COMPANIES AND SECURITIES ADVISORY COMMITTEE

PROSPECTUS LAW REFORM SUB-COMMITTEE

REPORT

MARCH 1992

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INTRODUCTION

Background

1. The Prospectus Law Reform Sub-Committee (the "Sub-Committee") was established as a Sub-Committee of the Companies and Securities Advisory Committee ("CASAC" or "the Advisory Committee") in July 1991.

Objective of the Sub-Committee's Review

2. The objective of the Sub-Committee was to review the prospectus provisions of the Corporations Law and to recommend any reforms in respect of those provisions which would facilitate the efficient preparation of prospectuses without compromising the information needs of investors. The ultimate purpose of the review was to determine the problems that existed in the Corporations Law system and recommend possible solutions to the Federal Attorney-General.

Membership of the Sub-Committee

3. The members of the Sub-Committee are:

Wayne Lonergan (Chairman)	Coopers & Lybrand
John McIntosh	McIntosh Hamson Goare Govett Limited
Norman O'Bryan	Minter Ellison
Rowan Ross	BT Australia
Simon Moore (Secretary)	Coopers & Lybrand

4. The members of the sub-committee were assisted in the preparation of the Report by Andrew Moore (Coopers & Lybrand), John Kluver (CASAC), Mark Blair (CASAC) and Jillian Orchiston (CASAC).

The Review Process

The Role of the Sub-Committee

5. The Sub-Committee held regular meetings to discuss all aspects of prospectus law reform. Draft issue papers were prepared for each meeting to facilitate discussion. Recommendations from the public submissions and concerns expressed by members of the Consultative Group were incorporated into these issue papers.

6. From the outset, the Sub-Committee sought to establish a conceptual framework by debating key issues of prospectus law. Particular attention was given to the issues raised in the public submissions and by members of the Consultative Group.

7. Having established a conceptual framework the Sub-Committee sought to resolve the more specific problems which it had identified and which had been brought to its attention. This process involved discussion of all sections of the Corporations Law relevant to prospectuses.

The Role of the Consultative Group

8. The Consultative Group was established on the initiative of the Sub-Committee. The Sub-committee wanted to ensure that the review of prospectus law incorporated the views of all major professional and industry bodies in the country. These bodies were invited to nominate representatives to participate in the Group. Members of the Group are listed in Appendix A to this report.

9. A meeting of the Consultative Group was held on 9 October 1991, in Sydney. The meeting provided a useful forum for the discussion and debate of those areas of prospectus law of particular concern to the business community. Members of the Consultative Group also made written and verbal submissions to the Sub-Committee. Feedback from members of the Group was duly considered prior to finalisation of this Report.

Role of the Public Submissions

10. The Sub-Committee invited submissions from interested parties to address the following issues:

(a) problems encountered in compliance with the prospectus provisions of the Corporations Law;

(b) perceived inadequacies of the current legislation; and

(c) proposed solutions to any perceived problems.

11. The closing date for submissions was 30 August 1991. Several requests were received to lodge submissions after this date. All these requests were acceded to. 61 submissions were received from a variety of different sources including law firms, fund managers, industry bodies, accounting firms, merchant banks, large and small corporations and members of the general public. Appendix B contains a list of persons and organisations from whom submissions were received.

12. All submissions were summarised and the recommendations for reform contained in the submissions were discussed in meetings of the Sub-Committee. Whilst the Sub-Committee did not agree with all the recommendations for reform, the submissions were extremely useful in identifying those areas of the law causing interested parties the most concern. This provided a focus for much of the Sub-Committee's discussion.

The Role of the Advisory Committee

13. The Companies and Securities Advisory Committee is established under the Australian Securities Commission Act 1989. Section 148 of this Act specifies the functions of the Advisory Committee:

148(1) - The Advisory Committee's functions are, on its own initiative or when requested by the Minister, to advise the Minister, and to make to the Minister such recommendations as it thinks fit, about any matter connected with:

(a) a proposal to make a national scheme law, or to make amendments of a national scheme law; the operation or administration of a national scheme law; (c) law reform in relation to a national scheme law; (d) companies, securities or the futures industry; or

(e) a proposal for improving the efficiency of the securities markets or futures markets:.

The members of the Advisory Committee as at the date of this Report:

Mark Burrows (Convenor)	Don Argus	John Barner
Reg Barrett	Prof Philip Brown	David Crawford
Kevin Driscoll	William Gurry	Leigh Hall
Tony Harmell	Wayne Lonergan	Ann McCallum
Alan McGregor	Mark Rayher	Andrew Turnbull

Structure of this Report

14. Following this Introduction and the Executive Summary, the remainder of this Report is divided into two major sections, namely:

(a) General Concepts Review (Part III)

The General Concepts Review identifies the key conceptual and philosophical issues arising out of the prospectus provisions of the Corporations Law.

(b) Section-by-Section Review (Part IV)

The Section-by-Section Review addresses problems in relation to the operation and drafting of specific sections of the Corporations Law relevant to prospectuses. The conceptual framework established in the General Concepts Review formed the fundamental basis for the proposed solutions to these problems.

II EXECUTIVE SUMMARY

Introduction

15. The Executive Summary is divided into the following sections:

* Continuous disclosure
* Collective investments
* Definitions
* Disclosure
* Registration
* Excluded issues
* Rights issues
* Secondary trading
* Liability and defences
* Securities hawking
* Advertising
* Supplementary prospectuses
* Miscellaneous

16. In general, each section includes:

(a) an outline of the general view of the Sub-Committee; and

(b) a summary of the Sub-Committee's recommendations.

17. The Sub-Committee has made 53 recommendations for amendment and recommendations for repeal. The key recommendations of the Sub-Committee are to:

* redraft the definition of prospectus;

* clarify the definition of securities requiring a prospectus;

* clarify the persons considered to authorise or cause the issue of a prospectus;

* restrain the power to prescribe prospectus content by regulation;

* reverse the onus of proof in S765 to facilitate the inclusion of forecasts in prospectuses;

* restrict the period in which prospectuses must be registered to two business days;

* allow investors with an investment over $500,000 to "top up" their investment without requiring a prospectus;

* clarify how the number of offers should be determined for the purposes of the 20 offers in 12 months exclusion;

* significantly reduce the disclosure requirements for rights issue prospectuses;

* provide a complete exemption from the prospectus provisions of the Law for secondary trading of listed securities;

* extend the exemption for secondary trading of listed securities to securities of approved listed foreign corporations, determined at the discretion of the ASC;

* repeal S1030(1A) and clarify the intended anti-avoidance purpose of S 1030;

* remove the overlap between the Corporations Law and the Trade Practices Act with respect to conduct in relation to prospectuses;

* extend the availability of the due diligence defence to any party incurring liability in respect of a defective prospectus;

* clarify the liability position of experts on due diligence committees;

* exempt the ASX from prospectus liabilities;

* permit a reprinted prospectus when a supplementary prospectus is required to be lodged;

* repeal the securities hawking provisions for listed securities by licenced securities dealers;

* remove unnecessary advertising restraints for companies which are to be listed or which are listed;

* restrict the use of interim stop orders

Continuous Disclosure

18. The issue of continuous disclosure is important to the prospectus law reform debate. The resolution of many practical problems which have been experienced with the prospectus provisions of the Corporations Law will be influenced either directly or indirectly by the implementation of a regime of continuous disclosure.

19. The Sub-Committee supports the concept of continuous disclosure.

Collective Investments

20. A number of submissions received by the Sub-Committee contained recommendations in respect of collective investments (e.g. cash management trusts, mortgage trusts). Some of these recommendations were considered to be beyond the scope of the Sub-Committee's review and it is suggested that they be considered in light of the joint review of collective investments being conducted by the Australian Law Reform Commission CALRC") and CASAC.

Definitions

21. The Sub-Committee believes that certain definitions contained in the Corporations Law relevant to prospectuses could be amended or altered in scope to clarify ambiguities and inconsistencies.

Recommendations

22. The Sub-Committee recommends redrafting the definition of prospectus as it is concerned that instruments which are not, in reality, prospectuses (such as enclosure letters) are currently inadvertently treated as such by the legislation.

23. The Sub-Committee recommends that in order to remove uncertainty in the interpretation of S1018(1), the definition of "securities" to which S1018(1) relates be clarified. S92 provides two definitions of securities; one is a definition of "securities" and the other is a definition of "securities when used in relation to a body corporate". Currently, it is not clear whether "securities of a corporation" referred to in S 1018(1) should be interpreted in the light of the S92 definition of "securities" or the S92 definition of "securities when used in relation to a body corporate".

24. The Sub-Committee recommends that the definition of "securities" in the context of S 1018(1) be expanded to expressly cover options and any other rights or interests in respect of unissued securities, and warrants and similar rights in respect of issued securities. Furthermore, the Sub-Committee recommends that the definition be expanded so as to include any investment right or interest which is accepted for trading on the Australian Stock Exchange or any other Australian securities market or is accepted by the Australian business community as able to be traded. This will allow the Australian securities markets to develop new securities from time to time which the definition will catch generically rather than by prescription.

25. The Sub-Committee recommends that the parties who are considered to "authorise or cause the issue of a prospectus" be specifically restricted to include only directors, underwriters, promoters and persons covered by S 1030(4). This should remove the uncertainty which certain parties (e.g. trustees and members of due diligence committees) have experienced with regard to the applicability of provisions such as S996 and S1011.

26. The Sub-Committee recommends that the definition of "promoter" be redrafted to the effect that it does not include experts merely because they are members of due diligence committees. This should ensure that such experts are not considered to authorise or cause the issue of a prospectus merely by their participation on a due diligence committee.

Disclosure

27. The Sub-Committee supports the philosophy underlying S 1022 and considers that the advantages of a general, or non-prescriptive, disclosure obligation (which places the onus on the prospectus preparers to determine the information which is disclosed to investors) substantially outweigh any perceived disadvantages.

28. Consistent with its support for the philosophy underlying S 1022, the Sub-Committee does not support the call for mandatory prescriptive disclosure or any departure from the philosophy of S 1022. The Sub-Committee does, however, support the encouragement of industry bodies to develop and offer non-mandatory "best practice" disclosure guidelines.

29. The view of the Sub-Committee is that the inclusion of forecasts in prospectuses is desirable and should be encouraged. However, consistent with its support for the philosophy of S 1022, the Sub-Committee believes that the inclusion of forecasts should not be made mandatory.

Recommendations

30. The Sub-Committee received numerous suggestions that the ASC use its power to make regulations to require mandatory disclosure of certain information (e.g. key data summaries, Investigating Accountants Reports). The Sub-Committee recommends that the use of the power to prescribe content by regulation (S 1021(7)) not be exercised so as to subvert the philosophy of S 1022. This recommendation is made in support of the Sub-Committee's endorsement of the philosophy of S1022.

31. The Sub-Committee recommends that the reverse onus of proof in S765 should not apply to forecasts included in prospectuses and that S765 be amended accordingly. Currently the reverse onus of proof in S765 provides too great a disincentive to include forecasts in a prospectus even though their exclusion risks being considered a material omission.

32. The Sub-Committee recommends that S 1022(3)(e) be amended by replacing the word "known" with "available and which could reasonably be expected to be known". The problem with the wording as it currently stands is that it is almost impossible to ascertain what is "known". The recommended amendment should ensure that S 1022(3)(e) includes statutory accounts which will correct the current ASC interpretation that they are not assumed to be known.

Registration

33. The Sub-Committee endorses the philosophy that there should be no detailed pre-vetting of prospectuses by the ASC. The Sub-Committee considers that the pre-vetting process is time and cost inefficient particularly when conducted in the context of S 1022 where the lack of a prescribed content and format for prospectuses makes a standardised review process impractical.

Recommendations

34. The Sub-Committee recommends that the time in which the ASC must register prospectuses be limited to two business days. This should be done in the same way it is for Part A Statements by deeming a prospectus to be registered, if by 5pm on the next day (being a day on which the office of the ASC at which the prospectus was lodged is open to the public) after the day on which the prospectus was lodged, the ASC has neither registered nor refused to register the prospectus. This recommendation is made in support of the Sub-Committee's endorsement of the philosophy that there should be no detailed pre-vetting of prospectuses by the ASC.

35. The Sub-Committee proposes that if the recommendation to restrict the registration period to two business days (see above) is not adopted then S 1020A should be amended to require a prospectus to be lodged 28 days prior to the intended issue and, if the prospectus is registrable, registered within 14 days of the issue. Currently, if a prospectus is registered late in the registration period there is insufficient time to organise for its final printing and distribution prior to the date of intended issue.

Excluded Issues

36. The Sub-Committee endorses the general approach used in the Corporations Law to determine which fundraising schemes should require a prospectus. The recommendations below represent proposed refinements to certain exclusions created by the legislation. These refinements mostly relate to closing potential loopholes and clarifying uncertainties.

37. The Sub-Committee received several submissions recommending special exclusions from the prospectus provisions of the Corporations Law (e.g. employee share ownership plans, investment in film and television production). It is the view of the Sub-Committee that it is a matter of government policy whether special exclusions should be allowed from the prospectus provisions of the Corporations Law. As a general principle, the Sub-Committee does not consider that one type of issue or issuer should be preferred to another because this has the effect of diverting economic activity from the non-preferred to the preferred type.

Recommendations

38. The Sub-Committee recommends that the intention of paragraph (a) of S1017 be clarified to exempt from the operation of Division 2 "offers" and "invitations" leading to an "excluded issue of securities" if this was the original intention of the legislation. Currently S1017 paragraph (a) exempts an "excluded issue of securities" whereas S1018 only prohibits offers and invitations.

39. The Sub-Committee recommends that the definition of "approved unlisted corporation" be extended to related bodies corporate under the definitions in S50 and to trusts established for the specific purpose of an employee share ownership plan ("ESOP") provided the related corporation or its ESOP trust are approved by the ASC. Currently, exemption from registration extends only to shares or prescribed interests made available by a corporation to its own employees.

40. The Sub-Committee recommends the wording in Regulation 7.12.06(b) should be adopted in S66(3)(a) such that an exclusion is available to an offer for subscription or an invitation to subscribe, "if the amount payable by each person to whom the offer is made or the invitation is issued is at least $500,000." Currently, it would appear that an exclusion is available under S66(3)(a) when offers for subscription or invitations to subscribe for amounts greater than $500,000 are made but where subsequent acceptance is for an amount less than $500,000.

41. The Sub-Committee recommends that for reasons of commerciality S66(3)(a) be amended such that an offer to an investor who already has an investment of $500,000 or greater and who wishes to invest additional funds in amounts less than $500,000 does not require a prospectus. The Sub-Committee suggests, however, that care be taken in drafting the recommended amendment to ensure loopholes are not mated.

42. The Sub-Committee recommends that S66(3) be amended to provide a specific exemption for bonus issues of securities. Whilst an exemption may seem to be available by virtue of S66(3)(c) this may not be the case in all circumstances.

43. The Sub-Committee recommends that to eliminate uncertainty the exemption provided by S66(3)(d) should be clarified such that the only offers counted in relation to a particular transaction involving securities of a corporation are those made during the previous 12 months (in relation to securities of that corporation) by a particular offeror and/or his associates, including any agents acting on their behalf.

44. The Sub-Committee recommends that S66(3)(d) be clarified by amendment so that exempt offers are not counted for the purposes of the 20 offers in 12 months exemption. This will make it much simpler to accurately quantify the number of offers that have been made for the purposes of determining whether an exclusion from the prospectus provisions is available.

45. The Sub-Committee recommends that prescribed interests get the benefit of the exemption provided by S66(2)(d) and (3)(d) unless there is a compelling reason for not extending the exemption. It is important that there be consistency in the legislative treatment of shares and prescribed interests.

46. The Sub-Committee recommends that S66(2)(m) be amended to have the effect that the exclusion is available to persons who "request to exercise the fight" to reinvest or switch. Currently the exemption is only available if the interest holder exercised the fight to reinvest or switch, and rarely does an interest holder have such a legally enforceable right.

47. The Sub-Committee recommends that an amendment should be made to S66(2)(m) to the effect that an application form can be included with a prospectus. Currently, such an application form must be "attached to" a prospectus. This amendment should enable much simpler application forms to be used by investors wishing to switch or reinvest. Currently, application forms must be able to cater for numerous switching and reinvesting alternatives making such forms unnecessarily complicated.

48. The Sub-Committee recommends that the exemption in Regulation 7.12.06(j) (re offers to investors who control amounts in excess of $10 million for the purposes of investment in securities) should be reworded to clarify the intended exemption. Currently it is unclear whether there is a requirement for the securities to be liquid or whether a warranty from the investor will be needed at the time of making the offer that the offeree has continued to satisfy the exclusion test. This is important because the offeror, who bears liability for the prospectus, is at risk if the offeree's true status is other than as disclosed at the time of the offer.

Rights Issues

49. Although the requirement for a prospectus for a rights issue might appear contrary to the deregulatory approach underlying the prospectus provisions of the Corporations Law the Sub-Committee believes that this requirement should remain for the following reasons:

(a) the information needs of existing shareholders when it comes to an additional investment of new capital in a company, are substantially no different to those of investors in other primary issues;

(b) cost and delays in preparing rights issue prospectuses will be significantly reduced if continuous disclosure requirements are met.

Recommendations

50. In recognition of the cost and delays involved with the preparation of rights issue prospectuses, the Sub-Committee believes that there should be a different disclosure regime for these prospectuses. Accordingly, the Sub-Committee recommends that the information required to be disclosed in rights issue prospectuses be specifically limited to:

(a) terms and conditions of the offer,

(b) purpose of the issue;

(c) dividend policy and ranking;

(d) identification of all statements lodged in accordance with the prevailing continuous disclosure regime since the last annual report; and

(e) an express confirmation that there is no other information of which the issuing corporation is aware that should be brought to the attention of potential subscribers to the rights issue (or if there is such information, the details of it).

Secondary Trading

51. The Sub-Committee believes that in the interests of ensuring efficient operation of the capital markets that the exemption for secondary trading of listed securities should be simple and unambiguous. The Sub-Committee considers it undesirable to have a substantial regulatory overlap in relation to secondary trading as such an overlap creates uncertainty for those responsible for compliance.

Recommendations

52. The Sub-Committee recommends that S1018 be amended such that an unqualified exemption is provided for secondary trading of listed securities. The structure of the current exemption is unnecessarily complicated and the effect of S1018(5) in particular will become less relevant as time goes by because of the ASX requirement that all new listings of securities will require a prospectus.

53. The Sub-Committee recommends that S1018 be amended to extend the listed securities exemption to approved listed foreign corporations (as prescribed by regulation) which are acquired through licenced dealers. The Sub-Committee recognises the potential political and diplomatic difficulties in providing such an exemption on a country by country basis. It is therefore recommended that the ASC grants the exemption on a company by company basis to foreign corporations which can demonstrate compliance with disclosure and listing rule standards equivalent to Corporations Law and ASX Listing Rule requirements.

54. The Sub-Committee recommends that S1018(8) should be repealed. The exemption for secondary trading of listed securities should be complete and unequivocal. It is important that uncertainty be eliminated from secondary trading transactions involving listed securities. The existence of S 1018(8) creates the possibility that secondary trading in listed securities will require a prospectus. Further, the fact that a prospectus is required, or deemed to exist, may not be known. A dealer in securities will often be unaware of whether the securities being traded have been involved in a breach of S 1030 and may inadvertently become exposed to liability pursuant to S 1030(4).

55. The Sub-Committee supports the inclusion of provisions which prohibit avoidance of the prospectus provisions. Therefore it is recommended that S1030(1A) be repealed and that S1030 be amended to clarify that it is an anti-avoidance provision aimed at the mischief of a corporation seeking to avoid lodging or registering a prospectus by exploiting one of the excluded offer exemptions. S1030(1A) actually provides an avoidance opportunity by virtue of excluding SEATS secondary trading from the operation of S1030. Furthermore there is unnecessary uncertainty in the case of secondary trading following the legitimate use of an excluded offer exemption.

Liability and Defences

56. The Sub-Committee supports the clarification of the categories of persons exposed to liability for prospectuses. This is consistent with its support for the underlying philosophy of S 1022 and its support for no detailed pre-vetting of prospectuses by the ASC.

57. The Sub-Committee supports the concept of a due diligence defence. The Sub-Committee does not, however, support any attempt to define due diligence in the legislation.

Recommendations

58. The Sub-Committee recommends that the provisions of the Corporations Law which relate specifically to prospectuses should prevail over S52 of the Trade Practices Act in cases where there is an overlap. As a consequence, the Sub-Committee recommends that S 1005(3) be amended. The existing overlap creates uncertainty which is detrimental to the efficient operation of the capital markets.

59. The Sub-Committee recommends that a common due diligence defence, worded as in S 1011 (1), should be available to any party who may incur liability in respect of a defective prospectus and that the defence should be available against both civil and criminal liability. The current system of defences is inadequate because it does not provide defences for all persons who are potentially liable and it does not provide exactly the same defence for all classes of person (due to different wordings).

60. The Sub-Committee recommends that the S 1011 defence be made specifically available to officers and employees seen to be "involved in the contravention" by virtue of S79.

61. The Sub-Committee recommends that S996 be amended so as not to be applicable if:

(a) a prospectus is not required to be lodged;

(b) the transaction consideration is in excess of $500,000; and the party acquiring securities pursuant to the prospectus controls an amount of not less than $10,000,000 for the purposes of investment in securities.

Prior to recent amendment, S996 applied to all prospectuses, lodged or otherwise. The scope of the section was narrowed by the Corporations Legislation Amendment Act (No. 2) 1991 to apply only to lodged prospectuses. The recommendation of this Sub-Committee is that the scope now be broadened slightly to give smaller investors the protection of S996 even if a prospectus is not required to be lodged.

62. The Sub-Committee recommends that S 1017 be amended to make it clear that an offer or invitation exempted by virtue of S1018(2) or (5) or Regulation 7.12.02 (re Part A Statements and offer documents relating to share swap takeover schemes) is an excluded offer or invitation. Currently, S996 potentially applies to offers or invitations despite being offers or invitations for which a prospectus is not required. S996(1A) specifically exempts excluded offers and excluded invitations.

63. The Sub-Committee recommends that the Law be amended to make clear that persons who are or have been advisers to, or business counterparties with, the offering entity shall not for that reason alone not be considered to be "another person" for the purposes of S 1011 (1)(c). This should help contain the cost of due diligence exercises within reasonable limits as persons who can avail themselves of the S101 l(1)(c) defence will be saved the cost of conducting due diligence on the work performed by their advisers and business counterparties.

