Carter Newell LAWYERS

Partner: Tony Stumm
Direct: (07) 3000 8402
Fax: (07) 3000 8433
Email: tstumm@carternewell.com

14 March 2014

Mr David Murray AO
Chairman
Financial System Inquiry
GPO Box 89
Sydney NSW 2001

Dear Mr Murray

Reform – relax fundraising restrictions on unlisted public companies

I am sending you the **attached** open discussion paper in the hope that it might lead to reform to assist unlisted public companies in raising funds in certain circumstances without having to use a disclosure document.

Yours faithfully

TONY STUMM
PARTNER
CARTER NEWELL LAWYERS

TIME FOR REFORM – RELAX FUNDRAISING RESTRICTIONS ON UNLISTED PUBLIC COMPANIES!

Introduction

The Corporations Act 2001 has a regulatory bias in favour of listed public companies when attention focuses on the ability of listed companies to raise equity capital. There are accommodating provisions in the Corporations Act 2001 to allow listed companies to raise equity capital without a full compliant prospectus. Examples are:

1. Rights issues to existing investors (section 708AA) which entails an offer document and 'cleansing notice';

2. Placements of quoted securities without on sale restrictions (section 708A); and

3. Short form prospectuses (section 713) where the content is reduced because of continuous disclosure compliance by the issuing company.

Unlisted public companies do not have these advantages. Their fundraising activities in seeking equity capital largely rests upon these alternatives:

1. Reliance on the 20/12/$2M rule in section 708(1);

2. Making placements to sophisticated or professional investors (section 708(8) and (10));

3. Making placements to associated persons such as senior company managers or their close relatives (section 708(11);

4. The issue of an Offer Information Statement. This limits the amount raised to up to $10 million in aggregate and requires the inclusion of an audited balance sheet for the company, with a balance date not older than 4 months (section 714).

Why are unlisted public companies and listed public companies treated so differently?

The answer lies with disclosure. The introduction of the continuous disclosure regime into the Corporations Act 2001 requiring disclosing entities (such as ASX listed companies) to make timely announcements and lodgements of materially price sensitive information was intended to give investors confidence arising from their ability to access released information so as to be fully informed in making investment decisions. Unlisted public companies do not normally have these disclosure obligations unless they have 100 or more shareholders as a consequence of the take up of shares under a disclosure document (section 111AF).

In my view, it is obvious that Parliament believed that the 'disclosure' distinction between listed companies and unlisted public companies meant that listed companies can be trusted to responsibly exercise fundraising privileges which they have over unlisted public companies because the actual information which investors might want to know about is truly accessible. Put another way, there is no need for listed companies to be burdened with prospectus type disclosure because they already have serious disclosure obligations imposed.

What constructive observations can be made to assist unlisted public companies?

If one analyses the content requirements for a regulated Offer Information Statement, the readily observable protective elements for investors are these:

1. Investors get the benefit of seeing and analysing recent audited financial statements;

2. There is a limit of $10 million on the amount raised, hence limiting the number of participating investors liable to potential losses;

However, Regulatory Guide 157 was published by ASIC 14 years ago (i.e. February 2000) and the success or failure of an Offer Information Statement as a 'poor man's prospectus' does not appear to have been subject to any published review covering the use of Offer Information Statements or their apparent failings. In contrast, ASIC conducted a review of prospectus requirements (see ASIC Consultation Paper 155 issued April 2011) which led to lightening of prospectus disclosure requirements as covered by ASIC Regulatory Guide 228.

ASIC exemptions

Through ASIC Class Order 02/0273, ASIC has issued conditional exemptions capable of being used by unlisted public companies (including managed investment schemes) needing funds up to $5 million provided that the number of accepted offers (made to personally known people) does not exceed 20 in the previous 12 months. It is not know how extensively this exemption has been used. However, given the thrust of this paper in seeking general fundraising reform for the benefit of unlisted public companies, it would be useful if ASIC could report on the adoption of this relief and whether the threshold fundraising amount ($5 million) could be raised.

Conclusion

Many unlisted public companies have evolved into listed companies. In this evolution, unlisted public companies often struggle to attract investors. Unlisted public companies compete with listed companies for investor attention.

Since 2001, listed public companies have been able to obtain valuable and cost saving concessions to help them cost effectively raise funds, by reason of their status as listed companies and their need to comply with the continuous disclosure regime. The main concession introduced in 2001 to help unlisted public companies raise funds was the Offer Information Statement. There has not been any published report on whether Offer Information Statements do help unlisted public companies raise capital cost effectively.

My proposition is that it is time for either ASIC or Parliament to review the fund raising rules for unlisted public companies by enquiring into the possibility of relaxing some of the current Corporations Act restrictions affecting unlisted public companies such as:

- Allowing unlisted public companies to make rights issue offers to their shareholders (without a regulated disclosure document) if conducted within a certain period from the issue date of the company's annual report.

- To consider increasing the $2 million monetary limit on the 20/12/$2 million exemption for unlisted public companies.

- To consider the past use by unlisted public companies of Offer Information Statements in terms of ascertaining the success or otherwise of these documents as a fundraising tool and whether there is a feasible case to consider an increase of the $10 million fundraising limit, balanced by the need to maintain adequate investor protection.

The author, Tony Stumm is a partner in the Corporate Group of Carter Newell Lawyers and has recently submitted a copy of this paper to:

1. *The Honourable Joe Hockey M.P., Treasurer;*
2. *The ASIC Commissioner, Greg Tanzer;*
3. *The Financial System Enquiry.*

If you agree with the author's views, it may help to elevate ASIC's serious consideration of this paper if you convey your written support to ASIC.

This paper is not intended to constitute legal advice and should not be considered as providing nay legal advice. The views experienced in this paper are those of the author and do not necessarily reflect the views of this firm, Carter Newell Lawyers.

Contact Tony Stumm on 07 3000 8402 on tstumm@carternewell.com.