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Abstract
One of the main aims of the fundraising and takeover provisions in the Corporations Law is the protection of investors and thus shareholders. The Corporate Law Economic Reform Program Act 1999 ('the CLERP Act') has made many amendments to the provisions of the Corporations Law which deal with fundraising and takeovers. It would not be possible to deal with all of these amendments in detail in this paper but the main changes, which are of more general importance, will be highlighted.

Keywords
Corporate Law Economic Reform Program Act 1999, fundraising, takeovers, corporate law

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OVERVIEW OF THE CLERP REFORMS REGARDING FUNDRAISING AND TAKEOVERS

By John Lessing[*]

Introduction

One of the main aims of the fundraising and takeover provisions in the C*orporations Law* is the protection of investors and thus shareholders. The *Corporate Law Economic Reform Program Act 1999* ('the CLERP Act') has made many amendments to the provisions of the *Corporations Law* which deal with fundraising and takeovers. It would not be possible to deal with all of these amendments in detail in this paper but the main changes, which are of more general importance, will be highlighted.

Amendments to the fundraising provisions

The CLERP Act introduces a new chapter 6D into the *Corporations Law,* which replaces Part 7.12 and most of Part 7.11.[1] The stated aims of the changes are to improve the environment for raising capital, lower transaction costs and lead to an increased level of investment, especially in small to medium-sized enterprises - by facilitating more efficient and cost-effective access to equity for such enterprises.[2]

It is important to note that the *basic prohibition* - against making offers without lodgment of a disclosure document - remains. As does the prohibition against distributing application forms to investors without also sending a disclosure document. The wording of these prohibitions has, however, been changed to facilitate the electronic distribution of

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1 See, in general, Ford, Austin & Ramsay, *An Introduction to the CLERP Act 1999-Australia's New Company Law,* Butterworths (2000) 41-67 (chapter 4); Hughes C, *CLERP Fundraising Reforms* (2000), unpublished student paper.

2 See CLERP Proposals for Reform: Paper No 2, *Fundraising,* 7.

disclosure documents. The term 'disclosure document' is now used – it includes prospectuses but is a broader concept as explained below.

The *content requirement* remains similar (the 'reasonable investor' standard) though the wording has been changed. In essence, a prospectus must contain all the information that investors and their professional advisers would reasonably require to make an informed assessment of the matters set out in s710.[3] These matters include the rights and liabilities attaching to the securities, as well as the financial position and performance of the company. The less onerous disclosure test is retained for an offer of quoted securities – s713. This lesser test is based on the fact that the securities being offered are quoted securities and thus subject to the continuous disclosure regime, so that any important information that may affect the value of the securities, will already have been disclosed.

The *main changes* regarding fundraising can be summarised as follows:

- The exemptions have been expanded. First, by permitting unlimited personal offers subject to acceptances by no more than 20 investors in a 12 month period – s708. The wording now makes it clear that it is acceptances that are to be counted and not offers. The amount raised by this method may not exceed $2 million and the offers must be 'personal' offers. This means that the offer may only be accepted by the person to whom it is made and must be made to *a person who is likely to be interested in the offer*, having regard to:

    - previous contact between the person making the offer and the person receiving it; or

    - some professional or other connection between the person making the offer and the person receiving it; or

    - statements or actions by that person that indicate that they are interested in offers of that kind.

Offers based on this exemption may not be advertised – s734(1) prohibits this. An interesting consequence of the new wording of the exemption seems to be that not even a single offer could be made to a stranger –

3 All section references are to the *Corporations Law.*

unless there happens to have been the required previous contact, connection or action. Offerors may need to first strike up a general conversation with the stranger and then politely enquire whether the stranger might be interested in the offer if it were to be made.

The second exemption that has been expanded is the exemption for sophisticated investors (the 'Gold Card exception'). The exemption for investors who invest over $500 000 in an issue has been maintained. Offers are also now permitted to investors with high net assets (at least $2.5 million) or high gross income ($250 000); and to investors through licensed dealers who certify to the investor's experience. The reasoning here is that such wealthy or experienced investors have the means and ability to assess the merits of the offer but this may not always be the case.

- The definition of 'securities' has been extended to include options to acquire other securities. This includes options over unissued securities. This means that the offer of an option is now as offer of a security and requires disclosure – though there is an exception for exchange traded options and put options will not be caught by the definition as they do not involve an option *to acquire.* The definition of 'securities' also includes shares, debentures and interests in a registered managed investment scheme.