64. The Sub-Committee recommends that the definition of "another person" in S 1011(2) be amended to remove the possible interpretation that every person involved in the preparation of the prospectus can be seen to be an "agent" of the corporation. Currently, it is possible to interpret the legislation in such a way that "the corporation" can not avail itself of the S101 l(1)(b) and (c) defences.

65. The Sub-Committee recommends that guidance be provided on how "the corporation" in S1006(2)(a) should be interpreted in regard to prescribed interest transactions. Currently, it is not clear whether "the corporation" is the management company, the trustee or one of the other potential participants in the prescribed interest offering.

66. The Sub-Committee recommends that as an interim measure, S1006(3) be amended to require trustees to include a report in prospectuses with which they are associated outlining what role (if any) they have played in the preparation of such prospectuses. This should clarify the role of the trustee for the purposes of establishing potential liability and available defences. Ultimately, the joint review of collective investments being conducted by the ALRC and CASAC should clarify the role of trustees and thereby assist the interpretation of their role in prospectus preparation.

67. The Sub-Committee recommends that S 1011(1) be narrowed such that persons who can avail themselves of this defence for liability incurred under S 1005 can only do so "in respect of a false or misleading statement in or a material omission from a prospectus". Currently the S 1011 defence is expressed to be a defence to all S 1005 liabilities yet it relates solely to false or misleading statements and material omissions. Similar wording to that used in S 1010(1) should be adopted.

68. The Sub-Committee recommends that the ASX and its officers be exempted expressly from any liability which they might otherwise incur under Part 7.1.1 by reason of reviewing a draft prospectus prior to its lodgement with the ASC. Because of ASX concerns that it would incur liability under Part 7.11 if it is in any way involved in the formulation of a prospectus, even to the extent of commenting on it only, it is not currently possible to make a formal application for the admission of a company to the official list of the ASX prior to the time of lodgement of a prospectus with the ASC.

Supplementary Prospectuses

Recommendations

69. The Sub-Committee recommends that the legislation be amended to require notification in the general press of the existence of a supplementary prospectus and details of its availability. This will ensure that persons with a copy of the original prospectus are given a reasonable opportunity to get the benefit of the supplementary advice.

70. The Sub-Committee recommends that the legislation be amended to make it clear that an issuer can issue a reprinted prospectus which incorporates amendments. In cases where several supplementary prospectuses are lodged (as is often the case for continuous debt issuers such as finance companies) a reprinted prospectus would be much clearer for a potential investor.

71. The Sub-Committee recommends that S 1024(1)(b)(ii) be mended to ensure that supplementary prospectuses are allowed to be lodged where it is subsequently realised that a matter in existence at issue date requires some form of amendment. Currently, it appears that supplementary prospectuses can only be issued where the preparers become aware of a matter which arose after the preparation of the prospectus.

Securities Hawking

Recommendation

72. The Sub-Committee recommends that the remaining provisions of Division 6 of Part 7.12 (the sharehawking provisions) be amended to not apply to listed securities by licenced securities dealers. S1018 regulates all offers and invitations and therefore Division 6 of Part 7.12 serves no useful purpose and its continued existence creates uncertainty which hinders the efficient operation of the capital markets.

Advertising

Recommendation

73. The Sub-Committee recommends that S 1025 and S 1026 be redrafted to not apply to listed companies or companies which are to be listed. S995, S52 of the Trade Practices Act and relevant provisions of the States' Fair Trading Acts provide sufficient recourse for persons suffering loss as a result of misleading or dishonest advertising in relation to securities. The repeal of these provisions will also enable the public to be adequately informed of pending issues, including privatisation issues, which in the opinion of the Sub-Committee will enhance the efficiency of the capital markets.

Miscellaneous

Recommendations

74. The Sub-Committee recommends that S1020(b) be amended so that in the case of a renounceable rights issue the form may be "accompanied by" a copy of the prospectus, rather than having to be "attached to" the prospectus. Entitlements trading and dealing in renounceable rights worked acceptably well in the past and there would appear to be no need to change the established practice.

75. The Sub-Committee recommends that the date referred to in S 1021 (3) be specifically required to be the date that the prospectus is signed by the directors (in the case of primary prospectuses) or the sellers (in the case of secondary prospectuses). This should remove general uncertainty and also eliminate the time gap created when directors sign a prospectus which is dated at some time in the future.

76. The Sub-Committee recommends that the meaning of "material contract" be clarified in the legislation.

77. The Sub-Committee recommends that consideration be given to repealing S 1029(b) as contracts may contain commercially sensitive informative which a company should not be required to provide for display particularly if details of such parts are not required to be disclosed in accordance with S 1022.

78. The Sub-Committee recommends that S1031 be amended to provide greater certainty for foreign corporations listed on overseas exchanges. It may be difficult in the case of foreign stock exchanges (due to different local requirements) to comply with certain aspects of S 1031 within the timeframes specified

79. The Sub-Committee recommends that the legislation be amended so as not to allow interim stop orders to be given under S1033 where there is no real possibility that securities will be allotted or issued prior to disclosure of changed circumstances in a supplementary prospectus or prior to the holding of a hearing. The issue of an interim stop order could have a potentially irremediable effect on the market for the securities in question (particularly in the case of a continuous debt raiser).

80. The Sub-Committee recommends that S1035(4) be repealed. The sub-section is contrary to the thrust of the Corporations Law with regard to non-prescriptive disclosure. There would appear to be no reason why an issuer should be prevented from offering for subscription $1.00 shares paid to $0.01 if the issuer has otherwise complied with the prospectus requirements.

81. The Sub-Committee recommends that the application of S 1038 be confined to material changes to contracts during the period between allotment and the statutory meeting as material changes to contracts in the period before allotment can be regulated by S1024 (i.e. by supplementary prospectus).

82. The Sub-Committee recommends that S 1063 be reviewed with a view to ensuring that ordinary business relationships not intended by the Government to be regulated are clearly made exceptions.

83. The Sub-Committee recommends that the definition of franchise in Regulation 1.02(1) be reviewed with a view to making it broader and applying the broader definition retrospectively. It has been suggested that the definition is currently too narrow and as a result does not reflect the Government's policy of exempting all ordinary business relationships.

84. The Sub-Committee recommends that consideration be given to clarifying the meaning of the word "strive" in S 1069(1)(a) and Regulation 7.12.15(1)(e).

III GENERAL CONCEPTS REVIEW

INTRODUCTION

85. The essential aim of the General Concepts Review was to develop a framework within which specific recommendations for prospectus law reform could be addressed. Conducting a structured conceptual review also served the purpose of ensuring that important matters were not omitted from this Report simply because they did not relate specifically to a particular section of the Corporations Law.

86. The key conceptual issues discussed in this Report are:

* Interaction with a continuous disclosure regime
* Disclosure requirements
* Registration and pre-vetting
* Excluded issues offers and invitations
* Rights issues
* Secondary trading
* Securities hawking
* Liability
* Defences
* Cost of fundraising

INTERACTION WITH A CONTINUOUS DISCLOSURE REGIME

87. The issue of continuous disclosure is important to the prospectus law reform debate. The resolution of many practical problems which have been experienced with the prospectus provisions of the Corporations Law will be influenced either directly or indirectly by the implementation of a regime of continuous disclosure. The recommendations of the Sub-Committee have generally assumed that prospectus reforms will be implemented contemporaneously with reforms in the area of continuous disclosure.

CASAC Continuous Disclosure Review

88. The Companies & Securities Advisory Committee ("CASAC") handed down its "Report on an Enhanced Statutory Disclosure System" ("the CASAC Report")' to the Federal Attorney-General in September 1991. The report was prepared in response to a request from the Federal Attorney-General in June 1991 to examine the need for a legislatively-based continuous disclosure regime and the nature of any such scheme. The report is currently with the Attorney-General and it has been distributed for comment to major industry and professional bodies.

The Basic Recommendation of the CASAC Report

89. The CASAC Report recommends that "disclosing entities" be required to report all beneficial or adverse "material matters". Disclosing entities are defined to include:

* all listed companies/trusts;

* all public companies with 50 or more members and/or holders of debentures;

* all companies and prescribed interests with total (gross) assets in excess of $10 million;

* public sector corporations that carry on a business.

90. A material matter is defined to be:

(a) any change in, or reassessment of, the disclosing entity of which equity or debt investors would reasonably require disclosure for the purpose of their making an informed assessment of the assets and liabilities, financial position, profits and losses, or prospects of the disclosing entity (i.e. a Corporations Law S1022 type test); and

any matter that is likely to materially affect the price of the disclosing entity's debt or equity securities or is necessary to avoid the establishment or continuation of a false market in those securities (i.e. a test similar to the old ASX Listing Rule 3A(1)).

Abbreviated Prospectuses

91. The CASAC Report recommends that securities issuers should be entitled to incorporate in their prospectuses, by reference, information previously disclosed in any "Statement of Material Matter" and that the prospectus should include a summary of this information. It is recommended that such "abbreviation" should not be permitted for primary offers unless the issuer has been a disclosing entity for at least one year immediately prior to the lodgement date of the prospectus.

Interim Reporting

92. The CASAC Report recommends that all disclosing entities that are required to lodge annual reports under the Corporations Law should also be required to lodge half-yearly reports with the ASC (and if listed, with the ASX). It is proposed that a full audit of half yearly reports would not be required. Instead these reports would be subject to a "limited review" by auditors.

93. The CASAC Report does not recommend mandatory quarterly reporting whilst it sees some merit in this concept. It proposes that a quarterly reporting requirement could be a matter for future review.

Annual Reporting Requirements

94. The CASAC Report recommends with respect to annual reporting that exempt proprietary companies should be required to include a set of accounts in their annual return.

Proposed Timetable

95. In a press release dated 13 October 1991, the Federal Attorney-General announced his intention to implement improved disclosure requirements under the Corporations Law once consultation with the business community on the CASAC Report had been undertaken. He stated that he would anticipate the exposure draft by August 1992 for introduction in the Budget Session of Parliament.

Conclusion

96. The Sub-Committee supports the concept of continuous disclosure. In particular, the Sub. Committee endorses the proposal that some form of abbreviated prospectus be allowed for listed entities which have fulfilled their continuous disclosure obligations.

DISCLOSURE REQUIREMENTS

Outline of the Approach under the Corporations Law

97. The Corporations Law has adopted a general, or non-prescriptive, disclosure obligation, which places the onus on the prospectus preparers to determine the information which is to be disclosed to investors. The key provision giving effect to this general form of disclosure is S 1022. This section provides that a prospectus must:

... contain all such information as investors and their professional advisers would reasonably require, and reasonably expect to find in the prospectus, for the purpose of making an informed assessment of:

(a) the assets and liabilities, financial position, profits and losses, and prospects of the corporation; and

(b) the rights attaching to the securities.

98. S 1022(3) provides guidance in determining what information to include in a prospectus by detailing certain matters to be considered. These matters are:

(a) the nature of the securities and of the corporation;

(b) the kinds of persons likely to consider subscribing for or buying the securities;

(c) the fact that certain matters may reasonably be expected to be known to professional advisers of any kind whom those persons may reasonably be expected to consult;

(d) whether the persons to whom the offers or invitations are to be made or issued are the holders of shares in the corporation and, if they are, to what extent (if any) relevant information has previously been given to them by the corporation under any law, any requirement of the business rules or listing rules of a securities exchange, or otherwise; and

(e) any information known to investors or their professional advisers by virtue of any Act, State Act or law of a Territory.

99. The general disclosure philosophy of S 1022 is based on S 163 of the United Kingdom Financial Services Act 1986.

100. S1021 of the Corporations Law sets out limited specific disclosure requirements for all prospectuses. The requirements contained in this section are not extensive and very little is prescribed in the way of detailed information content. However, S 1021 (7) does provide for prospectus contents to be specified by regulation.

Outline of the Approach under the Companies Code

101. The Companies Code prescribed contents for prospectuses in S98 and the relevant Regulations and Schedules thereto. Information prescribed by the NCSC was required to be disclosed by virtue of S98(eb).

Rationale for the Corporations Law Approach

102. The Explanatory Memorandum circulated when the Corporations Bill was first introduced into Federal Parliament ("the May 1988 Explanatory Memorandum") indicates that it was the intention of the new provisions to:

...ensure that the public is informed fairly about any invitation or offer of securities and is given all information relevant and necessary to the making of an informed investment decision .... (paragraph 3028)

103. With reference to the prospectus provisions of the Companies Code the May 1988 Explanatory Memorandum further stated that:

These provisions were specific and whilst requiring extensive quantities of material to be disclosed did not necessarily ensure that the investor received adequate information about the securities in question. (paragraph 3033)

104. The May 1988 Explanatory Memorandum also stated that the Companies Code disclosure requirements:

... did not always provide the information that private and professional investors need to make an informed investment decision. (paragraph 3045)

105. The clear intention of the change from a prescriptive to a general disclosure requirement was therefore to ensure that the preparers of prospectuses would concentrate on providing only relevant information to investors. It should be noted that a change back to a regime of prescriptive disclosure by making use of the power to make regulations prescribing prospectus content (per S 1021(7)) was not envisaged. The implication in the May 1988 Explanatory Memorandum was that this power is intended for occasional use only (paragraphs 3034, 3050).

Advantages and Disadvantages of a General Disclosure Requirement

Disadvantages

106. The disadvantages of a general disclosure requirement as opposed to a prescriptive disclosure requirement can be summarised as follows:

(a) Uncertainty

Persons involved in the preparation of a prospectus in accordance with a general disclosure requirement do not have the benefit of simply complying with a checklist for disclosure content but rather have to determine form and content themselves on a case by case basis by consideration of the information needs of investors. Given that information needs vary between individual investors, there will always be an element of uncertainty in identifying and agreeing upon an acceptable level of disclosure.

(b) Inconsistency and non-comparability

Prospectuses prepared in accordance with a prescriptive disclosure requirement will at least display consistency in form and content. It would be likely that prospectuses prepared under such a regime would therefore be reasonably comparable. There is some concern that prospectuses prepared under a general disclosure regime may not be consistent or comparable in form or content (e.g. Investigating Accountants Reports and key data summaries).

(c) Problems experienced with non-mandatory disclosure in respect of accounts preparation

The information required to be disclosed in a set of financial accounts is prescribed in Approved Accounting Standards, the Corporations Law and Schedule 5 to the Corporations Regulations. Some corporations have been reluctant to disclose information other than that required to be disclosed by law. Until recently, compliance with accounting standards was not required in cases where doing so would result in the financial statements not giving a "true and fair" view. This has now been changed such that compliance is mandatory. This change was effected by the deletion of S298(2) of the Corporations Law with the passing of the Corporations Legislation Amendment Act (No. 1) 1991.

A key motivation for the change in the law governing accounts preparation was the inconsistency experienced when preparers were given the option of over-riding the requirement to comply with prescriptive accounting standards. Being able to avoid compliance with accounting standards has, in the past, resulted in some preparers of accounts misrepresenting performance and financial position. The shift in prospectus disclosure philosophy to a general content requirement may result in similar problems arising to those experienced when a non-mandatory disclosure philosophy was adopted for accounts preparation.

(d) Cost and time inefficiency

It has been argued that, other things constant, the cost of a prospectus under a general disclosure regime is greater than under a prescriptive disclosure regime. The increased cost being attributed to the additional time and therefore cost of requiring advisers to determine and agree upon the prospectus form and content. This has been argued to be particularly onerous for small to medium sized businesses.

(e) Problems of interpretation by litigation

Litigation arising in respect of prospectuses that are considered to have omissions or false or misleading statements will ultimately result in guidance being given by the courts in respect of disclosure requirements. The disadvantages of such guidance are that:

(i) standards will only be created when a breach has occurred and a successful action has been taken to court. The fact that the guidance will only arise after the breach and after the time lapse for the litigation process to complete means that guidance from the courts may come too late. Furthermore, critical guidance may never become publicly known because some matters may be settled without ever going to court;

(ii) the interpretation by the courts may be inconsistent and therefore guidance by way of precedent may not be able to be relied on; and

(iii) the interpretation by the courts based on specific factual circumstances may become precedent applied to different circumstances where such application is inappropriate and/or inadequate;

(iv) the interpretation of what level of disclosure meets reasonable expectations may continue to escalate beyond the point justified by a cost-benefit analysis.

Advantages

107. The advantages of a general disclosure requirement such as that in S 1022 over a prescriptive disclosure requirement can be summarised as follows:

(a) Capital market efficiency

As a result of improved disclosure, securities will be more efficiently priced with substantial consequential benefits to investors and the capital markets generally.

(b) Relevance of information disclosed

Information disclosed under a general disclosure requirement is more likely to be relevant to investors as the information required to be disclosed is determined by reference to the current circumstances of the capital raising. Advantages flowing from the disclosure of only relevant information include:

(i) increased readability;

(ii) reduced likelihood for important information to be obscured; and

(iii) reduced confusion for investors.

(c) Reduced likelihood of omission of important information

Under a prescriptive disclosure regime, information which is particularly important and relevant to investors may be omitted because it is not specifically required to be disclosed. A general disclosure requirement ensures that such omissions cannot be made from a prospectus without attracting liability.

(d) Focus of prospectus preparers is on the information needs of users

Persons involved in the preparation of a prospectus under a general disclosure regime are effectively forced to be much more responsive to changing capital market circumstances and concentrate on the information needs of users, as opposed to blindly following a disclosure checklist with little or no regard for the relevance of information contained therein.

(e) Reactivity to changes in the market

A general disclosure requirement ensures that changes in investors' needs should always be taken into account in the preparation of a prospectus. A prescriptive disclosure requirement suffers from the problem of being inflexible in the event of a fundamental change in investors' needs or in market circumstances. Legislation can be changed, but the lead time is often several years. Such delays are unacceptable in today's fast changing capital markets.

(f) Other advantages

Other advantages of a general disclosure requirement include:

(i) encouraging greater securities research by investors and advisers, thereby ensuring that securities prices more closely, and quickly, reflect underlying economic values;

(ii) ensuring that equity resources in the Australian market are more effectively channelled into appropriate investments, and that funds are withheld from poorly performing corporations. This promotes capital market efficiency;

(iii) assisting potential equity or debt holders to better evaluate their investment alternatives;

(iv) minimising the opportunities of management perpetrating market abuses;

(v) improving managerial performance and accountability by providing the market with more timely indicators of corporate performance;

(vi) encouraging the growth of information systems within issuing corporations, thereby assisting directors and management in their decision making and compliance with their fiduciary duties.

Conclusion

108. The Sub-Committee supports the philosophy underlying S1022 and considers that the advantages of a general disclosure requirement substantially outweigh any perceived disadvantages.

Common Issues Raised with Respect to Disclosure Requirements

109. Many of the submissions received by the Sub-Committee raised concerns over S 1022. Two of the most commonly raised concerns were:

(a) the need for some form of prescriptive disclosure - whether it be mandatory or non-mandatory (although it should be emphasised that the Sub-Committee received only one recommendation for a return to the former Companies Code disclosure regime); and

(b) the difficulty of interpreting the requirement to inform investors of the "prospects" of the corporation.

Some Form of Prescriptive Disclosure

110. The types of prescriptive disclosure called for by the submissions include:

(a) key data summaries;

(b) plain English summaries;

(c) financial forecasts;

(d) independent reviews of financial information (e.g. Investigating Accountants Reports).

111. In addition to these calls for specific mandatory disclosure, a number of submissions recommended that non-mandatory "best practice" guidelines be established by either:

(a) the ASC; or

(b) relevant industry bodies.

Conclusion

112. Consistent with its support for the philosophy underlying S1022, the Sub-Committee does not support the call for mandatory prescriptive disclosure or any departure from the philosophy of S1022.

113. Consistent with its support for the philosophy underlying $1022, the Sub-Committee recommends that the use of the power to prescribe content by regulation not be exercised so as to subvert the philosophy of S1022.

114. The Sub-Committee believes it would not be possible to prescribe content for key data summaries or plain English summaries without making certain assumptions as to the content of the prospectuses being summarised. This would be contrary to the intent and philosophy of S1022.

115. The Sub-Committee does not consider it necessary to prescribe the need for independent reviews of financial information. Such reviews could be expected to form an essential part of the due diligence process without needing to be specifically required by the legislation.

116. The Sub-Committee supports the encouragement of industry bodies to develop and offer non-mandatory "best practice" disclosure guidelines.

Interpreting "Prospects"

117. The submissions indicated that there are practical difficulties associated with requiring a prospectus to provide details of the prospects of the corporation.

118. Whilst forecasting, by its very nature, is prone to error, it is the belief of the Sub-Committee that it is better to disclose forecasts with appropriate caveats and with details of the underlying assumptions than to disclose no forecast information.

119. Any statement about future performance is inherently uncertain. Parties responsible for prospectuses are therefore quite reasonably reluctant to assume responsibility for forecasts because of the legal liabilities that may arise if the actual results differ from those forecast. A practical difficulty then arises because the disincentive to disclose forecast information must be balanced with the competing requirement that a prospectus contain no material omissions.

120. Another practical difficulty in relation to "prospects" arises due to S765 of the Corporations Law. This section provides that a representation with respect to any future matter made by a person who does not have reasonable grounds for making the representation is taken to be misleading. Further, the onus of proof is on the person who made the representation to provide evidence that there were reasonable grounds for the representation otherwise he is deemed to have had reasonable grounds (and hence the statement is taken to be misleading). The onus of proof which applies in S765 is the reverse of that which normally applies where the plaintiff in such an action would have to prove that the statements of the defendants were in fact misleading. S765 is based upon S51A of the Trade Practices Act.

121. The reverse onus of proof in S765 provides an additional disincentive to make forecasts in a prospectus as any such forecast will be taken to be misleading unless reasonable grounds can be found to justify it. The reverse onus of proof in S765, coupled with the liability in S 1005, create a double jeopardy because a contravention may be proved without the need to show a causal link between the damages suffered and the forecast statement.

122. Whilst these factors create disincentives for issuers to provide information on the "prospects" of a corporation, it is doubtful whether prospectuses can truly satisfy investor needs without including some form of forecast (particularly in the case of Initial Public Offerings). This point is well illustrated by the public criticism following the failure of the Commonwealth Bank prospectus to disclose financial forecasts. In other words, the policies behind S765 and S 1022 (the latter of which requires a discussion of prospects which the former renders highly dangerous) come into an undesirable conflict.

