Capital Raising Process Being Overhauled

The often substantial amounts of money required to both establish mining businesses and keep them competitive over time, makes mining a capital intensive industry. During the establishment phase at least, it can seem like vast sums of money are literally being poured into a hole in the ground.

In large part, the required equity capital comes from a mix of investors. Some will be large sophisticated investors experienced in the mining industry and will know the risks. Others will not.

In either case, the raising of equity finance in New Zealand (as with other forms of securities) is currently governed by the Securities Act 1978. The Securities Act however is in for a major overhaul in the form of the Financial Markets Conduct Bill ("FMCB") which is currently before Parliament.

The FMCB aims to restore investor confidence by improving information and protection for investors – and importantly - to update and streamline the rules for raising capital.

The FMCB maintains a similar fundamental disclosure regime to the current Securities Act. Under the Securities Act when making offers for securities (such as shares) to members of the public, unless a relevant exemption applies you need to issue a registered prospectus and investment statement. Under the FMCB a single streamlined document known as a product disclosure statement (PDS) will be required.

Smaller and medium sized businesses currently seek to avoid the time and cost constraints of issuing a prospectus and investment statement when raising equity, by relying on one of the exemptions to the Securities Act. Common exemptions relied on are that investors are 'habitual investors', or a close business associate of the company or one of its directors, or investors have been specifically selected by the company to invest otherwise than as a member of the public.

There has always been a risk for directors of companies seeking to raise equity on this basis as to whether the investor truly fits within one of the statutory exemptions – often this is not entirely clear and there is potential personal liability for directors if they get it wrong.

One real advantage under the FMCB is that there is a "small offer" regime which is based on a similar exemption under Australian securities law. The small offer regime provides that businesses looking to raise less than $2,000,000 in any twelve month period from less than 20 investors can do so without the need for a product disclosure statement. Not only does this have obvious advantages in terms of cost, time and compliance, but it alleviates some of the issues that directors of companies grapple with when they seek to make small "private" offers currently.

Note that under the new regime these "small offers" cannot be advertised and are only capable of being accepted by investors meeting the financial criteria or who are "likely to be interested in the offer" (having regard to previous contact between the investor and the issuer, some professional or other connection between the investor and the issuer, or statements or actions by the investor indicating that the person is interested in offers of that kind).

The "small offers" regime, coupled with the FMCB's proposed clarification of some of the existing exemptions to public offers should mean that compliance risks, time and costs for smaller capital raisings are significantly reduced. This is good news for the mining industry, and businesses in general.

The FMCB was introduced to Parliament in October 2011, has been through the Select Committee stage and a Supplementary Order Paper was released in April this year. It is expected that the FMCB will be enacted this year, and come into force in 2014.

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