



Equity Partnerships and your responsibilities under legislation

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Equity Partnerships have been being engineered for a considerable time now; however, our experience is that issuers and promoters are often not clear about their legal obligations. All parties to the formation and promotion of an Equity Partnership business should always seek professional advice from a trusted solicitor. An outlay of costs at the start can help you avoid potentially expensive pitfalls and mistakes going forward.

There are several Acts which apply in this area. The main ones that we will cover briefly in this newsletter are:

1. The Fair Trading Act 1986
2. The Securities Act 1978.

You may be wondering "why bother, I have a good relationship with my investors". The reality is that as long as an investment is performing at or better than expectations, investor relations are likely to be good. However as soon as the land market takes a turn for the worse, or your business fails to meet investor expectations, you could potentially see some disgruntled investors who are having difficulty in extracting their funds, or potentially facing losses. Just ask the investors in any of the many failed finance companies over the last two years. Also, it's important to note that the bodies enforcing the relevant Acts don't always need a complaint to be made before launching an investigation.

Some of the penalties for breaching these Acts include:

- Investments may be declared void, requiring all investment monies to be repaid
- Imprisonment for up to five years or a fine of up to \$300,000 plus \$10,000 for each day during which the offence continues
- The Courts can award up to \$500,000 for individuals and \$5,000,000 for companies in civil penalties.

And added to this is the impact on the reputation of the promoter and issuer.

This newsletter aims to provide some basic understanding of what is required to comply with these Acts, to reduce risk especially to the issuers and promoters of Equity Partnerships.

The Fair Trading Act 1986

The Fair Trading Act prohibits misleading and deceptive conduct, false representations and unfair practices by people in trade. The Act covers all advertising and selling of goods and services. This Act is administered by the Ministry of Consumer Affairs and enforced by the Commerce Commission.

With regard to Rural Equity Partnerships, the main consideration is to ensure that any information and supporting material is not:

1. Deceptive
2. Misleading
3. Confusing.

All assumptions used in generating the supporting information should be clearly stated in the information memorandum. You need to ensure that you can substantiate the production figures and financial projections used and that these are not unrealistic. You should also ensure that any contingencies and conflicts of interest are clearly disclosed. This would include fees being charged for the promotion and management of the opportunity and any ownership interest of a promoter or person associated with the promoter.

The Securities Act 1978

This Act applies to offers of securities to the public and is administered by the Securities Commission.

The Act was prepared to facilitate the raising of capital by securing the timely disclosure of information to prospective subscribers, and is aimed at the protection of the investors.

The Act provides that (unless an exemption applies) no offer of securities may be made to the public unless the offer is made in an "authorised advertisement" or is accompanied by the relevant disclosure documents. The Act also includes obligations which are similar to the Fair Trading Act in that all offer documents must not be likely to deceive, mislead or confuse.

What is an offer of securities? Broadly, an offer of securities is an offer to participate in the capital, assets or earnings of any person, which includes shares in a company and debt securities. In the case of Equity Partnerships the offer of securities will traditionally be offers raising capital by way of shares, and in some cases debt by way of shareholder loans.

What is an offer to the public? An offer "to the public" is not clearly defined within the Act, but includes an offer to a section of the public however selected, an offer to individual members of the public selected at random and an offer to a person who became known to the offeror as a result of an advertisement likely to result in the public seeking further information. The Act specifically clarifies that a person may still be considered a member of the public even though he or she may be a client or employee of the issuer. It is also important to note that offering to one person selected as a member of the public will make the whole offer 'an offer to the public'.



As you can see, the definition is quite broad hence the reason for seeking advice from a trusted and experienced solicitor.

What is an "authorised advertisement" and/or the relevant disclosure documents? For shares in a company, the relevant disclosure document is an Investment Statement and/or a Registered Prospectus.

An authorised advertisement means either an Investment Statement or an advertisement which refers to an Investment Statement and complies with requirements for advertisements in the Act and regulations. Complying with these requirements can involve considerable time and cost. There are however certain exemptions and exceptions that can be relied upon by an issuer and allow them to offer securities without the requirement of a Registered Prospectus or Investment Statement.

What exemptions are there?

In brief, the exemptions are:

1. The securities have been previously allotted (i.e. the shares are being on-sold as opposed to offered for the first time). This would apply in many instances where Equity Partnerships are seeking to replace an existing shareholder. There are some exceptions to this, including where the security was originally allotted with a view to being offered to the public and the on-selling is the first time the security has been offered to the public. Importantly, if the shares are sold within six months of allotment, the allotment will be deemed to have taken place with a view to selling to the public: or

2. The securities are being offered to "habitual investors" and/or are subject to a minimum subscription of at least \$500,000 for each investor who is offered those securities: or
3. The securities are only being offered to "eligible persons" (each such person being determined as being eligible by the requisite independent certification before the offer takes place): or
4. The offer is being made only to relatives or close business associates, although given the wide meaning of "offer to the public" this is a difficult exception to fall within.

An important point to note from this is that you generally can not use more than one of these exemptions for the same offer.

Each exemption still places requirements on the issuer (such as independent certification as an eligible person) and it is imperative that these are followed to ensure the requirements of the Act are not breached.

Summary

Legislative issues around offers of securities in Equity Partnerships may seem boring, however, compliance is critical to ensure the protection for the issuer and promoter of these investments. Sound legal advice is required from a solicitor who has a good working knowledge and experience of this legislation. In some cases this may mean seeking a referral to a solicitor other than your normal conveyancing solicitor.

Opportunities

1. 236ha North Canterbury dairy farm entering its second year of milking, near Oxford. The property is irrigated by two centre pivots supplied from the Waimakiriri Irrigation scheme and includes a 12 month old 60 bale rotary cow shed with ACR's. The property will milk 840 cows with budgeted production starting at 288,000kgms and rising to 330,000kgms. This opportunity is being promoted by Southern Dairy Developments Limited. The offer of securities relating to the opportunity is not an offer for sale or subscription to members of the public in New Zealand in terms of the Securities Act 1978. The minimum subscription for securities is \$500,000.
2. I have a number of clients situated in various locations around New Zealand who are seeking Equity Partners for sheep and beef opportunities. In most cases these are people keen to act as Equity Managers but are seeking additional capital for moderate to larger scale sheep and beef farms. If interested, please contact the National Equity Partnership Manager.

3. We often have clients seeking an Equity Manager both in New Zealand and now Australia. If you are currently sharemilking but looking for a step into land ownership, or are looking for a management opportunity, please contact the National Equity Partnership Manager. There are currently positions available in a variety of locations including Gore, Oxford, Tasmania and Victoria.

In the current market any opportunities will be advised by email initially so that they can be investigated by interested parties at the earliest possible time. Please make sure we have your email address if you require these updates. If you have not received an email within the last two months, then we do not have your email address.

A personal disclosure statement for David Clarke is available free of charge by calling 03 214 7439.

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