123. Problems with the forecasts contained in the National Foods Limited ("NFL") prospectus resulted in the need to issue a supplementary prospectus. Clearly the additional time and costs associated with the preparation of a supplementary prospectus can be considerable. The issue of a supplementary prospectus could potentially damage the success of a fundraising exercise, particularly an Initial Public Offering. Due to the inherent uncertainty of forecast information, the issue of a supplementary prospectus under circumstances such as those of the NFL float is not likely to be an isolated occurrence.

124. The NFL float is frequently, but wrongly, cited as an example of the problems associated with the requirement to disclose forecast information. It is worth noting the positive aspects of the NFL float because it is these very circumstances that, quite correctly, the legislation aims to address. The release of the NFL supplementary prospectus indicated that the issuers of the NFL prospectus were aware of their obligations under the Corporations Law to advise of changes in forecast information relevant to the prospectus. The issue of a supplementary prospectus to inform investors of a downward revision of profit forecasts provides tangible evidence that investor protection has been enhanced under the Corporations Law.

125. The Sub-Committee believes that it is desirable that forecasts, at least for the remainder of the financial period in which the capital is raised, should be disclosed. However this should not be de mandatory.

126. It is the belief of the Sub-Committee that the market will require forecasts for most Initial Public Offerings and that this is a natural and healthy demand.

127. The Sub-Committee recognises the need for there to be appropriate disincentives to discourage over-enthusiastic promoters from overstating the prospects of an issue. However, the reverse onus of proof in S765 unduly discourages forecasts and this section should be amended so that it does not apply to forecasts included in prospectuses. The Sub-Committee considers that the liabilities created in Parts 7.11 and 7.12 of the Law provide sufficient investor protection in the prospectus context, without the additional burden of S765.

128. The Sub-Committee recognises that reversing the onus of proof in S765 may cause problems for plaintiffs as they may have difficulty ascertaining the basis for a particular forecast because this information might be known only to those associated with the promotion of the prospectus. In cases where a plaintiff has truly suffered loss or damage however it is likely that valid arguments could be raised to support a case that the forecasts included in the prospectus were not based on reasonable grounds (particularly if the assumptions used to generate the forecasts were disclosed in the prospectus).

Conclusion

129. The view of the Sub-Committee is that the inclusion of forecasts in prospectuses is desirable and should be encouraged. However, consistent with its support for the philosophy underlying S1022, the Sub-Committee believes that the inclusion of forecasts should not be made mandatory.

130. Forecasts should be treated like any other information that could be included in a prospectus. Forecasts should be subject to the same tests of relevance and should have available the normal due diligence defences. Accordingly, the Sub-Committee recommends that the reverse onus of proof in S765 should not apply to forecasts included in prospectuses and S765 should be amended accordingly.

REGISTRATION AND PRE-VETTING

Outline of the Approach under the Corporations Law

131. Under the Corporations Law, all prospectuses must be lodged with the ASC. Furthermore, unless specifically excluded, prospectuses must also be registered by the ASC. S 1020A provides that when a registrable prospectus is lodged the ASC must register the prospectus "as soon as possible and in any event within the prescribed period". Regulation 7.12.08 establishes that the prescribed period is 14 days.

132. S 1020A further provides that the ASC shall refuse to register a prospectus if:

(a) it appears that the prospectus does not comply with the legislation; or

(b) the ASC is of the opinion that the prospectus contains a false or misleading statement or that there is an omission from the prospectus.

133. The extent to which the ASC should go in determining whether a prospectus should be refused registration is not specified in the legislation.

134. ASC Policy Statement Release 2 titled "The Prospectus Provisions of the Corporations Law: The first three months" indicated that the ASC had adopted (as an initial practice) the following principles in respect of registration of prospectuses:

(a) not to provide advice on draft prospectuses or assist lodging parties in the preparation of documents to be lodged for registration;

(b) where a prospectus contains a few minor matters requiring rectification the ASC will notify the lodging party and a satisfactorily revised prospectus may be resubmitted for registration within 14 days of the original lodgement;

(c) if a prospectus does not comply with the law in a substantial respect, registration will be refused and the applicant will be required to lodge a fresh application for registration; and

(d) there will be no detailed pre-vetting.

135. ASC Policy Statement Release 5 titled "Section 1020A: Registration of Prospectuses" indicated that it was the ASC's intention to devote "less resources to examination of prospectuses than was employed under the Co-operative Scheme".

136. A further aspect of the Corporations Law relevant to pre-vetting concerns the stop order power of the ASC. Under S1033 the ASC can issue a stop order directing that no further securities to which an issue relates be issued. The circumstances under which a stop order can be issued are prescribed by S1033(2) to be:

(a) when the prospectus contravenes in a substantial respect any of the requirements of Division 2 of Part 7.12 of the Corporations Law;

(b) when the prospectus contains a statement, promise, estimate or forecast that is false, misleading or deceptive; and

(c) when the prospectus contains a material misrepresentation.

137. Another aspect of the Corporations Law relevant to pre-vetting concerns the requirement to issue supplementary prospectuses. S 1124 of the Corporations Law requires that a supplementary prospectus must be lodged when a significant change occurs affecting a matter contained in the original prospectus or a significant new matter arises. The supplementary prospectus must contain particulars of the change or new matter.

Outline of the Approach under the Companies Code

138. Under the Companies Code, a prospectus was required to be registered by the NCSC (or generally by a State CAC as delegate for the NCSC). The NCSC required a draft of the prospectus to be lodged prior to registration. The draft prospectus was pre-vetted by the NCSC and matters needing rectification were referred back to the issuer.

139. In pre-vetting a prospectus the NCSC was required by S102 of the Companies Code to:

(a) consider whether the prospectus complied with the requirements of the Code; and

(b) form an opinion that the prospectus did not contain any statement or matter that was false in any material particular or was materially misleading in the form and context in which it appeared.

140. It should be noted that the opinion required to be formed by the NCSC (as described in (b) above) is different to that currently required to be formed by the ASC. The requirement on the NCSC was a more exacting one. Broadly, the NCSC had to satisfy itself that the prospectus contained no misleading statements before registering the prospectus whereas the ASC is only required to hold up registration if, in the opinion of the ASC, the prospectus contains a misleading statement (or omission). The requirement imposed on the ASC is arguably not a demanding one. Whilst the Sub-Committee is aware of the stated policy of the ASC, evidence is yet to emerge as to whether the ASC will take a strict interpretation of its powers under S 1020A.

Rationale for the Corporations Law Approach

141. The most significant problem with the registration and pre-vetting regime under the Companies Code was the time and cost inefficiencies of the process.

142. A report by the Senate Standing Committee on Constitutional and Legal Affairs titled "The Role of Parliament in relation to the National Companies Scheme" (dated April 1987) details that it had received complaints that the pre-vetting process was slow and frustrating, often involving checking of minute and trivial points. Another complaint was that different interpretations of the pre-vetting process were adopted from one State to the next.

143. The May 1988 Explanatory Memorandum concurred with this view, stating:

Registration and vetting of prospectuses by the various state CAC offices has been the subject of numerous complaints, from businessmen and other persons who have been involved in prospectus preparation, as musing unnecessary delays and increased costs. (paragraph 3032)

144. It further noted that pre-vetting prospectuses involved a substantial part of the CAC's time and resources, yet despite this, misleading prospectuses did sometimes "slip through" (paragraph 3032)

145. The original Corporations Bill tabled in Federal Parliament provided for no registration of prospectuses by the ASC. The Explanatory Memorandum to this Bill stated (at paragraph 3090) that:

While prospectuses will no longer be pre-vetted and registered the ASC may consider, in detail, a lodged prospectus at any time. The ASC may by random checking discover or may be put on notice of a shortcoming in the prospectus or the conduct of a corporation. This provision (cl.1033) makes clear that despite the simplification of procedures for the issuing of a prospectus issuers have not been given a free rein to engage in misleading or other unsavoury practices in the issue of securities. The ASC will act as a 'watch dog' on their activities...

146. Following arguments that pre-vetting performs an indispensable function, particularly in the case of non-listed entities, amendments were made to the Bill by the House of Representatives to require registration of a number of types of prospectuses (e.g. those relating to unlisted companies, and prescribed interests). This resulted in the insertion of S 1020A which (unlike the Companies Code) imposes a positive duty on the ASC to register a prospectus unless it appeared not to comply with the law or it appeared to contain a false or misleading statement or an omission.

147. Subsequently, the provision was amended in the Senate to include a time limit, to be prescribed by regulation, following the recommendation of the Joint Select Committee on Corporations Legislation (April 1989) (the Edwards Committee). In addition, an over-riding requirement was introduced that the ASC should generally register the prospectus "as soon as possible". The Supplementary Explanatory Memorandum to the Corporations Bill (No. 2) at paragraphs 121-122 states that:

This is to avoid the tendency for the prescribed period to become the standard period, rather than the outer limit. This would be undesirable and could undermine the purpose of the present provision to require the ASC to devote adequate resources and adopt efficient procedures in registering prospectuses.

The essential purpose of this amendment is to promote commercial efficiency and certainty.

148. The clear intention of the legislation was therefore to improve the efficiency of issuing securities by substantially removing the requirement to pro-vet prospectuses. It should be noted that the liability provisions have been increased as a consequence. These provisions allow investors to protect themselves through litigation if a prospectus proves to be defective.

Advantages and Disadvantages of Pre-vetting '

Advantages

149. The advantages of having prospectuses pre-vetted in detail by a regulatory authority can be summarised as follows:

(a) Reducing the likelihood that a defective prospectus is issued

A pre-vetting system is designed to ensure that defective prospectuses are identified before they are issued to prospective investors. Whilst the ASC has the power to issue a stop order under S 1033 of the Corporations Law to halt the issue of a prospectus, this power is really curative rather than preventative. Excessive or indiscriminate use of this power would also be disruptive and create uncertainty in the capital markets. The argument that increased exposure to liability of persons involved in the preparation of a prospectus under the Corporations Law represents a new form of prevention is accepted. This form of prevention will not, however, stop a truly fraudulent fundraising scheme. Arguably no form of prevention will stop all such schemes.

(b) Consistency in the process of review

The pre-vetting system of the NCSC under the Companies Code made use of a checklist aimed to ensure all matters requiring disclosure were contained in a prospectus. The benefit of this approach was supposed to be that all prospectuses were subject to the same process of review prior to registration. As noted above, however, the standard and quality of review differed between States. Under a regime in which prospectuses are not pre-vetted in detail it is unlikely that there would be consistency in the process of review.

(c) Independent review

Under a pre-vetting system, the regulatory authority vetting prospectuses is completely independent of the parties involved in the preparation of the prospectus. Furthermore, the regulatory authority has no vested interest in the outcome of the issue.

Disadvantages

150. The disadvantages of having prospectuses pre-vetted in detail by a regulatory authority can be summarised as follows:

(a) Time and cost inefficiencies

As previously discussed, the time delays inherent in a system of detailed pre-vetting can be considerable. Such delays are commercially unacceptable as the timing of fundraising is often crucial. Examples of the importance of timing include:

(i) raising funds when market conditions are favourable;

(ii) raising funds for a specified debt repayment;

(iii) raising funds to establish sufficient cash reserves for a cash financed takeover bid; and

(iv) raising funds to meet an agreed capital expenditure commitment.

Time delays are also likely to have negative implications for the cost of preparation of the prospectus.

(b) Lack of expertise and accountability in the review process.

Under the Corporations Law advisers and experts become responsible for a form of de facto "pre-vetting". Advisers and experts are likely to have a greater level of skill and expertise than their regulatory authority counterparts. They are also made accountable by the process of cross checking which tends to occur amongst advisers and experts conducting due diligence.

Advisers and experts have an added incentive to exercise a high degree of care and skill in conducting their review in that they are exposed to potential liability for their actions. Under the Companies Code system of pre-vetting by the NCSC, the NCSC was not liable if it registered a defective prospectus even though it had conducted (or was supposed to have conducted) a thorough pre-vetting.

(c) Inconsistency with the general disclosure philosophy

Pre-vetting is inconsistent with the general disclosure philosophy of S 1022. The diversity of matters which may need to be disclosed pursuant to S 1022 would render any form of detailed pre-vetting cost prohibitive to both the regulator and the issuers. The lack of a prescribed content and format for prospectuses makes a standardised review process impractical.

(d) Risk of Insider Trading

The greater the period of time between the preparation of a prospectus and the issue of a prospectus, the greater is the risk of insider trading taking place based on information contained in that prospectus. It has been argued that the current registration period is too long and as a result it increases the opportunities for insider trading.

Conclusion

151. The Sub-Committee endorses the philosophy that there should be no detailed pre-vetting of prospectuses by the ASC. The Sub-Committee recommends that this philosophy should be further supported by limiting the time available to register prospectuses to two business days. This should be done in the same way it is for Part A Statements by deeming a prospectus to be registered, if by 5pm on the next day (being a day on which the office of the ASC at which the prospectus was lodged is open to the public) after the day on which the prospectus was lodged, the ASC has neither registered nor refused to register the prospectus.

EXCLUDED ISSUES OFFERS AND INVITATIONS

Outline of the Approach under the Corporations Law

152. Under the Corporations Law all offers and invitations to subscribe for or buy securities prima facie require a prospectus. This is given effect by S 1018(1) which states that:

A person shall not offer for subscription or purchase, or issue invitations to subscribe for or buy, securities of a corporation unless:

(a) a prospectus in relation to the securities has been lodged;

(b) the prospectus complies with the requirements of this Division (Division 2 of Part 7.12); and

(c) if the prospectus is a registrable prospectus - the prospectus has been registered by the Commission under S 1020A.

153. Exceptions to the general rule in S1018(1) are contained in S1017, S1018(2) and S1018(5).

154. The effect of S1017 is that S 1018(1) does not apply to:

(a) an excluded issue of securities; or

(b) an excluded offer of securities for subscription or purchase; or

(c) an excluded invitation to subscribe for or buy securities.

155. S66 details what constitutes an excluded issue or an excluded offer or invitation. Further exclusions are detailed in the regulations by virtue of S66(2)(n) (in relation to issues) and S66(3)(k) (in relation to offers and invitations) which specify that an exclusion can be declared by regulation. The exclusions contained in S66 and the regulations basically take the form of objective tests.

156. S 1018(2) and S 1018(5) broadly have the effect of providing an exclusion from the requirement of S 1018(1) for offers or invitations to buy issued securities which are listed. Therefore, as a general rule secondary trading of listed securities receives the benefit of an exclusion from the requirement to prepare a prospectus provided securities of that class were listed on 1 January 1991 or were offered pursuant to a prospectus at some time in the past.

Outline of the Approach under the Companies Code

157. Generally speaking, under the Companies Code an offer or invitation fell within the prospectus provisions whenever that offer or invitation was made to the public. The meaning of "offer to the public" was clarified to a certain extent in S5(4) however it was not defined. Important aspects of S5(4) were:

(a) that offers or invitations to the public included an offer or invitation to a section of the public; and

(b) that certain offers or invitations should not be taken to be offers or invitations to the public, including most significantly:

(i) those made to existing shareholders, debenture holders or holders of prescribed interests; and

(ii) those made to persons whose ordinary business was to buy or sell shares, debentures or prescribed interests (i.e. professional investors).

Rationale for the Corporations Law Approach

158. The May 1988 Explanatory Memorandum indicated that the reason for the abandonment of the "offer to the public" concept was that the interpretation of the term caused confusion as to whether a prospectus was required in a particular circumstance.

159. As a matter of practice it was always difficult to determine whether or not an offer was an offer to the public or to a section of the public. This uncertainty invited exploitation and many fundraising schemes sought to benefit from the loophole created by the expression "offer to the public".

160. An essential element of the rationale for the change from the "offer to the public" concept to a system of specific exclusions was therefore to eliminate uncertainty. Consistent with this, the tests used in the Corporations Law to determine whether or not an offer is an excluded offer are more objective in nature, and are therefore less likely to be subject to exploitation.

Advantages and Disadvantages of Specific Exclusions

Disadvantages

161. The disadvantages of a regime in which all issues, offers and invitations, other than specified exclusions, require a prospectus can be summarized as follows:

(a) Application to bona fide private transactions

Certain bona fide private transactions between commercially knowledgeable parties may require a prospectus under the Corporations Law where they would not have required a prospectus under the Companies Code. The time and costs of preparing a prospectus and the liability to which persons involved in the preparation are exposed provide considerable disincentives to raise funds subject to a prospectus. As a consequence:

(i) the fundraising capacity of smaller corporations may be restricted; and

(ii) one commercially knowledgeable party is given a statutory imposed advantage over the other commercially knowledgeable party whereas historically both parties were on an equal footing.

(b) Form prevailing over substance

Exclusions from the requirement to prepare a prospectus under the Corporations Law adopt a "substance over form" approach. A problem with the use of objective tests to determine whether a prospectus is required is that the limits they prescribe are somewhat arbitrary. The arbitrary limits may be such that they result in the regulation of transactions which were not intended to be regulated.

Advantages

162. The advantages of a regime in which all issues, offers and invitations require a prospectus except for specific exclusions can be summarised as follows:

(a) Limiting avoidance opportunities

Under the Companies Code there were significant opportunities to avoid preparing a prospectus for a fundraising exercise because of the uncertainty of the meaning of "offer to the public". An exclusion regime like that of the Corporations Law limits such avoidance opportunities.

It is accepted that some of the exclusions under the Corporations Law are open to alternative interpretations. Some particular difficulties of interpretation are addressed in the Section-by-Section Review (Part IV) of this Report. Whilst accepting that the exclusions in the Corporations Law have certain imperfections, the exclusions at least provide objective tests which can be reasonably efficiently implemented in practice.

Conclusion

163. The Sub-Committee endorses the general approach used in the Corporations Law to determine which fundraising schemes should require a prospectus.

164. In addition, the Sub-Committee recommends redrafting the definition of prospectus as it is concerned that instruments which are not, in reality, prospectuses (such as enclosure letters) are currently being inadvertently treated as such by the legislation.

The Definition of "Securities"

165. The Corporations Law prospectus provisions apply to offers and invitations in relation to securities. The definition of securities is contained in section 92 of the law. This definition provides:

"92(1) ["securities"]

Subject to this section, "securities" means:

(a) debentures, stocks or bonds issued or proposed to be issued by a government; or \

(b) shares in, or debentures of, a body corporate or an unincorporated body; or

(c) prescribed interests; or

(d) units of such shares or of prescribed interests; or

(e) an option contract within the meaning of Chapter 7;

92(2) ["securities" in relation to a body corporate]

The expression "securities", when used in relation to a body corporate, means:

(a) shares in the body;

(b) debentures in the body;

(c) prescribed interests made available by the body; or

(d) units of such shares or prescribed interests;

but does not include a futures contract or an excluded security."

166. The definition is confusing and deficient in a number of respects. It is confusing because it is unclear in what circumstances the definitions contained in sub-sections 92(1) and 92(2) are intended to apply. Most of the references to "securities" in the prospectus provisions of the Law refer to "securities of a corporation". Doubt exists as to whether such a reference is "used in relation to a body corporate".

167. The term "body corporate" used in sub-section 92(2) is not defined in any relevant way in the Law. Ordinarily it is considered to be a wider term than "corporation", but there is some doubt in relation to the Corporations Law because the Law contains an inclusive definition of the term "corporation" which includes "bodies corporate" and a number of other entities. Thus the Law's definition of "corporation" suggests that "corporation" is a wider category than "body corporate".

168. Due to the confusing nature of the definition of securities, there is a degree of uncertainty as to whether option contracts are "securities of a corporation" for the purposes of the prospectus provisions of the Law. Similarly, doubt exists as to whether issues of warrants and other more unconventional securities require the preparation of a prospectus.

Conclusion

169. The Sub-Committee recommends that in order to remove uncertainty in the interpretation of S1018(1), the definition of "securities" to which S1018(1) relates be clarified.

170. The Sub-Committee also recommends that the definition of "securities" in the context of S1018(1) be expanded to expressly cover options and any other rights or interests in respect of unissued securities, and warrants and similar rights in respect of issued securities. Furthermore, the Sub-Committee recommends that the definition be expanded so as to include any investment right or interest which is accepted for trading on the Australian Stock Exchange or any other Australian securities market or is accepted by the Australian business community as able to be traded. This will allow the Australian securities markets to develop new securities from time to time which the definition will catch generically rather than by prescription.

Requests for Special Exclusions

171. Several submissions were received by the Sub-Committee recommending special exclusions from the prospectus provisions of the Corporations Law. In general, these recommendations were for:

(a) an exclusion for a particular type of issuer, or

(b) an exclusion for a particular type of fundraising exercise.

172. Particular types of issuers recommended for exclusion included:

(a) banks; and

(b) unlisted public companies which are co-operatives for the purposes of the Income Tax Assessment Act.

173. Particular types of fundraising exercises recommended for exclusion included:

(a) fundraising pursuant to employee share ownership plans; and

(b) fundraising for the purposes of investment in film and television production.

Conclusion

174. It is the view of the Sub-Committee that for the above cases it is a matter of government policy whether exclusions should be allowed from the prospectus provisions of the Corporations Law. The Sub-Committee therefore declines to make any recommendations on the special exclusions requested in the submissions because such recommendations would be contrary to the other recommendations made by the Sub-Committee. As a general principle, the Sub-Committee does not consider that one type of issue or issuer should be preferred to another because this has the effect of diverting economic activity from the non-preferred to the preferred type.

RIGHTS ISSUES

Outline of the Approach under the Corporations Law

175. There is no specific exemption under the Corporations Law from the requirement to prepare a prospectus for a fights issue.

Outline of the Approach under the Companies Code

176. Under the Companies Code the requirement to prepare a prospectus was clearly excluded for a fights issue by virtue of S5(4) which inter alia provided that an offer of shares to existing members of a corporation did not constitute an "offer to the public."

Rationale for the Corporations Law Approach

177. The Supplementary Explanatory Memorandum to the Corporations Bill (No. 2) justified the application of the prospectus requirements to fights issues on the basis that rights issues essentially involve a new investment decision in the company by the shareholders, and for that reason, shareholders should be entitled to relevant material information (paragraph 207). However, it also acknowledged that the level of disclosure should not be as high for a fights issue as for an issue to non-members.

Advantages and Disadvantages of Requiring a Prospectus for a Rights Issue

Disadvantages

178. The disadvantages of requiring a prospectus for a rights issue can be summarised as follows:

(a) Increased costs and time delays

The requirement to prepare a prospectus has necessarily resulted in an increase in the cost of making a fights issue. Similarly, the requirement to prepare a prospectus has resulted in more preparation time being needed for fights issues.

