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PRIVATISATION

The Legal Aspects

EXECUTIVE SUMMARY

Introduction

This paper surveys the potential impact of the Australian corporate law and regulatory framework on the process of privatisation of government-owned entities. In particular, the paper focuses on the marketing, foreign ownership, pricing and governmental control aspects of the privatisation process and highlights various legal issues which will need to be addressed by those involved in any general offer of equity in any statutory or other government-owned corporations.

Some of the relevant provisions of both the current and prospective legislative framework are discussed in this paper particularly as they apply to some of the more significant issues to be addressed in considering a general offer of equity in a government corporation. The discussion is directed principally at a public offering, but the material dealing with Articles of Association, Golden Shares, and related matters, will also be of relevance to a limited sale to institutions or other corporations.

Pending final resolution of the differences between the States and the Commonwealth of Australia over the administration of companies and securities legislation, it is unclear to what extent the provisions of the Corporations Act 1989 (of the Commonwealth) may be introduced to replace the current Companies Act and the Codes of the various Australian States.

The requirements of the Australian Stock Exchange Limited ("ASX") for the admission of securities to be listed for trading and the maintenance of that listing are incorporated in the Main Board Listing Rules (the "Listing Rules"). They are currently given some statutory force in that compliance by listed companies can be enforced through the provisions of the Securities Industry Act and Codes, again uniform throughout Australia. Some of the issues raised by current Listing Rules are also discussed below.

Marketing

One of the chief lessons of the privatisation experience in the United Kingdom and New Zealand has been that the marketing of the sale, both domestically and internationally, is of great importance in ensuring that sufficient funds will be subscribed to enable the issue to float successfully. The nature of the marketing exercise is largely determined by the motivation for, and the objectives of, each privatisation. Nevertheless, two elements have emerged of particular significance in the "marketing phase" – the advance campaign, and the drafting of the prospectus.

While the prospectus would be the most important document in the overall marketing of a general offer of equity, the terms of the Articles of Association of the company would be crucial not only to a successful flotation but also to achievement of the government aims for the company. These aims may be found entrenched either for a limited time or permanently in specific provisions which effectively remove management control of certain issues, in the rights conferred on government through the issue to it of special shares effectively conferring veto rights and in provisions limiting foreign ownership of shares.

Pricing

One of the most difficult decisions in the process of privatisation, and indeed for any new public offering, is the decision on price. The traditional fixed price offer is the easiest for the investing public to understand but the multiple over-subscriptions produced by the British privatisations demonstrate the importance of pricing.

Employment Issues

It has been common in overseas privatisations for special arrangements to be made to allow employees to participate in the offer of equity. Additionally the full range of employment law consequences arising out of the Federal and State industrial systems will need to be assessed.

Golden Shares

A number of overseas privatisations have involved the issue of a special rights preference share, or "Golden Share", to the government.

The attraction for governments of such a shareholding is that it permits the Golden Shareholder to monitor and maintain levels of service at desired rates and to have a determinative hand in public policy areas of the company's operations while at the same time allowing the company to pursue the economic and administrative advantages arising out of full participation in market place competition.

Finance Implications

Decisions on the structure of the enterprise will need to take into account any risks for existing financing, and ensure that the new structure will permit future borrowings to be undertaken in the most cost effective way.

Conclusion

Until the final structure of any proposed offer of securities is known (eg: it could be an equity raising by the company, a sale of shares in a new subsidiary company which would acquire the operations business of the company, or a sale of shares held in the company by the Australian Government – so as to direct the benefits of the offer to general revenue rather than the company) it is not possible to provide a comprehensive review of the legal implications of such a proposal. Nevertheless, it is clear that the privatisation process presents a unique challenge to government and its legal and financial advisors to maximise and distribute the benefits of privatisation and to provide for the successful long term development of a variety of Australian industries.

Blake Dawson Waldron has a high level of knowledge and understanding of corporatisation and privatisation. For further information, please contact one of the partners or senior staff listed at the end of this booklet.

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ASPECTS OF PRIVATISATION OF
AUSTRALIAN GOVERNMENT-OWNED COMPANIES

1. **Introduction**

This paper surveys the potential impact of the Australian corporate law and regulatory framework on the process of privatisation of government-owned entities. In particular, the paper focuses on the marketing, foreign ownership, pricing and governmental control aspects of the privatisation process and highlights various legal issues which will need to be addressed by those involved in any general offer of equity in any statutory or other government-owned corporations.

A general offer of equity in a government-owned company would require a public offer document in the nature of a prospectus covering a wide range of issues.

Depending upon the countries in which it might be proposed that such offers would be made, separate offer documents for each legal jurisdiction would be required. So, under the offer for sale of shares in British Airways plc ("British Airways") separate offerings were made in the United Kingdom, United States of America, Canada, Japan and Switzerland in order to conform with the separate requirements of each jurisdiction regulating the content of and manner in which the offers were made.

Given that if equity was to be generally offered for sale in government-owned companies then it would be on the basis that the shares as issued could be traded on Stock Exchanges, the terms of any offer for sale would be governed by both the requirements of companies and securities legislation in the relevant jurisdiction as well as the requirements of those Stock Exchanges on which the shares once issued were to be listed for trading.

The answer to the question of on which Stock Exchanges the shares would be listed would be determined by the extent the marketing and price achieved for the shares would be positively affected by the separate listings. The major Exchanges which would obviously be the subject of consideration in this regard, apart from Australia, are The International Stock Exchange, London and The New York Stock Exchange. The separate requirements of those Exchanges are not addressed in this paper but could be summarised if serious consideration was to be given to listing of shares on any foreign Exchange. Blake Dawson Waldron is familiar with the process through involvement in the listing of an Australian corporation (News Limited) overseas, and a foreign corporation (Waste Management, Inc.) in Australia.

The current principal legislative determinant of a general offer of equity is the Companies Act 1981 (the "Act"). The provisions of this Commonwealth Act, which applies in the Australian Capital Territory, are reproduced in the cognate Companies Codes in force in each Australian State and the Northern Territory. While uniform in their provisions, they have a large element of separate state or territory administration.

Pending final resolution of the differences between the States and the Commonwealth of Australia over the administration of companies and securities legislation, it is unclear to what extent the provisions of the Corporations Act 1989 (of the Commonwealth) may be introduced to replace the current Companies Act and the Codes of the various Australian States.

Some of the relevant provisions of both the current and prospective legislative framework are discussed in this paper particularly as they apply to some of the more significant issues to be addressed in considering a general offer of equity in a government-owned corporation.

The requirements of the Australian Stock Exchange Limited ("ASX") for the admission of securities to be listed for trading and the maintenance of that listing are incorporated in the Main Board Listing Rules (the "Listing Rules"). They are currently given some statutory force in that compliance by listed companies can be enforced through the provisions of the Securities Industry Act and Codes, again uniform throughout Australia. Some of the issues raised by current Listing Rules are also discussed below.

Until the final structure of any proposed offer of securities is known (e.g. it could be an equity raising by the company, a sale of shares in a new subsidiary company which would acquire the operations business of the company, or a sale of shares held in the company by the Australian Government – so as to direct the benefits of the offer to general revenue rather than the company) it is not possible to provide a comprehensive review of the legal implications of the proposal.

2. Marketing and the Prospectus

One of the chief lessons of the privatisation experience in the United Kingdom has been that the marketing of the sale, both domestically and internationally, is of great importance in ensuring that sufficient funds will be subscribed to enable the issue to float successfully. The nature of the marketing exercise is largely determined by the motivation for, and the objectives of, each privatisation. Nevertheless, two elements have emerged of particular significance in the "marketing phase" – the advance campaign, and the drafting of the prospectus.

2.1 Advance Marketing

It is now common for major British privatisations to be preceded, up to a year or more, by an "awareness heightening" advertising campaign. This period is characterised by various forms of advertising in the media and is often followed by the publication of an in-depth study of the business and its prospects by an influential firm of stock brokers. In the Australian context, it may well be that the publication of such an "in-depth" report or other documents designed to heighten awareness of the impending privatisation would be prohibited by either s.99 or s.100 of the Act (and the cognate Codes of the States and Territories).

Subsection 99(3) prohibits any person publishing a document, not being a registered prospectus, calling attention whether directly or indirectly to an offer or invitation or an intended offer to the public for subscription or purchase of shares in a corporation. While there are specified exceptions they would not apply to such a document issued prior to registration of the prospectus.

