



ASIC

Australian Securities & Investments Commission

Disclosure in Reconstructions

Regulation impact statement (RIS)

February 2007

What this regulation impact statement (RIS) is about

This RIS addresses the Australian Securities and Investments Commission's (ASIC's) proposed policy to apply its interpretation that "offer" for the purposes of the prospectus provisions in Ch 6D of the *Corporations Act 2001* (the Act) includes an invitation to vote on the issue or transfer of securities at a meeting of an entity's members. The effect of this interpretation is to require prospectus disclosure in reconstructions and capital reductions involving the issue or, in some cases, transfer of securities. This RIS also covers ASIC's proposed relief from the prospectus requirement in certain circumstances.

"Reconstructions" for the purposes of this RIS do not include schemes of arrangement regulated under Pt 5.1 of the Act ("Pt 5.1 schemes"), but include schemes similar to them such as foreign schemes of arrangement or trust schemes. A trust scheme can involve the issue or transfer of securities or interests in a managed investment scheme (interests) to members of a managed investment scheme as a result of a vote of the members.

This RIS also addresses ASIC's proposed policy to give relief to Pt 5.1 schemes so that a Pt 5.1 scheme involving the offer or issue of an interest does not require a Product Disclosure Statement (PDS).

Contents

What this regulation impact statement (RIS) is about	2
Issues	3
Objectives	6
Options	6
Impact analysis	11
Consultation	27
Conclusion and recommended options	28
Implementation and review	32

Issues

Background

1. Practice Note 40 *Reconstruction meetings* [PN 40] was issued in November 1993 to set out the then Australian Securities Commission's view that the prospectus and securities hawking provisions did not apply to reconstructions involving "dispatching a notice to people convening a meeting at which they will consider a proposal which could result in securities being issued to them".

2. [PN 40] provides two examples of such reconstructions:

- A trustee proposes a resolution to cancel all interests in the trust other than the interests of an Australian company, in exchange for an issue of shares by the Australian Company to the beneficiaries under the trust (i.e. a trust scheme); and
- A UK company proposes a scheme of arrangement under the *Companies Act 1985* (UK) under which shares would be issued to the creditors of the UK company including certain debenture holders in Australia (i.e. a foreign scheme): [PN 40.1].

What are the issues being addressed?

Issue 1: Inadequate disclosure in reconstructions

3. [PN 40] has not been updated since its introduction in 1993. Since that time there have been significant legislative developments that have affected the application of [PN 40].

4. [PN 40] no longer provides any practical assistance to offerors in most cases because in practice the on-sale provisions in Pt 6D.2 of the Act require offerors to prepare a prospectus for reconstructions involving the offer of securities if those securities are to be traded (which is ordinarily the case). Entities planning a reconstruction involving the issue of securities have sought relief from the on-sale provisions to avoid the need to prepare a prospectus. ASIC has not ordinarily granted this relief because investors do not receive the same level of disclosure and protection when they receive securities in a reconstruction as they do when they receive securities under a prospectus or under a Pt 5.1 scheme.

5. ASIC's approach is consistent with section 708(17) which exempts Pt 5.1 schemes from the prospectus provisions. This is because a Pt 5.1 scheme of arrangement provides adequate disclosure and protection to investors through a statutory framework involving an explanatory memorandum, shareholder approval and court oversight.
6. Also, [PN 40] is inconsistent with the PDS provisions in Ch 7.9 of the Act. The PDS provisions require an issuer of a financial product (such as an interest in a managed investment scheme) to give each recipient a PDS on the 'issue' of the financial product as well as on the 'offer' of the financial product. In contrast, the prospectus provisions only apply to 'offers' of securities. This means, under [PN 40], in a reconstruction where both shares and interests are issued (say when shares in a company are being stapled to units in a managed investment scheme), a PDS will be required for the issue of the interests but no prospectus will be required for the shares.
7. The uncertainty of [PN 40]'s application has the potential to result in inadequate disclosure where entities rely on [PN 40] and results in unnecessary applications to ASIC for relief from certain provisions of the Act.
8. ASIC recognises that any change to the application of [PN 40] could impact entities in various situations where there may be no need for additional disclosure. These situations are dealt with in paragraphs 9 to 13 below.

Issue 1(a): Foreign schemes of arrangement

9. If a prospectus were required for a reconstruction involving the issue or transfer of securities, some foreign schemes not previously subject to the prospectus requirements would require a prospectus. If a foreign scheme of arrangement has been subject to local regulation with the same essential characteristics as a Pt 5.1 scheme, or that otherwise provides an adequate mechanism for disclosure and investor protection, it may not be necessary that they be subject to the prospectus requirements.

