year that ends after listing was included in working capital. Specific rules apply for mining exploration entities.

(i) disclose to the ASX completed restriction agreements for all "restricted securities" as required by the ASX Listing Rule 9.3;

(j) if, in the 2 years before the date of the application, the entity acquired a classified asset (see ASX Listing Rules for definitions) from a related party or promoter, the consideration must have been restricted securities unless one of the exceptions of ASX Listing Rule 1.1 Condition 10 apply;
(k) all options having an exercise price of at least $0.20 cents in cash; and
(l) the entity must appoint a person to be responsible for communication with the ASX in relation to listing rule matters.

8.4 Criteria for official quotation

The entity's main class of securities must satisfy the following criteria for official quotation of those securities:

(a) compliance with the requirements of Chapter 6 of the ASX Listing Rules concerning the characteristics of the securities including voting rights, dividend or distribution rights and rights upon a return of capital;
(b) the issue price of the securities of at least 20 cents in cash;
(c) the securities must satisfy the CHESS requirements (exceptions for foreign entities);
(d) if the securities are partly paid securities, there must be a defined call project setting out the date and amount of each proposed call;
(e) if the securities are debt securities or convertible debt securities, a copy of the documents setting out the terms of the securities must have been given to the ASX; and
(f) if the securities are debt securities, their aggregate face value must be at least $10 million.

Upon approval of the entity's application for admission to the official list, the entity's main class of securities are automatically approved for official quotation and admission to the CHESS transfer system. CHESS is an ASX computer system that manages the settlement of share transfers (the exchange of the funds and the shares) and administers an electronic register of shareholdings.

8.5 Applying for listing

In order to be granted admission to the official list and official quotation, an entity must complete and lodge an application for admission to the official

list. The application must be accompanied by copies of the entity's prospectus, the entity's constitution, specified documents including restriction agreements and details of the entity's characteristics including structure, assets and issued securities.

The application must be lodged within seven days after the date of the entity's prospectus. A period of at least three to five weeks should be allowed for approval of an ASX listing application.

8.6 Post quotation requirements

The ASX Listing Rules set down requirements for continued admission to the official list. These requirements are obligations concerning the operation and management of the entity. A summary of the important obligations are:

(a) *Continuous disclosure*

Subject to certain exceptions, a listed entity must immediately notify ASX of any information which a reasonable person would expect to have a material effect on the price or value of the entity's securities.

(b) *Period reporting requirements*

A listed entity must provide ASX with its half yearly, draft and final annual reports and financial statements. Mining companies have additional disclosure requirements.

(c) *Issue of securities*

The ASX Listing Rules generally prohibit a listed entity issuing securities which represent more than 15% of the issued ordinary securities of the entity in any 12 month period without first obtaining shareholder approval.

(d) *Related party transactions*

There are specific restrictions on transactions between a listed entity and related parties including requirements to obtain shareholder approval for acquisitions and disposals of substantial assets.

(e) *Significant transactions*

A listed entity is also generally prohibited from making a significant change to its activities, including sale of its main undertaking without notifying ASX. ASX may require the listed entity to obtain prior shareholder approval for the significant transaction.

9

Transfer of shares of a company

9.1 Important issues

- Consider application of Chapters 6 and 7 of the Corporations Act and the Foreign Acquisitions and Takeovers Act (see Chapter 13 of this Guide).
- Consider application of financial assistance and related party transaction provisions of the Corporations Act.
- Consider whether stamp duty will be payable.
- Consider whether warranties should be obtained in relation to the rights and liabilities attaching to the shares.

9.2 Procedure for transfer of shares

Set out below are the basic steps to transferring the shares of a company from one person to another person:

(a) legal entities - identify the legal entities to sell and purchase the shares.
(b) taxation - consider the taxation consequences of the transfer including income tax, stamp duty, capital gains tax and GST.
(c) regulation - consider the laws applying to the transfer including Chapter 6 of the Corporations Act and the Foreign Acquisitions and Takeovers Act.
(d) due diligence - (if necessary) review the assets, structure, agreements and characteristics of the entity to determine the nature of the company including risks and liabilities being acquired.
(e) purchase price - determine the purchase price and finalisation of other commercial terms.
(f) documentation - prepare and negotiate documentation to give effect to the transfer including:
    (i) share sale/purchase agreement
    (ii) share transfer form
    (iii) new share certificate
    (iv) consents to appointment for new directors (if applicable)

(v) minutes of directors' meetings

(g) assets subject to third party interests - make arrangements for the release of shares from relevant third party interests (for example, mortgages and charges) on or before completion of the transfer.

(h) execution of documentation - execute share sale/purchase agreement (if any) and share transfer form

(i) completion of the transfer - arrange for the transfer of the legal and equitable title to the shares including:

(j) holding directors' meeting to approve transfer of the shares

(k) execution of new share certificate

(l) stamp duty - arrange payment of stamp duty

9.3 References

Chapters 6 and 7 of the Corporations Act
Foreign Investment Review Board Web Site www.firb.gov.au

10

Takeovers

10.1 Important issues

- Takeovers typically involve one company purchasing another company by acquiring a controlling interest in the second company's voting shares.
- Chapter 6 regulates the acquisition of interests in unlisted companies with more than 50 members, listed companies and listed managed investment schemes.
- There is a general prohibition on acquiring over 20% of the voting power of a relevant entity unless the procedures laid down in Chapter 6 are followed.
- Consider the type of takeover bid used (off-market or on-market).
- The Takeovers Panel hears claims during the takeover bid period.

10.2 Policy objectives of Chapter 6

The principles embodied in Chapter 6 are designed to ensure that:

(a) the acquisition of control over the voting shares in listed entities (companies, registered bodies or management investment schemes) and unlisted companies with more than 50 shareholders (Controlled Entities) occurs in an efficient, competitive and informed market;
(b) shareholders and directors of the target entity know the identity of any person who proposes to take over the entity;
(c) a reasonable time period exists in which directors and shareholders of the target entity may consider any takeover proposal;
(d) a sufficient supply of information is made available to shareholders of the target company to enable them to assess the merits or otherwise of a takeover proposal;
(e) as far as practicable, all shareholders of the relevant class of voting shares or interests are given equal opportunity to participate in any takeover proposal; and
(f) an appropriate procedure is followed as a preliminary to compulsory acquisition.

10.3 Prohibition on acquisition of relevant interests

Section 606 of the Corporations Act states that a person must not acquire a relevant interest in issued voting shares in a Controlled Entity if, because of the transaction, that person's or another person's voting power in the Controlled Entity increases:

(a) from 20% or below to more than 20%; or
(b) from a starting point that is above 20% and below 90%.

