
FORESTRY INVESTMENT SCHEMES

The past few years have seen an increased interest in forestry investment floats. This is attributed to the return to annual tax deductibility and a greater awareness of forestry's investment potential, particularly in relation to perceived national superannuation shortcomings. Many of the proposals have involved NZIF members in a variety of roles such as promoter, forest manager, adviser, and director.

Parties to investment schemes have many obligations and liabilities subject to the Securities Act and other legislation. The Consultants Committee of the NZIF recently commissioned Kensington Swan to provide a review of the implications of the relevant legislation as a service to the Recognised Forestry Consultants. This review is also of relevance to the broader spectrum of members, and is reprinted below.

SECURITIES ACT OBLIGATIONS AND LIABILITIES FOR PARTICIPANTS

Simon McArley and Andrew Caddie

Introduction

The Securities Act 1978 provides the general framework within which public funds may be solicited for investment. The Act applies to equity, debt and other investment structures, including investment partnerships. Subject to limited exceptions, investment opportunities may not be offered to the public, either by way of formal offer or general advertisement, until the procedural requirements of the Act have been complied with.

Offers to the Public

The Securities Act 1978 (the "Act") does not apply to investment opportunities offered to persons who are not "members of the public". However, the concept of "offers to the public" is wider than may be thought. A prudent issuer should treat any offer made to persons who are not:

- (i) relatives or close business associates of the issuer; or
- (ii) professional investors or investment companies;

as being an offer to the public.

An investor will remain a member of the public notwithstanding that he may be an existing customer, employee or client of the issuer or may have previously subscribed for other securities issued by the same person.

The possibility of class actions makes the potential extent of this civil liability significant.

'Private' Investment Schemes

The Act and its regulations will not apply to a member acting as an expert adviser

to or promoter of investment offers made to persons who are not "members of the public".

However the promoters of 'private' schemes and advice given in connection with such schemes will still be subject to the provisions of the Fair Trading Act 1989. The Fair Trading Act prohibits false or misleading behaviour in the course of trade and where breached provides for fines of up to \$30,000 for individuals and \$200,000 for corporations, as well as scope for extensive civil liability. In addition, other consumer protection legislation and the usual common law remedies for breach of contractual terms or negligent advice may be available to disgruntled investors in 'private' investment schemes.

It is important for members to understand that the concept of an "offer to the public" is not defined narrowly. Members should exercise extreme care before becoming involved as a director or promoter of a 'private' investment scheme where the offerees do not clearly fall within the excepted groups.

Professional Legal Advice

It is accordingly essential that before investment is sought for a forestry venture, the manner in which these contributions are to be solicited be carefully examined and where necessary the provisions of the Act be fully complied with. Professional advisers consenting to inclusion of statements in prospectuses or advertisements should obtain independent legal advice and should seriously consider seeking indemnification from the issuer and promoter for any liability they incur as a result of their

Simon McArley and Andrew Caddie are Associates with solicitors Kensington Swan (Wellington). Simon McArley practises in the Banking and Finance Group of the firm's Wellington office with particular experience in Securities Law issues. Andrew Caddie practises in the Commercial Group of the firm's Wellington office and has particular experience in Forestry issues, having graduated Bachelor of Forestry Science prior to obtaining his law degree. This article has been prepared as a general guide to the requirements of the Securities Act 1978 and is not intended to provide exhaustive or complete advice. Before any particular transactions are entered into or securities issued, specific and comprehensive legal advice should be obtained. The writers can be contacted at Kensington Swan, P.O. Box 10-246, Wellington. Phone (04) 472-7877, Fax (04) 472-2291.

involvement. The costs and risks involved with non-compliance are substantial and more than adequately justify the cost of obtaining competent and comprehensive legal advice before proceeding.

In certain circumstances the resale of securities previously allotted to the vendor will also constitute an "offer to the public".

Participants

There are a number of roles in which members of the New Zealand Institute of Forestry Inc. may find themselves involved in a forestry investment scheme.

Firstly, and most usually, is the role of expert advisers. The Act contains proce-

dural requirements which must be complied with by expert advisers, whose statements of advice appear in advertisements or prospectuses promoting the investment scheme. Extensive civil liability may attach to experts whose advice appears in an advertisement or prospectus and is false or misleading.

Members may also find themselves involved more closely with the investment scheme. While the actual investment vehicle, referred to in the Act as the "issuer", will usually be either an incorporated company or a partnership, members may find themselves participating as directors of that issuer or partners in the issuer, where the issuer is a partnership. The obligations proposed under the Act extend to directors or partners of an issuer. The Act imposes significant civil and criminal liabilities imposed on these persons where issuers fail to comply with the provisions of the Act.

