Communications LAW B•U•L•L•E•T•I•N

THE OFFICIAL PUBLICATION OF THE COMMUNICATIONS AND MEDIA LAW ASSOCIATION (CAMLA) A.C.N. 002 651 005

Registered by Australia Post. NBG 4474 EDITED BY ANTHONY MRSNIK VOL 13 No 4 Autumn 1994

Fund raising for films - does "Lightning Jack" represent a one off or a way forward into the future?

David Williams discusses an innovative form of funding for films

In the middle of 1993 the public was offered the opportunity to invest in the big budget film "Lightning Jack", to star Paul Hogan. The offer was made via a registered prospectus and related to units in a unit trust, which units would be listed on the ASX. The offer was partially underwritten and was successful. The film is now in the stage of completion with release scheduled for March 1994.

Finding investment funds to produce films is a continuing problem for all but a few film producers. The *Lightning Jack* approach, which combined elements which had not previously appeared together, is one which has now succeeded and broken new ground. The real issue is whether others can follow in the footsteps.

Critical features of the float

The critical features of the *Lightning Jack* float (not in any order of priority) seem to have been:

- total risk attaching to the investment (i.e: no guaranteed returns);
- Marquee Name attached;
- marketable security rather than a permanent economically non-transferable investment;
- unit trust structure;
- ATO Tax Ruling;
- large amount being raised;
- underwritten offer;
- Village Roadshow involvement;
- an interesting and easy to read prospectus; and
- an ADR program.

Other people may focus on other aspects and judge them to be critical factors. The following comments on the critical features may be of interest.

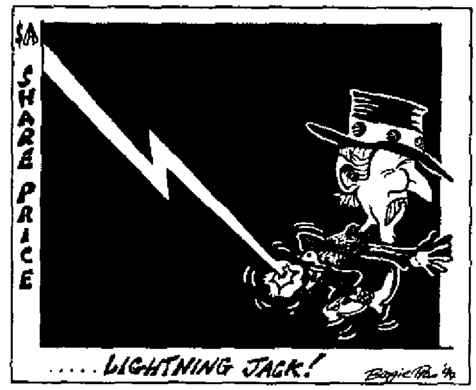
Total Risk

Unlike most other film-based projects offered to the public, *Lightning Jack* was a "total risk" or "entrepreneurial investment" rather than a "financial investment" (which would normally have a guaranteed level of return to ensure at least no capital loss occurred).

Investors were asked to take a risk that could involve them losing the whole of their investment (excluding any tax benefits under Division 10B of the *Tax Act)*. This, of necessity, involved investors making a commercial judgement on the likelihood of the Project recovering its cost and making a profit.

There is a significant difference between this situation and the type of film investment marketed in Australia over the past 10 years on a "no risk, guaranteed return" basis.

The investments competing with *Lightning Jack* for investors funds were the Woolworths float and the Channel 7 float and not tax shelter products such as normal Division 10BA film investments and agricultural shelters. What it demonstrated was the existence of such a market, provided that the right elements are present.



The profile of investors

On speaking to a number of these investors, it became clear that they were treating the whole of their investment as money that could be lost. Approximately two-thirds of investors invested only $2,000, ie: the minimum amount of investment.

In other words, it was not an investment where the investor "needed" to recover the principal and minimum return or otherwise they would suffer a severe financial disadvantage. It is not clear what would have been the level of investment on response to the offer if there had been a minimum investment limit fixed at say $20,000.

The marquee element

The presence of a marquee element(s) is critical to the success or otherwise of such an offer to investors. However, this is a very subjective matter involving investor perception.

At the time of the float Paul Hogan was well-known both in Australia and overseas. He has a good track record in an industry historically littered with failures. The success of the *Crocodile Dundee* films is legendary. The market knew this.

In my view, there would be few other marquee elements (including good track record) that could achieve a successful *Lightning Jack* style float. However, this is a very subjective issue.

Stock exchange listing

On a "going forward" basis, the ability to quit an investment in reaction to changing circumstances seems to be a critical aspect of any investment portfolio and the ability to offer a "liquid" investment increased the attractiveness of *Lightning Jack* units as an investment.

The trading in *Lightning Jack* units has been more consistent with investors wanting to hold a piece of the action and see where it takes them. I suspect most investors are treating the investment as a pure risk investment and, unless faced with immediate financial difficulties, are unlikely to quit the investment before the release of the film and an indication of its likely commercial success. At that time there is likely to be a significant increase in trading in the stock.

The ADR Program

This simply enhances the investment, in that there is potentially an increased market of purchasers should the investor wish to sell. This is the result of being able to trade the units over the counter in certain US banks without the normal SEC requirements for a public issue of securities.

Unless there is a significant US exposure, as is the case with *Lightning Jack*, this may be a neutral factor.

Distribution, Tax & Underwriting

The fact that a major Australian distributor, Village Roadshow, was closely involved in the production of the project may have influenced investors to invest. It is not clear how much this acted as a confirmation to potential investors that the project was worth investing in as a risk investment or indeed on what basis it would be interpreted by potential investors.

Increasingly, there is a need to obtain certainty of tax treatment up front. The project was submitted to the ATO and extensively reviewed.

A binding private ruling was issued to the trustee and to one prospective investor and this was disclosed in the prospectus. This minimised the element of uncertainty associated with the taxation treatment of an investment (particularly where the investment involved innovative aspects).

Again, underwriting sends a message to potential investors of an underwriter being confident that it will be a fully subscribed issue.

Underwritting also gives comfort that an investment will be a real investment and not returned because minimum subscription for the issue is not reached.

A way forward - into the future?

Is it practical for other film promoters to adopt a similar approach? Only time will provide the answer to this question.

Hopefully for the Australian film industry the answer is yes.

David Williams is a Sydney based partner with Mallesons Stephen Jaques

CONTENTS