There are a number of exceptions to the prohibition including:

(a) an acquisition that results from the acceptance of a formal offer under a takeover bid for the Controlled Entity;
(b) an acquisition approved by a resolution passed at a general meeting of the company in which the acquisition will occur (with no votes being cast by the acquirer or an associate);
(c) an acquisition that results in a person holding no more than 3% higher voting power in a Controlled Entity than they had 6 months before the acquisition; and
(d) an acquisition that results from a pro-rata rights issue pursuant to section 611(10) of the Corporations Act.

Further exceptions and the details of the above exceptions are contained in section 611 of the Corporations Act.

10.4 Off-market takeover bids

An off-market bid is an offer to buy all the securities in the bid class or a specified proportion of securities in the bid class. All the offers under an off market bid must be the same. A bidder under an off-market bid may offer any form of consideration for the securities (including cash, securities in another entity or a combination of both). This type of offer must remain open for between 1 and 12 months. This is the most common form of takeover bid.

The key steps in an off-market bid are as follows:

(a) bidder prepares a bidder's statement and offer document (bid documents);
(b) bidder lodges the bid documents with ASIC;

(c) within 21 days of lodging the bid documents, the bidder must send a copy of these documents to the target and must notify ASIC once this is done;
(d) bidder sends a copy of bid documents to the ASX or other relevant exchange;
(e) within 14 – 28 days after the bid documents are sent to the target, and within a three day period, the bidder must send the bid documents to each person (other than the bidder) holding bid class securities as at the date set out in the bidder's statement;
(f) on the same day, the bidder must notify the target, the relevant exchange and ASIC that the bid documents have been sent;
(g) after receiving the bid documents, the target must prepare a target's statement, responding to the bid offer;
(h) target must send the target's statement and any accompanying report to the bidder. This must be done no later than 15 days after the target receives the bidder's notice that all offers have been sent to relevant security holders. On the same day, the target must send a copy of the target's statement to the relevant exchange and ASIC; and
(i) Within the same time limit, the target must send a copy of the target's statement to holders of bid class shares and bid class options.

10.5 On-market takeover bids

An on-market takeover bid is an offer to acquire shares in a listed target company, up to a specified bid price. It involves the bidder announcing the takeover bid on the relevant exchange and service of a bidder's statement on the relevant exchange, ASIC and the target entity on the day the announcement is made.

A bid cannot be conditional, it must be in cash and it must be open for acceptance for a period between 1 and 12 months. Under an on-market takeover bid:

(a) the bidder must have the bid announced to the relevant exchange and, on that day, serve on the target, ASIC and the relevant exchange, a copy of the bidder's statement and the exchange announcement. Within 14 days after the announcement is made, the bidder must send to the holders of

bid class securities in the target a copy of the bidder's statement;

(b) the target is obliged to produce a target's statement and, within 14 days after the announcement is made, send a copy of it to the relevant exchange, the bidder and ASIC on the same day. The target must send a copy of the target' statement to all the holders of bid class securities in the target within 14 days after the announcement is made. The target's statement must comment on the bid and disclose all the information that shareholders of the target and their professional advisers would reasonably require to make an informed assessment whether to accept the offer under the bid;

(c) a market licensee, on behalf of the bidder, then stands in the market for a minimum period of one month (commencing 15 days after the announcement) offering to buy any share of the target of the bid class at a specified price;

(d) unlike offers under an off-market bid, the consideration must be in cash and the offers cannot be conditional; and

(e) the consideration offered for securities in the bid class must equal or exceed the maximum consideration that the bidder or an associate of the bidder provided, or agreed to provide, for a security in the bid class under any purchase or agreement during the 4 months before the date of the bid.

10.6 Content of bid documents

There are strict rules in Chapter 6 relating to the preparation and contents required in a bidder's statement and offer documents and in a target's statement and accompanying documents.

Generally, a bidder's statement must include the information required by section 636 including any information that is material to the making of the decision by the holder of bid class securities whether to accept the offer and that is known to the bidder and does not relate to the value of securities offered as consideration under the bid.

The target's statement must include all the information that holders of the bid class securities and their professional advisers would reasonably require to make an informed assessment whether to accept the offer. It must also contain a statement by each director of the target recommending that offers under the bid be accepted or not accepted and giving reasons for the recommendation or giving reasons why a recommendation is not made.

10.7 Compulsory acquisition

If during or at the end of the offer period the bidder and its associates have relevant interests in at least 90% (by number) of the bid class securities and they have acquired at least 75% (by number) of the securities they offered to acquire, the remaining securities in that class may be acquired by compulsory acquisition.

Further, a holder of securities in an entity (including any bidder) who obtains voting power of at least 90% and who, alone or together with related companies, holds full beneficial interests in at least 90% (by value) of the target's shares and securities convertible to shares (combined) may compulsorily acquire the balance within six months of becoming a 90% holder.

10.8 Liability under the takeovers regime

Liability under the takeovers regime in Australia is predominantly governed by Chapter 6B of the Corporations Act. In particular, section 670A sets up the general prohibition against giving:

(a) a bidder's statement;
(b) a takeover offer document;
(c) a notice of variation of a takeover document;
(d) a target's statement;
(e) a compulsory acquisition notice;
(f) a compulsory buy-out notice; or
(g) a report that is included in, or accompanies, a statement or notice in one of the above documents,

if:

(h) for all documents – that document contains a misleading or deceptive statement; or
(i) for a bidder's statement or target's statement – that document omits any information required by statute; or
(j) for a bidder's statement or a target's statement – any new circumstance has arisen since the document was lodged and would have been required to be included in the document had it arisen earlier; or
(k) for an expert's report – that document omits material that would have been required to be included in it.

10.9 Takeovers Panel

Division 2 of Chapter 6 provides that the Takeovers Panel (the "Panel") may review a decision of ASIC under sections 655A or 673 of the Corporations Act and declare unacceptable circumstances in relation to circumstances affecting control or ownership of a Controlled Entity.

The Panel derives its powers from Part 6.10 of the Corporations Act and Part 10 of the *Australian Securities and Investments Commission Act 2001* (Cth). As of October 2005 the Panel has 47 members, all of whom are part-time. This number does not include the Panel Executive. The Panel is the sole avenue open to parties during the course of a bid: section 659B(1). There are three Chapter 6 gateways into the Panel for a party:

(a) section 656A provides for a review of a section 655A ASIC exemption decision;
(b) section 657C is the key provision where a party seeks a declaration of unacceptable circumstances from the Panel pursuant to the Panel's power under section 657A; or
(c) section 657EA which provides for internal review of a Panel decision.

In exercising its section 657A power to declare circumstances unacceptable the Panel must, among other things, have regard to the purposes of Chapter 6 as set out in section 602 of the Corporations Act. Section 657A(1) provides that the Panel may make a declaration of unacceptable circumstances "whether or not the circumstances constitute a contravention of this Act". This, together with section 657A(3)(a)(i), has the effect of placing the black letter rules in a subordinate position to the principles underpinning Chapter 6.