The third class of participants in securities issues is that of promoter. A promoter is any person or corporate body which is instrumental in the formation of an investment scheme or plan. Where a body corporate is the promoter, the directors or partners of that promoter are personally exposed. Promoters can also incur extensive criminal and civil liability.

For example, issuers and promoters (and their directors/partners) can be exposed to prison terms of up to five years, fines of up to \$25,000 as well as extensive civil liability to investors who suffer loss.

Statutory Requirements

1. Where an offer of securities is made to the public, the issuer must, prior to advertising the offer, allotting the securities or accepting payment of any monies:
 - * if a partnership or debt structure is involved, appoint a trustee or statutory supervisor and entered into a trust deed or deed of participation;
 - * in all cases, complete a prospectus which complies with the requirements of the Act and Securities Regulations;
 - * register the prospectus with the Registrar of Companies together with, if applicable, the trust deed or deed of participation.
2. A prospectus must set out prescribed statutory information. For example, current audited financial statements presenting a true and fair view of the state of affairs of the issuer. The precise content of each prospectus will vary from case to case and whether a company or partnership structure is adopted. Generally, however, each prospectus must contain:
 - * a description of the investment
 - * a description of the scheme development or business of the issuer
 - * a forecast as to the prospects of the issuer's business
 - * a summary of the terms of the securities
 - * other material contracts
 - * where required the deed of trust/participation.
3. Particular care must be taken where third-party guarantees are envisaged or where valuations are to be included. The prospectus may include matters in addition to those required by the Act, but must not contain any information which is false or misleading or likely to confuse. Additional information must be provided if provision of the minimum statutory information only would result in confusion or deception. Similarly, where a subsequent change in circumstances renders an existing prospectus misleading or false the prospectus must be updated.
4. Where a statement from an expert or professional adviser appears in a prospectus the following special rules apply:
 - * The professional adviser must have consented in writing to inclusion of the statement, in the exact form and context in which it appears. A statement of this consent must appear in the prospectus.
 - * A statement of the professional adviser's qualifications must appear in the prospectus.
 - * The prospectus must include a statement as to whether the professional adviser is or intends to become a director, officer, employee of or professional adviser to the issuer of the securities.
 - * If the statement by the professional adviser is made more than four months prior to the date of the prospectus a supplementary statement, made not less than four months prior to the date of the prospectus, must appear in the prospectus. The supplementary statement may either affirm, deny or qualify the original statement.

Advertisements

The Act also prescribes the content of advertisements advertising investment schemes. Advertisements must not be inconsistent with the prospectus. Advertisements must not be likely to deceive, mislead or confuse. An advertisement must contain a reference to the availability of a registered prospectus. Special care must be taken when including in

advertisements references to profit forecasts, guarantees, tax rates, interest rates or rates of return. Statements as to the safety or security of investments are prohibited. Again, there are special rules to be complied with where statements from expert or professional advisers are included in advertisements. The Securities Commission has the power to prohibit advertising that it believes is inconsistent with the Act. This power if used, can, as recent examples have shown, have a serious adverse effect upon the public image of the issuer concerned.

Applications

Applications for allotment of securities must be accepted on a properly signed application form only. The application form must have been accompanied by a copy of the prospectus when originally provided to the investor.

Record Keeping Requirements

Issuers of securities are also required to perform obligations following allotment of the securities. Certificates must be issued in a form complying with the requirements of the Act, statutory registers must be maintained and available for inspection and proper accounting records must be kept.

Non-Compliance - Refund of Monies

The consequences of non-compliance with the Act can be extremely serious.

If no registered prospectus is completed the allotment is void, invalid and of no effect. Any subscriptions received must be held on trust and repaid to the subscriber (together with any interest earned thereon), as soon as reasonably practicable. Where repayment is not completed within two months the directors of the issuer or promoter will be personally, jointly and severally liable to repay the subscription together with interest at 10% p.a. Remember that where a partnership structure is used, the term "director" includes every partner of the partnership.

Where a prospectus is completed and registered but, securities are allotted while:

- * the procedural requirements have not been complied with;
- * using a form of application not properly distributed or signed; or
- * maximum or minimum subscription levels are breached;

such an allotment will be voidable at the option of the subscriber. This option may be exercised with:

- * at any time in 12 months of issue of the security to the subscriber; or
- * six months after the subscriber becomes aware of, or ought to have become aware of the relevant breach:

whichever is the lesser. Subscriptions must be refunded to any investor who exercises this option, within one month. If subscriptions are not repaid within this period the directors of the issuer become jointly and severally personally liable to repay the subscriptions, together with interest accrued at 10% p.a.

Non-Compliance – Criminal Liability

Issuers, promoters, their directors and partners and other persons involved in the distribution of a prospectus or advertisement that contains untrue state-

ments, or distribution of a prospectus or allotments of securities otherwise in contravention of the Act face criminal liability. Fines of up to \$25,000 and prison terms of up to five years can be imposed.

