

# The life and times of a prospectus

The September 1994 changes relating to prospectuses - life, content and method of correction.

**T**he *Corporate Law Reform Act 1994* ("the Act") provides for a number of changes to the provisions of the Corporations Law regulating the life, content and method of correction of prospectuses.

These changes apply with effect from 5 September 1994 (the date of commencement of the Act) to all prospectuses issued from that date.

## extended life of prospectuses

**T**he Act permits the life of a prospectus to be extended from 6 months to 12 months after the date of issue of the prospectus.

In light of the obligations of prospectus issuers to disclose any price sensitive information under the new continuous disclosure provisions, the restriction of the life of a prospectus to 6 months was seen as an unnecessary and costly restriction for continuous issuers.

Therefore section 1040(1) of the *Corporations Law* now prohibits the issue or allotment of securities after the end of 12 months from the date of issue of the prospectus.

Consequential amendments have been made to the provisions concerning the validity of allotments or issues and the statement required to be included in prospectuses concerning the life of the prospectus.

The ASC has indicated that it is considering granting relief to allow some prospectuses to have a life of 13 months. This would be to accommodate difficulties in including the most recent accounts in the prospectus.

## existing prospectuses?

**T**he transitional provisions of the Act provide that where a prospectus has been issued prior to the commencement of the Act (i.e. before 5 September 1994), the amended prospectus provisions do not apply.

Fund managers will not be able to extend the life of a prospectus currently in use to 12 months or take advantage of the new mechanisms for correction of prospectuses.

## incorporation by reference

**T**he ASC's policy of allowing prospectuses to incorporate certain technical or financial information into the prospectus by referring to that information in the prospectus and providing the information separately to investors has been expanded.

Provided that the document to be incorporated:

- is a document lodged with the ASC under a provision of the *Corporations Law* at any time prior to lodgment of the prospectus (or a supplementary or replacement prospectus); and
- is summarised in the prospectus; and
- will be provided free of charge to investors, and the prospectus states that a copy of the document is available free of charge during the life of the prospectus,

then the document and the information contained in it is taken to be part of the prospectus under the provisions of the *Corporations Law*.

These provisions will be useful in enabling the simplification of some prospectuses by allowing material such as statutory accounts, the constituent documents of prescribed interest schemes and documents lodged under the enhanced disclosure rules to be incorporated in a prospectus by reference. However, issuers should also be aware that full prospectus liability will apply to the material incorporated by reference.

Importantly, an issuer of the prospectus may rely on the incorporated information for the purposes of satisfying its obligations to provide information to investors. However, care needs to be exercised to ensure that significant information is given adequate emphasis in the prospectus as a whole to ensure that the prospectus is not misleading.

## correction of prospectuses - new methods

**T**he circumstances in which a supplementary prospectus must be issued and the information which must be included by a supplementary prospectus have been revised by the Act.

These changes are very important for prospectus issuers. The procedures adopted by fund managers for identifying when a supplementary prospectus must be issued need to be assessed in the light of the Act. The Act also provides for two different options to be followed in processing applications received after a supplementary prospectus has been issued.

## matters requiring a supplementary prospectus to be issued

**T**he existing requirement remains that a supplementary prospectus must be issued where any significant changes affect matters set out in a prospectus or significant new matters arise after the issue of the prospectus.

The Act now also provides that if a mistake or omission concerning information in the prospectus which was based on a state of affairs existing at the time of issue of the principal prospectus is subsequently discovered during the life of the prospectus, the prospectus must be corrected.

A prospectus must also be corrected under the new provisions whenever the issuer becomes aware during the life of the prospectus that the prospectus is deficient.

The definition of a "deficiency" in relation to a prospectus, includes, but is not limited to:

- a material statement that is false or misleading; or
- a material omission from the prospectus.

This new inclusive definition of a "deficiency" means that any information that comes to light during the application period for securities under a prospectus that would have had to be included in the prospectus to ensure that the prospectus was not false or misleading (and therefore to avoid liability under section 996 of the Law) but was not required by the specific requirements in section 1021 or 1022, must be included in a supplementary prospectus. Immaterial omissions may also be rectified.

When considering whether a prospectus is deficient, regard must also be had to any changes to or omissions from any information incorporated by reference into the prospectus (see above).