Subsection 100(3) of the Act prohibits a person who is aware that a prospectus relating to an issue of shares or debentures is in course of preparation, or has already been issued by or on behalf of a corporation, from publishing a report that is reasonably likely to induce persons to apply for shares in that corporation. Subsection 100(4) of the Act provides a number of exceptions to s.100(3) but it is doubtful whether an "in-depth study" of the type used in the pre-prospectus stage of British privatisations would fall within any of the

exceptions. In particular, such a report is ordinarily issued prior to the registering of the prospectus and is specifically commissioned by the promoters of the privatisation.

It should be noted that there is no "sophisticated investor" type of exception applying to recipients of such material.

However, the authority administering companies and securities legislation (the National Companies and Securities Commission, expected to be replaced in January 1991 with the Australian Securities Commission ("ASC")) has power under s.215C of the Act to exempt persons from compliance with any provisions of this part of the Act or perhaps more relevantly to modify these provisions.

2.2 The Prospectus

This will be the principal document in any general offer of equity. Some of the requirements of the Act relating to the contents of the prospectus are referred to later.

As mentioned above the prospectus itself has become a key instrument in the marketing of a privatisation. In particular, British privatisations such as British Steel plc ("British Steel") have made use of "pathfinder prospectuses" and "mini-prospectuses".

The pathfinder prospectus is usually as complete and full a document as the final prospectus except that it omits a share price. The rationale for the pathfinder prospectus is that potential investors have an opportunity to understand the corporation more fully, and at their leisure, before the full prospectus is registered and the statutory timetable commences. In the case of British Steel, the issue of the pathfinder prospectus gave potential investors an additional four weeks to consider their position. In the event, the issue was subscribed 3.3 times over.

The issue of the full British Steel prospectus was accompanied by the issue of a mini-prospectus giving simplified details of the offer drawn from the full prospectus.

The usefulness of both pathfinder prospectuses and mini-prospectuses is evident from the British experience. However, neither the Act nor the Listing Rules of the ASX provide for such prospectuses.

The issue of pathfinder prospectuses in Australia would constitute a breach of s.103 of the Act which provides that prospectuses shall not be issued unless a copy has first been registered by the Commission. Subsection 103(2) of the Act provides that the Commission shall not register a copy of the prospectus unless, inter alia, the prospectus appears to comply with the requirements of the Act. Section 98 of the Act prescribes the form and content requirements of prospectuses under the Act. Most of the requirements of s.98 could be met by a pathfinder prospectus but not, for example, the requirement to state "*the amount payable on application for and allotment of each share.*"

Arguably, the typical pathfinder prospectus is not one registerable with the Commission because it fails to nominate the share price. It can be noted however that the Commission is not necessarily hostile to such prospectuses and, indeed, has authorised a large number of exemptions to prospectuses for British share issues distributed in Australia.

It might be argued that a pathfinder prospectus could be issued prior to the registration of a full prospectus on the basis that the pathfinder was not a prospectus at all. Section 104 of the Act however provides that:

"... where a corporation allots or issues or agrees to allot or issue to any person any shares in ... the corporation with a view to all or any of them been offered for sale to the public, any document by which the offer for sale to the public is made shall, for all purposes, be deemed to be a prospectus issued by the corporation and all enactments and rules of law relating to the contents of prospectuses and liability in respect of statements and non disclosures in prospectuses apply and have affect."

In relation to mini-prospectuses it is unlikely that as abbreviated a document as the British Steel mini-prospectus would comply with the requirements of s.98 of the Act. Additionally, Listing Rule 2B(2) of the ASX Listing Rules prohibits the abridgment of any report contained in a prospectus. The same rule also provides that each report contained in a prospectus should be dated not earlier than one month prior to the date of registration of the prospectus.

Although the rule clearly presupposes the existence of a full registered prospectus it should be noted that the issue of mini-prospectuses in the United Kingdom was only possible with the explicit authorisation of the Stock Exchange. Similarly, an application to the ASX can be made at any time to waive the requirements of the Listing Rules and as mentioned above, under ss.215C(2) of the Act the Commission may exempt a person from compliance with (inter alia) the regulations and provisions of the Act relating to prospectuses.

2.3 Corporations Act 1989

As mentioned earlier, it is as yet unclear whether and, if so, to what extent the provisions of this Commonwealth Act will be adopted by the Commonwealth and States as part of their compromise agreement over the administration of company law.

The sections of the Act dealing with prospectuses and referred to in 2.2 above are substantially reproduced in Part 7.12 of the Corporations Act, with some variations as to form. It should be noted that ss.1021(7) provides for the regulations to specify the contents of prospectuses but as yet, no regulations have been promulgated under the section.

Under the Corporations Act the current prospectus provisions would be modified in three ways:

- (a) the concept of prospectus provisions applying only where there is an offer or invitation to the "public" or a "section of the public" would be abandoned. The requirement to issue a prospectus would apply except in certain limited cases. In the privatisation context this modification is of little effect;
- (b) except where the securities are listed or are only made available to a limited class of people, most prospectuses would need to be registered and pre-vetted by the ASC; and most significantly,
- (c) civil remedies, including injunctions and damages, would be available in respect of conduct being the issue of a prospectus in relation to securities of a corporation in which there is a false or misleading statement or from which there is an omission.

Particularly in the context of pathfinder and mini-prospectuses this will mean that it will be of extreme importance that great care be taken to ensure that the manner in which information is presented (or omitted) in a prospectus should not expose those involved in the promotion to an allegation that false or misleading statements have been made.

In conclusion, the privatisation process in Australia would be greatly assisted by amendments to the regulatory regime or the administering authorities indicating that they will exercise their discretions so as to permit limited marketing before registration of the prospectus and distribution of pathfinder and/or mini-prospectuses.

3. Foreign Ownership

While the prospectus would be the most important document in the overall marketing of a general offer of equity, the terms of the Articles of Association of the company would be crucial not only to a successful flotation but also to achievement of the government aims for the company. These aims may be found entrenched either for a limited time or permanently in specific provisions which effectively remove management control of certain issues, in the rights conferred on government through the issue to it of special shares ("Golden Shares" – see below) effectively conferring veto rights and in provisions limiting foreign ownership of shares.

The Articles of Association of the vast majority of British privatised companies do not provide for the limitation of foreign ownership of shares in the company.

The Articles of Association of British Airways however, contain powers which may be used to limit the number or voting rights of shares in which non-United Kingdom nationals own interests or, if necessary, to require their compulsory disposal, or to restrict the transferability of shares. These powers include the power to impose an overall limit of not less than 25% on the number of shares in which non-United Kingdom nationals have any direct or indirect interest. The power is exercisable by the Secretary of State for Transport (as the 'Special Shareholder') if he determines, on the application of the directors, that it is necessary to use such powers to protect British Airways' operating rights, either because action affecting such rights has occurred or is contemplated, threatened or intended or may occur because of the ownership or control of the company by non-United Kingdom nationals or because of the aggregate number of foreign owned shares.

In the Australian context Listing Rule 3J(30) provides that the Articles of Association of a company shall not contain provisions which shall have the effect of limiting or restricting the ownership of its securities by foreign persons except where such limits or restrictions are contained in Australian law. So, unless the enabling legislation of a privatised company contained a prohibition on holdings by foreign persons above a limit, this Listing Rule would not, in the absence of a waiver by the ASX, permit Articles to be adopted which limited foreign shareholdings.

It should also be noted that Articles of Association empowering directors to refuse to register transfers of shares and to deprive holders of shares in excess of a specified limit of the right to attend and vote at general meetings, may require a waiver of Listing Rule 3K. In particular, Listing Rule 3K(2) provides that voting rights in respect of fully paid shares shall be on a one for one basis and Listing Rule 3K(3) provides that a holder of ordinary shares shall be entitled

to be present and vote at any general meeting in respect of any share or shares upon which all calls due to the company have been paid.

Similarly, Listing Rules 3D(3)(a) and (b) provide that a company shall not refuse to register or fail to register or give effect to any transfer in registerable form of a security issued by a company on the Official List. Listing Rule 3D(3)(c) however, provides that notwithstanding paragraphs (a) and (b), a company may refuse to register any transfer of securities where (inter alia) the registration of the transfer would result in a contravention of or failure to observe the provisions of a law of a State or Territory or of the Commonwealth.