Under the Companies Code, the decision to raise funds by fights issue could be made one week and the funds could be raised shortly thereafter. Such efficiency of fundraising is claimed to be impossible under the Corporations Law in the case of fights issues.

(b) Listed securities and a comparison with secondary trading

It would seem unreasonable that a broad exemption is given from the requirement to prepare a prospectus for secondary trading in listed securities yet a new issue of listed securities to existing holders of those securities is not exempt.

(c) Increase in placements at the expense of rights issues

The requirement for a corporation to prepare a prospectus for a rights issue arguably represents a considerable disincentive for raising funds in this way when funds can be raised by private placement without the need for a prospectus. There is a danger that the incentive to make private placements rather than rights issues will result in a decline in the participation of small shareholders in the market. It is arguable that over time the interests of small shareholders in a particular corporation could be diluted due to the preference of that corporation to raise funds by private placement. It is likely, however, that the effect of this dilution would be minor in economic terms.

(d) Lack of consistency with Dividend Reinvestment Plans

It should be noted that shares offered pursuant to a dividend reinvestment plan ("DRP") are excluded from the prospectus provisions by virtue of Regulation 7.12.06(g). A non-renounceable rights issue, which requires a prospectus, is effectively equivalent to a DRP issue, which does not require a prospectus. The inconsistency in the treatment of these issues is undesirable.

(e) Seasonal demand for funds

It has been speculated that one way for a corporation to reduce the cost of making a rights issue is to make it soon after its annual report is released. Such timing enables the annual report to be incorporated by reference in a prospectus and thereby save the cost of producing a separate document which would contain basically the same information. More importantly, however, there would be a saving of due diligence costs as the preparation of the prospectus would be contemporaneous with the statutory audit. Given that most Australian corporations have 30 June balance dates, these types of rights issues are likely to occur at the same time of the year. This has the disadvantage of potentially mating a seasonal demand for funds.

(f) Underwriting of tights issues

There is a fundamental difference in the role of underwriters in Initial Public Offerings and rights issues. In Initial Public Offerings underwriters provide credibility to the issue whereas in rights issues underwriters argue that they merely provide certainty of cash for the issuing company. It is argued to be anomalous that although the underwriter performs a lesser function in the fights issue, the Corporations Law imposes the same liability. Therefore it is argued that increased underwriting costs (i.e. to cover due diligence expenses) discourage fights issuers from seeking underwriting (a disadvantage to all shareholders), or alternatively reduce the number of tights issues altogether.

Advantages

179. The advantages of requiring a prospectus for a tights issue can be summarised as follows:

(a) Avoiding capital raising from an uninformed market

Existing shareholders of a corporation may be unaware of the recent performance or the prospects of the corporation. This is less likely to be the case under an adequate continuous disclosure regime.

The over-tiding intention of prospectus law is to provide investor protection. Rights issues made without a prospectus are arguably not providing satisfactory investor protection as they may often be raising funds from an uninformed market.

(b) Increasing accountability of corporations

Requiring a prospectus for a tights issue requires corporations to justify:

(i) the purpose of the issue; and

(ii) how the proceeds will be spent.

The liability provisions have had the effect, in practice, of increasing the accountability of the parties involved in fights issues and as a result disclosure has increased.

(c) Similarity of Initial Public Offerings and rights issues

Requiring a prospectus to be prepared for a rights issue is not unreasonable given that Initial Public Offerings and rights issues are fundamentally capital raising transactions and as a result the level of protection afforded to investors should be the same.

(d) Consolidation of information for investors

The requirement to prepare a prospectus ensures that information relevant to investors is consolidated in one document which can be read on a standalone basis.

Conclusion

180. Although the requirement for a prospectus for a rights issue might appear contrary to the deregulatory approach underlying the prospectus provisions of the Corporations Law the Sub-Committee believes that this requirement should remain for the following reasons:

(a) the information needs of existing shareholders when it comes to an additional investment of new capital in a company, are substantially no different to those of other investors in other primary issues;

(b) cost and delays in preparing such prospectuses will be significantly reduced if continuous disclosure requirements are met.

181. In recognition of the cost and delays involved with the preparation of rights issue prospectuses the Sub-Committee believes that there should be a different disclosure regime for these prospectuses. Accordingly, the Sub-Committee recommends that the information required to be disclosed in rights issue prospectuses be specifically limited to:

(a) terms and conditions of the offer;

(b) purpose of the issue;

(c) dividend policy and ranking;

(d) identification of all statements lodged in accordance with the prevailing continuous disclosure regime since the last annual report; and

(e) an express confirmation that there is no other information of which the issuing corporation is aware that should be brought to the attention of potential subscribers to the rights issue (or if there is such information, the details of it).

SECONDARY TRADING

Outline of the Approach under the Corporations Law

182. Under the Corporations Law, initial offerings and secondary trading of securities are brought within the scope of the prospectus provisions by the one provision. S 1018 provides that:

A person shall not offer for subscription or purchase, or issue invitations to subscribe for or buy, securities of a corporation unless:

(a) a prospectus in relation to the securities has been lodged;

(b) the prospectus complies with the requirements of this Division [Part 7.12 Division 2]; and

(c) if the prospectus is a registrable prospectus - the prospectus has been registered by the Commission under Section S 1020A.

183. The words "purchase" and "buy" in S 1018 give this provision application in the secondary trading context. No distinction is drawn between initial offerings and secondary trading except that secondary trading of listed securities is in most cases excluded from the requirement to prepare a prospectus by virtue of S1018(2) and S1018(5). S1018(8) has the effect of ensuring that S1018(2) and S1018(5) have no application where an offer is made of securities which were issued for the purpose of resale, as determined under S 1030.

184. Broadly, S 1030 deems a document which offers for sale securities, which were issued or allotted for the purpose of on-selling, to be a prospectus. It also deems persons purchasing such securities to be subscribers for those securities. S1030(3) provides that it is evidence that an allotment or issue of securities was made for the purpose of on-selling those securities if it is shown that an offer of any the securities for sale was made within six months of the issue or allotment.

185. The Corporations Legislation Amendment Act (No.2) 1991 contains an amendment which has the effect of exempting Stock Exchange Automated Trading System ("SEATS") trading from the operation of S 1030.

Outline of the Approach under the Companies Code

186. S 104 of the Companies Code was the predecessor of S 1030 of the Corporations Law, being a broad anti-avoidance provision.

187. There were five definitions of prospectus in S5(1) of the Companies Code, each differing from each other in minor respects. One of the definitions had application in the case where the expression was used in relation to the purchase of shares in or debentures of a corporation which could have been interpreted to suggest prospectus requirements encompassed secondary trading. Despite this, a prospectus was generally not required for sales of existing securities outside the context of S 104.

Rationale for the Corporations Law Approach

188. Whilst there is no specific statement in the May 1988 Explanatory Memorandum it is generally understood that the rationale for regulating secondary trading was one of investor protection. From the investor's perspective, there is really no difference between subscribing for shares issued as part of an Initial Public Offering and buying shares on the secondary market. The level of protection afforded should therefore be the same.

189. As a general rule, shares in listed companies can be sold on the secondary market without a prospectus needing to be prepared. The assumed rationale for this exemption is presumably that investor protection is provided by the Stock Exchange Listing Rules in the case of listed securities. This rationale will be strengthened when a mandatory legislative continuous disclosure regime is in place.

190. Given the broad exemption for listed securities a prospectus will prima facie only be required in secondary trading situations when the securities being traded are unlisted securities. Arguably many of these situations will involve offers for purchase or invitations to buy securities which will be exempt offers or invitations (by virtue of the 20 offers in 12 months exclusion) and therefore a prospectus will not be required. Therefore, the circumstances in which a prospectus will be required for the secondary trading of securities will probably be quite rare.

Conclusion

191. The Sub-Committee believes that in the interests of ensuring efficient operation of the capital markets that the exemption for secondary trading of listed securities should be simple and unambiguous. The Sub-Committee considers it undesirable to have a substantial regulatory overlap in relation to secondary trading as such as overlap creates uncertainty for those responsible for compliance.

192. The Sub-Committee recommends that S1018 be amended such that an unqualified exemption is provided for secondary trading of listed securities. The structure of the current exemption is unnecessarily complicated and the effect of S1018(5) in particular will become less relevant as time goes by because of the ASX requirement that all new listings of securities will require a prospectus.

193. The Sub-Committee recommends that S1018(8) should be repealed. The exemption for secondary trading of listed securities should be complete and unequivocal. It is important that uncertainty be eliminated from secondary trading transactions involving listed securities. The existence of S1018(8) creates the possibility that secondary trading in listed securities will require a prospectus. Further, the fact that a prospectus is required, or deemed to exist, may not be known. A dealer in securities will often be unaware of whether the securities being traded have been involved in a breach of S1030 and may inadvertently become exposed to liability pursuant to S1030(4).

Section 1030

194. As mentioned previously, a recent amendment was made to S1030 with the insertion of S1030(1A). A submission by the Law Council of Australia to the Federal Attorney-General (a copy of which was provided to the Sub-Committee) identified certain issues regarding S 1030 (and S 1030(1A) in particular) which needed attention. The comments of the Law Council were particularly succinct and as such they have been largely reproduced below:

195. The general effect of subsection (1A) is to exclude S1030(1) whenever an offer or invitation for the on-sale of securities is made on SEATS. Any document produced for the purpose of on-sale is therefore deemed not to be a prospectus issued by the corporation if the only offer or invitation "made or issued" occurs through SEATS. This seems to provide an avenue for the avoidance of the prospectus provisions.

196. It appears to be open to a listed issuer which wishes to raise funds by means of a distribution of securities of the same class as securities quoted continuously since 1 January 1991 to proceed as follows. First, all of the new securities are allotted to an intermediary for a consideration in excess of $500,000, in a transaction which is exempted from the prospectus requirement by S66(3)(a). It is intended that the intermediary will on-sell the securities in circumstances to which, but for subsection (1A), S1030(1) would apply. The intermediary prepares a documentary information memorandum in which no offer or invitation is "made or issued" - indeed, the document may set out the proposed method of distribution, provided that it does not imply any invitation. This document is distributed to the intermediary's clients, or to institutions, or even to all shareholders of the issuer. Then the intermediary causes the new securities to be offered for on-sale through SEATS. Because of S1018(2), the offer on SEATS does not require a prospectus. The protection afforded by S1 O18(2) is not taken away by S1018(8) because, since the offer is made on SEATS, subsection (1A) prevents S1030(1) from applying. The fact that the offer for on-sale occurs within six months of the allotment is immaterial, notwithstanding S1030(3), because subsection (1A) excludes the application of Sl030(1) whether or not there is in fact a purpose of on-sale. Such a procedure may well, after the introduction of subsection (JA), become the standard method of distribution in a rights issue or placement. The objectives of the fundraising provisions, to ensure adequate disclosure for the protection of potential investors and to expose relevant parties to liability for material misstatements or omissions, will be subverted.

197. The policy behind S1030 seems to be that liability for prospectus misstatements or omissions should not be capable of being avoided by the issuer subdividing the process of distribution of new securities into two steps, by allotting to one or a small number of allottees with the intention that the allottees will produce a wider distribution by on-selling. It is hard to see the justification for creating an exception to this policy simply because the wider distribution is achieved on-market. If it is thought that information about securities in the same class as quoted securities is already available and thus there is no need for further regulation, then it is hard to see why subsection (1A) does not extend to special crossings of quoted securities. The assumption seems to be that the stock exchange is a kind of market overt where purchases can be made without disclosure in circumstances where all other transactions are thought to require information.

198. The justification for subsection (1A) as advanced in the Explanatory Memorandum to Corporations Legislation Amendment Bill (No 2) of 1991 (paragraph 39), is that the amendment makes it clear that a transaction on SEATS does not involve a document. However, subsection (IA) provides a wider exception than would be justified in this fashion. It provides an absolute exemption from S1030(1) whenever the only offer or invitation of on-sale is made on SEATS. Accordingly, at the very least, subsection (1A) should be amended so that it is merely a provision making it clear that trading on-market does not generate a document.

199. Even where S1030 applies to a secondary sale of securities, the registration or lodging of a prospectus by the issuing company would not remedy the situation, since it is the document by which the offer for sale is made which is deemed to be the prospectus issued by the company. The company, which is not a party to a sale between a shareholder and a purchaser, would normally have little control over what information went into such a document. It follows that, even if the company prepared and lodged its own prospectus which contained all relevant information, it would still be potentially liable for the "offer document" not complying with the prospectus requirements. This is a clear defect in S1030.

Conclusion

200. S1030 has assumed a quite inappropriate and unintended significance and it should be amended to clarify that it is, indeed, an anti-avoidance provision aimed at the mischief of a corporation seeking to avoid lodging or registering a prospectus by exploiting one of the excluded offer exemptions. New subsection (1A) will serve only further to confuse the position. By expressly exempting SEATS trading, even greater uncertainty will arise in the case of other trading following the legitimate use of an excluded offer exemption.

201. In accordance with the views expressed by the Law Council of Australia, the Sub-Committee considers that subsection (1A) should be repealed and S1030 amended to clarify its anti-avoidance purpose.

SECURITIES HAWKING

Outline of the Approach under the Corporations Law

202. Under $1078 of the Corporations Law a person is prohibited from "going from place to place":

(a) issuing invitations to subscribe for or buy securities or a corporation;

(b) offering securities of a corporation for subscription or purchase (S 1078).

203. S1077 defines a reference to a person going from place to place to include a reference to a person communicating with other persons at different places by the use of an eligible communication service. This is in turn defined in S9 as a postal, telegraphic, telephonic or other like service, within the meaning of paragraph 51 (5) of the Constitution.

204. Thus, a verbal offer made over the telephone to two or more persons will constitute securities hawking; so will a written offer communicated to two or more persons by means of the postal service.

205. The securities hawking provisions do not apply to certain categories of exempted securities (S 1077A) or in relation to which the ASC has exempted the corporation from its operation (S 1078(2)).

206. Additional exemptions are:

(a) for offers in relation to listed securities, where the offer so states, specifying the relevant securities exchange and the invitation or offer was issued or made by the holder of a dealers licence (not an exempt dealer) and was communicated by the use of an eligible communication service; and

(b) certain categories, but not all categories, of excluded offer or invitation (S1078(4) and Regulation 7.12.17).

Outline of the Approach under the Companies Code

207. Generally speaking a person was prohibited under the Companies Code from going from place to place offering shares for subscription or purchase to the public or any member of the public.

208. The relevant section had less scope because it was limited to offers to the public by share hawkers physically going from place to place.

209. The exemption from the share hawking provision was limited to shares in a listed class where the offer so stated specifying the securities exchange. However, the offer was not required to be made by the holder of a dealers licence.

210. An additional exemption was created where the prospectus provisions had been complied with. This contrasts with the Corporations Law where compliance with the prospectus provisions does not automatically exclude an offer from the securities hawking provisions. For that to occur, the relevant offer must be made in or be accompanied by a complying prospectus and be sent by post. In other words it is prohibited for an issuer to:

(a) telephone prospective investors about the existence of a prospectus; or

(b) physically deliver prospectuses to prospective investors otherwise than by post.

Rationale for the Corporations Law Approach

211. No rationale is found in the May 1988 Explanatory Memorandum for the changes to the stage and operation of the securities hawking provisions.

Advantages and Disadvantages of Specific Regulation for Securities Hawking

Advantages

212. The advantages of specific regulation for securities hawking can be summarised as follows:

(a) Investor protection

If the securities are issued, it is supportive of investor protection that offers of those securities are only made by the holder of a dealers licence who is subject to various obligations (such as in S851) to make securities recommendations only when the circumstances of the offeree have been considered, and that only listed securities are offered in this way;

(b) Application to unlisted securities

The restriction is not unduly onerous for ASX listed securities. Non-ASX listed securities should not be able to be offered, over the telephone, by post or otherwise without there being a complying prospectus.

Disadvantages

213. The disadvantages of specific regulation for securities hawking can be summarised as follows:

(a) Needless complication

The securities hawking provision are a needless additional complication for offers of securities;

(b) Duplication of regulation

If offers of securities, listed or unlisted are made over the telephone, then, in the absence of being able to rely on S1018(2) or (5), that activity will contravene S 1018(1) in any event without the need for reliance on the more specific provisions in S1078. If offerors of securities are sufficiently regular in that activity as to constitute the carrying on of a securities business and no exemption is otherwise available, then those offerors will be required to be licenced and comply with the various obligations imposed on licencees. The requirements of provisions such as S851 apply irrespective of whether the offeror is licenced;

(c) Inconsistency with the exemption for secondary trading of listed securities

If it is possible to offer ASX listed securities under S1018(2) or (5), there should not be an added restriction under S1078;

(d) Inconsistency with issuer's exemption from requirement to hold a dealers licence

It seems incongruous that an issuer of securities is not permitted to offer its own securities over the telephone where there is in existence a complying prospectus. Issuers are exempted from the requirement to hold a dealers licence. If the exemption is thought appropriate in that context, it seems inconsistent not to extend a similar exemption to issuers generally from the provisions of S1078;

(e) Unnecessary regulation of physical delivery of prospectuses

There seems no policy reason why the simple activity of physically delivering copies of a prospectus otherwise than by post should be the subject of specific regulation. Circumstances may vary and it may be expedient for copies of a prospectus to be delivered otherwise than by post, say by personal collection or physical delivery. Alternatively, depending on the size of the prospectus it may be entirely feasible and appropriate that a copy of the prospectus be transmitted to a prospective investor by facsimile. Such an activity, currently prohibited, is not detrimental to the principles of investor protection.

Conclusion

214. Given that the remaining securities hawking provisions govern areas of activity which are already governed by the general prospectus and securities business provisions, the securities hawking provisions do not add anything to the policy of the securities provisions of the Corporations Law. The Sub-Committee therefore recommends that the remaining provisions of Division 6 of Part 7.12 should not apply to "hawking" by licenced investment dealers of securities listed on the ASX or intended to be listed on the ASX within 90 days.

215. However, because of the potential for abuse in this area the provisions should still govern unlisted securities and securities listed on overseas stock exchanges.

LIABILITY

Outline of the Approach under the Corporations Law

Civil Liability

216. Civil liability arises under the Corporations Law by virtue of S1005 which provides that:

... a person who suffers loss or damage by conduct of another person that was engaged in a contravention of a provision of this Part [7.11] or Part 7.12 may recover the amount of the loss or damage by action against that other person or against any person involved in the contravention, whether or not that other person or any person involved in the contravention has been convicted of an offence in respect of the contravention.

217. S79 defines the circumstances in which a person is "involved in a contravention". The definition includes circumstances when a person "has been in any way, by act or omission, directly or indirectly, knowingly concerned in, or party to the contravention."

218. S 1006 specifies the persons against whom an action may be brought in cases where the conduct referred to in S 1005 is the issue of a prospectus in relation to securities of a corporation in which there is a material statement that is false or misleading or from which there is a material omission.

219. The provisions most likely to be contravened to trigger an action under S 1005 in respect of false or misleading statements in or omissions from prospectuses are:

(a) S 1022 - which details the general disclosure requirement for prospectuses;

(b) S995 - which provides inter alia that a person shall not, in or in connection with any prospectus issued, or notice published, in relation to securities engage in conduct that is misleading or deceptive or is likely to mislead or deceive; and

(c) S996 - which provides that a person must not authorise or cause the issue of a prospectus in relation to securities of a corporation in which there is a material statement that is false or misleading or from which there is a material omission.

220. S 1007 provides that a person is not liable in an action under S 1005 to a person who suffered loss or damage as a result of a false or misleading statement in or an omission from a prospectus if it is proved that the second mentioned person knew that the statement was false or misleading or was aware of the omitted matter when the securities were bought or subscribed for.

Criminal Liability

221. Criminal liability arises under S996 for persons who "authorise or cause the issue of a prospectus" in relation to securities of a corporation in which there is a material statement that is false or misleading or from which there is a material omission.

Outline of the Approach under the Companies Code

Civil Liability

222. S 107 of the Companies Code provided that certain persons were liable to pay compensation to all persons who subscribed for or purchased any shares or debentures or units of shares or debentures on the faith of a prospectus for any loss or damage sustained by reason of any untrue statement in the prospectus or by reason of the non-disclosure in the prospectus of any matter of which they had knowledge and which they knew to be material.

223. A wider group of persons are exposed to liability under the Corporations Law by virtue of S 1006 than was the case under S 107 of the Companies Code.

Criminal Liability

224. The criminal liability provision in the Companies Code in relation to prospectuses was S 108. The effect of this provision was broadly the same as S996 of the Corporations Law.

Rationale for the Corporations Law Approach

225. Broadly, the liability for misleading statements and omissions is the same under the Corporations Law as it was under the Companies Code. The major difference is the extension in the categories of persons exposed to liability.

226. The rationale for extending the categories of persons exposed to liability is really attributable to changes in other aspects of the Law in relation to prospectuses. The relaxing of the detailed prospectus contents requirements and the change in registration and pre-vetting procedures would have resulted in a decline in prospectus integrity if liability for persons such as experts and underwriters involved in the preparation of a prospectus had not been increased. The May 1988 Explanatory Memorandum states that:

By expanding the range of persons who may be held liable for "defective" prospectuses it is sought to provide another means in the Bill of ensuring prospectus integrity. The Bill aims to make all persons involved in the preparation of a prospectus responsible for the prospectus. (paragraph 2996).

Advantages and Disadvantages of Extending the Categories of Persons Exposed to Liability

227. As explained above, the extension of categories of persons exposed to liability was a necessary requirement given the change in philosophy of other, aspects of prospectus law. The advantages and disadvantages of extending liability are therefore inseparable from the advantages and disadvantages of adopting a general disclosure requirement and restricting pre-vetting of prospectuses. These advantages and disadvantages have been discussed in earlier sections of this Report.

Conclusion

228. The Sub-Committee supports the clarification of the categories of persons exposed to liability for prospectuses. This is consistent with its support for the philosophy underlying S1022 and its support for no detailed pre-vetting of prospectuses by the ASC.

229. The Sub-Committee recommends that the parties who are considered to "authorise or cause the issue of a prospectus" be specifically restricted to include only directors, underwriters, promoters and persons covered by 1030(4). The Sub-Committee also recommends that the definition of "promoter" be redrafted to the effect that it does not include experts merely because they are members of due diligence committees.

Liability of the ASX

230. Because of ASX concerns that it would incur liability under Pan 7.11 if it is in any way involved in the formulation of a prospectus, even to the extent of commenting on it only, it is not currently possible to make a formal application for the admission of a company to the official list of the ASX prior to the time of lodgement of a prospectus with the ASC.