It is important therefore to be familiar with the Panel's Guidance notes, as these are a tool of regulatory flexibility used by the Panel to fill in the gaps left by ambiguous principles and rules that cannot possibly cover the field in takeovers. As of October 2005 the Panel has published a total of 16 Guidance notes. Previous decisions of the Panel may also be a useful tool to gauge the Panel's position on a particular issue.

Panel decisions, Guidance notes and Rules for Proceedings are available on the Panel's website.

10.10 References

Chapter 6 – Corporations Act
Takeovers Panel website www.takeovers.gov.au

11

Transfer of assets of a company

11.1 Important issues

- Consider the need for heads of agreement, confidentiality agreement and due diligence.
- Determine the legal entities to sell and purchase the assets.
- Expressly identify the particular assets being transferred.
- Consider whether the assets are affected by any third party interests.
- Consider whether stamp duty or other taxes are payable.

11.2 Steps involved in transferring the assets of a company

Set out below are the basic steps to transferring the assets of a business from one company to another company:

(a) legal entities - identify the legal entities to sell and purchase the relevant assets and whether the purchaser is an appropriate entity to acquire the assets.
(b) approvals - consider approvals necessary and applicable laws or rules, for example, Foreign Investment Review Board approval or ASX Listing Rules.
(c) taxation - consider the taxation consequences of the transfer including income tax, stamp duty, capital gains tax and GST.
(d) heads of agreement - consider need for heads of agreement or explanatory memorandum.
(e) assets - identify the assets to be transferred including:
    (i) plant and equipment/fixed assets;
    (ii) trading stock;
    (iii) land;
    (iv) goodwill; and
    (v) debtors.
(f) agreements, leases and licences - identify agreements, leases and licences of the transferor. Determine whether the arrangements will be terminated, completed or assigned to the transferee. Identify whether third party consents are needed.

(g) employee entitlements - identify employee entitlements. Determine whether employee entitlements will be transferred to the transferee (for employees who accept new positions).
(h) superannuation - establish arrangements for the transfer of superannuation of transferring employees.
(i) purchase price - determine the purchase price and finalisation of other commercial terms.
(j) agreements - prepare agreements to give effect to the transfer.
(k) insurance - make arrangements for the assets to be insured at the time of transfer.
(l) assets subject to third party interests - make arrangements for the release of assets from relevant third party interests (for example, mortgages and charges) on or before completion of the transfer.
(m) material supplier contracts - send letter to material suppliers requesting them to deal with the transferee and confirm that the transferor is released from obligations.
(n) material customer contracts - send letter to customers requesting them to deal with the transferee and confirm that the transferor is released from obligations.
(o) hire purchase agreements/equipment leases - arrange for the termination of hire purchase/equipment leases and the execution of new agreements.
(p) notify debtors – send letter to debtors notifying them of the payment details of the transferee.
(q) land - prepare the documentation for the transfer of land.
(r) execution of agreements .
(s) completion of the transfer - arranging the actual transfer of the legal and equitable title to the assets including payment of the purchase price and transfer of the assets.
(t) change stationery.
(u) notify utilities - notify relevant service providers, for example, electricity and water.
(v) stamp duty – lodge any variations and dutiable forms within relevant periods.

12

Related party transactions

12.1 Important issues

- Chapter 2E of the Corporations Act requires public companies to disclose and seek member approval of transactions involving related parties.
- Related party is broadly defined to include, for example, spouses of company officers.
- If the public company is listed on the ASX, also consider Chapter 10 of the ASX Listing Rules.

12.2 Policy objectives of Chapter 2E

The purpose of Chapter 2E of the Corporations Act is to protect:

(a) a public company's resources available for distribution to its creditors; and
(b) the interests of the members of a public company

by requiring that proposed related party transactions, which could adversely affect those resources or interests, be disclosed and approved by members in a general meeting before such beneficial transactions are entered into.

12.3 Need for member approval of financial benefit to related party

Section 208 provides that for a public company or an entity controlled by a public company to give a financial benefit to a related party of the public company:

(a) the public company or controlled entity must:
    (i) obtain the approval of the members of the public company as provided in sections 217 - 227; and
    (ii) give the benefit within 15 months of obtaining such approval; or
(b) the benefit must fall within one of the exceptions set out in sections 210 - 216.

12.4 Key elements

To determine whether a transaction is a related party transaction and therefore falling within the ambit of Chapter 2E, one must look at whether:

(a) a financial benefit has been given; and
(b) the benefit has been given to a related party of a public company.

12.5 Financial benefit

Section 229 states that a reference to giving a financial benefit:

(a) is intended to be interpreted broadly;
(b) is intended to focus on the substance rather than the form of the transaction;
(c) need not involve the payment of money, but will generally involve a financial advantage;
(d) includes the giving of a financial benefit indirectly, for example, through one or more interposed entities; and
(e) includes giving a financial benefit by making an informal agreement, oral agreement or an agreement that has no binding force.

Section 229(3) sets out examples of financial benefits, including:

(a) giving or providing the related party finance or property;
(b) buying an asset from or selling an asset to the related party;
(c) leasing an asset from or to the related party;
(d) supplying services to or receiving services from the related party;
(e) issuing securities or granting an option to the related party; and
(f) taking up or releasing an obligation of the related party.

12.6 Related party

Section 228 outlines who and what are taken to be related parties of a public company for the purposes of Chapter 2E of the Corporations Act:

(a) an entity that controls a public company;
(b) a director of the public company;

(c) a director of an entity that controls the public company OR the persons that make up the controlling entity;
(d) spouses and de-facto spouses of any person referred to in paragraphs (b) and (c);
(e) parents and children of persons referred in paragraphs (b), (c) and (d);
(f) an entity controlled by a related party referred to in paragraphs (a) to (e) is a related party of a public company unless the entity is also controlled by the public company;
(g) an entity that was a related party referred to in paragraphs (a) to (f) within the last six months;
(h) an entity that believes or has reasonable grounds to believe that it is likely to become a related party of the public company of the kind referred to in paragraphs (a) to (f) at any time in the future; and
(i) an entity that acts in concert with a related party of the public company on the understanding that the related party will receive a financial benefit if the public company gives the entity a financial benefit.

12.7 Member approval

The procedure for obtaining member approval to give a financial benefit to a related party is detailed in sections 217 – 227 of the Corporations Act. The public company must prepare:

(a) explanatory documents;
(b) notice of the meeting; and
(c) material a member may reasonably require to decide on the proposed ordinary resolution.

The public company must complete and lodge an ASIC Form 5057A with ASIC along with the current lodgement fees (which are listed on the ASIC website). ASIC must comment on the documents within 14 days of receiving the documents.

The public company must:

(a) give at least 21 days notice of the meeting to members or in the case of a listed company at least 28 days notice;
(b) hold the meeting and record the ordinary resolution; and
(c) lodge an ASIC Form 205 with ASIC setting out the text of the resolution within 14 days after the resolution is passed.