If there is to be a limit on foreign shareholdings then the definitions adopted in the articles of "foreign interest" will be extremely important. It may be that the type of definition presently being drafted for inclusion in amendments to the Broadcasting Act will be appropriate. Certainly, one approach to avoid is the adoption of the definitions applying to "relevant interest" in the Companies (Acquisition of Shares) Act. This extremely wide and uncertain definition has recently been criticised as an inappropriate basis for identifying different shareholding interests (Shears v Phosphate Co-Operative Co of Australia Ltd 1989 7 ACLC 812).

4. **Pricing**

One of the most difficult decisions in the process of privatisation, and indeed for any new public offering, is the decision on price. The traditional fixed price offer is the easiest for the investing public to understand but the multiple over-subscriptions produced by the British privatisations demonstrate the importance of pricing.

One alternative to fixed pricing is the tender offer. This form of offer relies on the judgment of the investor (and ultimately the investor's adviser) as to the value of the shares. In a true tender, investors whose applications are accepted pay at the price they have tendered. Applications are accepted beginning with the highest price tendered and continue in descending order until all of the shares have been allocated. In the context of a major privatisation, and particularly where one of the goals of the privatisation is to achieve a wide share ownership, the tender system of pricing throws a great weight of investigation and assessment on the potential investor. As a result, some privatisations have involved offers of a proportion of the shares at a fixed price and a proportion by tender.

A partial solution to the problems of a true tender is a "striking price". The striking price is selected from the range of tender offers which will clear the offer price (the price at which there are sufficient offers to absorb all the shares). All successful investors pay the striking price rather than the price they tendered. Provision can also be made for smaller applications to be made "at the striking price" so that the small investor need not make any decision of their own on price.

There are also other methods of calculating the price payable on the application, but it will be necessary to overcome or satisfy the requirement that a prospectus must indicate *"the amount payable on application for and allotment of each share or where such amount may vary during the currency of the offer, the basis of calculation of the amount so payable."*

5. Golden Shares

A "Golden Share" is a class of share to which extraordinary rights are attached so as to permit the "Golden Shareholder" to exercise control over key areas of the subject company's operations notwithstanding that the Shareholder does not hold any other shares.

Such shares are held, for example, by the Government of the United Kingdom in Cable & Wireless plc and by the New Zealand Government in New Zealand Telecom.

The attraction for governments of such a shareholding is that it permits the Golden Shareholder to monitor and maintain levels of service at desired rates and to have a determinative hand in public policy areas of the company's operations while at the same time allowing the company to pursue the economic and administrative advantages arising out of full participation in market place competition.

The Articles of New Zealand Telecom provide for the registration of the Golden Share, known as the "Kiwi Share", in the name of the Crown.

Article 11.2.2 lists a number of matters which are deemed to be a variation of the rights attaching to the Kiwi Share and consequently require the written consent of the Kiwi Shareholder to be effective.

These matters include:

- (a) the amendment or removal or alteration of all or any of a number of listed definitions and articles including the definitions of "Articles", "Share", "Shareholder", "Voting Share" and articles relating to the nature and function of the Kiwi Share, the ethnic composition of the Board of Directors, voting at meeting of directors and director's duty of confidentiality; and
- (b) any act or omission to act that fails to comply with any of the Articles specified in Article 11.2.2.1, whether or not the act or omission is that of the Board or the Shareholders in general meeting and whether or not the act or omission has been approved by a special resolution of Shareholders.

Article 11.2 further provides that the rights which attach to the Kiwi Share are legally enforceable against the company at the suit of the Kiwi Shareholder and that the company shall indemnify the Kiwi Shareholder against the costs of such enforcement proceeding. The Articles further provide that alteration of Article 11.2 shall only be effective with the consent in writing of the Kiwi Shareholder.

Article 11.5 of New Zealand Telecom's Articles of Association provides that unless the Kiwi Shareholder agrees otherwise the company shall observe certain principles relating to the provision of telephone services set out in Article 11.5.2. These principles include:

- (i) availability of residential telephone services to all households throughout the country;
- (ii) standard prices as between urban and rural users;
- (iii) price movement; and

(iv) local call charging.

It can be seen from the above examples that it is possible to entrench both the provisions relating to the nature and operation of the Golden Share itself as well as those areas of public policy over which the Golden Shareholder wishes to maintain control.

Nevertheless, it may be that particularly draconian entrenching provisions relating to the nature and operation of the Golden Share will have the effect of rendering the shares of the subject company less attractive as an investment because of the fettering on freedom of management which would be entailed.

The Golden Share regime discussed above is less oppressive than the entrenching device used in the privatised English company, Britoil plc ("Britoil"). It provided that, in certain circumstances, the Special Share shall have in respect of any resolution at a company general meeting a total number of votes on a poll which is one more than the total number of votes not owned by the Special Shareholder. The ramifications of such a broad power, particularly in the takeover context are obvious. The Britoil device has its origins in an Article upheld by the House of Lords in Bushell v Faith [1970] AC 1009. In that case, the Articles of Association provided that in the event of a resolution being proposed at a general meeting for the removal from office of a certain director, shares held by that director would, on a poll in respect of such resolution, carry the right to three votes per share. That Article was held effective.

In the Australian context it should be noted that Listing Rule 3K(1) would prevent a company with such an Article from obtaining main board listing without a waiver of the rule first being obtained from the Exchange. Further, Listing Rule 3K(2) provides that voting rights in respect of fully paid shares shall be on a one for one basis.

Finally, it should be noted that the exercise by the Golden Shareholder of the rights conferred upon his share may in some circumstances amount to oppressive conduct within the meaning of s.320 of the Act. Although majority shareholders are not in a fiduciary position to the company or to the minority shareholders, they are required to exercise their powers not only as required by law but also bona fide for the benefit of the company as a whole. Although the scope of the section appears quite broad, case law in relation to the operation of s.320 indicates that the section is concerned with fairness in an objective sense and in all the circumstances: Morgan v 45 Flers Avenue Pty Limited (1986) 10 ACLR 692. The consequence will be that in some circumstances the exercise of power by a Golden Shareholder may be the subject of review by a Court on the application of another shareholder on the ground of its fairness in the context of the company and all its shareholders.

6. Special Arrangements

6.1 Employees

All of the British privatisations have included in their offers to the public special arrangements for the employees of the corporation. British Airways, for example, reserved 9.5% of the total share issue for employee arrangements. Each British Airways employee was offered 76 free shares (worth £95) as well as up to 120 further shares on the basis of 2 free shares for each share purchased. Employees were also offered a purchase discount of 10% for a specified number of shares (1600) if held until the final instalment was paid. Ninety percent of British Airways employees participated in the scheme.

Such arrangements could be made for the benefit of employees in Australia. In Release 114 the NCSC has indicated that the strict application of the prospectus provisions of the Act may not be appropriate in the context of employee share schemes. The modified requirements for domestic employee share scheme prospectuses are contained in Part 8 of the Release.

Further, ss.129(9) of the Act provides that the general prohibition against a company giving financial assistance for the purpose of the acquisition by any person of shares in the company does not apply if the shares are to be held by or for the benefit of the employees of the company and the company in general meeting approves the scheme.

6.2 Other Marketing Techniques

A number of marketing techniques have been developed as a means of encouraging small individual investors to buy shares in privatised companies. These include payment for shares by instalment, loyalty bonuses (the issue of one free share for, say, every 10 shares held for at least three years) and discounted shares. Provision for the issue of shares at a discount is made in s.118 of the Act.

7. Finance Implications

A government-owned body which is being privatised must take care that any changes in its structure do not unnecessarily prejudice its existing financing arrangements. The loss of a government guarantee or even a mere change in ownership may breach undertakings in loan documents or trigger early repayment obligations. If one of the aims of the privatisation is to make more capital available to the enterprise, it is clearly counterproductive for the enterprise to reduce the loan capital available to it or to have to refinance existing arrangements on less favourable terms.

Rising interest rates and insolvency worldwide have increased the cost of loan capital for all borrowers both in domestic and overseas markets. The loss of government backing, even where there has been no explicit guarantee, will almost always result in lenders demanding a higher margin for a perceived greater risk. It is for these reasons that a premature repayment or renegotiation of existing loan capital arrangements may be extremely costly and is to be avoided where consistent with the other objectives of the privatised enterprise.

It is equally important that the post-privatisation structure is appropriate for future borrowings and that the internal arrangements permit flexible and rapid responses to the needs of the enterprise for funding.

Decisions on the structure of the enterprise will need to take into account any risks for existing financings, and ensure that the new structure will permit future borrowings to be undertaken in the most cost-effective way.

8. Employment Issues

There are a number of industrial and employment related issues which may arise in the course of any privatisation.