Conclusion

231. The Sub-Committee recommends that the ASX and its officers be exempted expressly from any liability which they might otherwise incur under Part 7.11 by reason of reviewing a draft prospectus prior to its lodgement with the ASC.

DEFENCES

Outline of the Approach under the Corporations Law

232. The defences available under the fundraising provisions of the Corporations Law vary depending on the role of the person in the preparation of the prospectus.

233. The specific words "due diligence" appear only in S 1011 of the Corporations Law. Defences in other sections, whilst not mentioning the words "due diligence", are in effect due diligence defences. Defences such as those contained in S 1008A, S 1009 and S996 refer to making "such enquiries (if any) as were reasonable" and having "reasonable grounds to believe".

234. S 1011 provides that:

The corporation, a person referred to in S 1006(2)(d) [promoter] or (f) [stockbroker, sharebroker, underwriter] or (2A)(a) [seller] or (d) [stockbroker, sharebroker or underwriter for the seller] or a person who authorised or caused the issue of the prospectus is not liable in an action under S 1005 if it is proved that the false or misleading statement or the omission:

(a) was due to reasonable mistake;

(b) was due to reasonable reliance on information supplied by another person; or

(c) was due to the act or default of another person, to an accident or to some other cause beyond the defendant's control;

and, in a case to which paragraph (c) of this sub-section applies, that the defendant took reasonable precautions and exercised due diligence to ensure that all statements to be included in the prospectus were true and not misleading and that there were no material omissions from the prospectus.

235. S1008 and S1008A provide specific defences to directors. S1009 provides a specific defence for experts.

236. S 1010 enables certain persons including underwriters, stockbrokers, sharebrokers, auditors, bankers, solicitors and other professionals named in part only of a prospectus to restrict their liability to statements in or omissions from that part.

237. S996(2) provides a due diligence type defence to prosecution for contravention of S996(1).

Outline of the Approach under the Companies Code

238. The defences available to directors and experts in the Corporations Law under S 1008A and S 1009 were available to these persons under S 107 of the Companies Code.

239. There was no "part only" defence or generally applicable due diligence defence in the Companies Code. There are therefore no equivalents in the Companies Code to S 1010 and S 1011 of the Corporations Law.

240. Criminal liability arising under S 108 of the Companies Code has a similar defence to that applying for criminal liability under S996 of the Corporations Law.

Rationale for the Corporations Law Approach

241. The rationale for expanding the defences available under the Corporations Law, particularly the inclusion of the general due diligence defence of S 1011, would appear to be directly related to the extension of categories of persons liable for prospectus contents.

242. The May 1988 Explanatory Memorandum stated that S1006 "does not act indiscriminately or unfairly" and that:

Each of the persons who may be liable under clause 1005 is provided with a defence and in general will only be liable if they have not exercised due diligence (paragraph 2996).

243. The intention of the legislation according to the Explanatory Memorandum would therefore appear to have been to make available a due diligence defence to any person capable of attracting liability under S 1005.

Advantages and Disadvantages of a General Due Diligence Defence

Disadvantages

244. The disadvantages of having a system of defences based on the concept of due diligence can be summarised as follows:

(a) Due diligence is undefined

The expression "due diligence" is undefined in the Corporations Law. The lack of definition creates uncertainties and unnecessary costs for the parties involved in the preparation of a prospectus as it is difficult to determine when enough due diligence has been performed.

(b) Time delays and increased costs

The necessity of independent reviews to establish the due diligence defence has resulted in an increase in the number of advisers involved in the prospectus preparation process. Time delays and increased costs have necessarily accompanied the increase in adviser involvement.

Advantages

245. The advantage of having a system of defences based on the concept of due diligence can be summarised as follows:

Fairness

Given that the categories of persons liable for the contents of a prospectus have been extended under the Corporations Law, all persons potentially liable should, for reasons of fairness, be able to avail themselves of the same defence, that defence being based on the concept of due diligence.

Conclusion

246. The Sub-Committee supports the concept of a general due diligence defence. The Sub-Committee has made recommendations in the following section of the General Concepts Review (titled "Rationalisation of the Due Diligence Defence") to ensure this defence is available to all persons who may be liable for false or misleading statements or material omissions under S1005. These recommendations have been made in accordance with the Sub-Committee's understanding of the intention of the legislation as expressed in the May 1988 Explanatory Memorandum.

Rationalisation of the Due Diligence Defence

247. Three aspects of the due diligence defence need to be considered:

(a) the liabilities against which the defence applies;

(b) the wording and operation of the defence; and

(c) the nature and degree of due diligence required.

Liabilities against which the Due Diligence Defence Applies

248. The due diligence defences found in S 1008A, S 1009 and S 1011 of the Corporations Law are expressed in different terms and apply only to civil liability for breach of the prospectus provisions arising under S 1005. A due diligence defence against criminal liability is contained in S996(2). It is considered unreasonable that a defendant has a due diligence defence to a civil suit in different terms to that applicable to a criminal suit based on exactly the same facts. The purpose of the due diligence defence is to motivate those preparing a prospectus to use their best endeavours to ensure a prospectus is complete and accurate. The absence of an identical due diligence defence to criminal prospectus liability detracts from the motivation to ensure that the prospectus is complete and accurate.

Wording and Operation of the Due Diligence Defence

249. At present, the Corporations Law contains a number of due diligence defences available to various participants in prospectus preparation. These defences are confusing because they are stated in different words for the different participants. The defences are described below.

S1008

250. For example, in relation to directors, a due diligence defence is contained in S 1008A(4) where the directors:

...after making such inquiries (if any) as were reasonable, had reasonable grounds to believe, and did until the time of the allotment, issue or sale of the securities believe, that the statement was true and not misleading.
S1009 and S996

251. A defence in similar terms is given to experts by S1009(3) and (4). Similar terms are also used in the defence against the criminal liability created by S996(1) for those who authorise or cause the issue of a prospectus containing a material error or omission.

S1011(1)

252. The actual words "due diligence" only appear in S 1011 (1) of the Corporations Law by which defences are given to the corporation, its promoter, or a stockbroker, sharebroker or underwriter. Corporations Legislation Amendment Act (No. 2) contained an amendment to include, in relation to secondary prospectuses, the seller of the securities and the seller's stockbroker, sharebroker or underwriter in relation to the sale. The S 1011 due diligence defence is available provided the defendant can show that the error or omission:

...was due to the act or default of another person, to an accident or to some other cause beyond the defendant's control; and.., that the defendant took reasonable precautions and exercised due diligence to ensure that all statements to be included in the prospectus were true and not misleading and that there were no material omissions from the prospectus. [S1011(1)(c)]

253. The formulation in S 1011 (1) is based upon S85 of the Trade Practices Act, upon which there have been some decisions and S 10(I) of the Environmental Offences and Penalties Act (NSW), in respect of which there has been only one reported decision to date: SPCC v Kelly (1991) 5 ACSR 607.

254. In SPCC v Kelly, Hemmings J said (at 608):

Due diligence, of course, depends upon the circumstances of the case, but contemplates a mind concentrated on the likely risks. The requirements are not satisfied by precautions merely as a general matter in the business of the corporation, unless also designed to 'prevent the contravention'.

Whether a defendant took the precautions that ought to have been taken must always be a question of fact and, in my opinion, must be decided objectively according to the standard of a reasonable man in the circumstances. It would be no answer for such person to say that he did his best given his particular abilities, resources and circumstances. This particularly applies to activities requiring experience and acquired skill for proper execution.

255. In Universal Telecasters Queensland Limited v Guthrie (1978) 32 FLR 360 at 363, (a decision of TPA S85) Bowen CJ stated:

While [took reasonable precautions and used due diligence] are plain English words, which have to be applied as they stand, it appears to me that two responsibilities which [the defendant] would have to show it had discharged, in order to establish this defence, would be that it had laid down a proper system to provide against contravention of the Act and that it had provided adequate supervision to ensure that the system was properly carried out. .... The mere fact that its system and supervision has proved inadequate to prevent error, does not necessarily establish that its system is defective. Even the best systems may break down due to human error. It is necessary to make a judgment about the system and the provision for supervision.

256. This formulation has been followed in subsequent trade practices cases (see, for example, Adams v Eta Foods Ltd. (1987) 19 FCR 93 at 101 and Gardam v George Wills & Co Ltd. (1988) 82 ALR 415 at 429) and is likely to be followed in the Corporations Law context also.

Conclusion

257. The Sub-Committee recommends that a common due diligence defence, worded as in S1011(1), should be available to any party who may incur liability in respect of a defective prospectus and that the defence should be available against both civil and criminal liability.

"Another person"

258. Questions have arisen about the meaning of "another person" in the due diligence defence. In particular, questions have been raised about the propriety of forming due diligence committees in prospectus preparation and in relying upon the work performed by accountants, solicitors and other experts or professionals who have or have had a relationship with the offering entity.

259. "Another person" is defined in S 1011 (2) of the Law so as not to include:

...a person who was:

(a) a servant or agent of the defendant; or

(b) if the defendant was a corporation or another body corporate - a director, servant or agent of the defendant;

when the prospectus was issued.

Conclusion

260. In order to contain the cost of due diligence exercises within reasonable limits, the Sub. Committee recommends that the Law be amended to make clear that persons who are or have been advisers to, or business counterparties with, the offering entity shall not for that reason alone not be considered to be "another person" for the purposes of S1011(1)(c).

The Nature and Degree of Due Diligence Required

261. There has been substantial debate since the introduction of the Corporations Law about the nature and degree of due diligence. The term "due diligence" is not defined in the Corporations Law. It does not yet have a settled meaning in Australian jurisprudence although the cases set out earlier are likely to be highly persuasive in the Corporations Law. Also relevant, will be decisions on analogous provisions in the UK and USA prospectus legislation. Accordingly, the precise content of due diligence will be settled by cases in which the defence is pleaded by those who are alleged to have breached the prospectus requirements of the Corporations Law.

262. Although the process of definition by litigation is inherently inefficient, it is likely that an Australian court faced with the need to define due diligence will consider. evidence from experts in the field, including those professionals (lawyers, accountants etc) who are commonly engaged in due diligence exercises. Accordingly, the nature and definition of due diligence will be substantially defined by reference to best professional practice in the field.

263. A number of organisations have been active in the preparation of due diligence manuals. The most comprehensive due diligence manual available is that produced by the Securities Institute of Australia in April 1991. Whilst this manual has been criticised as overly demanding, it provides a useful starting point for performing a due diligence exercise. The Securities Institute is to be congratulated for its initiative in defining the scope of due diligence. The Sub-Committee hopes that other professional and business organisations will also endeavour to undertake the task of defining due diligence for the assistance of their members at the earliest possible opportunity.

Conclusion

264. The Sub-Committee does not recommend that the legislature endeavour to define due diligence further in the Corporations Law.

COST OF FUNDRAISING

265. The issue of the cost of prospectus preparation is a pervasive one. It has been raised several times already in this Report.

Over-reaction to Increased Costs

266. The cost of fundraising under the prospectus provisions of the Corporations Law has received considerable attention in the press, particularly since the Corporations Law came into operation. A standard argument has been that the cost of preparing prospectuses under the Corporations Law is significantly greater than was the cost of preparing prospectuses under the Companies Code. The Sub-Committee believes that there has been an over-reaction to the cost implications of the new prospectus requirements. Some press articles have arguably been misleading in their reporting of costs. Ways in which the reporting has been misleading include:

(a) failure to emphasise sufficiently the proportion of costs represented by underwriting fees, which are essentially determined by a reference to the percentage of capital raised. The National Foods Limited float for example cost $17.0 million of which $9.5 million (or 55.9%) was represented by underwriting fees;

(b) failure to emphasise the cost of preparation of the prospectus relative to the total capital raised. The Commonwealth Bank float for example cost $37.5 million, which on first glance appears expensive. However, when consideration is given to the fact that $1292.2 million was raised in the float, costs of $37.5 million (or 2.9%) are not unreasonable.

267. Despite the perceived over-reaction by the press, the Sub-Committee do accept that it is likely that, other things constant, the costs of preparing a prospectus under the Corporations Law are greater than under the Companies Code (discussed below). Unfortunately, because information regarding the total cost of prospectus preparation was not required to be disclosed under the Companies Code (unlike under the Corporations Law) no empirical evidence is available to ascertain the extent of the likely increase in costs.

Reasons for Increased Costs

268. An increase in the cost of prospectus preparation should not be unexpected. The intention of the Corporations Law was that there should be no detailed pre-vetting of prospectuses by the ASC. The burden of "pre-vetting" has therefore been shifted to the persons responsible for the preparation of prospectuses. Whilst the direct costs associated with this "independent" pre-vetting will necessarily be greater than if the ASC were conducting the pre-vetting, the benefits flowing from this arrangement are considerable. These benefits include:

(a) increased efficiency of the capital raising process by elimination of the need for pre-vetting by a regulatory authority which past experience has shown to be both time consuming and wasteful;

(b) a higher standard of "pre-vetting" due to:

(i) the expertise of those performing the "pre-vetting" (i.e. experts and other advisers);

(ii) the liability to which those performing the "pre-vetting" are exposed.

(c) more relevant information being available to investors resulting in the fairer pricing of securities and benefits to the capital markets generally;

(d) reduction in costs for the ASC; and

(e) increased time for the ASC to address other important aspects of corporate regulation;

Conclusion

269. Although the fundamental objective of this Sub-Committee is to recommend reforms to improve the efficiency of prospectus preparation without compromising the information needs of investors, it is simply not possible to perform a cost/benefit analysis of the Corporations Law without access to reliable empirical evidence. As the information needs of investors appear to have been well served by the new system, the Sub-Committee does not believe it is appropriate to make recommendations on the basis of cost arguments alone where the evidence remains largely anecdotal.

270. Particular concern has been raised in respect of the cost of prospectus preparation for rights issues. The Sub-Committee accepts that the cost of preparing a prospectus for a rights issue should be significantly less than the cost of preparing a prospectus for an Initial Public Offering.

271. However, as discussed earlier in this Report, it is expected that reforms in the area of continuous disclosure will provide a basis for an "abbreviated prospectus" to be sufficient in the case of rights issues. Such a prospectus, which would incorporate by reference information made available under a continuous disclose regime, would clearly be less costly than a full prospectus.

IV SECTION-BY-SECTION REVIEW

Introduction

272. The Section-by-Section Review addresses problems in relation to the operation and drafting of specific sections of the Corporations Law relevant to prospectuses.

273. The recommendations and proposals contained in the first column of the Section-by-Section Review do not represent the Sub-Committee's recommendations for reform but rather represent views presented to the Sub-Committee for consideration (through submissions and discussion with the Consultative Group). It should be noted that the Sub-Committee's response to the recommendations and proposals is not positive in all cases.

274. The Sub-Committee's recommendations for reform of the prospectus provisions of the Law are included in some of the Sub-Committee's responses. All the recommendations of the Sub-Committee contained in the Section-by-Section Review are also contained in the Executive Summary.

SECTION-BY-SECTION REVIEW

Section	Proposal / Recommendation	Reason	Sub-Committee's Response
66	Clarify exactly what the $500,000 limit in S66(3)(a) relates to.	It is unclear whether it relates to face value or amount paid. It is unclear how the $500,000 limit should be interpreted when considering: (a) issues to partnerships in excess of $500,000 (where the contribution made by each partner is less than $500,000); (b) issues which form part of a package with other securities (e.g. land) sold ill aggregate for greater than $500,000; (c) control over counter offers; and (d) offers or invitations for amounts greater than $500,000 where subsequent acceptance is for much less than this amount.	The $500,000 limit should be clarified. The Sub-Committee recommends that the wording in Regulation 7.12.06(b) should be adopted in S66(3)(a) such that an exclusion is available to an offer for subscription or an invitation to subscribe, "if the amount payable by each person to whom the offer is made or the invitation is issued is at least $500,000." The over-riding intent should be to ensure that the limit relates to the transaction value not the value of the offer or invitation. It is the view of the Sub-Committee in relation to issues to partnerships and issues forming part of a package that no specific clarification of the $500,000 limit is needed.

SECTION-BY-SECTION REVIEW

Section	Proposal / Recommendation	Reason	Sub-Committee's Response
	2. Amend S66(3)(a) such that investors who already have an investment of $500,000 or greater and who wish to invest additional funds in amounts less than $500,000 do not require a prospectus.	Currently an investor can not "top up" an original investment of $500,000 which seems to be uncommercial and at odds with the spirit of the legislation.	It is the view of the Sub-Committee that there is merit in this proposal. It is noted that this proposal is also given support in the June 1990 ASC Policy Discussion Paper. The Sub-Committee considers, however, that implementation of the proposal would result in a number of practical difficulties and potentially open loopholes. Accordingly, care will need to be taken in drafting appropriate provisions to ensure these loopholes are closed. The over-riding concern should be to retain objectivity in the test for exclusion and avoid the subjectivity which was inherent in the previous legislation through the "offer to the public" concept.
	3. Consider amending S66(2)(a) to reflect the standing of the purchaser not the size of the issue or block.	Make the legislation in regard to exclusions less rigid.	Disagree. Any departure from objective tests should be avoided as the alternative creates loopholes. The "standing" of the purchaser is also specifically taken into account in other exclusions e.g. Regulation 7.12.060) by virtue of S66(3)(k).

SECTION-BY-SECTION REVIEW

Section	Proposal / Recommendation	Reason	Sub-Committee's Response
	4. Address the problem of the S66(2)(a) exclusion for issues greater than $500,000 resulting in the encouragement of placements over rights issues.	The exclusion disadvantages existing shareholders, particularly smaller shareholders.	The current disincentive to make rights issues rather than placements will be addressed by the introduction of continuous disclosure requirements. This is discussed in greater detail in the General Concepts Review section of this Report.
		As a matter of public policy, if a listed company wishes to raise share capital it should do so by making pro-rata rights issues to its existing shareholders.	Continuous disclosure aside, the directors of a corporation have a fiduciary duty to act in the best interests of the corporation. The view of the Sub-Committee is that prospectus law should not interfere unnecessarily with the exercise of this fiduciary duty. The dilution effect of placements on existing shareholders is restricted in the case of publicly listed companies by virtue of ASX Listing' Rule 3E(6)(a) i.e. the 10% in 12 months rule. The effect on those shareholders of publicly listed companies who do not receive the placement is therefore minor in financial terms.
	5. Amend S66(3) to specifically exclude bonus issues from the prospectus provisions.	S66(3)(c) does not provide an effective exemption for bonus issues of securities. A bonus issue is, at least normally, an issue for consideration, because the bonus securities are accounted for out of a fund which would otherwise be available for distribution to securities holders in another fashion.	Concur. Rather than rely on the partial protection of S66(3)(c) (and arguably Regulation 7.12.06(g)) bonus issues should be wholly protected by an appropriately worded category of excluded offer.

SECTION-BY-SECTION REVIEW

Section	Proposal / Recommendation	Reason	Sub-Committee's Response
	6. Amend S66(3)(d) such that only successful offers/invitations are counted in determining whether 20 offers have been made.	Problems of including unsuccessful offers include: (a) offering shares to a bank as security for a loan; (b) prospective offerors not being aware of such offers; and (c) being unable to accurately determine the number of offers.	It is arguable that offers regarding the same class of securities made by anyone in the previous 12 months must be taken into account in determining whether the present offer satisfies the rule. In the case of listed securities, this exclusion will rarely be able to be relied on. There will always have been more than 20 offers for a listed security in any year. Indeed, even for non-listed securities, unless those securities are very tightly held, it will be virtually impossible to determine whether others have made offers of the securities within the preceding 12 month period. The Sub-Committee recommends that this exemption should be clarified such that the only offers counted in relation to a particular transaction involving securities of a corporation are those made during the previous 12 months (in relation to securities of that corporation) by a particular offeror and/or his associates or their agents.

SECTION-BY-SECTION REVIEW

Section	Proposal / Recommendation	Reason	Sub-Committee's Response
	6. [Continued]		A related problem is that it appears that offers falling within other exempt offer categories, are counted. For example, if an offeror makes 20 offers in a year within the professional investor exemption and then one offer which is not within the exemption, that last offer will not get the benefit of the 20 offers in 12 months exemption. The Sub-Committee recommends that S66(3)(d) should be clarified by amendment to eliminate this consequence i.e. exempt offers should not be counted for the purposes of the 20 offers in 12 months exemption.
	7. Amend S66(3)(d)(ii) such that the number of offers or invitations made by third parties re shares of the same class are not included when determining whether 20 offers have been made.	A corporation has no control over the number of offers or invitations extended by third parties, particularly in the case of a publicly listed company.	Refer to the response to 5. above.

SECTION-BY-SECTION REVIEW

Section	Proposal / Recommendation	Reason	Sub-Committee's Response
	8. The exclusion applying for issues to no more than 20 persons (S66(2)(d)) should be extended.	For a small company with greater than 20 shareholders, the legislation requires a prospectus for a pro-rata issue to existing shareholders but does not require a prospectus for an issue to less than 20 new investors.	The view of the Sub-Committee is that any numerical threshold is, of necessity, arbitrary. Therefore, in the absence of more compelling reasons, the Sub-Committee do not consider a change in the threshold to be necessary.
		The exemption should be extended from 20 to 50 to be consistent with S116 which defines a proprietary company.	The Sub-Committee note that the number of persons threshold was reduced from 25 to 20 in accordance with a recommendation from the Joint Select Committee on Corporations Legislation (the Edwards Committee), which was in turn adopting a recommendation of the Securities Information Review Committee.
	9. Consider extending S66(2)(d) and (3)(d) to prescribed interest offerings.	The combination of non-applicability of this exemptions to prescribed interest offerings combined with the severe effect of S 1073(2) makes the scope of regulated prescribed interest offerings extremely wide.	Concur. The Sub-Committee is not aware of any reason why prescribed interests should not get the benefit of this exemption. It is important that there be consistency in the legislative treatment of shares and prescribed interests. Unless there is a compelling reason, the Sub-Committee recommends that prescribed interests should get the benefit of this exemption. The reason cited by the Edwards Committee which refers to agricultural schemes and fraudulent promoters is not in itself considered to be a compelling reason.

