

Corporate Update

Taskforce releases Interim Report

On 28 November 2008, New Zealand's newly established Capital Markets Development Taskforce (**Taskforce**) made a number of recommendations to the Minister of Commerce on actions to take in response to the current financial crisis.

The Taskforce, established in July of this year, is not due to finally report until September 2009. In providing this interim report, the Taskforce is recognising the need for urgent action to be taken to minimise the costs of the current market downturn and to speed the recovery. The Government is being encouraged to adopt the recommended changes by March 2009.

Given the raison d'être for the Taskforce, it is not surprising that the key theme of these recommendations is easing regulation around access to capital. Practitioners and participants in the capital markets area are likely to be relieved rather than surprised at the recommended changes as, in many instances, they call for the removal of what many see as unnecessary, costly and time consuming restraints.

Rob Cameron, chairman of the Taskforce states "it is critical to do everything we can to improve businesses' access to capital and reduce the costs of raising capital." The Securities Commission supports some, but not all, of the recommendations made. We summarise in this article the recommendations and their likely effect.

The Recommendations

The Interim Report separates its recommendations into those to be *implemented* urgently (by March 2009) and those to be *progressed* urgently (i.e to be further assessed and the details clarified before implementing). The recommendations for urgent implementation are further split into two groups – those applying to listed companies, and those to private companies.

Of course, balanced against the call for change is the underlying concern for investor protection. In the interim report it is suggested investor protection will not be undermined, in relation to listed companies at least, as the information relevant to capital raising is already known to market participants as a result of the continuous disclosure regime. There is strength in this argument for the listed environment, as the requirement for prospectuses and investment statements result in an unjustified and costly duplication of materials which are under utilised by investors.

Many of the proposed changes relate to relaxing the rules around capital raising from existing shareholders. However, if the Securities Commission and the NZX accept that the continuous disclosure regime is providing all necessary information to the market then arguably the proposed exemptions could be extended to *all* offers of securities (whether debt or equity) made by a listed company.

Listed Companies

So, what is proposed to assist listed companies to raise capital? The NZX is fast tracking consultation on changes to the NZX Listing Rules aimed at reducing the cost of capital raising. The proposed changes are supported by the Taskforce and are discussed in full in our newsletter "Proposed Changes to NZX Listing Rules Set to Affect Capital Raising", click [here](#) for the link.

The Taskforce's recommended changes, which are broadly in line with the NZX's proposed changes, include:

- removing the requirement for listed equity issuers to produce prospectuses and investment statements for an issue of debt securities and replacing these with a simple term sheet and a warranty given by the Board, the CEO and the CFO that the issuer has complied with the continuous disclosure requirements in full and no other relevant information is known. A key issue for a Board (and the CEO and CFO) will be what actions it needs to take in order to be able to rely on the "reasonable grounds" defence to any potential liability in respect of the term sheet. As a minimum, the Board will need assess its internal processes for dealing with continuous disclosure and be comfortable that it is complying with its obligations.
- Three changes to thresholds set under the NZX Listing Rules for issues of equity securities:
 - amending Rule 7.3.4(ba) (Pro rata and \$5,000 offers) of the NZX Listing Rules and the Securities Act (NZX – Share and Unit Purchase Plans) Exemption Notice 2005 by raising the threshold from \$5,000 to \$25,000. This will allow up to \$25,000 of capital to be raised from each existing shareholder without shareholder approval under the NZX Listing Rules or a prospectus and investment statement under the Securities Act. The Taskforce also suggests that with the continuous disclosure regime in place, the obligation to prepare a prospectus could be dispensed with entirely where capital is raised from existing shareholders.
 - amending rule 7.3.5 (Issues within 15% limit) by raising the threshold from 15% to 20%. This will allow capital up to 20% of a company's market capitalisation to be raised in each 12 month period before shareholder approval is required.

- amending Rule 7.10.2 (Closing Date for Applications) and Rule 7.10.10 (Quotation of Rights) of the NZX Listing Rules to reduce the timeframes for a rights issue. Rights issues currently take around six weeks. The proposed change will reduce this by nearly three weeks by reducing the timeframe for applications to be received under Rule 7.10.2 (from 18 business days after mailing letters of entitlement to 12 business days) and the time which information and offer documents must be provided to NZX before they are circulated (Rule 7.10.10 from 10 business days to 3 business days).
- The final recommended change for listed companies is to amend the NZX Listing Rules to allow greater flexibility in the type of remuneration able to be paid to directors and employees. Currently the Listing Rules only contemplate monetary remuneration. The proposed change introduce more flexibility by extending this to the issue of shares.

