Switching on the ASC

Electronic commerce means regulators need more byte

Cyberspace has become a powerful forum for the conduct of business, although the present law and regulatory structure in Australia does not yet fully accommodate electronic technology. ALAN CAMERON explains that technology and globalisation will continue to be the major impetus for innovation and structural change in electronic commerce.

Since the creation of the Australian Securities Commission in 1991, keeping up to date with information technology developments has remained a high priority.

The regulatory approach preferred by the commission is that electronic commerce should be regulated to the extent necessary to ensure safe, efficient, fair markets, and the adequate protection of investors, who need to be encouraged to take into account these developments.

The ASC considers that the electronic environment should be fundamentally regulated in the same way as the traditional paper environment. That is, the same policy objectives that underpin the current regulatory regime should apply in the electronic environment.

For the immediate future, the ASC plans an expanded role in electronic commerce in light of the government’s acceptance of the recommendations about technology-driven innovation made in the report of the Wallis inquiry into the financial system.

The years ahead will see the ASC, in its “reincarnation” as the Australian Corporations and Financial Services Commission (ACFSC), adopt a wider role in monitoring financial innovation and technological developments in financial products and services (as distinct from monitoring current ASC-regulated products and services), and determining appropriate regulatory responses. This expanded role will also focus on ensuring that industry initiatives for consumer protection in relation to new technologies develop in a co-ordinated way.

GUIDANCE TO INVESTORS AND MARKET PARTICIPANTS

In May 1996 the ASC released a package of policy papers relating to electronic commerce, including a draft statement of principles on electronic communications under the Corporations Law and information on the application of the law to the provision of investment information on the Internet.

Consequently the ASC released two policy statements:
- Electronic Prospectuses (Policy Statement 107) which focuses on electronic prospectuses issued on the Internet or other computer networks, CD-ROM and floppy disk. In essence, the ASC considers that electronic prospectuses can be allowed in cases where the policy underlying the prospectus provisions in the Corporations Law can be satisfied; and
- Investment Advisory Services: Media, Computer Software and Internet Advice (Policy Statement 118), which sets out guidelines in relation to a
enabling the public to search the ASC’s corporate database, ASCOT, and its document retrieval network, DOCIMAGE, through a link from the ASC’s Internet home page to certain information brokers who are electronically linked to the ASC’s information system. Businesses and members of the public in Australia and overseas and therefore connect to an information broker and obtain on-line information that is available at any ASC business centre.

INVESTOR OR CONSUMER PROTECTION
The ASC believes that the following issues are of concern to investors, as well as market participants and securities regulators:

Disintermediation
Maintaining investor protection and confidence will become increasingly important for the regulator as the roles performed by intermediaries, stockbrokers and other market participants, change as a result of electronic commerce. We may see increased “disintermediation”, with the end-purchaser (the investor or consumer) and the end-seller being able to deal directly, without the traditional intermediary. This change may mean that it is appropriate to review the licensing regime so that all financial intermediaries whose business is providing facilities and services are subject to three main types of licences: a market operator’s licence; a clearing and settlement facility operator’s licence; and a licence for intermediary business (including broking, dealing, advising, managing collective investments or holding financial instruments as trustee or custodian).

Transitional issues
Many investors and consumers are still not comfortable with the electronic environment, mainly because of unfamiliarity and lack of opportunities to learn about new technologies. The ASC acknowledges that while a growing number of investors and consumers have access to electronic information, text-based materials should continue to provide the basic reference point for most investors.

The electronic environment should not unduly or materially disadvantage investors who do not have access to information in electronic form.

ENFORCEMENT TOOLS AND TECHNIQUES
It has been suggested that it is all but impossible to control the flow of information on the Internet, or the types of material transmitted. This issue was described by R. Clark Hooper of the US Office of Disclosure and Investor Protection, speaking at the ASC electronic commerce conference, as “getting your arms around smoke”.

With the Internet, traditional audit or paper trails do not exist (although there is a computer trail unless fraud is involved), human involvement is minimal, and traffic crosses national borders indiscriminately. This lack of control is of great concern to regulators and law-enforcement agencies worldwide and raises important issues:

- the practical enforceability of existing national securities regimes where national borders are becoming increasingly irrelevant to the global business community;
- the need for international co-operation between regulators and market authorities; and
- should regulation focus on the provider or user of any offending information on the Internet — ie, should rules be created to restrict the activities of the person who puts material on the Internet, or the person who reads it from the Internet?

WHAT CAN THE ASC DO?
The ASC continues to seek a greater emphasis on enforcement issues because some of these have yet to be resolved, particularly in the electronic environment (such as cross-jurisdictional issues, evidentiary issues, and the liability of providers and users of offending information).

Over the past two years the ASC has received an increasing number of reports of misconduct, including:

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