SECTION-BY-SECTION REVIEW

Section	Proposal / Recommendation	Reason	Sub-Committee's Response
	10. Consider adjusting the numerical thresholds (i.e. increase the 20 persons limit and decrease the $500,000 limit) such that certain issues currently requiring a prospectus will get an exemption.	The May 1988 Explanatory Memorandum indicated that the categories of issues which would be exempt from the prospectus provisions would be similar to the exemptions existing at the time. The issues paper released by the Attorney-General at the same time indicated no major shifting of the boundary between regulated and unregulated offers was intended.	Disagree. In relation to the 20 persons limit, refer to the response to 7. above. In relation to the $500,000 limit, no adjustment should be made unless empirical evidence can be presented which details that a limit of $500,000 rather than an alternative amount will result in a particular class of individuals (e.g. retirees) being enticed into making large investments without receiving the protection of the prospectus provisions of the Corporations Law.
	11. Amend S66(2)(c) and (3)(c) such that the performance by an employee of the duties of employment is not taken to be "consideration".	Any offer or invitation in respect of an employee share ownership plan ("ESOP") extended to an employee even where such employee may not be required to make any specific cash payment for the rights conferred on him cannot be said to have been made for no consideration unless the proposed amendment is made. This would particularly affect profit-sharing schemes where the employee's profit share is used to pay up in full shares in the employer corporation which are then issued to the employee.	It is considered beyond the scope of this Sub-Committee to comment on matters relating to employee share ownership as this represents an issue which should be determined as a matter of government policy.

SECTION-BY-SECTION REVIEW

Section	Proposal / Recommendation	Reason	Sub-Committee's Response
	12. Widen the exclusion in S66(2)(m).	The exclusion only applies if the interest holder exercised the right to have those interests issued and rarely does a unitholder have a legally enforceable "right" to do such things as: (a) reinvest entitlements to income and revised capital gains; (b) to "switch" investments from one fund to another under the same first deed; and (c) to invest additional amounts on a periodic basis as is the case with regular savings plans. A unitholder may often have nothing more than a right to request a reinvestment or switch.	Concur. The Sub-Committee recommends that an amendment should be made to S66(2)(m) to have the effect that the exclusion is available to persons who "request to exercise the right" to reinvest or switch.
	13. Amend S66(2)(m) to remove the requirement that the necessary election in relation to a switching facility or reinvestment facility be made on an application form attached to the prospectus.	Application forms would need to become extremely complicated to accommodate this requirement. The situation would be even worse if every time a distribution was reinvested or a switch made an application of the requisite nature had to be lodged with the investment.	Concur. The Sub-Committee recommends that an amendment should be made to S66(2)(m) to the effect that an application form can be included with a prospectus.

SECTION-BY-SECTION REVIEW

Section	Proposal / Recommendation	Reason	Sub-Committee's Response
	14. The exemption re "executive officer" share schemes should be widened (S66(2)(e)).	Many executive share plans and most universal employee share plans will have participants who are not "executive officers" within the definition of S9.	Disagree. Employees not falling within the definition of executive officer are unlikely in many cases to be well informed about a company's performance. Furthermore, it would not be possible to adopt a definition which would include in its scope all "executives" in all situations.
		Investor protection concerns are minimal because: (a) small initial outlays are required, participation is voluntary, price is at or below market and the investment is almost risk-free; (b) employees are generally well informed about a company's performance.	
	15. Clarify why employees who become members of employer sponsored superannuation funds are not given the full protection of the fund raising provisions.		This proposal should be referred to the Australian Law Reform Commission and the Companies and Securities Advisory Committee to be considered in their joint review of collective investments.
	16. Extend the exclusion available under the Corporations Law to provide for a more general exclusion for shares issued as part of an ESOP.	Securities laws prevailing in the Northern Hemisphere have generally recognised ESOPs as a specific case for the exclusion of prospectus requirements.	Refer to the response to 10. above.
	17. Consider limiting the extent to which securities can be issued under S66 to "institutional investors".	The fact that securities can be issued to "institutional investors" without a prospectus being required has the effect of diluting existing shareholders.	Disagree. Refer to the response to 4. above.

SECTION-BY-SECTION REVIEW

Section	Proposal / Recommendation	Reason	Sub-Committee's Response
	18. Clarify the exemption in Regulation 7.12.060).	The meaning of the words "controls the amount" is obscure. It is not clear whether there is a requirement for the securities to be liquid. It is also unclear whether a warranty will be needed at the time of making the offer that the offeree has not dissipated any part of the amount that he controls.	Agree that clarification is needed. Currently, the offeror (who bears liability for a prospectus) is at risk if the offeree's true status is other than as disclosed at the time of the offer.

SECTION-BY-SECTION REVIEW

Section	Proposal / Recommendation	Reason	Sub-Committee's Response
96 Now 994	1. The restriction imposed by the ASC in only permitting reference to a discrete document in a prospectus should be withdrawn.	The ASC's policy that a reference can be made in a prospectus only to a discrete document is in conflict with the intention of S 1022.	The repeal of S96 and replacement of the section by a new S994 (per the Corporations Legislation Amendment Act (No. 2)) purports to ensure that this provision is interpreted with respect to liability (as it was intended) rather than with respect to prospectus contents.
	2. Clarify whether short form prospectuses can be issued.	Short form prospectuses appear to be prohibited.	The Sub-Committee believes that prospectuses for Initial Public Offerings should not be able to incorporate information by reference. On the other hand, the Sub-Committee believes that short form prospectuses should be able to be issued for rights issues. This is discussed in more detail in the General Concepts Review section of this Report.

SECTION-BY-SECTION REVIEW

Section	Proposal / Recommendation	Reason	Sub-Committee's Response
995	1. Allow vendor and purchaser to be able to contract out.	The definition of "prospectus" is too broad and many other instruments are caught by the definition.	There is no specific provision in the Corporations Law to stop parties from contracting out of S995. The view of the Sub-Committee is that it would be contrary to public policy to amend the legislation so that parties can clearly contract out of S995, particularly given that there is no legislative provision to contract out of S52 of the Trade Practices Act and a number of judges have commented that this cannot be done. The Sub-Committee believes however that "sophisticated market participants" should be able to make provisions such that S995 applies only to such representations and warranties as are included in defined documents, thereby excluding oral representations. The Sub-Committee recommends redrafting the definition of "prospectus" as it is concerned that instruments which are not, in reality, prospectuses (such as enclosure letters) are currently inadvertently treated as such by the legislation.
	2. This section should not apply to excluded issues.	To avoid the provision applying to non regulated transactions.	Disagree. All transactions should be conducted on an honest basis, with a positive requirement to ensure honesty.

SECTION-BY-SECTION REVIEW

Section	Proposal / Recommendation	Reason	Sub-Committee's Response
	3. Introduce a due diligence defence, and ensure that not being able to reasonably determine conduct was misleading and deceptive is a defence.	To introduce an element of fairness. Cases involving S52 of the Trade Practices Act have shown that liability can attach even when innocent conduct causes the contravention.	Whether a due diligence defence should be introduced for all contraventions of S995 is beyond the scope of the Sub-Committee's review. However, the defences in S1007 to S 1011 should be made applicable as safe harbours to all liability including liability under S995 in cases where those defences are in terms available. The discussion of the due diligence defence in the General Concepts Review section of this Report recommends that the due diligence defence be broadened for breaches of the Corporations Law relating to prospectuses. This recommendation stops short of broadening the due diligence defence to apply generally to any contravention of S995.
	4. Introduce an obligation to establish an element of wrongdoing (such as knowledge or recklessness) before the conduct is actionable.	To introduce an element of fairness.	Disagree. This is a prohibition provision and "criminal intent" should not be required to establish liability pursuant to S 1005.
	5. Clarify the legislation to ensure that actions defended under Part 7.11 Division 4 are not still actionable under S995 and S996.	The prospect of actions under S995 and S996 not being defendable by due diligence removes the motivation for taking due diligence precautions.	Refer to the response to 3. above.
	6. Legislate to ensure that S52 of the Trade Practices Act CTPA") is overridden to the extent there is any inconsistency.	There would appear to be an overlap between S995 and S52 TPA which is undesirable. The overlap creates uncertainty which is detrimental to the efficient operation of the capital markets.	It is recognised that there is an overlap between S995 and S52 TPA. Whether S995 should prevail over S52 TPA in all cases is beyond the scope of the Sub-Committee's review (given the application of S995 to matters other than prospectuses). The Sub-Committee recommends however that the provisions of the Corporations Law

which relate specifically to prospectuses should prevail over S52 TPA in cases where there is an overlap. As a consequence, the Sub-Committee recommends that S 1005(3) be amended.

SECTION-BY-SECTION REVIEW

Section	Proposal / Recommendation	Reason	Sub-Committee's Response
996	1. Should not apply to prospectuses which are not required to be lodged.	It is not possible to identify/evaluate an omission when there are no applicable disclosure requirements (i.e. in the case of excluded issues Part 7.12 is not applicable). It is impossible to set disclosure standards given the range of transactions caught under S996: * private placements to institutions; * shares acquired by an underwriter under an underwriting agreement; * share sale agreement of shares in a private company; * a receiver disposing of a company in exercise of a power of sale; * a letter offering securities by one institution to another. Excluded issues would relate mostly to professional investors, private transactions and so forth which should not require the protection of S996.	A common theme to the examples given of transactions to which Part 7.12 does not apply is that each party to the transaction deals with the other on a relatively level playing field; each is in a position to bargain for protective representations and warranties. The price paid and the terms of the transaction reflect a risk/reward assessment for each party to the transaction. With the thresholds contained in the exemptions referred to in S 1017 it is clear that unsophisticated investors will not be involved. The Sub-Committee has noted the amendments to S996 in the Corporations Legislation Amendment Act (No. 2) but believes the section could be further amended so as not to be applicable if: (a) a prospectus is not required to be lodged; (b) the transaction consideration is in excess of $500,000; and (c) the party acquiring securities pursuant to the prospectus controls an amount of not less than $10,000,000 for the purposes of investment in securities. This proposed broadening of scope gives smaller investors the protection of S996 even if a prospectus is not required to be lodged.

SECTION-BY-SECTION REVIEW

Section	Proposal / Recommendation	Reason	Sub-Committee's Response
	2. Should not apply to prospectuses which are not required by virtue of S1018(2) or (5) of Regulation 7.12.02.	S996(1A) only exempts excluded issues and excluded invitations from the operation of S996. A strict interpretation of this would be that offers/invitations exempted from the requirement to prepare a prospectus under S 1018(2) or (5) or Regulation 7.12.02 (re Part A Statements and offer documents relating to share swap takeover schemes) would not get the benefit of the S996(IA) exemption.	Concur. The Sub-Committee recommends that S 1017 be amended to make it clear that an offer or invitation exempted by virtue of S 1018(2) or (5) or Regulation 7.12.02 is an excluded offer or invitation.
	3. The concept of materiality of prospectuses not lodged under Part 7.12 should not involve consideration under S 1022 as suggested by the ASC in Practice Note 7.11.1.	This conclusion of the ASC is not supported in the law, and for reasons outlined in the response to 1. above, references to S 1022 are often not relevant given the range of transactions caught under S996.	Concur. The Explanatory Memorandum to the Amendment Bill to effect this Sub-Committee's recommendations should clarify this matter. This would then provide guidance pursuant to S 109J(3) and (4) and would establish the correct interpretation.

SECTION-BY-SECTION REVIEW

Section	Proposal / Recommendation	Reason	Sub-Committee's Response
	4. The meaning of "authorise or cause the issue of a prospectus" requires clarification.	The position of certain parties is unclear e.g.: (a) advisers in "non-expert" (S.1006(e)) roles; (b) trustees; (c) the clerk who lodges the document at the ASC.	Concur. This is a significant concern for advisers etc and should be addressed. The Sub-Committee recommends that the parties who are considered to "authorise or cause the issue of a prospectus" be specifically restricted to include only directors, underwriters, promoters and persons covered by S 1030(4).
		The liability position of all interested parties in a prospectus needs to be established to ensure they are adequately on notice to take reasonable precautions (i.e. conduct due diligence or avoid conduct which inadvertently "authorises or causes" the issue). The old terminology is too imprecise, particularly in the context of the recent emergence of due diligence committees. There is inadequate precedent to provide guidance.	This recommendation is subject to a review of the definition of "promoter". Under the current definition an expert on a due diligence committee could be seen to be a promoter. The implication of this is that such an expert would authorise or cause the issue which should not be the case. The Sub-Committee therefore recommends that the definition of "promoter" be redrafted to the effect that it does not include experts merely because they are members of due diligence committees. The Sub-Committee recognises that S 1021(6)(d) suggests that an expert could be involved in the "promotion" of a corporation. Given the recommendation to redraft the general definition of "promoter", it may be necessary to also define "promoter" and "promotion" specifically for the purposes of S 102 l(6)(d).
	5. Due diligence should not be an essential component of the reasonable belief defence.	As a matter of policy, no person holding an honest and reasonable belief should attract a criminal liability.	Disagree. The defence must show positive steps were taken to establish the reasonable belief otherwise recklessness is effectively

sanctioned under S996.

SECTION-BY-SECTION REVIEW

Section	Proposal / Recommendation	Reason	Sub-Committee's Response
1005	1. Clarify whether a causal connection is required between the contravention and suffering loss or damage.	A vendor should not be liable when the loss or damage occurs as a result of an event (e.g. a stock market collapse) entirely unrelated to a contravention of Part 7.11 or 7.12.	Disagree. Statutory clarification is not needed in regard to this matter as the necessity to establish a causal connection has been adequately addressed in case law.
	2. Clarify whether there needs to be reliance on a misleading statement in order to establish a contravention.	A purchaser should not be encouraged to embark on a decision to purchase securities without being aware of (or concerned about) the contents of the prospectus.	In accordance with case law in relation to Trade Practices matters and common law the courts will infer reliance on a false or misleading statement if there has been reliance on the prospectus as a whole. It is the defendant's task to prove that such an inference is not warranted. Thus, the defendant will have a defence if it can be shown that on the balance of probabilities an investor would have invested regardless of whether or not the prospectus contained a false or misleading statement.

SECTION-BY-SECTION REVIEW

Section	Proposal / Recommendation	Reason	Sub-Committee's Response
1006	1. Amend paragraphs (2)(a), (b), (d) and (e) so that persons are only deemed "involved" if consent to be named is provided.	In a secondary trading context these persons may play no part in (or have no knowledge of) the transaction.	The necessary amendments have been made in the Corporations Legislation Amendment Act (No. 2).
	2. Provide guidance on how "the corporation" in S 1006(2)(a) should be interpreted.	It is difficult to understand how the expression should be interpreted in regard to prescribed interest transactions. Should it be a reference to the management company, the trustee or one of the other potential participants in a prescribed interest offering?	The Sub-Committee recommends for the reasons given that guidance should be provided on how "the corporation" should be interpreted in this circumstance.
	3. Amend this section to limit its operation to persons involved in the preparation/issue of the prospectus rather than those named.	Persons with existing relationships with the corporation (e.g. auditor, banker, solicitor) who have no role in the issue should not be exposed to liability, as being named should carry no implication that responsibility is accepted.	Disagree. If a person chooses to be named in a prospectus then liability must be accepted. The commercial solution to the perceived problem is simply not to be named.
	4. Make defences available to persons not named but regarded as having been "involved in a contravention" as defined in s79.	There should be an over-riding defence to civil liability based on the principle that a person should only be responsible for information known to that person or information which a person could obtain by making reasonable enquiries.	Concur. This issue is essentially resolved by the Sub-Committee's proposed rationalisation of the due diligence defence discussed in the General Concepts Review section of the Report. More specifically, however, the Sub-Committee recommends that the S 1011 defence be made available to officers and employees seen to be "involved in the contravention" by virtue of S79.

SECTION-BY-SECTION REVIEW

Section	Proposal / Recommendation	Reason	Sub-Committee's Response
	5. Clarify the responsibility of trustees for prospectus contents including whether trustees "authorise or cause the issue" of prospectuses and whether a trustee is a S 1006(2)(h) person.	Trustees are unclear as to whether they authorise/cause the issue if their role is limited to being named and approving the issue in terms of the relevant trust deed.	S 1006(3) does not adequately clarify the trustee' s role due to the words "for that reason alone".
		It is generally recognised in the financial market that the prospectus is the fund manager's document and there is an argument that the trustee is only responsible to investors once they become unitholders.	Prudentially the law should have the effect of either making trustees take an interest in the contents of a prospectus or not requiring trustees to take an interest and thereby not exposing them to the corresponding liability. The joint review of collective investments being conducted by the Australian Law Reform Commission and the Companies and Securities Advisory Committee should clarify the role of trustees and thereby assist the interpretation of their role in prospectus preparation. As an interim step, S 1006(3) should be amended to require the trustee to include a report in the prospectus outlining what role (if any) it has played in the preparation of the prospectus.
	6. Delete categories (2)(g) and (h).	The liability provisions are unnecessarily complicated and the liability these persons may incur only arises if they are acting in the capacity of expert for which there exists a separate category (i.e. 2(e)).	Disagree. Categories (2)(g) and (h) persons specifically have available the "part only" defence. Deleting categories (2)(g) and (h) persons would therefore eliminate the important "part only" defence for these types of experts.
	7. Amend (2)(h) so that every company issuing a prospectus must name a solicitor and professional adviser.	This will provides a means of independent pre-vetting.	Disagree. Whether or not a prospectus should name a solicitor and a professional adviser should be left to the marketplace to determine.

SECTION-BY-SECTION REVIEW

Section	Proposal / Recommendation	Reason	Sub-Committee's Response
1008A	1. Provide a defence for directors responsible for material omissions.	Assumed to be a drafting error.	Agree. The necessary amendment has been made in the Corporations Legislation Amendment Act (No. 2) in Section S 1008A.
	2. Narrow the scope of the defence.	The defence is expressed to be a defence to all S 1005 liabilities yet the due diligence element of the defence is couched solely in terms of false and misleading statements and material omissions. This is assumed to be a drafting quirk.	Agree. The necessary amendment has been made in the Corporations Legislation Amendment Act (No. 2) in Section S 1008A.
	3. In relation to the "expert parts" defence, there should be a requirement that the person liable make enquiries or hold beliefs as to the truth/falsity of the actual statement given that they have made enquiries and hold beliefs as to the competence of the person making the statement.	The "expert" parts and "non-expert" parts dichotomy seems to be based on US law except that in the US persons liable must show in relation to "expert parts" that they had reasonable ground to believe and did believe that the statements therein were true. In other words, the directors should still be liable in circumstances where they know the experts statement was incorrect, regardless of whether they considered the expert competent.	Concur. The necessary amendment has been made in the Corporations Legislation Amendment Act (No. 2).
	4. Add S 1006(2)(b) and (c) persons to the list of those entitled to rely on a S 1011 defence or alternatively clarify S 1008A.	S 1008A can be interpreted as not providing a defence for an omission in the form of "mere" silence. If directors are expressly included in S 1011 they will get the benefit of a defence for a "mere" silence omission.	The Sub-Committee does not agree with the suggested interpretation of S 1008A. The Sub-Committee's proposed rationalisation of the due diligence defence discussed in the General Concepts Review section of the Report further clarifies the defences available to directors.

SECTION-BY-SECTION REVIEW

Section	Proposal / Recommendation	Reason	Sub-Committee's Response
1009	1. Provide a defence for experts responsible for material omissions.	Assumed to be a drafting error - inappropriate to impose a higher standard of liability on experts and advisers than that applicable to directors.	Concur. The necessary amendments have been made in the Corporations Legislation Amendment Act (No. 2).
	2. Provide a defence for an expert who has a statement purported to be made by him unknowingly included in a prospectus.	An expert can attract liability under S 1005 by virtue of S 1006(2)(e) but have no defence under S 1009 as he/she had not given consent under S 1032 to the issue of the prospectus or made reasonable inquiries in relation to the statement because he/she was unaware of the inclusion of the statement in the prospectus.	Concur. The necessary amendments have been made in the Corporations Legislation Amendment Act (No. 2).
	3. Liability should only arise with respect to statements where that matter was within the role being performed by that person and the defective statement arose with respect to a matter within the area of expertise of that person.	Accountants and solicitors who are retained to advise generally are currently exposed to liability for statements with aspects of meaning that are not based solely on their relevant expertise.	Disagree. Experts should not be free to make statements outside their area of expertise without attracting liability. Further, experts should not be able to avoid liability by making claims that a particular statement was outside their area of expertise.
	4. Clarify the liability of auditors regarding the inclusion of audited accounts in a prospectus.	Any reference to an audit opinion could be taken to be a statement purporting to be made be an expert thereby exposing the auditor to liability.	Clarification is not specifically required. Auditors should specify what work they have performed in relation to the financial information contained in the audited accounts after the signing of the audit report and avail themselves of the "part only" defence in S1010(1).
	5. Experts named in other experts' reports should not be subject to the same level of liability/risk as promoters, directors and other advisers.	The prospectus process can be considerably delayed if every expert named (regardless of the relative importance of their role) faces	The view of the Sub-Committee is that an expert should attract liability if consent to be named is given. If consent to be named is not

the same liability.	given, no liability should be attracted.

SECTION-BY-SECTION REVIEW

Section	Proposal / Recommendation	Reason	Sub-Committee's Response
1010	1. Clarify the consequences of making a statement that indicates an expert has been responsible for part only of a prospectus when this statement is actually false (particularly with regard to S995 and S996).	Whilst it seems wrong to reward people for making false statements it does seem to have been the intention of the legislation to permit certain experts to isolate the areas of the prospectus for which they bear liability.	No clarification is necessary in respect of this issue. A false "part only" statement should not be made and if it is, it is reasonable that liability should be attracted under S995.
	2. Clarify the scope of the provision in relation to omissions.	It would be difficult to determine whether omitted material has been omitted from a particular part of a prospectus. To assist the determination it would appear that some classification of the different parts of the prospectus is necessary.	The view of the Sub-Committee is that in most circumstances it would be too difficult to clarify this matter by legislation.