The change in the legal identity of the employer may require appropriate notices to be sent to all employees informing them of the change and providing an opportunity for discussion.

The operation of industrial awards (both Federal and State) and Federal and State legislation will have to be considered. Under the Australian Industrial Relations system terms and conditions of employment for many employees are contained in industrial awards which are determined by industrial tribunals and which have the force of law. The awards are binding on employers and it is therefore necessary that there be a full understanding and appreciation of the employer's obligations in this regard. There are also provisions contained in legislation, such as the Industrial Relations Act, 1988 (Commonwealth) applicable where there is a transmission of business from one employer to another.

In Australia most areas of the public sector are unionised. Where changes to conditions of employment or to the organisation and performance of work is contemplated, negotiations with the relevant unions will be necessary. This may lead to proceedings before the appropriate industrial tribunal in the event that an industrial dispute arises in relation to the proposed changes. Negotiations could involve issues such as manning levels, work practices and/or a renegotiation of award conditions.

In certain circumstances there may be redundancy. In some States there is legislation which requires employers to make redundancy payments to employees in certain circumstances. Additionally, many Federal awards oblige an employer to make severance payments in the event of redundancy and also require the employer to involve unions in discussions about the redundancies. Reorganisation of management staff may require a consideration of existing contracts of employment and retrenchment packages.

Finally, the application of National Wage fixing principles and State wage fixing principles will require consideration. Both the Federal and State industrial tribunals have determined principles which govern the fixing of wages for all employees covered by industrial awards. These principles restrict the manner in which wages can be increased and require the parties to process all wage increases before the tribunals.

9. The Legislative Framework – General Comments

9.1 Companies Act 1981

As mentioned earlier, s.98 and Schedule 4 of the Companies Act 1981 specify the information required to be included in any prospectus. These parts of the Act are appended to this paper in Appendix A but the following requirements may be of particular interest.

The prospectus must set out details of all the significant ("material") contracts entered into by the company within the previous 2 years, but not including those entered into in the ordinary course of business. This may cause some concern as to confidentiality. Further, full particulars of the interests of each director or proposed director and of each expert in any property to be acquired by the corporation, or provided to that person as an inducement for his participation in the promotion, must be stated.

Unless an exemption is obtained, details of all options, including the names and addresses of the option holders, will need to be set out. This may be of particular significance if it is proposed to offer an option, for example, to a foreign investor or pursuant to an employee or executive share plan.

If the proceeds, of the issue of the shares are to be applied in the purchase of any business, an investigating accountant's report, made not more than 28 days before the issue of the prospectus, which deals with the profit or loss of the business for each of the 5 financial years preceding the issue of the prospectus and the assets and liabilities of the business as at the end of the last financial year will be needed.

9.2 ASX Listing Rules

The ASX prerequisites for admission to the Official List and Official Quotation as well as ASX requirements for prospectuses are appended to this paper in Appendix B.

Official Quotation will only be granted to shares which carry voting rights which are appropriate and confer equitable representation on shareholders as a body or any substantial section of them.

Official Quotation will only be granted to partly paid securities if the statement authorising the issue includes a defined call programme.

The Listing Rule requirements for prospectuses include the following:

- (A) any prospectus shall not make reference to admission to the Official List or grant of Official Quotation, except with the written permission of the Exchange;
- (B) the prospectus shall not contain a report of any expert on any real or personal property which has been or will be acquired by the company if such expert has any interest, direct or indirect, in such property (Listing Rule 2B(3));
- (C) the minimum subscription shall be not less than 80% of the underwritten amount except where there are no clauses which may affect the obligations of the underwriter under the underwriting agreement after the opening of the issue (Listing Rule 2B(4A)); and
- (D) the minimum subscription shall be not less than 80% of the underwritten amount except where there are no clauses which may affect the obligations of the underwriter under the underwriting agreement after the opening of the issue (Listing Rule 2B(4A)).

9.3 Foreign Acquisitions and Takeovers Act 1975 ("FATA")

Under the FATA any transaction involving the acquisition by a non-resident or its associates of interests in shares of an Australian company so that they are interested in 15% or more of the shares of that company (or so that the number of shares in which they are interested increases when they are already interested in 15% or more of those shares) must be notified in advance to the Foreign Investment Review Board ("FIRB") (an agency of the Treasury) for approval. Similar notification must be made where the acquirer is a resident corporation (or trust) in which a single non-resident entity and its associates are interested in 15% or more of the share capital or income or capital (in the case of trusts) or the total of non-resident interests (including interests of associates) is at least 40% (s.26).

Formal notification of a proposal under s.25 or s.26 (by way of the prescribed form) activates a time clock pursuant to which the Treasurer must take action within 30 days. Failure to make an order of prohibition within the 30 day period results in the Treasurer losing the ability either to block the proposal or impose conditions on its approval. The statutory period may be extended up to a further 90 days by the issue of an interim order (s.22, ss.25(3)).

If the Treasurer is of the opinion that the proposed acquisition would lead to the corporation being "controlled by foreign persons" or the foreign persons who "control" the corporation changing then the Treasurer may prohibit the acquisition if he considers it contrary to the national interests (s.18). It is not necessary for the proposal to demonstrate any economic or other benefit.

The Treasurer also has the power to order the divestiture of shares the acquisition of which had the result that the corporation became controlled by foreign persons or that the foreign persons who controlled the corporation changed and the Treasurer is satisfied that that result is contrary to the national interest.

Although there has been a relaxation on policy towards foreign investment, particularly in the manufacturing and service sectors, special conditions apply in specific industries such as banking, civil aviation, media and natural resources.

9.4 Companies (Acquisition of Shares) Act 1980

The acquisition of shares in companies with more than 15 members is regulated by the Companies (Acquisition of Shares) Act 1980 (the "CASA") (and its cognate Codes in the States and Territories of Australia).

The scheme of CASA is to prevent any one shareholder from acquiring more than 20% of the shares in a company without first offering to acquire the shares of the other shareholders or, alternatively, obtaining their approval.

Section 10 provides for the application of CASA to:

"... all natural persons, whether resident in Australia or not and whether Australian citizens or not, and to all bodies corporate or unincorporate, whether incorporated or carrying on business in Australia or not, and extends to acts done or omitted to be done whether in Australia or not."

Section 11 of CASA prohibits anyone entitled to less than 20% of the voting shares in a company from acquiring more than 20% of the shares in a company, and any acquisition by which a person who is entitled to more than 20% but less than 90% of the voting shares increases their entitlement otherwise than as provided by CASA.

Section 12 provides certain exceptions to s.11 including the allotment or purchase of shares pursuant to registered prospectuses where the prospectus was issued in relation to an offer to the public to subscribe for shares, or where the prospectus was the first prospectus issued by the company and the person who acquired the shares was a promoter in respect of the prospectus.

Section 11 will not apply to the initial float of a privatised company so as to prohibit any acquisition. However, given the very wide concept of 'entitlement' and 'acquisition of relevant interests' in voting shares both Government and investor companies as well as their major shareholders will have to pay

considerable attention to the provisions of CASA so as to ensure that their planned shareholdings, associations and relationships do not lead to contravention of this Code.

9.5 Trade Practices Act 1974 ("TPA")

The TPA regulates anti-competitive conduct and consumer protection in Australia. Part IV of the TPA, dealing with anti-competitive practices, and Part V of the TPA, dealing with unfair trading practices, are administered by the Trade Practices Commission.

Section 52 of the TPA provides that a corporation engaged in "trade or commerce" shall not engage in misleading or deceptive conduct. In the English case of Kowloon Stock Exchange Ltd v. Inland Revenue Commissioner [1985] 1A11ER 205 the trading of Stocks and Shares by brokers was held to be "trade". In the preparation of the prospectus and in the pre-prospectus stage of any privatisation great care will have to be taken to ensure that the promoters, who will include the corporation to be privatised itself, do not breach this section.

Further, s.2A of the TPA provides that the Act binds the Crown in right of the Commonwealth insofar as the Crown in right of the Commonwealth carries on a business, either directly or by an authority of the Commonwealth and applies as if the Commonwealth was a corporation. Thus, in the promotion of any privatisation it may be that the Commonwealth could be held to be "carrying on a business" and would therefore be subject to s.52. The airline companies and others involved in any offer of securities would certainly be subject to the provisions of this Act.

