

## THE GOVERNMENT AS A VENDOR — CAVEAT EMPTOR

### QUESTIONS AND ANSWERS

#### Question - John O'Sullivan (Freehill Hollingdale & Page, Sydney):

Cam, as draftsman of some, and I emphasise only some of the words from the Commonwealth Bank prospectus that you quoted, perhaps I could correct you about something. The second Commonwealth Bank issue was a secondary sale of existing issued listed shares. Under section 1018 no prospectus at all was required, and if the vendor were a normal private sector corporation, you can be sure that no prospectus at all would have been issued. So I think the government's issuing a document at all was a completely gratuitous and helpful piece of information.

By comparison, when the Commonwealth Bank did its first issue, which was a primary issue by the bank, then that prospectus was in the usual way a document for which the bank took full responsibility. So I think the point to be made is that whilst it might be true that governments are niggardly and measly with information, the Commonwealth Bank is not authority for that proposition!

#### Response - Cam Johnston (Speaker):

Thanks John. As I was saying, though, I think it is doubtful that that prospectus really helped the investor very much at all. It is very well drafted.

#### Comment - Bob Baxt (Arthur Robinson & Hedderwicks, Melbourne):

I wish to make just one point in relation to the matter of the *Trade Practices Act* and Hilmer. In August of this year, if things go as planned, we are going to see a revolution take place in this country in relation to the way in which State and Federal instrumentalities are subject to the *Trade Practices Act* or not. It seems to me that one thing that needs to be borne in mind is just what impact that might have on any agreements that might be struck now. You might want to consider, in terms of matters that might be anti-competitive, whether it is not better to seek authorisation now under the *Trade Practices Act* rather than rely on legislation which may not be grandfather for too long into the future and then have to seek authorisation later. The pain now might be less painful than the pain in the future.

I do not know how the Trade Practices Commission will deal with these matters once the full glare of competition policy on all of the State instrumentalities is going to be in the forefront. I think you might get a more sympathetic and quicker response today than you might in twelve months time.

#### Question - Tony Browne (Arthur Robinson & Hedderwicks, Melbourne):

Just following on from Bob Baxt, in fact in the Gladstone deal the decision was taken even before Hilmer to in fact go for an authorisation. And that is what happened, rather than rely on a section 51 exemption. I have just a sort of "bread and butter" question in relation to due

diligence. With most of these privatisations, as in the case of Loy Yang, you have a major project financing.

How do you see the exercise of dovetailing the due diligence requirements of the purchaser with the due diligence requirements of the banks? You know, governments are reluctant, in my experience, to have even purchasers and all their consultants crawling all over them, and then to be informed that there is a second team back there who are going to do it all again. It is a major problem. In Gladstone it seemed to work out all right, but I just wanted to have comments from Cam on how that might work.

**Response - Cam Johnston (Speaker):**

In the Loy Yang transaction, Tony, the banks had their own team of about 80 people beavering away in the data room doing their own very thorough due diligence. We as the solicitors for the purchaser were leading the due diligence, and to the extent that we managed to find our way through the maze of the data room, we were able to help the banks by pointing them in the right direction — but they nevertheless did their own due diligence.

**Comment - Peter Willis (Mallesons Stephen Jaques, Melbourne):**

Peter Willis, MSJ Loy Yang veteran! And with great deference I prolong this particular examination of what I think might be a unique structure or case study, not necessarily a difficult one. But it flows out of the discussion we have just had about structuring due diligence, and it flows very neatly also out of Cam's whole proposition that governments are funny creatures and are not used to selling things. I think it relates to the warranties point as well.

One of the reasons why governments are niggardly about giving warranties is that unlike buyers and sellers in the ordinary course, they do not have the experience to understand the significance of the warranties. They have not usually had the systems or the mental framework beforehand in running the business to even to have understood the particular risks that the typical warranties are directed towards. So that is the first phase of a very significant education process which a government, even a separate statutory corporation, has to go through.

And to finish off this little point, we (Mallesons) were the advisers to the sellers in Loy Yang B, and our first task was to in fact spend a year educating the seller and creating the data room, but educating the seller as to what the buyer and the buyer's banks were going to want. So there were not just two teams beavering away, there were three teams beavering away to get the finished product into a bankable situation. We basically set out our tasks as saying to them: "We are now advising you by way of anticipating everything that the banks and the buyer are going to ask for, and therefore please produce this document, that document, this system, that system...", and that created the monster called "the document room" which everyone else had — the labyrinth in which the Minotaur lurked! I think, therefore, it is a process that everybody has, but particularly that governments simply are not in the business of thinking in business terms.

**Response - Cam Johnston (Speaker):**

Thanks Peter. If I might just comment. I mentioned in my paper the data room sort of saga. I have heard that with Qantas they are looking at doing the same sort of approach, by setting up a data room and putting in rows and rows of bookshelves and filling them with documents. And then they say to the purchaser: "Well, it is all in the data room. You go and find it out". And if you ask them a question, they will not answer the question because they are scared that that answer could be then used against them later on as a misrepresentation. So the typical answer you get is "Oh, it is in the data room". It is like finding a needle in the haystack, but nevertheless it is there, so they have disclosed things fully!

**Comment - Roger Drummond (Chairman):**

On your behalf I would like to thank Cam Johnston, David Wicks and Graham Cunningham for a most interesting discussion on a very important topic, and I would ask you to show your appreciation in the normal fashion.