SECTION-BY-SECTION REVIEW

Section	Proposal / Recommendation	Reason	Sub-Committee's Response
1011	1. Clarify the extent persons must go to satisfy the requirements of S 1011(1)(b) and (c).	It may be very difficult for any of the persons referred to in S1011 to satisfy these tests, e.g. if "information supplied by another person" consisted of technical analysis by a scientific expert what constitutes "reasonable reliance".	Disagree, the extent of reasonable enquiry etc. should depend on the circumstances of the issue which are not necessarily foreseeable. Creating some statutory limit on the "extent" of due diligence also risks introducing loopholes for avoiding the intent of the legislation.
	2. Narrow the scope of the defence.	The defence is expressed to be a defence to all S 1005 liabilities yet the due diligence element of the defence is couched solely in terms of false and misleading statements and material omissions. This is assumed to be a drafting quirk.	The Sub-Committee recommends that S 1011(1) be narrowed such that persons who can avail themselves of this defence for liability incurred under S 1005 can only apply "in respect of a false or misleading statement in or a material omission from a prospectus".
	3. Make the due diligence defence available to all persons with potential liability.	Currently the defence is only available in the case of S 1011(1)(c) and there would appear to be no reason why it is so limited.	Concur. This issue is addressed by the Sub-Committee's proposed rationalisation of the due diligence defence discussed in the General Concepts Review section of this Report.
	4. Remove the limitation on the due diligence defence in which it is only established if another person caused the false or misleading statement or omission.	This limitation is at odds with the essential purpose of due diligence, namely that a defendant can avoid liability by demonstrating that he used all reasonable endearours to ensure neither he nor anybody else made the mistake.	The Sub-Committee disagrees with this interpretation of S 1011.
	5. The defences available to the corporation should be expanded. Amendment of definition of "another person" in S 1011(2) may be the way to achieve this.	Because of the definition of "another person" in S1011(2) (and the interpretation that every person involved in the preparation of the prospectus can be seen to be an "agent" of the corporation), the corporation effectively gets only the "reasonable mistake" defence.	Concur.

SECTION-BY-SECTION REVIEW

Section	Proposal / Recommendation	Reason	Sub-Committee's Response
1017	1. Clarify whether it is the intention of paragraph (a) to exempt from the operation of Division 2 "offers" and "invitations" leading to an "excluded issue of securities".	S 1017 paragraph (a) exempts an "excluded issue of securities" whereas S 1018 only prohibits offers and invitations.	Concur.

SECTION-BY-SECTION REVIEW

Section	Proposal / Recommendation	Reason	Sub-Committee's Response
1017A	1. The exemption from registration available to approved unlisted corporations should be statutory, and not require specific approval of the ASC.	This appears to be an unnecessary procedure particularly with regard to multinational ESOP's which must comply with securities and corporations laws of a number of jurisdictions.	Disagree. To make the exemption statutory would take away flexibility from the ASC to react to adverse situations.
	2. Extend the definition of "approved unlisted corporation" to related bodies corporate under the definitions in S50 and to trusts established for the specific purpose of an ESOP.	Exemption from registration extends only to shares or prescribed interests made available by a corporation to its own employees.	Concur, provided the related corporation or its ESOP trust are approved by the ASC.

SECTION-BY-SECTION REVIEW

Section	Proposal / Recommendation	Reason	Sub-Committee's Response
1018	1. Amend S1018 such that an unqualified exemption is provided for listed securities.	The wording of the current exemption (particularly S 1018(5)) is unnecessarily complicated. As time goes by, the effect of S 1018(5) will become less relevant because of the ASX requirement that all new listings of securities will require a prospectus.	Concur.
	2. Amend S 1018 to extend the listed securities exemption to, securities of foreign corporations listed on reputable securities exchanges (as prescribed by regulation).	Currently no exemption is provided for secondary trading in listed securities of foreign corporations.	Concur. The exemption should however only be available to securities which are acquired through licenced dealers. This would ensure that investors have the protection of the "know your client" rule (S851 and S852) which would in turn place pressure on licenced dealers to obtain relevant information on the securities. The Sub-Committee recognises the potential political and diplomatic problems which might arise by providing such exemptions on a country by country basis. It is therefore recommended that the ASC grants such an exemption on a company by company basis to foreign corporations which can demonstrate compliance with disclosure and listing rule standards equivalent to Corporations Law and ASX Listing Rule Standards.
	3. Amend paragraph 5(a) such that it can not be interpreted as imposing an obligation on the seller of listed securities to ensure that the market is fully informed of the affairs of the company.	It is unreasonable to require this in the case of independent secondary trading.	As outlined in the response to 1. above, the Sub-Committee believes that S 1018 should be amended such that S 1018(5) would no longer apply.
	4. Repeal paragraph 5(b).	It is inappropriate to require a secondary seller to ensure the listing rules have been complied with by the corporation. It should be enough that the corporation is listed.	Refer to the response to 3. above.

SECTION-BY-SECTION REVIEW

Section	Proposal / Recommendation	Reason	Sub-Committee's Response
	5. Secondary trading should not require a prospectus.	The argument that an issuer should be responsible for informing the market is reasonable but this argument is not as compelling with regard to a seller.	The Sub-Committee disagrees with the reason outlined.
	6. Directly legislate against backdoor listings.	It would appear that this was the intention of the S 1018 exemption being conditional on a prospectus having been lodged at some time in respect of the class of securities.	If the intention of the legislation is to compel all new listings to be supported by a prospectus, this should be expressly stated. If the legislation is intended to ensure that backdoor listings require a prospectus then it should adopt tests like those in the ASX Listing Rules to also capture situations in which prospectuses are obligatory.
	7. Primary issues and secondary trading should not be regulated by the one provision (S 1018).	One attempts to regulate the conduct of the issuing company whilst the other is concerned with the circumstances in which an owner of existing securities can offer them for sale.	Disagree, although the Sub-Committee notes that the Corporations Legislation Amendment Act (No. 2) has clarified the operation of prospectus laws for primary and secondary issues, which go to address these concerns.

SECTION-BY-SECTION REVIEW

Section	Proposal / Recommendation	Reason	Sub-Committee's Response
1020	1. Amend S1020(b) so that in the case of a renounceable rights issue the form may be "accompanied by" a copy of the prospectus, rather than having to be "attached to" the prospectus.	It is suggested that because the entitlements trading and dealing in renounceable rights has worked acceptably well in the past there should be no change to the established practise. It is noted that if the securities are debentures it is sufficient that the application form be attached to or accompanied by a copy of the prospectus.	Concur.

SECTION-BY-SECTION REVIEW

Section	Proposal / Recommendation	Reason	Sub-Committee's Response
1020A	1. Amend the legislation to require a prospectus to be lodged 28 days prior to the intended issue and, if the prospectus is registrable, registered within 14 days of the issue.	The existing 14 day registration period does not allow enough time for printing and distribution of a prospectus, particularly in the cases where the ASC's decision to register the prospectus coincides with the issue date.	The Sub-Committee proposes that if the recommendation to restrict the registration period to two business days (as outlined in the General Concepts Review section of this Report) is not adopted that S1020A should be amended as suggested.
	2. The ASC should not be allowed to interpret the legislation such that they have an option not to undertake preventative measures (i.e. pre-vetting).	The ASC has a positive requirement in law to form an "opinion" as to whether a prospectus complies with the legislation - particularly regarding false and misleading statements and omissions. It may be difficult for the ASC to rely on its stop order power (the use of which requires contravention in a substantial respect) if it has not met its obligation to refuse registration under S 1020A.	As discussed in the General Concepts Review section of this Report, the Sub-Committee wishes to implement changes which would specifically limit/restrict registration (and hence pre-vetting) to a period of two business days (as is applicable in the registration of Part A statements).

SECTION-BY-SECTION REVIEW

Section	Proposal / Recommendation	Reason	Sub-Committee's Response
1021	1. This section should only apply to lodged/registered prospectuses.	S1021(1) states that S1021 is applicable to all prospectuses. However the prescribed disclosures are clearly not applicable to the many other instruments which would be prospectuses caught under the S9 definition.	Concur. The Sub-Committee believes that the Corporations Legislation Amendment Act (No. 2) clarifies this section satisfactorily.
	2. It is unclear how a secondary trading vendor can comply with this section.	Certain prescribed disclosures are clearly not relevant to secondary trading e.g. S1021(5) requiring a statement that securities will be allotted or issued etc.	Concur. The Corporations Legislation Amendment Act (No. 2) clarifies this section satisfactorily.
	3. There should be a requirement for a plain English summary.	Prospectuses are currently becoming too long and involved to be readily understood by investors. Investors shown not to read prospectuses in the majority of cases anyway.	Disagree with need to legislate for this. The issuers should be able to present their offer/invitation as they choose, given that they retain liability for the document.
	4. S 1021(6) and Regulation 7.12.11 should be amended so that disclosure of remuneration payable to the director as an officer/employee of the corporation or related body corporate is not required.		Disagree.
	5. S 1021(6) should allow for disclosure that "usual professional fees have been paid or will be paid".	Actual amount of fees payable may not be accurately estimated at the date of release of the prospectus.	Disagree.

SECTION-BY-SECTION REVIEW

Section	Proposal / Recommendation	Reason	Sub-Committee's Response
	6. Normal directors fees and professional fees paid to an expert should not need to be disclosed.		Disagree.
	7. Clarify the date required by S 1021(3).	There is currently uncertainty as to which date is required. Is it the date the prospectus is signed by directors, lodged, registered or printed?	The Sub-Committee recommends that the date referred to in S 1021(3) be specifically required to be the date that the prospectus is signed by the directors (in the case of primary prospectuses) or the sellers (in the case of secondary prospectuses).

SECTION-BY-SECTION REVIEW

Section	Proposal / Recommendation	Reason	Sub-Committee's Response
1022	Some form of disclosure guideline should be issued.	The following reasons for a disclosure guideline have been presented:	
		* Prospectuses are said to have been too variable in their content. It has also been argued that it is too difficult to comply with S 1022 and that there is too great an uncertainty in the requirements. * A disclosure guideline would avoid a minimalist standard developing. * The current drafting of S 1022 is too vague to be of use.	Disagree. The Sub-Committee encourages disclosure standards being produced and promulgated by professional bodies. The ASC is not considered to be the appropriate body to develop these guidelines. Furthermore, if the ASC does develop guidelines it should not be placed in a position of being obliged to pre-vet and "police" its own standards.
		* Prospectuses have become lengthy as a result of being prepared to ensure adequate defence to liability rather than being prepared to be informative.	The issue of prospectus disclosure is discussed in detail in the General Concepts Review section of this Report. The thrust of this discussion is that the Sub-Committee supports the disclosure philosophy of S 1022 and does not support any departure from it.
	2. A key data summary should be required to be disclosed in prospectuses.	Key data summaries have traditionally provided useful information for investors and should be retained.	Disagree. Although the usefulness of key data summaries is recognised, to prescribe the contents of the summary in effect must be de facto prescribing the overall prospectus content which is contrary to the philosophy of S 1022.

SECTION-BY-SECTION REVIEW

Section	Proposal / Recommendation	Reason	Sub-Committee's Response
	3. Legislation should harmonise prospectus provisions with other provisions of Corporations Law in respect of financial information.	Legislation should recognise that financial statements prepared so as to give a true and fair view in compliance with accounting standards should satisfy the test for disclosure of S 1022(1).	The Sub-Committee considers that no action is necessary. It is questionable whether such "harmonising" needs to be spelt out. Presumably the courts interpretation of financial disclosure requirements would have regard to the reporting requirements of the Corporations Law in any event. It should also be remembered that compliance with accounting standards will not necessarily give a true and fair view.
	4. Need to spell out the standard of perception to be attributed to investors e.g. US test for reasonable investigation "that required of a prudent man in the management of his own property".	S 1022(3)(b) - it would be difficult to construct a public offering where the issuer can be confident that all kinds of persons needs will be satisfied.	It is agreed that the definition of reasonable investor is impossible to clarify. If professional bodies issue statements, however, the Sub-Committee believes that this problem will largely disappear.
	5. References to professional advisers could be deleted if the standard of perception to be attributed to investors was spelt out.	Refer the reason in 4. above.	Disagree.

SECTION-BY-SECTION REVIEW

Section	Proposal / Recommendation	Reason	Sub-Committee's Response
	6. The requirement to specify prospects should not relate to issues by "established" companies.	Issuers generally are having difficulty establishing the appropriate prospects disclosure. In some cases employee share schemes have been discontinued because directors were concerned about the prospects disclosure and related liability.	Disagree. It would be too difficult to create such an exemption.
	7. S1022(3)(e) needs to be clarified. S 1022(3)(e) should include statutory accounts in order to correct the current ASC interpretation that they are not assumed to be known.	It is impossible to ascertain what is "known". This should be amended as per the UK Financial Services Act to be "available and which could reasonably be expected to be known".	Concur.
	8. The intention/meaning of "prospects" needs to be more clearly presented. S 1022 should require forecasts only in circumstances where there are reasonable grounds for the statements.	Approaches in IPO prospectuses have varied widely (e.g. CBA and NFL). This is an unacceptable result. "Prospects" is not defined and is therefore meaningless.	This issue is discussed in detail in the General Concepts Review section of this Report. To summarise, the view of the Sub-Committee is that the inclusion of forecasts in prospectuses is desirable and should be encouraged but that inclusion of forecasts should not be mandatory.

SECTION-BY-SECTION REVIEW

Section	Proposal / Recommendation	Reason	Sub-Committee's Response
	9. The Corporations Law should be amended so that the onus of proof in S765 is reversed in respect of prospectus disclosures.	The current onus of proof applying in the case of forecasts is too severe and discourages issuers (e.g. CBA) from providing forecasts.	Concur. This issue is addressed in detail in the General Concepts Review section of this Report.
	10. Disclosures of assets, liabilities, profits and prospects are not relevant in all circumstances.	Profit forecasts/specific market predictions are inappropriate for unit trust prospectuses, investment managers only hold arms length investments and they are not in a position to obtain the management information to make such projections. Unit trust investments (e.g. superannuation) may encompass time horizons beyond the currency of the prospectus.	No action is considered necessary. If a particular disclosure is likely to be irrelevant or misleading, then it is at the issuer's discretion whether the statement should be included in the prospectus.
		Such information is unnecessary for highly rated debentures and cash management trust prospectuses. In such cases the only relevant information is the interest rate to maturity or current market interest.	Disagree.
	11. "Investor" should be defined.	Defining the profile of the investor has a direct bearing on the nature and extent of reasonable disclosure.	No action is considered necessary. The refined definition may create loopholes (i.e. assumed knowledge of investors etc) which could weaken the law. It is noted that the recommendation to amend S 1022(3)(e) will provide some assistance in the determination of reasonable disclosure (refer the response to 7. above).

SECTION-BY-SECTION REVIEW

Section	Proposal / Recommendation	Reason	Sub-Committee's Response
1024	1. Amend S1024(l)(b)(ii) to ensure that supplementary prospectuses are allowed to be lodged where it is subsequently realised that a matter in existence at issue date requires some form of amendment.	Currently it appears supplementary prospectuses can only be issued where the preparers become aware of a matter which arose after the preparation of the prospectus. There appears to be no provision to allow supplementary prospectuses to be issued where preparers become aware of a matter which existed at the time of the issue.	Concur.
	2. Incorporate an objective test for what constitutes "significant".	General uncertainty.	The Sub-Committee does not believe that the word "significant" needs specific statutory clarification.
	3. Amend the legislation to make it clear that an issuer can issue a reprinted prospectus which incorporates amendments.	In cases where several supplementary prospectuses are lodged (as is often the case for continuous debt issuers such as finance companies) a reprinted prospectus would be much clearer for a potential investor. This approach would also provide the issuer with greater control in ensuring a large number of issuing outlets have accompanied the prospectuses with the supplementary prospectuses.	Concur.
	4. Amend the legislation to require notification in the general press of the existence of a supplementary prospectus and details of its availability.	Persons who have a copy of the original prospectus deserve to be given a reasonable opportunity to get the benefit of the supplementary advice	Concur.

SECTION-BY-SECTION REVIEW

Section	Proposal / Recommendation	Reason	Sub-Committee's Response
1025/1026	1. Repeal S 1025 and S 1026.	These provisions unnecessarily complicate the law. The existence of S995, S52 of the Trade Practices Act and relevant provisions of the States Fair Trading Acts provide sufficient recourse for persons suffering loss as a result of misleading or dishonest advertising in relation to securities. There would appear to be no reason why the public should not be informed of a pending issue of securities given that a remedy for those suffering as a result of dishonest information is available through S995. In the case of privatisation issues it may often be important for issues to gauge the likely public reaction to the issue. This process would be greatly facilitated by repealing S 1025 and S 1026 which place unnecessary restrictions on the dissemination of bona fide information.	Concur. However, the Sub-Committee considers there is still potential for some abuse in this area and believes the provisions should continue to cover unlisted securities. Accordingly it is recommended that S 1025 and S 1026 be amended to not apply to listed securities, or securities which are to be listed on the ASX within a reasonable period (say 90 days).
	2. Amend the legislation to relax pre-publicity restrictions.	Without relaxation the market would not be able to learn in advance of pending floats.	Concur. Refer to the response to 1. above.
	3. Clarify whether S 1025 and S 1026 apply to the broad definition of prospectus or only to those prospectuses requiring lodgement/registration. Propose introducing the notion of a "regulated prospectus" (i.e. a lodged or registered prospectus) re the application of these sections.	A consistent approach should be adopted so it is clear what each reference to a prospectus is meant to cover.	In the event that S 1025 and S 1026 are not repealed as recommended in 1. above, this clarification should be provided.

SECTION-BY-SECTION REVIEW

Section	Proposal / Recommendation	Reason	Sub-Committee's Response
	4. Modify S 1025 and S 1026 to ensure that their application to pathfinding documents and pricing and demand surveys is not too restrictive.	S 1025 and S 1026 as they currently stand could seriously impede the likelihood of success of privatisation issues or alternatively result in over subscription, as was the case in the CBA float.	This problem would be resolved by the repeal of S 1025 and S 1026 as recommended in 1. above. Although the Sub-Committee generally questions the relevance of pathfinder prospectuses (given pricing can be established by circulation of drafts to excluded institutions) the system should nevertheless be flexible enough to accommodate pathfinders without unnecessary complications.
	5. Make it clear that S 1025(2) is inclusive not exhaustive.	Whilst the change in drafting from the old S99 and the explanatory memorandum in relation to S 1025(2) indicate that the new provision is not intended to limit notices to the matters specified in paragraphs (a) to (f), some doubts have been expressed in regard to this interpretation.	In the event that S1025 and S1026 are not repealed as recommended in 1. above, the Sub-Committee agree with this proposal provided it can be shown that there are other significant matters which may need to be raised in such notices.
	6. S1025 should not apply if the "listed securities" exemptions apply.	There is currently no way an issuer can comply with the notice requirements of S 1025 without issuing a prospectus even if it can rely on an exemption to make such an issue elsewhere in the law (e.g. S 1018(5) and S 1078(3)). If the issuer cannot rely on various exemptions in the law a notice must comply with the requirements of S 1025. One of these requirements is that the notice must advise that a prospectus has been lodged.	In the event that S 1025 and S 1026 are not repealed as recommended in 1. above, the notice requirements of S 1025 should be reviewed with consideration being given to whether the section should apply to prospectuses not required to be lodged.

SECTION-BY-SECTION REVIEW

Section	Proposal / Recommendation	Reason	Sub-Committee's Response
	7. Amend S 1025 to enable a non-issuing seller to comply with the notice requirement.	It is currently not possible to structure an offer/invitation to comply with S 1025 where the seller is not the issuer because: (a) arguably the sending of an offer/invitation to a prospective purchaser is in itself a publication under S 1025; (b) this means it must include a statement that the contract for purchase of the securities can only be made on receipt of a form of application attached to or accompanied by a prospectus; and (c) this application form is designed for use where the seller is an issuer and cannot simply be amended where seller and issuer are different parties.	This issue appears 1o have been addressed in the Corporations Legislation Amendment Act (No. 2).
	8. Consider amendment to S 1025(2)(c) re the date requirement.	Compliance is often impossible at a practical level in the case where a fund manager's prospectus mentions other products of the fund manager.	In the event that S 1025 and S 1026 are not repealed as recommended in 1. above, the application of S 1025(2)(c) should be reviewed with consideration being given to prospectuses issued by fund managers.
	9. An Australian subsidiary of an overseas issuing corporation should be able to distribute information re an ESOP to Australian employees in the absence of a prospectus without contravening S 1025.		Concur. This problem would be resolved by repeal of S 1025 and S 1026 as recommended in 1. above.

SECTION-BY-SECTION REVIEW

Section	Proposal / Recommendation	Reason	Sub-Committee's Response
1029	Clarify the meaning of "material contract" mid consider repealing S 1029(b) (the requirement to make the whole contract available).	Contracts may contain commercially sensitive informative which a company should not be required to provide for display particularly if details of such parts are not required to be disclosed in accordance with S 1022.	Concur.

SECTION-BY-SECTION REVIEW

Section	Proposal / Recommendation	Reason	Sub-Committee's Response
1030	1. Consider repeal.	S 1018 regulates primary and secondary sales.	Disagree. The section hinges on establishing that the underlying purpose for the allotment or issue was to offer the securities for resale. It should therefore remain to catch blatant avoidance schemes without inhibiting the necessary exemption for proper SEATS trading.
	2. Clarify S 1030.	This section should specifically address the avoidance opportunities it is intended to overcome. The deeming provision is ineffective as no provisions impose liability re the issue of a prospectus (only authorising or causing the issue).	Refer response to 1. above and also refer to the discussion of this issue in the General Concepts Review section of this Report.

SECTION-BY-SECTION REVIEW

Section	Proposal / Recommendation	Reason	Sub-Committee's Response
1031	1. Amend this section to provide greater certainty for foreign corporations listed on overseas exchanges.	If there is a rights issue and the prospectus states that an application will be made for listing of the new securities on a foreign stock exchange S 1031 requires that application be made for listing within 3 days and requires the corporation to repay any money received by it pursuant to the prospectus if listing is not granted within a stated time period regardless of the local requirements.	Concur.

SECTION-BY-SECTION REVIEW

Section	Proposal / Recommendation	Reason	Sub-Committee's Response
1033	1. Amend the legislation so as not to allow interim stop orders to be given where there is no real possibility that securities will be allotted or issued prior to disclosure of changed circumstances in a supplementary prospectus or prior to the holding of a hearing.	S 1033 interim stop orders should be restricted to emergencies given the potentially irremediable effect they could have on the market for the securities in question.	Concur. The stop order power must be exercised With great caution. A stop order placed on a continuous debt issuer for example could seriously jeopardise the credibility (and liquidity) of such an issuer.

SECTION-BY-SECTION REVIEW

Section	Proposal / Recommendation	Reason	Sub-Committee's Response
1035	1. Repeal S 1035(4).	There would appear to be no reason why an issuer should be prevented from offering for subscription $1.00 shares paid to $0.01 if the issuer had otherwise complied with the prospectus requirements.	The sub-section is contrary to the thrust of the Corporations Law with regard to non-prescriptive disclosure.