10. Conclusion

Any general offer of equity in a government-owned company will require prior consideration of various legislative and regulatory requirements. Unless, as a result of consultation with the authorities administering these requirements, modifications or waivers can be obtained the offers may not be able to be made in the most desirable form. Obviously it would be more advantageous to have such consultations prior to the announcement of any intended general offer.

DISCLAIMER

Blake Dawson Waldron, Solicitors, has taken every care in the preparation of this publication. It is intended, however, only to provide commentary on the subject matter covered. It does not purport to be comprehensive or to render legal advice. No reader should act on the basis of any matter contained in this publication without first obtaining specific professional advice. In this regard, Blake Dawson Waldron would welcome any inquiries or approaches in relation to the matters raised herein.

APPENDIX A

Companies Act, 1981

SECTION 98 CONTENTS OF PROSPECTUSES

98. (1) **[Form and contents]** to comply with the requirements of this Act a prospectus:
- (a) shall be printed in type of a size not less than the type known as eight point Times unless the Commission, before the issuing or advertising of the prospectus in the Territory certifies in writing that the type and size of letter are legible and satisfactory;
 - (b) shall be dated;
 - (c) shall, as to one copy, be lodged with the Commission as required by this Act, shall state that a copy of the prospectus has been so lodged and shall also state, immediately after the statement that a copy has been so lodged, that the Commission takes no responsibility as to the contents of the prospectus;
 - (d) where the prospectus relates to shares, shall set out particulars as to:
 - (i) the minimum amount that, in the opinion of the directors, must be raised by the issue of those shares in order to provide the sums, or, if any part of the sums is to be defrayed in any other manner, the balance of the sums, required to be provided in respect of each of:
 - (A) the purchase price of any property purchased or to be purchased that is to be defrayed in whole or in part out of the proceeds of the issue;
 - (B) any preliminary expenses payable by the corporation, and any brokerage or commission so payable to any person in consideration of his agreeing to subscribe for, or of his procuring or agreeing to procure subscriptions for, any shares in the corporation;
 - (C) the repayment of any money borrowed by the corporation in respect of any of the foregoing matters; and
 - (D) working capital, and
 - (ii) the amounts to be provided in respect of the matters mentioned in sub-paragraph (i) otherwise than out of the proceeds of the issue and the sources out of which those amounts are to be provided;

- (e) shall contain a report by a registered company auditor (to be headed "Investigating Accountant's Report") containing the prescribed matters and such other matters as the commission requires;
- (ea) shall set out the prescribed matters and contain the prescribed reports;
- (eb) shall set out such other matters as the Commission requires and contain such other reports as the Commission requires;
- (f) in the case of a prospectus pursuant to which the public is to be invited to deposit money with or lend money to a corporation that is a subsidiary of another corporation or a prospectus pursuant to which a corporation that is a subsidiary of another corporation is to make offers to the public to accept moneys deposited with, or lent to, the corporation:
 - (i) shall contain a statement as to whether or not that other corporation is under any liability to repay those moneys or to pay any interest on those moneys; and
 - (ii) where that other corporation is so stated to be under any such liability – shall also give full particulars of the nature and extent of that liability, of the circumstances under which that liability arose and of the manner in which that liability is to be discharged;
- (g) shall contain a statement that no shares or debentures (as the case requires) will be allotted or issued on the basis of the prospectus later than 6 months after the date of the issue of the prospectus;
- (h) shall, if it contains any statement that is made by an expert or is contained in what purports to be a copy of, or extract from, a report, memorandum or valuation of an expert, state the date on which the statement, report, memorandum or valuation was made and whether or not it was prepared by the expert for incorporation in the prospectus;
- (j) shall not contain the name of any person as:
 - (i) a trustee for holders of debentures of the corporation;
 - (ii) an auditor, banker, solicitor, stockbroker or share broker of the corporation or for or in relation to the issue or proposed issue of shares or debentures; or
 - (iii) a person performing any function in a professional, advisory or other capacity not mentioned in sub-paragraph (i) or (ii) for the corporation or for or in relation to the issue or proposed issue of shares or debentures,

unless that person has consented in writing before the issue of the prospectus to act in that capacity in relation to the prospectus and, in the case of a company, a copy, verified by a statement in writing, of the consent has been lodged with the Commission;

- (k) shall set out the dates of, the parties to, and the general nature of, every material contract, not being a contract entered into in the ordinary course of the business carried on or intended to be carried on by the corporation or a contract entered into more than 2 years before the date of issue of the prospectus;
- (ka) shall state whether or not application has been, or is proposed to be, made for permission for the shares or debentures to which the prospectus relates to be listed for quotation on a stock market of a securities exchange and, if applications for such permission has been, or is proposed to be, made, shall specify each securities exchange to which application for such permission has been, or is proposed to be, made;
- (l) (Omitted by No. 192 of 1985, s. 53)
- (m) shall set out full particulars of the nature and extent of the interest (if any) of every director or proposed director and of every expert in the promotion of, or in the property proposed to be acquired by, the corporation, or, where the interest of such a director or proposed director or such an expert consists of being a partner in a firm, the nature and extent of the interest of the firm, with a statement of all sums paid or agreed to be paid to him or to the firm in cash or shares or otherwise by any persons, in the case of a director or proposed director, either to induce him to become, or to qualify him as, a director, or otherwise for services rendered by him or by the firm in connection with the promotion or formation of the corporation or, in the case of an expert, for services rendered by him or the firm in connection with the promotion or formation of the corporation;
- (n) shall, where the prospectus offers shares in or debentures of a foreign company, in addition contain particulars with respect to:
 - (i) the constituent documents of the foreign company;
 - (ii) the enactments or provisions having the force of an enactment by or under which the incorporation of the foreign company was effected;
 - (iii) an address in the Territory where the constituent documents, and the enactments or provision, or certified copies of the constituent documents, enactments or provisions, may be inspected;

- (iv) the date on which and the place where the foreign company was or is to be incorporated or formed; and
- (v) the address of the registered office of the foreign company in the Territory; and
- (o) shall specify each participating State or participating Territory (if any) in which it is proposed to issue the prospectus.

History

S. 98(1)(d) amended, (1)(ka) inserted and (1)(i) omitted by No. 192 of 1985, s. 53

S. 98(1)(c) substituted by No. 153 of 1981, s. 33

S. 98(1)(ea) and (eb) inserted by No. 153 of 1981, s. 33

98. (2) **[Date]** The date inserted in a prospectus pursuant to paragraph (1)(b) shall, unless the contrary is proved, be taken to be the date of issue of the prospectus.

98. (3) **[Regulations]** Regulations made for the purposes of sub-section (1) may make different provision in relation to different classes of prospectuses or in relation to prospectuses to be issued in respect of different classes of shares or debentures or different classes of corporations.

History

S.98(3) amended by No. 153 of 1981. s. 33

98. (3A) **[Adjustments]** A report contained in a prospectus in accordance with sub-section (1) or in accordance with a requirement made by the Commission under that sub-section shall either:

- (a) indicate by way of note any adjustments as respects the figures of any profit or loss or assets and liabilities dealt with by the report that appear necessary to the person or persons making the report; or
- (b) make those adjustments and indicate by way of note that adjustments have been made and the nature of those adjustments.

History

S.98(3A) inserted by No. 153 of 1981. s. 33

98. (4) **[Commission may require inclusion of accounts]** Without limiting the generality of sub-section (1), the Commission may require that a report that is required, pursuant to sub-section (1) or pursuant to a requirement made under that sub-section, to be contained in a prospectus shall contain accounts that comply with the requirements set out in the regulations in force for the time being under sub-section 269(8) or with such of those requirements as are specified by the Commission.

