



Regulation of Corporate Finance in Australia

By Jon Broadley, Director

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The Australian Securities and Investment Commission (ASIC) has delivered its recent report in respect of corporate finance activity in the 6 months ending June 2019.¹

In particular, ASIC's report provides various data and guidance about ASIC's regulation of fundraising transactions, mergers and acquisitions, corporate governance issues and experts.

The report refers to key concerns arising from practices occurring in these areas. This may include conduct that has caused ASIC to become involved. ASIC has provided its observations as well as suggested improved practice in the areas set out below.

The corporations division of ASIC is responsible for regulating the conduct of corporations and has a particular focus on equity fundraising and control transactions. As a part of this work, ASIC can take real time oversight of corporate finance transactions, including control and fundraising transactions; promotes good corporate governance; and assesses applications for relief from certain parts of the *Corporations Act 2001* (Cth), including the financial reporting provisions in Chapter 2M, the takeover provisions in Chapter 6 and the fundraising provisions in Chapter 6D.



Fundraising

ASIC has requested additional or amended disclosure in more than 25% of all prospectuses lodged during the above 6 month period. ASIC is concerned to ensure that adequate and clear disclosure of business models, proposed use of funds and various risks are properly disclosed. With this percentage in mind, ASIC has expressed the view that there is clear room for improvement and accounting, legal and other expert advisors are firmly urged to consider this when assisting with the preparation of required disclosure documents.

There has been an increase in the number of initial public offerings (IPOs) by technology development and service companies which are at a relatively early stage and at that time only loss-making. ASIC has sought corrective and additional disclosure in respect of revenue growth and customer number estimates which are part of a focus area in prospectuses for these types of issuers.

Further, ASIC has clearly stated that issuers, who engage marketers to promote offers, should actively monitor such marketing and promotional activities and materials to ensure that they are not misleading or deceptive to investors and the public.

Mergers and Acquisitions

ASIC has reported that, on 4 occasions in the last year, it either withheld letters to advise no-objection or alternatively intervened to oppose the approval of a scheme of arrangement. ASIC has made it clear that it will closely review schemes of arrangement which may involve practices considered by ASIC to be contrary to the principles underlying the regulation of takeovers

and which may undermine the integrity of the scheme of arrangement process.

ASIC has recommended that directors who are likely to receive benefits under a scheme of arrangement consider any potential conflicts of interest when considering whether to make a recommendation. Such consideration should be carefully disclosed in the documentation for the scheme of arrangement.

ASIC has also referred to concerns with various practices during transactions that may affect the integrity of the markets in which they take place. This could include matters pertaining to disclosures about substantial holdings in companies and minimum acceptance conditions in takeover bids. These concerns are in addition to matters concerning disclosure and structuring of offers.

Corporate Governance

As it is concerned to maintain its focus on the disclosure of climate risk in the context of company reporting and financial statements, ASIC has sought to clarify its policy in relation to the disclosure of risks and opportunities associated with climate change.² This should be highlighted as a systemic risk that could affect an entity's financial prospects for future years. This may need to be disclosed in a prospectus.

Experts

Expert reports are used in prospectuses as well as supporting opinions for balance sheet entries and other purposes. ASIC's investigation of independent expert licensees during the report period has disclosed that several experts have not maintained or had inadequate internal documentation of internal processes



in respect of the preparation of expert reports. Often experts' working papers have been found to be insufficient to provide evidence of work undertaken during an engagement. Missing materials included conflict checks, valuation calculations and analysis, file notes of face to face and telephone communications. ASIC is concerned to ensure that experts, as key parties in the area of corporate finance, are complying with their professional obligations.

Should you wish to discuss any matters arising out of this article, please contact:

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¹ ASIC Regulation of Corporate Finance: January to June 2019 (REP 630).

² Regulatory Guide 228 and Regulatory Guide 247.