CIVIL LIABILITY FOR ERRORS AND OMISSIONS IN INFORMATION MEMORANDA IN THE WHOLESALE CAPITAL MARKETS

Commentary

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In his paper Brian Salter has given us the law, both statutory and case law, and identified the difficulties and defects in the current legislative regime, especially for participants in the wholesale capital markets. Rather than attempting to add to what Brian has said and risk being repetitive, I thought it might be useful to outline the practical steps my organisation takes in an effort to deal with the legal risks it faces in this area.

The Deutsche Bank/Bain & Company Group is a significant participant in the whole range of wholesale financial markets in Australia. As such, we are involved with prospectuses and information memoranda in more than one market. We deal with prospectuses and information memoranda in our equity markets businesses, our capital markets businesses and even in our corporate banking business. Given that we are committed to these financial markets, we are stuck with the gaps and imperfections of the legal system so long as they persist. Therefore, we have had to learn to live with that situation and develop practical strategies in an effort to minimise the legal risks. We accept that, generally, we are not likely to be able to exclude those risks entirely.

Given that our approach is broadly similar in all of the areas where we encounter prospectuses and information memoranda and this is a session about the wholesale capital markets, I will couch my comments in terms of those markets. Our role in the wholesale capital markets is most often as a broker or dealer and also as an underwriter sometimes.

The steps we take to minimise the legal risks of civil liability in relation to information memoranda can be summarised as follows:

1. Do We Want to be Associated With This Issue?

While largely a commercial judgment there is also a legal element to it. Therefore, our lawyers are involved in considering the threshold question of whether a particular issue is one with which we want to be associated. This question will involve a judgment in relation to the nature and quality of the issuer, the product and the information memorandum. If the answer to this question is positive on the basis of input from legal and commercial people, we take considerable legal comfort.

2. The Information Memorandum

(a) Although in some ways a subset of the first question, a legal review is undertaken of the information memorandum in addition to the commercial review. That legal review will lead to a judgment about the quality of the information memorandum as a disclosure document. However, we will not make any comments on the information memorandum except in relation to the particular part in which a member of the Deutsche Bank/Bain & Company Group is named.

(b) Whether or not it is legally clear that we will have the "part only" defence in section 1010 of the Corporations Law, where we are a broker or dealer to an issue we insist on the "part only" language being included in the information memorandum. Even if the section 1010 defence is not available, this language may assist in relation to reliance issues.

3. Important Notice

We always ensure that an information memorandum contains an important notice. We try to ensure that the important notice is drafted in a way which improves the chances of it being severable and that it contains a number of elements. These elements include a disclaimer of liability, attribution of information to relevant sources, a negativing of reliance and statements to the effect that we have not undertaken any steps to verify the information contained in the information memorandum. Although there are views that the notice, or parts of it, may not successfully protect us from liability, we see its inclusion as essential and worthwhile. This is because, obviously, a properly worded important notice is much more likely to help us than no important notice at all.

4. Due Diligence Letters

Except where we are an underwriter, we rarely have the opportunity to participate in any due diligence process. Therefore, as a broker or dealer to an issue we usually obtain letters from the primary participants in the due diligence process being the issuer, its lawyers and its accountants or financial advisers. These letters outline in detail the due diligence process which has been undertaken and the results of it. These letters should help us establish the "reasonable mistake" or "reasonable reliance" defences in sections 1011(1)(a) and (b) of the Corporations Law where those defences are available. We also see these letters as likely to be helpful even where those defences are not available.

5. Legal Opinions

We very often obtain a legal opinion from the issuer's counsel. This is particularly the case for capital markets issues by securitisation vehicles or in other structured capital markets transactions. That opinion will give us comfort in relation to the usual matters which go to the binding effect of the documents. However, they also often give us comfort that the information memorandum, or relevant parts of it, are accurate.

6. Representations and Warranties, Undertakings and Indemnities

We always obtain representations and warranties, undertakings and indemnities from the issuer. Hopefully the issuer has sufficient creditworthiness to support its liability to us. The content of these representations and warranties, undertakings and indemnities will vary from transaction to transaction. At least, we will obtain an indemnity in relation to civil liability on the information memorandum and representations and warranties that the information memorandum is not misleading or deceptive by statement or omission.

7. Awareness and Culture

Finally and perhaps most importantly, we give a high priority to compliance and regularly conduct training in relation to the issues, risks and potential liabilities under section 52 of the Trade Practices Act and sections 995 and 996 of the Corporations Law. Our aim is to intensify awareness of these issues and engender a culture which values guarding against them. This is a long term process for us which involves regular repetition. In our training sessions on these issues we are fortunate to be able to cite a number of outstanding and well publicised examples of the potential outcomes of failing to manage the risks in this area.

I hope that this outline of the practical steps we take as an organisation in an effort to manage the legal risks of civil liability on information memoranda will form a useful comparison with what others do and will provoke discussion on how best to deal with the reality we face today. I would welcome your thoughts on what other and better steps could be taken.