



HERBERT
SMITH
FREEHILLS

DOING BUSINESS IN AUSTRALIA

FUNDRAISING



Chapter 8

Fundraising

One of the ways in which an Australian business or a foreign business can raise funds within Australia is by issuing securities (for example, shares or debentures) or financial products (for example, interests in a unit trust or collective investment scheme or other managed investment scheme product).

Fundraising activity within Australia is regulated by the *Corporations Act 2001* (Cth) (**Corporations Act**) which contains two separate fundraising regimes which prescribe disclosure and process:

- Chapter 6D of the Corporations Act applies to securities; and
- Part 7.9 of Chapter 7 of the Corporations Act applies to financial products other than securities.

Overview

Public companies can raise funds from the general public in Australia by issuing securities by making the appropriate disclosure or under an exemption from disclosure.

Proprietary companies are limited to raising funds from their shareholders and employees, and from the general public only if the fundraising is exempt from the requirement for a disclosure document or through equity-based crowd-sourced funding.

For a description of public and proprietary companies, see Chapter 3 of this publication, 'Business structures'.

Since September 2017, Australia has had an equity-based crowd-sourced funding (**CSF**) regime which aims to facilitate access to capital for small to medium sized unlisted Australian public companies (and since October 2018, Australian proprietary companies) by reducing the regulatory and disclosure requirements for making public offers of shares, while seeking to

ensuring adequate protections for retail investors. The CSF regime allows Australian eligible companies, those with less than A\$25 million of consolidated gross assets and less than \$A25 million of annual revenue, to raise up to A\$5 million in a 12 month period. The CSF regime limits to A\$10,000 the amount that an individual investor may invest in a single company.

Managed investment schemes (for example, unit trusts and some other collective investment schemes) can raise funds from the general public in Australia by issuing units or other interests by making the appropriate disclosure or under an exemption from disclosure. The trustee of any such scheme is required to hold an Australian Financial Services Licence issued under the Corporations Act authorising it to be a 'responsible entity' of such scheme.

Where interests in managed investment schemes are offered to the public in Australia, the process of establishing the investment structure, the ongoing administration and management of the structure, and the offer of financial products are all regulated by the Corporations Act, in particular the requirements of the Australian Financial Services Licence regime and the obligations of such a licensee. Tax considerations are an important element in determining whether, and how, to establish such structures. The establishment of such structures and the offering of such financial products require experienced professional legal (and other) support and advice.

Securities and financial products can be offered into Australia by foreign entities either in accordance with the applicable Australian disclosure requirements or under exemptions from disclosure, for example, to wholesale or professional investors. The marketing of offers of securities or financial products into Australia will also be governed by elements of the Australian Financial Services Licence regime. Foreign entities considering making an offer into Australia will require experienced professional legal (and other) support and advice.

Shares, debentures and interests in managed investment schemes can be quoted on the Australian Securities Exchange (**ASX**).

Disclosure requirements

Offers of securities to the general public in Australia must generally be made under a disclosure document, being a prospectus, offer information statement or profile statement lodged with the Australian Securities and Investments Commission (**ASIC**). The requirements for such documents are set out in Chapter 6D of the Corporations Act.

Offers of financial products, other than securities, to the general public in Australia must generally be made under a product disclosure statement (**PDS**), which may be required to be lodged with ASIC. The requirements for a PDS are set out in Part 7.9 of the Corporations Act.

Offers of new ASX listed shares and financial products to existing holders may be able to be made without a disclosure document or PDS provided that the offeror publicly confirms to the ASX its compliance with its continuous disclosure and financial reporting obligations and that there is no other material information necessary for investors to make an informed investment decision in relation to the offer.

The legal provisions and regulatory practice governing the form and content of disclosure documents and other aspects of the fundraising process are detailed and stringent, with specific liabilities (and in some cases, defences) for defective disclosure. These provisions require an offeror to provide information to prospective investors to enable those investors to make an informed decision about whether to invest. Such offers require experienced professional legal (and other) support and advice.

Offers of securities do not need to be made under a disclosure document if the offer is exempted from disclosure under the Corporations Act or ASIC provides relief from disclosure. The main offers of securities exempted from the requirement to provide a disclosure document include:

- personal offers accepted by less than 20 investors, which raise no more than A\$2 million in aggregate in any rolling 12 month period;
- offers where the amount paid (or topped up) results in a total investment by a person of at least A\$500,000 in the class of securities;
- offers to sophisticated investors (who have a certificate from a qualified accountant saying that the investor has net assets of at least A\$2.5 million or gross income of at least A\$250,000 per year for each of the last 2 financial years);
- offers to professional investors (such as superannuation funds, ASX listed entities, persons controlling gross assets of at least A\$10 million or ASX listed entities or their related bodies corporate);
- offers to senior managers or certain affiliates of the offeror;
- offers to existing security holders through a dividend reinvestment plan or bonus security plan;
- offers of securities for no consideration; or
- offers made under an Australian takeover bid or scheme of arrangement.

There are some similar, but less extensive, exemptions in relation to the offer of some financial products.

Listing on the Australian Securities Exchange (ASX)

The primary role of the ASX is to provide and maintain a fair, efficient, well-informed and internationally competitive market to raise capital and for trading securities. These include the securities of domestic and foreign issuers, and the direct and indirect debt of public bodies.

To qualify for listing on the ASX, an entity must satisfy minimum standards of quality, size and operations and must attract sufficient investor interest. ASX applies either a minimum profits or assets test.

Before an entity can be listed on the ASX and its securities quoted, the entity must generally have lodged with ASIC and ASX a prospectus, PDS or, with ASX's agreement, publicly released an information memorandum containing equivalent disclosure.

A company incorporated outside Australia may be listed on ASX subject to a number of conditions being satisfied including:

- being registered under the Corporations Act as a foreign company carrying on business in Australia;
- agreeing to comply with the Listing Rules of the ASX (although where the foreign entity is already listed on a foreign exchange and has sufficient scale, it may be exempt from compliance with many of the ASX's rules if it can meet the ASX's Foreign Exempt Listing conditions. There is a specific category of Foreign Exempt Listing for New Zealand Stock Exchange listed entities); and
- establishing and agreeing to maintain an Australian share register, a register of depository receipts, or appropriate facilities for the registration of transfers.

For information about the regulatory functions of ASIC and the ASX, see Chapter 2 of this publication, 'Corporate regulators'.

For more information about undertaking an initial public offering of securities in Australia, see Herbert Smith Freehills' Initial Public Offerings in Australia legal guide.

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