SECTION-BY-SECTION REVIEW

Section	Proposal / Recommendation	Reason	Sub-Committee's Response
1038	1. Confine the application of this section to material changes to contracts during the period between allotment and the statutory meeting.	Material changes to contracts in the period before allotment should be regulated by S 1024 (i.e. by supplementary prospectus).	Concur.

SECTION-BY-SECTION REVIEW

Section	Proposal / Recommendation	Reason	Sub-Committee's Response
1040	1. Specifically legislate to allow Cash Management Trusts ("CMT") an extended life prospectus i.e. 12 months.	Restrictions on CMT investments make them virtually as secure as bank or other deposits.	This proposal needs to be considered in light of the joint review of collective investments being conducted by Australian Law Reform Commission and the Companies and Securities Advisory Committee.
	2. Specifically legislate to allow continuous borrowing corporations and issuers of mortgage trusts an extended life prospectus.	In the past, changes in the prospectus of such issuers have usually been confined to a new set of financial accounts which only change every 12 months.	Refer to the response to 1. above.
	3. Specifically legislate to allow continuous offerers of securities such as unit trusts an extended life prospectus.	An appropriate level of investor protection can be maintained with 12 month prospectuses particularly given the existence of: (a) supplementary prospectus requirements; and (b) the ASC's stop order power.	Refer to the response to 1. above.
	4. Unit trust savings plans should not require an exemption from prospectus requirements (as the ASC has indicated).	Requirement for an exemption is inappropriate and in contrast with Life Insurance based products where superannuation and life insurance savings plans can continue to receive contributions following the original application without having to comply with exemption requirements.	Refer to the response to 1. above.

SECTION-BY-SECTION REVIEW

Section	Proposal / Recommendation	Reason	Sub-Committee's Response
1063	1. Ordinary business relationships not intended to be regulated should be clearly made exceptions.	This is the Government' s intention.	The Sub-Committee recommends that SI063 be reviewed with a view to ensuring that ordinary business relationships not intended by the Government to be regulated are clearly made exceptions.
	2. Amend the definition of franchise in Regulation 1.02(1) to make it broader, and make the amendment effective retrospectively (to 1 January 1991).	The definition is currently too narrow and as a result does not reflect the Government's policy of exempting all ordinary business relationships.	The Sub-Committee recommends that the definition of franchise be reviewed.

SECTION-BY-SECTION REVIEW

Section	Proposal / Recommendation	Reason	Sub-Committee's Response
1069	1. Clarify the meaning of the word "strive" in S 1069(1)(a) and Regulation 7.12.15(1)(e).	It is difficult to understand how this word should be interpreted in the context of each of these covenants.	Concur.
	2. Clarify what form of approval the trustee or representative should take in regard to S 1069(1)(b)(iii).	In order to give approval, and in accordance with its general fiduciary obligations, a trustee may require changes to the prospectus (and many go so far as suggesting drafting changes) which could have implications for the trustee in regard to its role in "authorising" the issue.	This proposal needs to be considered in light of the joint review of collective investments being conducted by the Australian Law Reform Commission and the Companies and Securities Advisory Committee.
	3. Remove the inconsistency in S 1069(5) and (7) re covenants deemed included in deeds	S 1069(5) deems the covenants contained in S 1069(1) (except for those covenants specifically excluded) in relation to deeds in existence prior to the introduction at the Corporations Law. S 1069(7) only deems such covenants to the extent practicable in relation to deeds coming into existence following the introduction of the Corporations Law.	Recommendations such as this one in respect of prescribed interests are beyond the scope of the Sub-Committee' s review.

SECTION-BY-SECTION REVIEW

Section	Proposal / Recommendation	Reason	Sub-Committee's Response
1073	1. Repeal this provision or at least make the rights of action granted by the section dependant upon the existence of a discretion granted to the courts.	The provision can operate to allow an offeree of prescribed interests to void the contract even in circumstances where only an insignificant or "technical" contravention of the legislation has occurred which bears no causal connection to any loss or damage sustained by the offeree. In fact it is not necessary for there to be any loss or damage sustained by the offeree as a prerequisite to the application of this provision. The section does not provide for any time period during which the rights granted pursuant to the provision can be exercised, meaning a "chain reaction" of contract voiding could occur back up to the ultimate vendor. If this were allowed to occur it would be damaging for business dealings with any prescribed interest involvement. The uncertainty and potentially damaging consequences for the vendor suggest that purchasers could use the provision to extract more favourable commercial terms from vendors.	The issue is noted, but any recommendation is Considered beyond the scope of the Sub-Committee's review and needs to be considered in the light of the joint review of collective investments being conducted by the Australian Law Reform Commission and the Companies and Securities Advisory Committee.

SECTION-BY-SECTION REVIEW

Section	Proposal / Recommendation	Reason	Sub-Committee's Response
1075	1. Amend to include mortgagee in possession.	Refer to the response to 1. of S 1073 above.	
	2. Give detailed consideration to the fact that even though the section exempts specified persons from the requirements of Division 5 of Part 7.12 such persons are liable in other material respects (i.e. S995 and S996).	This section needs consideration in light of the special circumstances which relate to insolvency administrations generally.	Refer to the response to 1. of S 1073 above.
	3. Clarify why a similar exemption to this is not available in relation to securities.	There would appear to be no reason why the exemption should not apply across the board.	Refer to the response to I. of S 1073 above.

SECTION-BY-SECTION REVIEW

Section	Proposal / Recommendation	Reason	Sub-Committee's Response
1077-1082	1. Delete Division 6 Part 7.12 (the sharehawking provisions) in their entirety.	S 1018 regulates all offers and invitations.	Concur. The Sub-Committee believes that the sharehawking provisions serve no useful purpose given that S 1018 regulates all offers and invitations and its continued existence creates uncertainty which hinders the efficient operation of the capital markets. However, because of the potential for abuse in this area the provisions should still govern unlisted securities and securities listed on overseas stock exchanges. Accordingly the Sub-Committee believes the sharehawking provisions should only be amended so as not to apply to listed securities or securities which are to be listed within a reasonable period (say 90 days). This issue is discussed in greater detail in the General Concepts Review section of this Report.
	2. Restrict the share hawking provisions to regulate secondary trades only.	With S1018 regulating only primary issues and Division 6 regulating secondary trades, any overlap between these provisions would be eliminated. If this course of action were adopted, S 1078 and S 1079 would need to be rationalised so they did not overlap e.g. have S1078 deal with oral communication and S 1079 deal with written communication.	Refer to the response to 1. above.
	3. S1078 and S1079 should have a total exemption for all listed securities whether or not communication is made by a licenced dealer.	Unlike S552(4) of the Companies Code, S1078 (3)(b) of the Corporation Law provides an exemption for listed securities only where the communication is by a licenced dealer.	Refer to the response to 1. above.

VALUATION OF SHARES IN PTSN

Summary of Submission by Mitsui ("M") and Onoda ("O") ("Submission")

* Controlling interest 70%

* No regulatory requirement for divestiture immediately (have up to 1997) (or 5 years ff GND does not purchase shares at offered price).

* Right to sell to third parties - right of first offer to GND.

* Fair market price.

* Output exceeds by = 16% installed kiln capacity as a result of ability to purchase clinker and grind in excess capacity grinding plant.

* Good brand names.

* Excess limestone capacity (surplus asset(?)).

* Well located near port.

* Good operating efficiencies GOM 47%/39% for 1990/1991 — But this not out of line (higher or lower) than rest of industry.

* Comparable transaction: — Indocement purchased TMPG (1991) for US$270 million 1.2 mtpa capacity.

* Proposed to be debt free by 1995
Large Forex exposure via foreign debt
High interest expense

* Tax-loss carry forwards US$38 million - 3 (or 5) years remaining.

* Japanese offer: — US$94.5 million for 70%
Repayment of loans guaranteed by Japanese:
$51.5 million (30 September 1992)
Repayment of indebtedness or liabilities to Japanese

B3276R/AT8/AMC1

Comments

DCF Discount Rate

The DCF discount rate calculation appears to be incorrect.

The traditional CAPM formula (Re = Rf + [(Rm - Rf) x ß) gives a cost of equity capital which is after tax bourne by the corporation but before tax bourne by investors in the corporation.

Thus, in order to gross-up the Re (after corporate tax) to a re (per corporate tax), in a situation where the assets of the corporation have a very long (or effectively infinite) life, the following formula applies:

$$\frac{Re}{1-t} = re$$

where: t = corporate tax rate expressed as a decimal.

Therefore, the calculation of a pre-corporate tax weighted average cost of capital ("wacc") is expressed as follows:

$$Wacc = \left(\frac{Re}{1-t} \times \frac{e}{v}\right) + \left(rd \times \frac{d}{v}\right)$$

where: e = market value of equity
d = market value of debt
v = the addition of d and e

The DCF model does not gross-up the Re to re when calculating the wacc discount rate.

The after tax wacc discount rates calculated on page 21 (Section D) of the Submission are not WACC discount rates but are the Re (equity) discount rates shown in Section C on page 21 multiplied by 1 minus the tax rate (expressed as a decimal). Therefore, the numbers are attempted calculations of after tax equity discount rates, not WACC. However, the calculations are incorrect, in that, as explained above, the Re (equity) is already post corporate tax and therefore the multiplication by .65 is incorrect.

It is noted that the WACC used compares with the Re, as follows:

Year	**Re (Cost of Equity)**	**WACC**
1992	14.02	11.48
1993	13.37	11.15
1994	12.72	12.36
1995 ff	12.72	12.72

That is, it is assumed that by end 1994, the company will be ungeared and an equity discount rate is appropriate.

However, the theory is that the WACC should be calculated using an industry standard gearing ratio as the ß and (Rm-Rf) used to calculate the Re are based on companies in the market which are inevitably geared to some degree.

The problem with this point is that it is disadvantageous to our client's case, as the correction of the error would lead to a lower discount rate and therefore a higher NPV.

The above calculations give nominal (i.e. inflated) (as distinct from real (i.e. uninflated)) discount rates and should be applied to nominal cash flows.

The DCF is not explicit as to whether it is expressed in real or nominal terms. However, it appears the DCF is expressed in nominal terms.

There is no direct indication of the ratios used in the calculation of the discount rate. $\frac{e}{v}$ and $\frac{d}{v}$

Applying the market values of debt and equity resulting from the DCF the correctly calculated after tax WACC (assuming all other factors are correct) would be as follows:

	1992	**1993**
Corrected	19.11	18.035
M&O Submission	11.48	11.15

Accordingly, the discount rates used in the M&O Submission are too low, thus incorrectly increasing the NPV.

Applying the corrected discount rate to the free cash flows in the M&O Submission would reduce the value of the company as a whole from Rp421, 262 million (US$205.49 million) to Rp324, 292 (US$158.19 million) see Appendix A.

Terminal Value ("TV")

The TV represents 42.9% of the total value which is a large percentage. It is equivalent to 7.75x the free cash flow in 2001 discounted at 12.72% for 9 years.

The discounted TV in 2001 of PTSN is stated to be Rp 180,732 million. This has been discounted at an unstated WACC. It is presumed the WACC applicable to 2001 has been used (12.72%). Therefore, the undiscounted TV is found as follows:

$180,732 \div (1 \div (1.1272)^{9}) = 530,938$

Free cash flow in 2001 = 68,542

530,938 ÷ 68,542=7.75x

Free cash flow in last three years averages = 61,908
530,938 ÷ 61,908 = 8.58x

The growth in free cash flow over the last five years of the model is as follows:

	Year on Year (%)	**Compound to 2001 (%p.a.)**
1997	12	11.4
1998	12	11.3
1999	11.5	11.2
2000	11.3	11.0
2001	11.0	-
Simple Avg:	11.6	11.2

Say 11.0% (nominal)

The issue is whether this growth is maintainable into the fume. Assuming so, the correct calculation of the TV multiplier would be:

$1 \div (17.93-(11.0 \times e)) = 1 \div (17.93-(11 \times 0.75)) = 1 \div 9.68\%$
v

= 10.3x

Therefore, the use of 7.75x as a TV multiplier in the M&O Submission could be regarded as favourable to GND, on the basis that the growth assumptions are accepted.

The implied growth assumption in the M&O Submission, using the discount rate adopted (12.72%pa) and the assumed financing mix is calculated as follows:

$1 \div 7.75 = 12.9\%$
$12.9\% = 12.72\% - (g \times 0.75)$
g=-0.24% i.e. (say) 0

In other words, the TV assumes no nominal growth (and presumably a real decline) in cash flow in years following 2001. This is favourable to GND.

Capital Expenditure

Capital Expenditure ("Capex") at a constant Rp 3,500 million p.a. appears low when compared with Depreciation and Amortisation charges which range from Rp 5,243 million in 1992 to Rp7,736 million in 2001. Also, as there is no increase in the amount to allow for inflation, the real value of Capex falls over the life of the model. This would normally lead to the adoption of higher discount rates to accommodate the potential for obsolescence of the capital equipment and a lower terminal value for the same reason.

Mathematical Accuracy

Verification of the mathematical accuracy of the DCF model remains outstanding.

Unlisted Discount/Premium for Control

We understand PTSN is unable to list its shares on the Jakarta Stock Exchange for at least three years although this appears to be disputed in the M&O Submission. An unlisted company generally trades at some discount to stock exchange valuation measures. On the other hand, a premium above stock market valuation measures is usually paid upon transfer of a controlling shareholding stake.

It is considered that a DCG model values an asset on a controlling interest basis. Therefore, any discount for non-negotiability and/or arising as a result of forced sale situation would lead to a discount on the value produced by the DCF.

Beta

There is no information given as to the calculation of the ß of 0.81 apart from the fact that it is a weighted average of ß of listed Indonesian cement companies. This is likely to be biased towards Indocement, as a result of its size and it is to be expected that Indocement would have a lower ß than the balance of listed market participants. Therefore the weighted average ß could be expected to be biased below a more realistic ß for companies of a size comparable to PTSN.

Cost of Debt

The cost of debt adopted in the model is equal to the projected Prime interest rate. It is presumed that the company could not borrow at the Prime rate but only at some margin above the Prime rate. Accordingly, the debt cost in the calculation of the discount rate would be too low leading to a discount rate which was lower than reasonable.

A 2% spread is used later in the M&O Submission when analyzing the replacement cost value. Therefore, arguably, the Rd should be increased by 2% p.a.. Question the reasonableness of the Prime rate forecast.

Sales Growth

How can sales growth of 8% p.a. (both inclusive) be justified?

(a) Historical Sales Growth(%)

1984	37.7
1990	16.7
1991	5.6
1992(f)	2.4

The historical sales growth trend is unfavourable.

(b) Inflation (CPI)(%)

1989	6.5
1990	7.4
1991	9.3
1992(f)	7.5
1993(f)	5.8
1994(f)	7.5
1995(f)	7.2
1996(f)	7.8
1997(f) to 200(f)	7.16

Whereas below inflation sales growth was achieved in 1991 and is expected in 1992, for 1993 and following years above forecast inflation growth in sales is projected, and this from a company which is experiencing capacity constraints. All sales growth projected is by way of increased prices as sales tonnes are projected to be constant.

Historical sales price increases have been as follows:

Information Available on PTSN		Government Controlled Retail Price (1)	
	Increase (%)		Increase (%)
1989	-	1980	n.a.
1990	19.8	1981	-
1991	3.5	1982	15.4
1992(0	3.1	1983	25.6
		1984	18.6
		1985	-
		1986	11.2
		1987	-
		1988	10.1
		1989	-
		1990	22
		1991	-
		1992	6.0
Annual compound growth (%pa) over period			8.7

(1) Source: M&O Submission pg 11

Earnings Multiples

Historical (higher) PER are being applied to FME. This is incorrect (verify!)

No information is given as to the gearing of comparable companies. This information will affect comparability of earnings multiples and [3's.

Surplus Assets ("SA")

Neither valuation mentions significant SA. One possible surplus asset may be the extensive limestone reserves of PTSN. However, to the extent that SA could only add value, it helps our client's case that no mention is made of them.

Free Cash Flow Forecast

The forecast free cash flow which forms the basis of the M&O Submission requires confirmation (or otherwise) as to whether it is acceptable.

Additional Liabilities ("ALL")

No mention is made of the existence (or otherwise) of AL. If they exist and are ignored, this would be detrimental to our client.

Other Comments

Pg28: various perceived drawbacks of the free cash flow methodology are outlined including:

(a) DCF ignores expansion potential;

(b) DCF downplays potential future large price increases;

(c) potential for disagreement over the appropriate discount rate; and

(d) volatility of Indonesian economy.

However, each of the above criticisms can also be leveled at PER - type valuation.

Pg29: reference is made to GND proposal to construct a new plant next to PTSN. The seriousness of the threat to PTSN requires investigation. The allegation is made at pg30 that the raw materials for the plant would have to be purchased from PTSN (thus increasing PTSN profits).

PBC:rlt

APPENDIX A

PROSPECTUS LAW REFORM SUB-COMMITTEE
CONSULTATIVE GROUP

MEMBER	ORGANISATION	REPRESENTATIVE BODY
Wayne Lonergan (Chairman)	Coopers & Lybrand	Prospectus Law Reform Sub-Committee
Simon Moore (Secretary)	Coopers & Lybrand	Prospectus Law Reform Sub-Committee
John Bills	Australian Finance Conference	Australian Finance Conference
Mark Blair	CASAC	CASAC
David Castle	Barker Gosling	Law Society of NSW
Allan Cowper	Perpetual Trustees Australia Ltd.	Trustee Companies Association
Tony Greenwood	Blake Dawson Waldron	Law Institute of Victoria
Peter Kent	AEFC Limited	Australian Society of CPAs
Martin Kinsky	Australian Stock Exchange Limited	Australian Stock Exchange Limited .
Ian Langfield-Smith	Australian Accounting Standards Board	Australian Accounting Research Foundation
Jillian Orchiston	CASAC	CASAC
Clive Speed	Business Council of Australia	Business Council of Australia
Malcolm Starr	Australian Merchant Bankers Association	Australian Merchant Bankers Association
Ray Thomsett	Price Waterhouse	Institute of Chartered Accountants in Australia
Prof. Bob Walker	University of NSW	Australian Shareholders Association
John Webster	Law Council of Australia	Law Council of Australia

APPENDIX B

PROSPECTUS LAW REFORM SUB-COMMITTEE
SUBMISSIONS RECEIVED

Submittor / Contact	Organisation
1. Mr. F Gill	CSR Limited
2. Mr. Don Blyth	Trustee Companies Association of Australia
3. Mr. Peter Hurley	Investment Funds Association of Australia Limited
4. Mr. Austin Donnelly	Donnelly Money Management Pry Ltd.
5. -	Lander & Rogers
6. Mr. L J Ruddle	Sigma Company Limited
7. Messrs Rodd Levy & Peter Hay	Freehill Hollingdale & Page
8. Mr. G F K Santow	Freehill Hollingdale & Page
9. Mr. John Green	Freehill Hollingdale & Page
10. Mr. Anthony Tregoning	-
11. Mr. J N Aitken	Cambooya Pty. Limited
12. Mr. B Howard	Howard Funds Management Limited
13. Mr. Michael MacLeod	-
14. Mr. Gary Ling	Westpac Financial Services
15. Mr. Michael Shatwood	Blake Dawson Waldron
16. Mr. Michael Whalley	Minter Ellison
17. Mr. Alex Malik	-
18. Mr. Geoff Hill	International Pacific Securities Ltd.

Submittor / Contact	Organisation
19. Mr. John Maslen	O H Michell & Sons (Australia) Pty. Ltd.
20. Ms Melinda Smith	BT Financial Services Ltd.
21. Mr. Hugh Scales	Gledhill Burridge & Cathro
22. Mr. Brian Treleaven	Thompson Douglass Financial Services Pty. Limited
23. Mr. Peter Kent	Australian Shareholders' Association Ltd.
24. Mr. John Wain	ATA Services Limited
25. Ms Prue Weaver	Australian Bankers' Association
26. Mr. I L Hammond	Price Waterhouse
27. Messrs Marshall, Siteh and Menzies	Marshalls & Dent
28. Mr. J H Richardson	KPMG Peat Marwick
29. Messm Tim Blue & Greg Golding	Mallesons Stephen Jaques
30. Mr. Richard Eager	-
31. Mr. Christopher Lack & Ms Linda Nicholls	County NatWest Australia Investment Management Limited
32. Messrs Kerry Bennett & Michael Hornibrook	Clayton Utz
33. Mr. Michael Gordon-Smith	Screen Production Association of Australia
34. Mr. F S Grimwade	Western Mining Corporation Holdings Limited
35. Mr. Chris Hamilton	Australian Stock Exchange
36. Mr. John Webster	Arthur Robinson & Hedderwicks
37. Mr. John Bills	Australian Finance Conference
38. Mr. John M Green	Institute of Corporate Managers Secretaries & Administrators Ltd.
39. Mr. Damien Lynch	August Investments Pty. Limited

Submittor / Contact	Organisation
40. Mr. Stephen Hodgkinson	Peter Hodgkinson Pty. Limited
41. Mr. John Dick	Abbott Tout Russell Kennedy
42. Mr. Ian Langfield-Smith	Legislation Review Board of the Australian Accounting Research Foundation
43. Mr. Tony Wehby	Coopers & Lybrand
44. Mr. G W Hone	Blake Dawson Waldron
45. Mr. Malcolm Starr	Australian Merchant Bankers' Association
46. Mr. David Taylor	State Chamber of Commerce
47. Mr. Peter Willis	Mallesons Stephen Jaques
48. Mr. Don Harding & Ms Kathleen Farrell	Freehill Hollingdale & Page
49. Mr. Martin Kinsky	Australian Stock Exchange
50. Mr. David Williams	Ord Minnett Securities Limited
51. Mr. Andrew Rothery	The Byvest Management Buyout Group
52. Mr. Tony Greenwood	Blake Dawson Waldron
53. Mr. Graeme Dickey	Baker & McKenzie
54. Mr. John O'Sullivan	Freehill Hollingdale & Page
55. Mr. Leigh Hall	Australian Investment Managers Group
56. Mr. J W A Higgins	Mallesons Stephen Jaques
57. Mr. Peter J Dunstan	The Australian Institute of Company Directors
58. Mr. John Tregonning	-
59. Messr Tony Rumble & Jeremy Kriewaldt	Macquarie Bank & Blake Dawson Wakiron
60. Mr. C E Bennett	Minproc Holdings Limited
61. Mr. N Bunon-Taylor	The Institute of Chartered Accountants in Australia
62. Mr. B J Waldron	Australian Society of CPAs
63.	Law Council of Australia