- An important change is that Offer Information Statements may now be used as alternatives to prospectuses where the amount to be raised is less that $5 million. The information requirements of an OIS are less onerous than for a prospectus. The requirements are listed in s715 and include a description of the company's business and what the funds are to be used for. The OIS must also state that it is not a prospectus and that is has a lower level of disclosure requirements than a prospectus. A different liability regime applies to an OIS in that mere lack of knowledge is a defence to statutory liability for misleading and deceptive conduct and it is not necessary to show reasonable enquiries – as it would be if a prospectus were involved.

- With ASIC's approval, an offer may be made with a Profile Statement instead of a prospectus. Even if such consent is obtained, a prospectus still has to be prepared and lodged.

- The restrictions on advertising have been clarified – and relaxed in respect of an offer of securities in a class that is already quoted. In essence, such offers may be advertised but the advertisement must contain a statement regarding the availability of the disclosure document. If the securities are not already quoted, there are restrictions on what the advertisement may contain.

- No prospectus needs to be registered any more but there is now a period of at least seven days after lodgment during which acceptance of applications is prohibited. This is known as the 'exposure period' and it may be extended by ASIC. The intention is to give ASIC, market participants, and commentators, the opportunity to review the document and comment upon it.

- Disclosure of interests is now required by advisers and stockbrokers who are named in the disclosure document.

- The onus on the maker of a forward-looking statement to prove that there was a reasonable basis for the statement, has been repealed. The purpose is evidently to encourage offerors to disclose potentially useful information but it will probably be a lot more difficult for investors to provide evidence that a defendant did *not* have reasonable grounds for making a predication than it would be for the defendant to produce evidence of the reasonable grounds (assuming there were such).

- The sharehawking provisions are now confined to offers in the course of unsolicited meetings and telephone calls. This does not appear to cover emails. There are some exceptions, for example, for a licensed securities dealer.

- There is a new obligation for those involved in prospectus preparation to give written notice if they become aware of defects in the disclosure documents during the application period – s730.

- The liability provisions and the defences have been simplified and clarified. Defences on grounds of due diligence and reasonable reliance are generally available and are in accordance with current best practice. The new provisions attempt to remove strict liability for misleading and deceptive conduct but, arguably, have not entirely succeeded as the exclusion is narrowly defined.

Amendments to the takeover provisions

The CLERP Act has made extensive changes to the provisions governing corporate takeovers. However, the proposal to introduce a new permissible method of taking over a company, the socalled 'mandatory bid method', has not been proceeded with. This was contentious as it allowed a bidder to exceed the traditional 20% threshold by means of a single acquisition – provided that the acquisition was immediately followed by a full unconditional bid for cash for a price at least equivalent to the highest consideration given by the bidder for an acquisition during the previous four months. This proposal may yet be revived as the Government has referred it to the Parliamentary Joint Committee for further consideration. As mentioned, the changes that have been introduced are extensive and not all of them are mentioned here[4] – but the main ones can be summarised as follows:

- The former Chapter 6 of the *Corporations Law* has been repealed in its entirety and replaced with four new chapters which deal respectively with: the acquisition of shares and takeovers (Chapter 6); compulsory acquisitions and buy-outs (Chapter 6A); relevant rights and liabilities (Chapter 6B); and the substantial shareholding and beneficial ownership provisions (Chapter 6C). Chapter 6 contains a statement of legislative purposes. These confirm the importance of the traditional Eggleston principles as well as the intention to ensure that acquisitions of control take place in an 'efficient, competitive and informed market'. The remaining stated purpose is to ensure that 'an appropriate procedure is followed as a preliminary to compulsory acquisition of voting shares or any other kind of securities…'.

- The role of the Takeover Panel has been greatly increased. It now takes the place of the courts as the principal forum for resolving takeover disputes – at least until after the takeover period. The intention is to avoid the delays associated with court action and to minimise tactical litigation. Only ASIC or a public authority may initiate court action in the period between the making of a bid and the conclusion of the bid period. Anyone whose interests are affected

4 For a more detailed discussion, see Ford, Austin & Ramsay, above n 1, 68-106 (chapter 5).

may now apply to the Panel, which is empowered to make a declaration of unacceptable circumstances having regard to the public interest. The Panel also now has the power to review ASIC's administrative decisions in stead of the Administrative Appeals Tribunal. The Panel now consists of 27 members who are mainly members of the business and finance communities. Simon McKeon, the Panel president, envisages increasing this to between 40 and 50 members.[5]

- The compulsory acquisition provisions have been extended to reduce administrative costs and greenmailing. They now allow the acquisition of securities of any kind – not just shares. This is to avoid the problems that arose under the previous provisions where outstanding convertible securities or options could not be compulsorily acquired – thus preventing the bidder acquiring full ownership of the target. Furthermore, the method of calculating the 75% requirement has been altered. It is now counted by reference to the number of outstanding securities rather than the number of holders. Importantly, they now permit the holder of 90% of a class of securities to acquire the outstanding securities in that class *without first making a takeover bid.* If the holder has 90% of the voting power and value of the company's equity securities, the holder can acquire all the outstanding equity securities, including securities convertible into equity. The minority shareholders do have a possible remedy if at least 10% of them object to the compulsory acquisition – then court approval has to be obtained.