History

S.98(4) substituted by No. 153 of 1981. s. 33

98. (5) **[Exceptions]** Paragraph (1)(m) and sub-paragraphs (1)(n)(i), (ii) and (iii) do not apply in the case of a prospectus issued more than 2 years after the day on which:

- (a) in the case of a company – it is incorporated; or
 - (b) in the case of a foreign company – it is registered as a foreign company in the State or in a participating State or a participating Territory under the provisions of the law in force in that State or Territory that correspond with Division 5 of Part XIII.
98. (6) **[Certain conditions void]** A condition requiring or binding an applicant for shares in or debentures of a corporation to waive compliance with any requirement of this section, or purporting to affect him with notice of any contract, document or matter not specifically referred to in the prospectus is void.
98. (7) **[Offence]** Where a prospectus relating to any shares in or debentures of a corporation is issued and the prospectus does not comply with the requirements of this Act, the directors of the corporation and any other persons responsible for the prospectus are each guilty of an offence.
- Penalty: \$2,500 or imprisonment for 6 months, or both.
98. (8) **[Defences]** In the event of non-compliance with, or contravention of, any of the requirements set out in this sections, a director or other person responsible for, the prospectus does not incur any liability by reason of the non-compliance or contravention if:
- (a) as regards any matter not disclosed, he proves that he had no knowledge of that matter,
 - (b) he proves that the non-compliance or contravention arose from an honest mistake on his part concerning the facts; or
 - (c) the non-compliance or contravention was:
 - (i) in respect of matter that, in the opinion of the court dealing with the case, was immaterial; or
 - (ii) otherwise such as, in the opinion of the court, having regard to all the circumstance of the case, ought reasonably to be excused.
98. (9) **[Further defence]** In the event of failure to include in a prospectus a statement with respect to the matters specified in paragraph (1)(m), no director or other person shall incur any liability in respect of the failure unless it is proved that he had knowledge of the matters not disclosed.
98. (10) **[Operation]** Nothing in the section limits or diminishes any liability that a person may incur under any rule of law or any enactment under this Act apart from sub-section (7).

PROSPECTUS

PART I

Matters to be Stated

1. The number of founders or management or deferred shares, if any, and the nature and extent of the interest of the holders of those shares in the property and profits of the corporation.
2. The number of shares, if any, fixed by the articles as the qualification of a director, and any provision in the articles as to the remuneration of the directors.
3. The names, descriptions, and addresses of all the directors or proposed directors.
4. The time of the opening of the subscription lists.
5. The amount payable on application for and allotment of each share or, where such amount may vary during the currency of the offer, the basis of calculation of the amount so payable, and, in the case of a second or subsequent offer of shares, the number, description and amount offered for subscription on each previous allotment made within the 2 preceding years, the number actually allotted, and the amount, if any, paid on the shares so allotted.
6. The number, description, and amount of any shares in or debentures of the corporation which any person has, or is entitled to be given, an option to subscribe for, together with the following particulars of the option:
 - (a) the period during which it is exercisable;
 - (b) the price to be paid for shares or debentures subscribed for under it;
 - (c) the consideration, if any, given or to be given for it or for the right to it;
 - (d) the names and addresses of the persons to whom it or the right to it was given or, if given to existing shareholders or debenture holders as such, the relevant shares or debentures.
7. The number and amount of shares and debentures which within the 2 preceding years have been issued, or agreed to be issued, as fully or partly paid up otherwise than in cash, and in the latter case the extent to which they are so paid up, and in either case the consideration for which those shares or debentures have been issued or are proposed or intended to be issued.
8. (1) With respect to any property to which this clause applies:
 - (a) the names and addresses of the vendors;

- (b) the amount payable in cash, shares, or debentures to the vendor and, where there is more than one separate vendor, or the corporation is a sub-purchaser, the amount so payable to each vendor;
 - (c) short particulars of any transaction relating to the property completed within the 2 preceding years in which any vendor of the property to the corporation or any person who is, or was at the time of the transaction, a promoter or a director or proposed director of the corporation had any interest direct or indirect.
- (2) The property to which this clause applies is property purchased or acquired by the corporation or by a subsidiary of the corporation or proposed so to be purchased or acquired, which is to be paid for wholly or partly out of the proceeds of the issue offered for subscription by the prospectus or the purchase or acquisition of which has not been completed at the date of the issue of the prospectus, other than property the contract for the purchase or acquisition whereof was entered into in the ordinary course of the corporation's or the subsidiary's business, the contract not being made in contemplation of the issue nor the issue in consequence of the contract.
- 9. The amount, if any, paid or payable as purchase money in cash, shares or debentures for any property to which clause 8 applies, specifying the amount, if any, payable for goodwill.
- 10. In relation to any payment within the 2 preceding years or any proposed payment, by way of brokerage or commission (but not including commission to sub-underwriters), in consideration of a person or persons:
 - (a) subscribing or agreeing to subscribe, whether absolutely or conditionally, for shares in or debentures of the corporation; or
 - (b) procuring or agreeing to procure subscriptions, whether absolute or conditional, for shares in or debentures of the corporation, the amount or rate of that payment, together with the names of any directors, promoters, experts or proposed directors who are entitled to receive any such payment and the amount or rate of the payment that they are entitled to receive.
- 10A. The number of shares for which persons have agreed, for payment by way of brokerage or commission, to subscribe absolutely.
- 11. The amount or estimated amount of preliminary expenses and the persons by whom any of those expenses have been paid or are payable, and the amount or estimated amount of the expenses of the issue and the persons by whom any of those expenses have been paid or are payable.
- 12. Any amount or benefit paid or given within the 2 preceding years or intended to be paid or given to any promoter, and the consideration for the payment or the giving of the benefit.
- 13. The names and addresses of the auditors of the corporation.

14. Where the prospectus relates to shares, if the share capital of the corporation is divided into different classes of shares, the right of voting at meetings of the corporation conferred by, and the rights in respect of capital and dividends attached to, the several classes of shares respectively.
15. In the case of a corporation which has been carrying on business, or of a business which has been carried on, for less than 3 years, the length of time during which the business of the corporation or the business to be acquired, as the case may be, has been carried on.

PART II

Reports to be contained in the prospectus

16. If the proceeds, or any part of the proceeds, of the issue of the shares or debentures are to be applied directly or indirectly in the purchase of any business, an investigating accountant's report which must not be made more than 28 days before the issue of the prospectus and deals with:
 - (a) the profit or loss of the business, in respect of each of the 5 financial years immediately preceding the issue of the prospectus and, where accounts have been made up for a part of the financial year in which the prospectus is issued, in respect of that part; and
 - (b) the assets and liabilities of the business, as at the end of the last financial year or part of the financial year referred to in paragraph (a), whichever is the later.
17. If:
 - (a) the proceeds, or any part of the proceeds, of the issue of the shares or debentures are to be applied directly or indirectly in any manner resulting in the acquisition by the corporation of shares in any other corporation; and
 - (b) by reason of that acquisition, or anything to be done in consequence or in connexion with it, that corporation will become a subsidiary of the first-mentioned corporation in paragraph (a):
an investigating accountant's report with respect to:
 - (c) where the other corporation has no subsidiaries:
 - (i) the profit or loss of the other corporation, in respect of each of the 5 financial years immediately preceding the issue of the prospectus and, where accounts have been made up for a part of the financial year in which the prospectus is issued, in respect of that part; and
 - (ii) the assets and liabilities of the other corporation, as at the end of the last financial year or part of the financial year referred to in sub-paragraph (i), whichever is the later; or
 - (d) where the other corporation has subsidiaries:

- (i) the profit or loss of the other corporation and the combined profits and losses of the other corporation and its subsidiaries, in respect of each of the 5 financial years immediately preceding the issue of the prospectus and, where accounts have been made up for a part of the financial year in which the prospectus is issued, in respect of that part; and
 - (ii) the assets and liabilities of the other corporation and the combined assets and combined liabilities of the other corporation and its subsidiaries, as at the end of the last financial year or part of the financial year referred to in subparagraph (i), whichever is the later in respect of the other corporation and each subsidiary.
- 18. For the purposes of clauses 16 and 17, the last financial year, or part of a financial year, in respect of which the investigating accountant's report deals with the matters referred to in those clauses shall be a financial year, or a part of a financial year, that ended not more than 6 months, or, with the consent of the Commission, not more than 12 months, before the date of the prospectus.
- 19. (1) For the purposes of paragraph 17(d), the investigating accountant's report shall deal with the combined profits and losses, and combined assets and combined liabilities, of a corporation and its subsidiaries, in
 - (a) a statement of consolidated profit and loss and consolidated assets and consolidated liabilities for the corporation and the subsidiaries;
 - (b) 2 or more statements of consolidated profit and loss and consolidated assets and consolidated liabilities together covering the corporation and the subsidiaries;
 - (c) a combination of one or more statements of consolidated profits and loss and consolidated assets and consolidated liabilities and one or more separate statements of profit or loss and assets and liabilities, together covering the corporation and the subsidiaries; or
 - (d) separate statements of profit or loss and assets and liabilities for the corporation and each of the subsidiaries.
- (2) The statements prepared pursuant to paragraph (1)(a), (b), (c) or (d) shall make allowance in relation to the profits or losses, and assets and liabilities, of the subsidiaries for the interests of members of the subsidiaries other than the corporation.
- (3) Where a statement of consolidated profit and loss and consolidated assets and consolidated liabilities is prepared, transactions and balances between the corporations covered by that statement shall be eliminated in determining any amounts to be included in that statement.
- (4) Where the combined profits and losses and combined assets and combined liabilities of a corporation and its subsidiaries are dealt with otherwise than in accordance with paragraph (1)(a), the investigating accountant shall certify in his report