12.8 Exceptions to the need for member approval

Member approval is generally not needed to give a financial benefit:

(a) on terms that would be reasonable in the circumstances if the public company and related entity were transacting at arm's length or are less favourable to the related party (section 210);
(b) if the benefit constitutes reasonable remuneration to officers or benefits that are payments of expenses incurred (section 211(1) and (2));
(c) if the benefit constitutes reasonable benefits with respect to indemnities exemptions or insurance premiums in respect of liability incurred by an officer in that capacity (section 212(1) and (3));
(d) if the benefit constitutes reasonable payments of legal costs (section 212 (2) and (3));
(e) that is an advance up to $2000 (or any greater amount prescribed by the regulations) given to a director or a director's spouse or de-facto spouse (section 213);
(f) that is a benefit given to or by a 'closely-held' subsidiary (as defined in section 214);
(g) if the benefit is given to a related party in their capacity as a member of the public company provided that the benefit does not discriminate unfairly against the other members of the public company (section 215); and
(h) if the benefit is given pursuant to a court order (section 216).

12.9 References

Chapter 2E of the Corporations Act
ASIC Policy Statement 76 Related party provisions
www.asic.gov.au
Chapters 10 and 14 of the ASX Listing Rules www.asx.com.au/index.htm

13

Regulation of foreign investment in Australia

13.1 Important issues

- Acquisition by foreign interests of substantial interests in existing Australian businesses with total assets over $50 million or where the proposal values the business at over $50 million require notification.
- Proposals by foreign interests to establish new businesses involving a total investment of $10 million or more require notification.
- Special provisions apply to the acquisition of interests in land and specific areas such as media and telecommunications.
- Set forms must be completed in order to provide notification or seek approval. Lodgement of the form is important to commence the time period in which the Foreign Investment Review Board (FIRB) must review any application.

13.2 Foreign Investment Review Board

The *Foreign Acquisitions and Takeovers Act 1975* (Cth) regulates non-residents acquiring interests in Australian assets, businesses and land. The Act provides the Commonwealth Government with the power to prohibit proposals in relation to the acquisition of interests in Australian assets, businesses and land that are contrary to the national interest. The assessment of proposals is administered by FIRB (a section of the Commonwealth Department of Treasury).

13.3 Regulated acquisitions

FIRB has issued a statement that the following types of proposals by "foreign interests" require prior notification to and approval by FIRB:

(a) acquisitions of substantial interests in existing Australian businesses with total assets over $50 million or where the proposal values the business at over $50 million;
(b) proposals to establish new businesses involving a total investment of $10 million or more;
(c) portfolio investments in the media of 5% or more and all non portfolio investments irrespective of size;

(d) takeovers of offshore companies whose Australian subsidiaries or assets are valued at $50 million or more, or account for more than 50 per cent of the target company's global assets;
(e) direct investments by foreign governments or their agencies irrespective of size;
(f) acquisitions of interests in urban land that involve the:
    (i) acquisition of developed non residential commercial real estate, where the property is subject to heritage listing, valued at $5 million or more;
    (ii) acquisition of developed non residential commercial real estate, where the property is not subject to heritage listing, valued at $50 million or more;
    (iii) acquisition of accommodation facilities irrespective of value;
    (iv) acquisition of vacant urban real estate irrespective of value;
    (v) acquisition of residential real estate irrespective of value; or
(g) proposals where any doubt exists as to whether they are notifiable.

13.4 Regulated foreign interests

A "foreign interest" is defined as:

(a) a natural person not ordinarily resident in Australia;
(b) a corporation in which a natural person not ordinarily resident in Australia or a foreign corporation, holds a controlling interest;
(c) a corporation in which 2 or more persons, each of whom is either a natural person not ordinarily resident in Australia or a foreign corporation, hold an aggregate controlling interest;
(d) the trustee of a trust estate in which a natural person not ordinarily resident in Australia or a foreign corporation, holds a substantial interest; or
(e) the trustee of a trust estate in which 2 or more persons, each of whom is either a natural person not ordinarily resident in Australia or a foreign corporation, hold an aggregate substantial interest.

A "substantial foreign interest" occurs where a single foreigner (and any associates) has 15% or more of the ownership or several foreigners (and

any associates) have 40% or more in aggregate of the ownership of any corporation, business or trust. Specific policies apply to various industry sectors including media, telecommunications and developed residential real estate. The notice requirements and thresholds are relaxed in relation to US interests, as provided under the Australia-US Free Trade Agreement.

13.5 References

Foreign Acquisitions and Takeovers Act 1975 (Cth) www.austlii.edu.au
Foreign Investment Review Board www.firb.gov.au

14

Share buy backs

14.1 Important issues

- The documents for the share buy back, for example, the letter of offer and share buy back agreement, may need to be lodged with ASIC.
- It is generally necessary to provide ASIC with 14 days prior written notice of a proposed share buy back.
- Shareholder approval may be required.
- Shares that are bought back must be cancelled by a directors' resolution.

14.2 What is a share buy back?

A share buy back is an offer to a shareholder of a company to sell their shares back to the company. Share buy backs are not compulsory in nature. One of the essential principles of a share buy-back is that any shareholder to whom the company makes an offer to buy back the shares may decide whether or not to sell. This distinguishes a buy-back from other forms of reduction of issued capital.

A company may buy back its shares for a number of reasons including to increase its earnings per share, to remove instability in the company's register of members or to give shareholders a price nearer to asset value.

14.3 What is a reduction of capital?

On the other hand, reductions in capital allow a company, as long as it has satisfied the various requirements of the Corporations Act, to reduce the number of shares on issue and/or the amount recorded as received in consideration for the issue of those shares, for example, cancelling uncalled capital.

Effectively, a share buy back is a form of reduction of capital because, after the buy back takes place, the issued capital of the company will be reduced by the number of shares bought back.

14.4 Permitted share buy backs

Section 257A of the Corporations Act provides that a company may buy back its own shares if:

(a) the buy-back does not materially prejudice the company's ability to pay its creditors; and
(b) the company follows the procedures laid down in Chapter 2J Division 2 of the Corporations Act.

The buy back procedures differ according to the type of share buy backs. There are five types of share buy backs identified by the Corporations Act. These are:

(a) minimum holding;
(b) employee share scheme;
(c) on market;
(d) equal access; and
(e) selective buy back.

The definitions of each of these types of share buy backs are set out in section 257B of the Corporations Act, except for "selective buy back" which is defined in section 9 of the Corporations Act.