## supplementary versus replacement prospectus

**T**he Act provides two alternative means to correct a deficient prospectus or insert further information:

- by issuing a supplementary prospectus; or
- by issuing a replacement prospectus.

The concept of a supplementary prospectus being an additional insert into the principal prospectus is not new. Each page of the supplementary prospectus is now required to state that the document is to be read in conjunction with the principal prospectus and identify the principal prospectus and any other supplementary prospectuses.

A replacement prospectus allows the issuer of a prospectus to circulate one document and not two. This has obvious marketing, as well as administrative, advantage.

A replacement prospectus has the same purpose as a supplementary prospectus and each page of the replacement prospectus must contain a bold statement that the document is a replacement of the principal prospectus and identify the principal prospectus.

A replacement prospectus may not, however, be used to substantially restyle or reword the original prospectus. *The Act* requires a replacement prospectus to have the same wording as the original prospectus except to the extent that it corrects a deficiency or provides particulars of a new occurrence.

It is interesting to note that "deficiencies" in a prospectus justifying the issue of a supplementary or replacement prospectus are no longer confined to

material deficiencies. Thus, the including of particulars of a new occurrence may allow scope for some flexibility in revising an original prospectus.

## consequences of correcting a prospectus

**U**nder the new provisions, once a deficiency or mistake in a prospectus has been discovered, or where any other information (which may be immaterial but relevant) is to be included, and either a replacement or supplementary prospectus has been issued (not just lodged), the original application form ceases to be "current". An application form may also no longer be current if a new application form is lodged with the ASC. This may occur for example where information to be incorporated by reference is set out in the application form.

If a prospectus issuer receives an application form that is not current when the issuer receives the application, then the issuer must give a written notice to the applicant:

- informing them that the application form received is not current;
- telling them how the issuer intends to deal with the application (there are two options discussed below); and
- attaching a copy of each supplementary prospectus or replacement prospectus issued after the prospectus to which the application form was attached and a current application form.

There are two options where a non-current application form is received:

- (1) treat the applications as withdrawn and refund the application money (with interest); or

- (2) at the same time as notifying the applicant that their application form was not current, issue the securities to the person. If a "material adverse change" has occurred in relation to the securities since the application form used was issued, the issuer must give the applicant a reasonable opportunity to return the securities and receive a refund of their application money (with interest).

For the purposes of option (2) above, a material adverse change will occur if a change occurs or new matter arises that is likely to have a material adverse effect on the value of the securities.

There are some technical problems in the way in which these new provisions are worded, particularly in relation to the distribution of new application forms after earlier application forms have ceased to be current. These problems have been drawn to the attention of the ASC and it is likely that class orders will be made to clarify these matters.

*David Williams, Partner, Mallesons Stephen Jaques.*

## Editor's note

Reference should also be made to the following articles by David Williams:

- "Fund raising for films - does 'Lightning Jack' represent a one off or a way forward into the future?" (CLB Vol 13 No 4, pp 1-2); and
- "Continuous Disclosure - an additional legal obligation" (CLB Vol 14 No 2, pp 19-20).

## COMMUNICATIONS AND MEDIA LAW ASSOCIATION (CAMLA)

# ESSAY PRIZE

**The Communications and Media Law Association is holding an essay competition in 1995.**

The purpose of the competition is -

- to encourage high quality work in undergraduate communications and media law courses; and
- to improve links between those studying and practising in the area.

The prize will be given for -

- a previously unpublished essay which is the original work of the author
- completed by a student enrolled in an undergraduate or postgraduate course, possibly as part of that course
- on a subject relating to communications or media law
- of 1000-3000 words.

A prize of \$1000 and a one year membership of CAMLA will be awarded to the winner. The winning essay will be published in the Communications Law Bulletin.

The winning entry, to be selected by a panel of experienced communications and media law practitioners, is likely to demonstrate original research, analysis or ideas. The panel will not necessarily be seeking detailed works of scholarship.

The award will be made at the annual CAMLA Dinner or Christmas Function.

Please send three copies of each entry typed well-spaced on A4 paper. The name,

address and telephone/fax contacts for the author should be included on a separate, detachable sheet. The author's name should not appear on the pages of the essay.

Entries should be submitted to:

The Administrative Secretary  
Communications and  
Media Law Association  
PO Box 545  
GLEBE NSW 2037

by 30 September 1995