Private Companies

A number of helpful recommendations are made by the Taskforce in relation to smoothing the path for private companies to raise capital. These include a number of 'common sense' amendments to the Securities Act, such as:

- Allowing offers to be made concurrently under sections 3(2) and 5(2CB). These are the sections which exempt certain offers from the requirement to prepare a prospectus and investment statement either because the offer is not considered an offer to the public (section 3(2)) or because the recipient of the offer is has certain qualities (ie is certified as being 'wealthy' or 'experienced' in investing money or in the industry to which the security relates) (section 5(2CB)). Currently the Securities Act does not allow issuers to rely on both of these exemptions in respect of the same offer, adding unnecessary costs and time.
- In relation to section 5(2CB), amending the test to clarify that an eligible 'wealthy' person is entitled to include their family trust property in determining their net assets (opinion currently differs as to whether this is the case and legislative clarification will be helpful).
- Extending the life of a certificate provided under section 5(2CD) (in relation to whether a person meets the 'wealthy' threshold) to twelve months so that subsequent offers can be made in reliance on that certificate.
- Where an offer is exempt from the Securities Act because the minimum subscription price is \$500,000, allowing subsequent incremental offers to such persons to be similarly exempt.
- Allowing financial information included in a prospectus not to be limited to the latest recent audited accounts

and allowing prospective financial information in a prospectus or advertisement to be referred to in accompanying documents. These changes will aid both investors and issuers in being able to provide more up to date information and will not adversely effect potential investors as issuers are still governed by the requirement to ensure the information provided is not misleading.

Finally, the Taskforce wishes to introduce a new power for the Securities Commission to issue "no action" letters, which would prevent it from taking action, particularly where matters are not material. It also reiterates much heard comments in relation to the Overseas Investment regime, recommending first that the Ministers instruct the OIO to speed up the process and second that the regime be reviewed and simplified – a call that will be endorsed by many.

For further consideration and analysis

A number of issues have been marked by the Taskforce for further analysis and later implementation. These include introducing a new 'registered investor' exemption, increasing the limit for related party transactions to 10% of market capitalisation, reducing the requirement for appraisal reports to be given, reviewing the exceptions to the prospectus / investment statement requirements to see if they fit market practice, and reviewing the prospectus requirements in the Securities Act and Regulations to make the most meaningful information is being provided to investors.

Conclusion

Access to capital is a real challenge being faced by business at the moment and will be a key determinant of business survival over the coming months. The recommendations made by the Taskforce seek to make this challenge easier by both extending thresholds for levels of capital which can be raised prior to restrictions applying and tidying-up our current regimes to minimise or eliminate any unnecessary costs and time associated with capital raising. Whether these changes are implemented will be an interesting indication of the trend of responsiveness of legislators to the current financial conditions.

Cathy Quinn is a member of the Taskforce and a partner in our corporate team. If you wish to pass on feedback to the Taskforce or to discuss any of the recommendations made, please contact Cathy or one of our other corporate partners whose details follow.

contacts



Cathy Quinn - Partner

T +64 9 353 9951

M +64 21 610 771

E cathy.quinn@minterellison.co.nz



Mark Stuart - Partner

T +64 9 353 9985

M +64 21 318 627

E mark.stuart@minterellison.co.nz



Allan McRae - Partner

T +64 9 353 9887

M +64 21 964 213

E allan.mcrae@minterellison.co.nz



Robert Falvey - Partner

T +64 9 353 9970

M +64 21 610 873

E robert.falvey@minterellison.co.nz



Paul Foley - Partner

T +64 4 498 5119

M +64 21 948 841

E paul.foley@minterellison.co.nz



John McCay - Partner

T +64 4 498 5135

M +64 21 606 171

E john.mccay@minterellison.co.nz

Disclaimer

The information contained in this update is intended as a guide only. Professional advice should be sought before applying any of the information to particular circumstances. While every reasonable care has been taken in the preparation of this update, Minter Ellison does not accept liability for any errors it may contain. Minter Ellison Rudd Watts is aware of the challenges that arise from climate change so are being environmentally responsible by using offset paper, manufactured using ECF pulp, sourced from sustainable well managed forests by Nordland Mill - an FSC certified mill.