14.5 Required procedure for a share buy back

Section 257B provides the following table, which specifies the steps required for and the sections that apply to, the different types of buy-back:

Procedures	**Minimum holding**	**Employee share scheme**		**On-market**		**Equal access scheme**		**Selective buy-back**
		Within 10/12 limit	**Over 10/12 limit**	**Within 10/12 limit**	**Over 10/12 limit**	**Within 10/12 limit**	**Over 10/12 limit**	
Ordinary resolution	-	-	Yes	-	Yes	-	Yes	-
Special unanimous resolution	-	-	-	-	-	-	-	Yes
Lodge offer documents with ASIC	-	-	-	-	-	Yes	Yes	Yes
14 days notice	-	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Disclose relevant information	-	-	-	-	-	Yes	Yes	Yes

when offer made								
Cancel shares	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Notify cancellation to ASIC	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes

14.6 What is the 10/12 limit rule?

Where the 10/12 limit rule applies, it means that the company cannot buy back more than 10% of its voting shares in any 12 month period. The rule does not apply to shares with no voting rights.

14.7 Reduction of capital procedure

A company has a general power to make a share capital reduction (in addition to ways which are otherwise authorised by the Corporations Act) if the reduction:

(a) is fair and reasonable to the company's shareholders as a whole;
(b) does not materially prejudice the company's ability to pay its creditors; and
(c) is approved by shareholders in accordance with the procedures set out in section 256C.

Whether a reduction of capital is fair and reasonable and does not prejudice the company's ability to pay its creditors is a commercial judgment required to be made by the directors of the company.

14.8 Relevant ASIC forms

An ASIC Form 280 (Share Buy Back Details) must be attached to share buy back documents lodged with ASIC. An ASIC Form 281 (Intention to carry out a share buy back) may also be required. An ASIC Form 284 (Share Cancellation) must be lodged within one month after a cancellation of shares effecting a share buy back.

14.9 Other relevant provisions

The following are provisions of the Corporations Act, which may also apply to share buy backs and reductions of capital:

(a) Sections 588G and 1317H - liability of director on insolvency;
(b) Section 1324 -injunctions to restrain contravention;
(c) Sections 609(4) and 611 - application of takeover provisions;
(d) Section 259A - consequences of failure to follow procedures by the company;
(e) Section 256D - consequences of failure to follow reduction in capital procedure;
(f) Sections 1001A-1001D - continuous disclosure provisions;
(g) Chapter 2E - benefits to related parties to be disclosed;
(h) Section 125 - provisions in constitution; and
(i) Sections 246B-246G - variation of class rights.

15

Stamp duty

15.1 Important issues

- Stamp duty applies to documents evidencing transactions relating to certain dutiable property; for example, transfer forms for land and securities.
- Stamp duty is levied at a State/Territory government level and applies differently throughout Australia.
- Stamp duty is calculated on an “ad valorum” (according to the value) basis.
- Time limits apply for the payment of stamp duty.
- Not all documents may be lodged over the counter at a service centre.
- It is important to identify to clients the liability to pay stamp duty.

15.2 What is stamp duty

Stamp duty is a levied at State and Territory government level on certain documents and transactions in relation to dutiable property. Each State and Territory administers their stamp duty legislation independently; in New South Wales, the Office of State Revenue is the relevant administrative body. When working on a transaction that involves dutiable property, it is important to identify those States and Territories in which stamp duty is payable and whether such duty will be payable in respect of your transaction at a nominal or ad valorem rate.

The relevant State or Territory legislation generally requires the lodgement of the original document and payment of the duty within one to three months of execution. Generally, stamp duty can be paid either at a service centre of the relevant government department (for urgent and routine matters) or by post to the relevant government department. There are liabilities for penalties and interest if stamp duty is not paid within the required periods.

The documents on which stamp duty must be paid include documents effecting a transfer of shares (except listed shares), documents effecting a transfer of assets and leases and licenses of land. For example, as at October 2002, in New South Wales stamp duty on a transfer of shares of a company was payable at the rate of $0.60 on each $100.00 or part for

shares not listed on the ASX. Stamp duty is not payable on the transfer of shares listed on the ASX.

15.3 References

Duties Act 1997 (NSW) www.stampduty.com.au
NSW Office of State Revenue www.osr.nsw.gov.au

16

Debt finance

16.1 Important Issues

- Debt finance is an alternative method of raising funds to equity fundraising.
- Chapter 2L of the Corporations Act governs the issuing of debentures.
- There may be taxation and other financial implications for the company depending on the form of financing.
- The company may need an Australian financial services licence.

16.2 Types of debt financing

Debt financing can be conducted in many ways, such as a simple loan or an issue of debentures. The type of debt financing chosen by a company may depend on many factors, such as the type of company it is (eg public or proprietary), tax considerations and whether the lender requires security (and, if so, the type of security demanded).

16.3 Security

Companies can give the same types of security as natural persons such as mortgages and charges, assignments, stock mortgages, and liens. However, a form of security peculiar to companies is the fixed and floating charge. Within the one security instrument, a company may give a fixed charge over certain assets and a floating charge over others. A floating charge usually covers a class of assets but is not fixed on any particular asset until a specified event occurs. Until this event occurs, the company is free to deal with those assets subject to the terms of the charge. When a charge becomes fixed by the occurrence of that specified event, the charge is often described as having “crystallised”.

A company may give a fixed charge over assets which exist and are owned by the company at the time of the giving of the charge. Such a grant of security may be achieved by way of a legal charge or mortgage. However, equity enables a company to grant security over assets in existence but not yet owned by the company, and over assets not yet in existence at the time the security is granted.

16.4 Debentures

A company has the legal capacity and powers of an individual, including the power to issue debentures: section 124(1)(b) of the Corporations Act. Section 9 of the Corporations Act defines a "debenture" of a company as a chose in action that includes an undertaking by the company to repay as a debt money deposited with it or lent to the company. Certain things are excluded from the section 9 definition of a debenture, including deposits with an authorised deposit-taking institution, cheques, some promissory notes, and bills of exchange.

Chapter 2L of the Corporations Act governs the issue of debentures by a company. Before offering debentures in Australia, the company will need to consider whether the offer requires:

(a) prospectus disclosure under Chapter 6D of the Corporations Act;
(b) the company to enter into a trust deed and appoint a trustee (section 283AA); and/or
(c) the company to obtain an Australian financial services licence.

Note that disclosure under Part 7.9 of the Corporations Act is not necessary for an offer of debentures due to the section 1010A carve out for securities, which includes debentures.

16.5 Redemption of debentures

The company will need to consider whether the debenture should be made redeemable at the option of the company, or at a predetermined date, or redeemable on the happening of some event or at some time in the future. The company could also consider whether the debenture should be issued on terms that the principal sum is repayable with a premium.

16.6 Variation of terms of the debenture

The company may wish to consider whether including in the terms of the debenture provisions allowing for meetings of the debenture holders at which the terms of the debenture can be varied by a specified majority.

16.7 Convertible debentures or notes

The company may also consider whether to issue debentures or notes which may be convertible to shares. If so, the debentures or notes may be

made convertible on the happening of a certain event or at a certain date regardless of the wishes of the holder, or alternatively, the debentures may be made convertible at the option of the holder.