- The takeover provisions now also cover listed managed investment schemes and all listed bodies. They also apply to unlisted companies with more than 50 members.

- The 20% threshold, which triggers the requirement for a full bid, remains but the concept of entitlement upon which it was based has now been scrapped and replaced with the concept of 'voting power'. This is defined in s610 (by means of a formula) as the 'person's and associates' votes divided by total votes in a body corporate multiplied by 100'. The section goes on to state that the first part of the definition means the total number of votes attached to all the voting shares in which the person or associate has a relevant interest.

5 Brown, 'Dispute panel opens account', *The Australian* 18 May 2000, 29.

'Relevant interests' are now defined in s608. Although the wording has changed, the basic approach is similar and the concept is still based on the power to control the right to vote and to dispose of the securities. Section 608 makes it clear that relevant interests can still be held through interposed companies and that 'it does not matter how remote the relevant interest is or how it arises'. The concept of voting power thus promises to be just as intellectually challenging to calculate as the previous concept of entitlement. It will still be necessary to work out what the relevant interests are of the person whose voting power is being determined as well as who the associates of that person are and what their relevant interests are.

- The terms 'takeover scheme' and 'takeover announcement' have been abandoned and replaced with 'off-market' and 'market' bids respectively. Similarly, the Pt A, Pt B, Pt C and Pt D Statements have been abandoned and replaced with either a 'bidder's statement' or a 'target's statement'. Many detailed changes have been made to the procedural and disclosure requirements, which are now set out in Pts 6.3-6.9 of the *Corporations Law.* The overall effect is to make the provisions more user-friendly, partly due to the use of helpful tables in the legislation.

- The minimum consideration requirement has been extended to scrip bids. Previously, if a takeover bid was for cash (or a cash option was offered) then the bid price could not be less than the highest price paid for a share during the four months prior to the sending of offers. Section 621(3) now extends this requirement to all bids. This could cause problems for bidders making a scrip bid if the price of the securities they are offering declines dramatically after the announcement of the bid.

- The problematical prohibition on the giving of collateral benefits to some shareholders before the start of the bid period, has been repealed. However, any such benefits remain of importance, as they have to be disclosed in the bidder's statement.

- As mentioned above, Chapter 6B contains the liability provisions and these have been substantially overhauled. As with the fundraising provisions, the intention is to exclude strict liability flowing from the general prohibitions on misleading and deceptive conduct and to deal

with liability for defective takeover (and compulsory acquisition) documents under the specific liability regime contained in Chapter 6B. As with the fundraising provisions, the exclusion of strict liability for misleading and deceptive conduct may not be complete as regards coduct during a takeover. Section 995(2) is excluded only if the conduct contravenes s 670A. This section says that a person must not 'give' any of the listed documents if they contain a defect of the kind described. This, arguably, may not include directors or advisers.

- Section 670C imposes a new duty on directors and others involved in the preparation of takeover documents to notify the 'issuer' of the document in writing if they become aware during the bid period that a material statement in the document is misleading, or that there is a material omission from the document, or a material new circumstance has arisen. A similar duty applies to experts under this section.

- Defences to both criminal and civil liability under ss670(A) and 670(B) are set out in s670D. These include lack of knowledge, reasonable reliance and withdrawal of consent. It is generally not necessary to prove that reasonable inquiries were made or that due diligence was undertaken in the takeover context.

Conclusion

The CLERP amendments are far-reaching and it will take some time to judge their effectiveness. The new fundraising provisions do make it easier for small and medium sized enterprises to raise funds. This should encourage economic activity. They also contain some welcome simplifications, for example, of the provisions containing the defences. The simplification of the takeover provisions is also to be welcomed, though questions may well arise on the interpretation of some of the new provisions; for example, the new concept of voting power and the new definition of relevant interests. The new Takeover Panel will have to prove that it is able to effectively deal with disputes and will have to be careful to avoid allegations of conflict of interests; for example, if the situation were to arise where one of its members was asked to pass judgment in a matter involving a former client. It has already become apparent that even the new Panel may be used for tactical purposes in a

contested takeover.[6] But the delays involved will be shorter and this, together with the new capital gains tax relief for scrip bids, should make corporate takeovers more attractive and more successful.

6 Frith, 'Email uses Takeovers Panel in tactical play for time', *The Australian* 17 May 2000, 26.