- (a) that, for reasons set out in the certificate, it was impracticable to deal with them in accordance with paragraph (1)(a) or that it was preferable that they be dealt with in accordance with paragraph (1)(b), (c) or (d) as the case may be; and
 - (b) that they were not significantly affected by transactions and balances between the corporations to which they relate, except to the extent stated in the notes in the report.
- 20. For the purposes of clause 17, the investigating accountant's report shall indicate how the profit or loss of the other corporation and, where applicable, the combined profits and losses of the other corporation and its subsidiaries dealt with by the report would, in respect of the shares to be acquired, have concerned members of the first-mentioned corporation in clause 17 and what allowance would have to be made, in relation to assets and liabilities and combined assets and combined liabilities so dealt with, for holders of other shares, if the first-mentioned corporation in clause 17 had at all material times held the shares to be acquired.
- 21. (1) A report by the directors as to whether after due inquiry by them in relation to the interval between the last date to which the accounts used in the preparation of the investigating accountant's report were made up and a date not earlier than 14 days before the issue of the prospectus, they have become aware –
 - (a) of any circumstances which in their opinion materially have affected or will affect the trading or profitability of the corporation or of its subsidiaries or of the value of the assets of the corporation or of its subsidiaries, if any; and
 - (b) of any contingent liabilities of the corporation or of its subsidiaries, additional to those contingent liabilities appearing in the prospectus.
- (2) If the directors have become aware of any circumstance or contingent liability referred to in sub-clause (1), full details must be set out in the report.

PART III

Directions applicable to Parts I and II

- 22. Clauses 2 and 11 (so far as they relate to preliminary expenses) shall not apply in the case of a prospectus issued more than 2 years after the date at which the corporation is entitled to commence business.
- 23. Every person shall for the purposes of this Schedule be deemed to be a vendor who has entered into any contract, absolute or conditional, for the sale or purchase, or for any option of purchase, of any property to be acquired by the corporation in any case where
 - (a) the purchase money is not fully paid at the date of the issue of the prospectus;

- (b) the purchase money is to be paid or satisfied wholly or in part out of the proceeds of the issue offered for subscription by the prospectus; or
 - (c) the contract depends for its validity or fulfilment on the result of that issue.
24. Where any property to be acquired by the corporation is to be taken on lease, this Schedule shall have effect as if the expression "vendor" included the lessor, and the expression "purchase money" included the consideration for the lease, and the expression "sub-purchaser" included a sub-lessee.
25. References in clause 6 to an option to subscribe for shares or debentures shall include an option to acquire them from a person to whom they have been allotted or agreed to be allotted with a view to his offering them for sale, but shall not include an option to subscribe for or acquire shares pursuant to a *bona fide* underwriting or sub-underwriting agreement.
26. For the purposes of clause 8 where the vendors or any of them are a firm, the members of the firm shall not be treated as separate vendors.
27. If, in the case of a corporation that has been carrying on business, or of a business that has been carried on, for less than 5 financial years, its accounts have only been made up in respect of 4 financial years, 3 financial years, 2 financial years or one financial year, Part II shall have effect as if references to 4 financial years, 3 financial years, 2 financial years or one financial year, as the case may be, were substituted for references to 5 financial years.
28. The expressions "financial year" in Part II means the year in respect of which the accounts of the corporation or of the business, as the case may be, are made up, and where by reason of any alteration of the date on which the financial year of the corporation or business terminates the accounts of the corporation or business have been made up for a period greater or less than a year, that greater or less period shall for the purposes of that Part of this Schedule be deemed to be a financial year.

PART IV

Additional matters to be set out in a prospectus relating to an invitation to deposit money with or lend money to a corporation

29. In every prospectus relating to an invitation to deposit money with or lend money to a corporation there shall be included
- (a) particulars of the limitations on the amount that the borrowing corporation may borrow.
 - (b) a statement as to the amount of subscriptions that are being sought;
 - (c) a statement as to whether or not the borrowing corporation reserves the right to accept or retain over-subscriptions and, if the borrowing corporation reserves such a right, the limit on the right so reserved expressed as a sum of money; and

- (d) where applicable, a statement as to whether or not the borrowing corporation has any right to create additional charges over any of the assets charged to secure the repayment of the deposits or loans which will rank in priority to or *pari passu* with that charge and if there is such a right particulars of its nature and extent.

History

Sch. 4 amended by S.R. 1983 No. 316

APPENDIX B

Australian Stock Exchange Limited Main Board Listing Rules

SECTION 1 – PREREQUISITES FOR ADMISSION TO THE OFFICIAL LIST

1A COMPANIES OTHER THAN EXEMPT FOREIGN COMPANIES

- (1) A company shall not be admitted to the Official List unless –
- (a) all ordinary shares are of the same nominal value;
 - (b) its Memorandum and Articles of Association do not contain provisions inconsistent with these Listing Rules;
 - (c) its Articles of Association provide that –
 - (i) the company shall refuse to acknowledge, deal with, accept or register any sale, assignment or transfer of Vendor securities which is or might be in breach of the Listing Rules or any escrow agreement entered into by the Company under the Listing Rules in relation to the Vendor Securities;
 - (ii) on a winding up of the company, the holders of shares which are classified under these Listing Rules or by the Home Exchange as Vendor securities and which are subject to escrow restrictions at the commencement of the winding up shall rank on a return of capital behind all other shares in the company; and
 - (iii) in the event of a breach of any escrow agreement entered into by the company under the Listing Rules in relation to shares which are classified under these Listing Rules or by the Home Exchange as Vendor securities, the member holding the shares in question shall cease to be entitled to any dividends and to any voting rights in respect of those shares for so long as the breach subsists.
 - (d) The Exchange is satisfied that such of the Listing Rules set out in Section 3 hereof as are in the opinion of the Exchange applicable to the company, have been or will be complied with; and
 - (e) it complies with Listing Rule 1(3)(a) or (b) or (c) or (d) or (e) and such other Listing Rules as are set out in this Section 1.
- (2) (a) Securities issued by a company to an underwriter or sub-underwriter for a consideration which in the opinion of the Home Exchange is substantially other than cash shall not be sold until at least 12 months after securities issued to members of the public have been granted quotation or until at least 12 months from the date of allotment whichever is the longer.
- (b) A company which has issued Vendor securities shall not be admitted to the Official List unless it has complied with Listing Rule 3T (other than paragraphs 3T(1)(a) and (f)) and entered into an escrow agreement of the type referred to in paragraph 3T(1)(b) in relation to those Vendor securities and provided a certified copy of such escrow

agreement and the certificate referred to in paragraph 3T(1)(e) to the Home Exchange prior to being admitted to the Official List.

- (3) (a) A limited liability company seeking Official Quotation of loan securities only, may be considered for admission to the Official List if –
- (i) it has at least \$1,000,000 of issued loan securities of the class to be quoted; and
 - (ii) there are at least 25 holders of such securities. (Refer Listing Rule 2A(7)).
- (b) A limited liability industrial company seeking Official Quotation of shares may be considered for admission to the Official List if –
- (i) the sum of the paid-up value of such shares of the one class and paid-up value together with any premium paid with respect thereto is at least \$300,000; and
 - (ii) there are at least 300 holders with marketable parcels of such shares of the one class and paid-up value; and
 - (iii) in the case of a company having a paid-up capital in respect of such shares –
 - a. of \$200,000 but not exceeding \$400,000 – members of the public are holders of at least 140,000 shares of the one class and paid-up value, or
 - b. in excess of \$400,000 – members of the public are holders of at least 200,000 shares of the one class and paid-up values; and
 - (iv) in the case of a company having a paid-up capital in respect of such shares –
 - a. of \$200,000 but not exceeding \$2,000,000 – at least \$70,000 or 25 per cent of such capital of the one class and paid-up value (whichever be the higher) is held by members of the public, or
 - b. in excess of \$2,000,000 – at least \$500,000 or 15 per cent of such capital of the one class and paid-up value (whichever be the higher) is held by members of the public, and
 - (v) it is a going concern or successor of a going concern having aggregated operating profit before income tax for the past 3 years of at least \$500,000 and which profits in the opinion of the Home Exchange are derived from the company's ordinary activities, or
 - (vi) it can demonstrate to the satisfaction of the Exchange that it has net tangible assets of not less than \$5 million.