16.8 Issue of debentures or notes at a discount or premium

The company may wish to issue debentures at a discount; that is, the debenture may be issued at an issue price that is lower than the face value at which the debentures will be redeemed in the future. Often such debentures do not pay a regular interest payment or coupon, and are referred to as zero coupon bonds (or "zeros"). Alternatively, the company may issue debentures or notes at a premium; that is, on terms that have a face value of less than the issue price, that is, the debenture is issued with the acknowledgement of an indebtedness for a lower amount in return for an advance of a higher amount.

16.9 Debenture trust deed

Where there are to be a number of lenders or creditors, the company may wish to consider whether to issue a series of debentures or debenture stock under a debenture trust deed. In certain circumstances, the company may need to comply with the disclosure requirements of Chapter 6D of the Corporations Act.

16.10 Stamping and registration

The issue of security instruments may require stamping under the relevant State or Territory legislation. This will usually depend on the type of security and where the assets secured by the security are located.

Certain security instruments will require registration either under the Corporations Act, such as fixed and floating charges, or under State law such as real property mortgages. The types of security instruments requiring registration under Corporations Act are set out in section 262. The registration procedure is set out in Chapter 2K and includes lodging with ASIC within 45 days of the creation of the charge the prescribed form (ASIC Form 309) together with the original or copy of the charge instrument attached. Registration fees are payable. An ASIC Form 350 certifying that the charge instrument has been duly stamped will also need to be lodged if not at the same time, then within 30 days of the date of lodgement of the ASIC Form 309. Generally if stamping cannot be completed within that time, on application (together with a fee), ASIC can extend the time of

provisional registration. Until the ASIC Form 350 is lodged, the charge is only provisionally registered.

16.11 References

Chapters 2K, 2L, 6D and 7 of the Corporations Act
H A J Ford, R P Austin and I M Ramsay, Ford's Principles of the Corporations Law (LexisNexis Looseleaf Service)
W J Gough, Company Charges (2nd ed, 1996), LexisNexis

17

Financial services and markets

17.1 Important issues

- A person must only operate, or hold out that the person operates, a financial market in this jurisdiction if the person has an Australian Market Licence (AML).
- A person who carries on a financial services business in Australia must hold an Australian Financial Services Licence (AFSL) covering the provision of those services, be appointed as an authorised representative of an AFSL holder, or be exempt from the AFSL requirements.

17.2 Introduction

The purpose of the *Financial Services Reform Act 2001* (Cth) (FSR Act) was to form a general regulatory umbrella that covered the financial services industry. It amended the Corporations Act and related legislation and introduced a new regulatory framework governing the licensing, conduct and disclosure of financial services. It also created a licensing regime for financial markets and clearing and settlement facilities.

The amendments made by the FSR Act were subject to a two-year transition period and came into effect on 11 March 2004.

17.3 Licensing of financial markets

For the purposes of Ch 7 of the Act, s767A(1) defines a financial market as a facility through which:

(a) offers to acquire or dispose of financial products are regularly made or accepted; or
(b) offers or invitations are regularly made to acquire or dispose of financial products that are intended to result, or may reasonably be expected to result, directly or indirectly, in:
    (i) the making of offers to acquire or dispose of financial products; or
    (ii) the acceptance of such offers.

A person must only operate, or hold out that the person operates, a financial market in this jurisdiction if the person has an AML to operate in this jurisdiction, or the market is exempt from the licensing requirements. To apply for an AML, an application is lodged with ASIC. With regard to the purpose of market regulation and to the features of the particular market, ASIC will assess and report to the Minister on the market operator's ability to adequately satisfy their legal requirements in determining whether or not to grant an AML. In applying this regime, market regulation ensures that the regulatory outcomes relevant to each market are achieved.

The granting of an AML by the Minister is subject to strict criteria, incorporating the need for the application to demonstrate that it has adequate operating rules, written procedures and supervisory arrangements. Once the licence has been granted the market operator must comply with general licensing obligations.

17.4 Licensing of providers of financial services

A person who carries on a financial services business in Australia must hold an AFSL (or be appointed as an authorised representative of a holder of an AFSL) covering the provision of those services. Determining whether a person is carrying on a financial services business in Australia is a complex matter, which can be broken down into two key questions: is the person's business providing a service that is considered a "financial service" for the purposes of the Corporations Act and, if so, is such a service being provided in relation to a "financial product".

17.5 What is a financial service?

You will need to analyse the types of activities undertaken by your client's business to consider whether a financial service is being provided. Section 766A of the Actprovides that the following activities are a financial service:

(a) providing financial product advice;
(b) dealing in a financial product;
(c) making a market for a financial product;
(d) operating a registered scheme; and/or
(e) providing a custodial or depository service.

Other activities may also be prescribed by regulation to be a financial service. It is important to also consider the exemptions in section 911A(2) of the Act. If one of the exemptions applies, then an AFSL need not be held

regardless of whether your client's activities fall under the above categories or not.

17.6 What is a financial product?

The definition of financial product appears in Division 3 of Part 7.1 of the Act. In particular, section 763A defines a financial product to be a facility through which, or through the acquisition of which, a person does one or more of the following:

(a) makes a financial investment;
(b) manages a financial risk;
(c) makes non-cash payments.

In addition to these general definitions of a financial product, the Corporations Act expressly provides for certain things to be financial products (see sections 762A(2) and 764A) and contains express overriding exclusions from the financial services regime (see sections 762A(3) and 765A).

Thus, the following hierarchy applies:

(a) if an overriding exclusion applies, your client's product is not a financial product regardless of (b) and (c) below;
(b) if a specific inclusion applies, your client's product is a financial product regardless of (c) below;
(c) if the general definition applies, your client's product is a financial product.

17.7 Applying for an Australian financial services licence

ASIC has prepared a Licensing Kit, which is available on the ASIC website. The Licensing Kit provides guidance on how to complete the application form (FS01) and the accompanying documents ("proofs") that are required. ASIC has also published a sample online application that contains answers to many of the questions that you may need to consider in completing the application.

The application process itself is electronic, and conducted through the licensees' portal on the ASIC website. ASIC has also published a number of Policy Statements which set out how ASIC will administer the licences conditions, along with some useful Guides to assist applicants in applying

and understanding ASIC's Policy Statements. These are all available on the ASIC website.

17.8 Authorised representatives

A holder of an AFSL (the licensee) may authorise another person to provide a specified financial service as an authorised representative of the licensee. The authorisation may be varied or revoked at any time by the licensee giving written notice to the authorised representative. Bodies corporate can be appointed as authorised representatives, as well as natural persons. Licensees cannot be authorised representatives of other licensees, except in the case of a licensee appointed as a representative of an insurer under a binder. ASIC requires notice of the appointment, variation or revocation of authorised representatives within defined time frames.

17.9 Retail v Wholesale Clients

Generally speaking, under Chapter 7, the extent of the obligations owed by a person who provides a financial service depends largely upon the person to whom the service is provided. Where the person to whom the financial service is provided is considered to be a "retail client", the provider of the financial service will have to comply with more onerous obligations. However, if a financial service is provided to a wholesale client, many of the onerous obligations do not apply to the provider of the service.