Non-Compliance – Civil Liability

In addition, there is the possibility of extensive civil liability for non-compliance with the Act. Issuers, promoters and their directors may become personally liable to compensate investors for losses and damages suffered as a result of reliance upon any prospectus or adverti-

sement that contains false, or untrue misleading statements. This extends to statements not contained in the prospectus itself but included or incorporated by reference or distributed in conjunction with a prospectus or advertisement.

Any professional adviser or expert who consents to the distribution of a prospectus or advertisement which contains an untrue statement purported to have been made by him or her will be personally liable to compensate investors for any loss or damage they suffer as a result of reliance on that untrue statement.

Report on IUFRO centennial meeting

The International Union of Forestry Research Organisations (IUFRO) celebrated its 100th birthday in August-September 1992 in Berlin and at Eberswalde, the birthplace of IUFRO and reputedly the birthplace of modern forest science, with a range of activities and a forestry science conference. I attended the IUFRO celebrations, principally to represent New Zealand at the IUFRO International Council meeting and present a paper to the conference S6.06-00 session concerned with research management for the 1990s.

IUFRO International Council Meeting

On August 30 the IUFRO International Council representatives from 52 countries met at Berlin's Humboldt University – the university where Albert Einstein worked and lectured earlier this century. This was a low-key meeting which was concerned mainly with progress reports from the IUFRO President, IUFRO Secretariat, IUFRO Vice President, IUFRO Treasurer and Coordinator for Special Programmes for Developing Countries. The most important points that were discussed and approved by the International Council were:

- the establishment of a IUFRO Development Fund for enhancing the research capacity of developing countries;
- a 10 per cent increase in the basic IUFRO membership fee beginning no earlier than 1994;
- the establishment of an agreement between IUFRO and Austria in which Austria provides facilities and staff for the IUFRO Secretariat at the Federal FRI in Vienna;
- the preparation of a strategic plan to chart the medium term future of IUFRO;
- the IUFRO budget for 1993 of which 70 per cent will come from membership fees and 30 per cent from grants;

- the major themes for the XX IUFRO World Congress in Tampere, Finland in 1995. These included themes concerned with tropical forest ecology, biodiversity, global physical changes, ecological balances (water, carbon dioxide, waste recycling) and dry forests.

The special plight of forest research in Peru was outlined by the Peruvian representative. Over recent years several research stations have been burnt and researchers killed or injured by terrorists. Peru wants to remain a member of IUFRO but also wants its fees waived.

Centennial Conference

I attended the paper presentations in my old IUFRO group (S1.04-00 Natural Disasters), the session on research management for the 1990s and a number of individual paper presentations covering a range of forest policy and management issues.

In the natural disasters session the most interesting and useful points were made in the general discussion which centred on the antecedent conditions that lead to landslide and debris flow activity. Research, particularly in Japan, indicates that shallow rapid landslides typically result from intense storms and the influencing antecedent period is usually measured in hours or days. On the other hand, the antecedent period of importance to deep-seated earthflow or other deep-seated landslides is likely to be measured in months.

At the research management session Graham Page, Senior Science Adviser for Forestry Canada, outlined a major project which is examining the research roles and responsibilities of the Federal Government, provinces, universities, industry and cooperative research organisations and the ways in which their activities may be more effectively linked together. It seems that the main thrust of reforms in Canadian forestry Science and Technology (S&T) will be aimed at

developing a more integrated S&T programme.

My paper on the reforms in S&T in New Zealand and their impacts on forestry research generated a good deal of discussion. The New Zealand reforms seemed to make the Canadian, US and UK research managers nervous, and although they talked about reforms in their countries I got the impression they did not want to diverge very far from the status quo. Criticism of the New Zealand reforms centred on the conflicts that could develop between the objectives of commercially-driven research companies and fundamental research and the management of creativity.

In other sessions the papers of most interest to New Zealand dealt with environmental impacts and non-economic values of forests. New environmental and resource management legislation in many countries is apparently forcing managers and researchers to review their approaches and priorities as environmental and intrinsic forest values are accorded more importance than in the past. Seigel (Law and Economics, USDA) presented a paper on the impact of local government environmental ordinances on forestry practices in the US. The burgeoning checker-board patterns of regulation created by diverse local ordinances are proving to be disruptive and expensive to the States' forest economies. There may be lessons here for New Zealand regarding the need for much collaboration and coordination between the forestry sector and local authorities in the development of regulatory ordinances, environmental guidelines, and such like.

Papers on the economic impacts of global changes on forest resources were interesting, particularly the results of research that show that growing stock and forest growth in Europe are currently increasing. It seems that a decline of forest resources in Europe is a threat in the future, not a historical fact.