- (vii) PROVIDED THAT, notwithstanding the provisions of paragraphs (i) – (iv) of this Listing Rule 1(3)(b), a company may be considered for admission to the Official List if –
 - a. not less than \$1,500,000 of its paid-up share capital, comprising not less than 1,000,000 shares of the one class and paid-up value, is held by at least 1,000 members of the public, or
 - b. notwithstanding its paid-up share capital is less than \$200,000, the Exchange approves of its admission to the Official List.

Unlisted Public Companies and Second Board Companies – Additional Rules

- (4) (a) A company admitted to a Second Board Official List of a State Subsidiary or an unlisted public company seeking Official Quotation of securities may be considered for admission to the Official List if –
 - (i) it proposes to issue a prospectus; or
 - (ii) it proposes to issue an information memorandum.
- (b) An information memorandum shall include unqualified audited accounts covering a period of not less than 6 months, that period ending not earlier than 6 months prior to the date of the application to the Home Exchange, and where the company proposes to acquire assets the information memorandum shall also include –
 - (i) an investigating accountants report on those assets based on unqualified audited accounts covering a period of not less than 6 months, that period ending not earlier than 6 months prior to the date of the application to the Home Exchange,
 - (ii) a proforma consolidation of the balance sheet of the company as if those assets has already been acquired, and made up to a date not earlier than 6 months prior to the date of the application to the Home Exchange, and in the case of a Second Board company the unqualified audited accounts shall be made up to a date after the company was admitted to a Second Board market and covering a period of at least 6 months from the date the accounts were last published.
- (c) The information memorandum shall contain all the information that would be required in a prospectus under the Act and by these Listing Rules and shall be forwarded to shareholders after examination by the Exchange. If a geologist's report is required to be included in such report it shall be made up to a date not more than one month prior to the date of the report.

SECTION 2 – PREREQUISITES FOR OFFICIAL QUOTATION

2A SECURITIES

General

- (1) Official Quotation shall only be granted to an issue of shares –
 - (a) in the case of a company seeking admission to the Official List, if at least 20 cents of the paid-up value is paid in cash; or
 - (b) in the case of a listed company if the amount paid-up or credited as paid-up is at least 20 cents.
- (2) Official Quotation shall only be granted to shares carrying voting rights which are appropriate and confer equitable representation on shareholders as a body or any substantial section of them and –
 - (a) in the case of an issue to existing shareholders the issue is made pro-rata; or
 - (b) in the case of an issue which is not made to existing shareholders pro-rata the shares for which quotation is sought carry voting rights which are not more advantageous than those available to shares previously granted quotation. (Refer Listing Rule 3K(1).)
- (3) Where a prospectus or letter of offer includes an unconditional listing clause or a statement that application for listing has been or shall be made in respect of some or all of the securities offered by that prospectus or letter of offer then the company shall forward all necessary documentation to the Home Exchange within one month of announcing the closure of the issue or offer.
- (4) Official Quotation shall only be granted to partly paid securities in a limited liability company if the statement announcing the issue includes a defined call programme. In the case of limited liability mining companies, the call programme shall provide for the securities to be fully paid within 2 years from the date of issue
- (5)
 - (a) Official Quotation shall only be granted to a new class of equity security or another security with rights of conversion to equity if there are at least 100,000 security units held by at least 50 holders holding marketable parcels.
 - (b) Official Quotation may be granted to a new class of ordinary shares or units where there are at least 1,000,000 shares or units and there are less than 50 holders provided such shares or units rank equally with the ordinary fully paid shares or units of the company or trust except where the new shares or units do not rank fully for the next dividend to be declared by the company or unit trust.
 - (c) Official Quotation may be granted to a new class of partly paid shares or units where there are at least 1,000,000 shares or units and there are less than 50 holders provided –
 - (i) such shares or units are partly paid to not less than 40 per cent of their issue price, and

- (ii) the uncalled amount is to be paid on a fixed date which is no later than 12 months after the date of issue.
- (6) Official Quotation shall only be granted to securities –
- (a) issued for cash after the Exchange is supplied with a statement setting out –
 - (i) the nominal amount of each security; and
 - (ii) the amount of premium paid or payable on each security.
 - (b) issued for a consideration other than cash after the Exchange is supplied with a statement setting out –
 - (i) the nominal amount of each security; and
 - (ii) the amount of premium treated as paid or payable on each security.

2B PROSPECTUS

General

- (1) Any prospectus offering securities shall not make reference to admission to the Official List or grant of Official Quotation on the Exchange, except with the written permission of the Exchange. Where permission of the Exchange has been granted for the company to be admitted to the Official List the statement set out in Appendix 9 shall be included in the prospectus.
- (2) Any report contained in the prospectus shall not be abridged and the qualifications of the person making the report shall be set out. Each report shall be dated not earlier than one month prior to the date of registration of the prospectus.
- (3) The prospectus shall not contain a report of any expert on any real or personal property which has been or will be acquired by the company if such expert has any interest, direct or indirect, in such property.
- (3A) The Home Exchange may require that a prospectus contain a report by an independent qualified person as to the consideration paid or payable to vendors for the acquisition of an interest in an asset setting out whether, in the opinion of the person making the report, the consideration paid or payable is a fair consideration. Where the vendor consideration includes securities in the company the independent person shall take into account the price at which investors have or will be invited to pay for securities in the company when determining that the consideration paid or payable is a fair consideration.
- (4) The prospectus shall set out the following information –
 - (a) where reference is made to a valuation of assets, the basis of valuation (e.g. the present day value or replacement value), the date of valuation, by whom the valuation was made, and in the case of realty any special conditions governing the valuation. Where a prospectus will be circulated in one or more States or Territories of Australia it shall also state an address in each of those States or Territories of Australia where copies of the valuation may be inspected;

- (b) particulars of any royalty payment or compensation to land owners, as distinct from consideration payable to holders of leases, licences, lease applications or similar rights and titles which must be stated separately;
- (c) a report by the directors stating whether or not the company was taxed as a public company in respect of any of the 5 financial years immediately preceding the issue of the prospectus;
- (d) in respect of subsidiaries of the company, the matters provided by Section 98(1)(k) of the Act as if those provisions applied to subsidiaries of the companies;
- (e) details of any agreements or contracts entered into between the company and any of its directors as may be required by the Home Exchange;
- (f) in the case of an issue of shares, the net tangible asset backing of each class of shares, after making allowance for the introduction of the new share capital except where the prospectus is issued by a mining company;
- (g) in respect of an issue of securities where a company reserves the right to close the issue at any time after the opening date, whether or not the company will accept the lodgement of applications prior to the opening date of the issue;
- (h) the minimum amount of the issue available for subscription after allowing for the portion of the issue over which the underwriter has the right to nominate allottees and the amount (if any) over which shareholders, noteholders or debenture holders have a prior right of application;
- (i) where the company and/or underwriter reserves the right to restrict allotment in any maturity and/or class of security, the extent of such right to restrict allotment and where the underwriters reserve the right to nominate allottees the extent to which such right to nominate allottees in any such restricted maturity or maturities may be exercised;
- (j) if applicable that the company and/or underwriter does not reserve the right to differentiate between maturities and/or classes of securities in making allotments;
- (k) a statement whether any expert whose report appears in the prospectus has –
 - (a) any shareholding in the company;
 - (b) the right (whether legally enforceable or not) to subscribe for securities in the company; and
 - (c) the right (whether legally enforceable or not) to nominate persons to subscribe for securities in the company;

and if so, a full description of same;

- (l) details of clauses in any underwriting agreement which may affect the obligations of the underwriter under the underwriting agreement after the opening of the issue and an express covenant by the underwriter that the exercise of a provision of any such clause after the opening of the issue will be advised to the Home Exchange of the company immediately. This Listing Rule shall not apply to an issue of loan securities;
 - (m) where the company proposes to issue any securities other than by subscription pursuant to the prospectus; the purpose of the issue, the names of the allottees, the number and type of securities to be issued and the issue price of those securities and other relevant information concerning the securities; and
 - (n) details of any escrow agreement relating to Vendor securities entered into or required to be entered into by the company pursuant to these Listing Rules.
- (4A) The minimum subscription shall be not less than 80 percent of the underwritten amount except where there are no clauses which may affect the obligations of the underwriter under the underwriting agreement after the opening of the issue. This Listing Rule shall not apply to an issue of loan securities.

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