Section 761G of the Act sets out the difference between wholesale and retail clients. It starts with the premise that all clients are retail, unless they meet one of the specified exemptions. Note that the test for determining whether a client is retail or wholesale will vary depending on the service and type of product that the client is receiving.

You should be aware that additional licence conditions will apply for licensees providing financial services to retail clients.

17.10 Applying for relief from the licensing requirements

In some cases, your client may require relief from certain licence conditions, including the requirement to hold a licence. ASIC has issued guidance on applying for relief in ASIC Policy Statement 51 and the applicable form is FS10.

Before applying for relief, you should firstly check whether any applicable relief has already been provided in the form of a Class Order relief. It is

also useful to check whether ASIC has previously granted similar relief to other industry participants as this will provide a useful precedent for your application. All relief instruments that have been granted are published in the ASIC Gazette, which is available from the ASIC website.

17.11 Process for varying an existing AFSL

There are two main reasons why a licensee may need to vary their existing AFSL:

(a) changing their responsible officers; or
(b) Adding new licence authorisations.

To vary an existing licence, you will need to complete a Form FS03. To change the Responsible Officers for a licence, you will need to complete a Form FS20. These forms can be lodged online using ASIC's e-licensing system, and are also available from the ASIC website. In most cases, if a licensee is varying their AFSL to add additional licence authorisations, they may also need to add an additional responsible officer to meet the organisation competency obligations as set out in ASIC Policy Statement 164. In this case, the licensee will need to complete and lodge both the FS03 and FS20.

In ASIC Policy Statement 164, a Responsible Officer is considered to include people on whom a licensee depends for its organisational competency (to carry on a financial services business) who are directly responsible for significant day-to-day business decisions about the ongoing provision of financial services by the licensee.

The FS20 is also used to notify ASIC of changes to a licence, such as a change to your principal business address; a change to your address for service of notices; adding or removing a business name; adding or removing a responsible officer; or a change to the details of your external dispute resolution scheme. ASIC has also published a specific Guide on varying licences, which is available on the ASIC website.

17.12 Managed Investment Schemes

A managed investment scheme is defined by the Act as:

(a) a scheme that has the following features:

(i) people contribute money or money's worth as consideration to acquire rights to benefits produced by the scheme;
(ii) any of the contributions are to be pooled or used in a common enterprise to produce financial benefits or benefits consisting of rights or interests in property for the people who hold interests in the scheme; and
(iii) the members do not have day to day control over the operation of the scheme;

(b) a time sharing scheme,

but does not include a partnership, body corporate or franchise. Managed investment schemes include trusts established for investment purposes, film schemes, time sharing schemes and member discretionary master funds.

An AFSL holder may run a managed investment scheme, provided its AFSL contains the appropriate authorisations. In addition to having an appropriate AFSL, the operator of a managed investment scheme may also need to register the scheme with ASIC. In general, a managed investment scheme must be registered if it has more than 20 members or it was promoted by a person in the business of promoting managed investment schemes.

17.13 Financial services disclosure

Disclosure of financial services information (as opposed to financial product information) is given via a Financial Services Guide ("FSG") and, where applicable, a Statement of Advice ("SOA"). The provider of the financial service (whether a licensee or authorised representative) must give the client an FSG if the provider is providing a financial service to that client as a retail client, and may give the information to the client personally, by post or fax, in printed or electronic form or as agreed. The FSG must be given to the client as soon as practicable after it becomes apparent to the providing entity that the financial service will be, or is likely to be, provided to the client, and must in any event be given to the client before the financial service is provided.

An FSG must set out specific details such as information about the kinds of financial services that the provider is authorised to provide, and the kinds of financial products to which those services relate; the dispute resolution system that covers complaints by persons to the financial service provider and the source of the provider's remuneration and relationships with issuers

of financial products, which might reasonably be expected to influence the provider in providing the financial service (see sections 942A to 942E).

Where a person provides advice to a retail client that is based upon or takes into consideration the personal circumstances and objectives of the client, the person providing the advice must give the client an SOA. The SOA may be the means by which the advice is provided, or a separate record of the advice. There are situations in which a SOA is not required but where it is, it must include specific information such as a statement setting out the advice, and information about the basis on which the advice is given. The SOA must be given to the client when, or as soon as practicable after, the advice is provided and, in any event, before the client is provided with any further financial service that is connected with that advice.

17.14 Financial product disclosure

Financial product disclosure is governed by Part 7.9 of the Act and is separate from and additional to the Australian financial services licensing regime. That is, the financial product disclosure regime applies to a person providing financial products regardless of whether that person is required to hold an AFSL in respect of those financial products. A regulated person must give a person a Product Disclosure Statement ("PDS") for a financial product, if the regulated person:

(a) provides financial product advice to the person that consists of, or includes, a recommendation that the person acquire the financial product. The PDS must be given at or before the time when the regulated person provides the advice;
(b) offers to issue the financial product to the person or offers to arrange for the issue of the financial product. The PDS must be given at or before the time when the regulated person makes the offer, or issues the financial product; and
(c) offers to sell the financial product to the person. The PDS must be given at or before the time when the regulated person makes the offer.

Importantly, the PDS must be given to the person before the person becomes bound by a legal obligation to acquire the financial product pursuant to the offer.

17.15 References

Corporations Act- Chapter 7
ASIC Policy Statements and Guides available on the ASIC website
www.asic.gov.au

18

Insolvency, winding up and liquidation of companies

18.1 Important issues

- The most common method to seek to wind up a company is pursuant to a statutory demand under Part 5.4 Division 2 of the Corporations Act.
- The method is relatively simple and quick. However, the applicant must be owed at least $2,000 by the company.
- The method requires strict compliance with the procedures of the Corporations Act and the Corporations Regulations.

18.2 Insolvency

The most common ground for commencing proceedings to wind up a company through the mechanisms of the Supreme Court is the ground of insolvency. The Corporations Act has equipped practitioners with a statutory test in ascertaining whether a company is insolvent. In essence, a company is insolvent if it is unable to pay all its debts as and when they become due and payable. Further, the Court must presume that the company is insolvent if the company has failed to comply with a statutory demand (Section 459C(2)(a) of the Corporations Act).

18.3 Process for winding up a company pursuant to a statutory demand

A creditor seeking to wind up a company on the ground of presumed insolvency must adhere to the following procedures prescribed by the Corporations Act and the Supreme Court (Corporations) Rules 1999 (the Rules):

(a) serve a statutory demand;
(b) file an originating process with accompanying affidavit;
(c) obtain the consent of a liquidator and notify ASIC;
(d) publication; and
(e) hearing.

18.4 Serving a statutory demand

Section 459E of the Act permits a creditor to serve a statutory demand on a company provided that the debt outstanding to the creditor is greater than $2000. The demand itself must be in writing and in the same format as Form 509H of the Corporations Regulations. The Act provides that the debt and its amount must be stated in the demand. The demand must also require the company to pay the amount of the debt or to secure or compound for the amount of the debt to the creditor's reasonable satisfaction within 21 days.

The demand must be signed by the creditor or on behalf of the creditor. Although it is permissible for a practitioner to sign the demand, it is prudent to obtain the client's written instructions prior to signing the demand. The demand must be accompanied by an affidavit sworn by the creditor unless the amount owing is a judgment debt. If the amount owing to the creditor is not a judgment debt, the affidavit must verify that the debt is due and payable by the company, and must comply with the Rules.

The demand should be served personally and an affidavit of service prepared. After the demand is served the debtor company will have three options:

(a) pay the creditor;
(b) enter into an arrangement with the creditor, such as an agreement to pay by instalments; or
(c) file and serve an application within 21 days of service of the demand, via an originating process (Form 2, Rule 2.2) together with a supporting affidavit (in accordance with Rule 5.4) seeking to set aside the statutory demand on the grounds that:
    (i) there is a genuine dispute about the existence or the amount outstanding in the demand;
    (ii) the company has an off setting claim; or
    (iii) because of a defect in the demand substantial injustice will be caused unless the demand is set aside;

The company may be able to satisfy the Court that there is some other reason why the demand should be set aside. In the event that the company ignores the statutory demand, the Court is entitled to presume that the company is insolvent and the creditor may proceed to wind up the company on that ground.

18.5 Filing an originating process with accompanying affidavit

Once the demand has been served and the time for compliance has lapsed, that is 21 days, the creditor may file an originating process (Form 2, Rule 2.2) together with an accompanying affidavit (in accordance with Rule 5.4) seeking to wind up the company on the ground of insolvency.

The originating process must set out the particulars of service of the demand on the company and of the failure of the company to comply with the demand, and must attach to the originating process a copy of the demand, or any order made varying the demand (section 459Q).

The originating process must be accompanied by an affidavit sworn by the creditor unless the amount owing is a judgment debt. If the amount owing to the creditor is not a judgment debt, the affidavit must:

(a) verify that the debt is due and payable by the company;

(b) comply with Rule 5.4, that is,

  (i) verify service of the demand on the company; and

  (ii) verify failure of the company to comply with the demand.

(c) state that the debt is still due and payable as at the date the affidavit was made.

The affidavit must be sworn within 7 days before filing the originating process.

It is preferable to file the originating process the day after the demand expires or as soon as practical thereafter, because an order granting winding up of a company on the grounds of insolvency must be based on current and accurate information. An application seeking to wind up the company on the ground of insolvency must be determined by the Court within 6 months after the application is filed (section 459R).

18.6 Consent of Liquidator and ASIC Notification

The consent of a registered liquidator must be obtained and filed with the originating process. The form must be in accordance with Form 8 of the Rules, and be served on the company at least one day before the hearing. An originating process must also be accompanied by an affidavit annexing a record of a search of the records maintained by ASIC, regarding the

company. The search must be carried out no later than 7 days before the originating process is filed.

After the originating process, supporting affidavit, consent of liquidator and affidavit of search have been filed, the matter will be listed in the Corporations List to be heard by a Registrar in Equity. An ASIC Form 519 must be filed with ASIC no later than 10:30am the next business day after the originating process was filed (section 470). The originating process, supporting affidavit and consent of a liquidator must then be served on the company no more than 14 days after filing and no less than 5 days before the hearing.

18.7 Publication

Unless the Court orders otherwise, the creditor must publish a notice of the application for an order that a company be wound up. The notice must be:

(a) in accordance with the Rules and Form 9;
(b) published in accordance with Rule 2.11, that is, the notice must be published once in a daily newspaper circulating in the State or Territory where the company has its principal or last known place of business (usually the Australian or the Sydney Morning Herald); and
(c) published at least 3 days after the originating process is served on the company and at least 7 days before the hearing.

The legal practitioner must then file an affidavit in accordance with Rule 2.12 stating the date of publication and annexing the advertisement.

18.8 Hearing

The hearing of the application seeking to wind up a company on the ground of insolvency is likely to be dealt with by the Registrar in the Corporations List. The practice of the Equity Division requires that, prior to the hearing, the creditor must annex to an affidavit a company search obtained from the records maintained by ASIC. It should be dated no later than 3 days before the date of the hearing and noting that the company has not already been wound up. The affidavit must be sworn no later than 3 days before the hearing. The creditor must also execute an affidavit of debt noting that the debt is still due and payable and that the company has failed to pay the amount outstanding to the creditor. The affidavit must also be sworn no later than 3 days before the hearing.

A company may only oppose a winding up application on the grounds that the company is solvent (section 459S). If the formalities prescribed by the Corporations Act have been complied with, and the application is not opposed or not successfully opposed the Court will order that the company be wound up. A liquidator will be appointed in accordance with the consent to act, or if none is filed, the Court will appoint a liquidator.

18.9 What happens after the order is made?

The legal practitioner must notify the liquidator of his appointment no later than the day after the order was made. The liquidator must then publish a notice of the winding up order and the liquidator's appointment. Such a notice must be in accordance with Form 11 and comply with Rules 2.11 and 2.12 with respect to publication (Rule 5.11).

The creditor must also provide ASIC with an updated ASIC Form 519 Notice advising of the outcome of the hearing of the application. The order made must then be entered into the Court's records and a sealed copy of that order must be served on ASIC, the company and the liquidator no later than 7 days after the order was made by the Court. The legal practitioner should then arrange for the taxation of costs so that a proof of debt can be lodged.

18.10 References

Parts 5.4 and 5.5 of the Corporations Act
Supreme Court (Corporations) Rules 1999

19

Important resources

ACT Government: www.act.gov.au

Australian Competition and Consumer Commission (ACCC) web-site: www.accc.gov.au

Australian Prudential Regulation Authority (APRA) web site: www.apra.gov.au

Australian Securities and Investments Commission (ASIC) web site: www.asic.gov.au

Australian Securities Exchange Limited (ASX) web site: www.asx.com.au

ASIC Info-line: 1300 300 630

Commonwealth Government Entry Point: www.fed.gov.au

Commonwealth Government Treasury web site: www.treasury.gov.au

The Takeovers Panel web site: www.takeovers.gov.au

Foreign Investment Review Board (FIRB) web site: www.firb.gov.au

Queensland Government web site: www.qld.gov.au

Northern Territory Government web site: www.nt.gov.au

NSW Government web site: www.nsw.gov.au

NSW Department of Fair Trading web-site: www.dft.nsw.gov.au

NSW Office of State Revenue (OSR) web-site: www.osr.nsw.gov.au

South Australian Government web site: www.sa.gov.au

Tasmanian Government web site: www.tas.gov.au

Victorian Government web site: www.vic.gov.au

Western Australian Government web site: www.wa.gov.au