Issue 1(b): Capital reductions

Note: A capital reduction occurs when a company returns excess capital to its members, and accordingly reduces its amount of share capital. Ordinarily a capital reduction involves a company returning cash to its members in exchange for reducing their nominal shareholding in the company, but sometimes a company will return assets such as shares.

10. The interpretation that an invitation to vote at a meeting where members will receive securities constitutes an offer will also affect

capital reductions where the consideration is either a distribution in specie of securities held by the company or securities issued or transferred by another entity. An invitation to vote on such a capital reduction may constitute an offer that requires a prospectus under Ch 6D. Previously, such capital reductions have not needed a prospectus. It is estimated that capital reductions where the consideration to members includes securities make up less than 20% of all capital reductions (based on publicly available information for listed companies conducting capital reductions). We are aware of only one capital reduction in 2005 where the consideration to members consisted of securities.

11. Capital reductions by Australian companies are regulated under the Corporations Act, including disclosure requirements and voting restrictions. However, these provisions do not provide the same level of disclosure and investor protection as the prospectus provisions or Pt 5.1 of the Corporations Act. Similarly, capital reductions conducted in foreign jurisdictions do not ordinarily involve prospectus level disclosure.

12. Most, if not all, capital reductions involving an offer of securities to members will be a distribution in specie of securities held by the company. In those circumstances, members may not need prospectus disclosure because they already had exposure to the securities. Their indirect interest in the securities merely becomes a direct interest.

Issue 1(c): No change in the underlying business or assets

13. Some reconstructions do not involve a change in the underlying business or assets of the entity but rather a change in the form of the entity. For example, when a managed investment scheme converts into a company the only change may be to the manner in which the entity is held. In these cases there may be no new investment decision to be made by the existing members of the managed investment scheme. The costs of preparing a prospectus, in addition to or as part of an explanatory statement, may not be justified in such cases.

Issue 2: Inconsistent treatment of Pt 5.1 schemes of arrangement

14. Part 5.1 schemes are exempt from the prospectus requirement because they provide an adequate mechanism for disclosure and investor protection in relation to the offer of securities for issue or sale. However, Pt 5.1 schemes involving the issue of interests are subject to the PDS requirement. It is incongruous to have additional

disclosure requirements of Pt 5.1 schemes involving the issue of interests but not of Pt 5.1 schemes involving the offer of securities.

Objectives

15. The primary objectives of this policy proposal are to:

- ensure investors are provided with adequate disclosure and protection when deciding whether to vote for a reconstruction or capital reduction involving the issue or transfer of securities;

Note: Adequate disclosure and protection for the issue (or in some cases transfer) of securities or interests means prospectus or PDS level disclosure and protection. The prospectus and PDS provisions specify levels of disclosure appropriate to investment decisions and give investors protection in the form of enforcement powers for ASIC, liability regimes and the creation of criminal offences for certain breaches. Part 5.1 schemes provide an equivalent level of disclosure and investor protection (as shown by their exemption from the prospectus provisions).

- where it won't compromise investor protection, reduce compliance costs for industry where application of the prospectus requirement would result in unnecessary disclosure to investors; and
- ensure consistency between the application of the prospectus provisions and the PDS provisions.

Options

Issue 1: Ensuring adequate disclosure in reconstructions and capital reductions

Option 1 – Require a prospectus for reconstructions and capital reductions involving the issue (or transfer) of securities

16. This option is based on the view that an invitation to vote on the issue (or transfer) of securities in a reconstruction or capital reduction constitutes an "offer" for the purposes of Ch 6D. If such offer requires a prospectus under Ch 6D (as either an offer for issue under s706 or an offer for sale under s707), the notice of meeting would need to be accompanied by or include a prospectus. ASIC expects that in most cases much of the information included in the prospectus would have

been provided in an explanatory statement, and so the additional resources required would be limited to those used to meet some specific disclosure requirements and probably a more rigorous due diligence procedure, given the liability regime for a prospectus under the Act. This option includes providing technical relief in the form of a class order from certain provisions of Ch 6D for prospectuses issued with or as part of a notice of meeting for a reconstruction or capital reduction.

17. If Option 1 is adopted, Issues 1(a), (b) and (c) must be considered to deal with the issues identified in paragraphs 9 to 13.

Option 2 – Maintain the status quo

18. This option involves leaving [PN 40] as published policy but where entities conducting a reconstruction or capital reduction involving the issue of securities wish the securities to be traded, they will need to prepare a prospectus to comply with the on-sale provisions in Ch 6D. This is because ASIC will not ordinarily grant relief from the on-sale prohibition when securities are issued as a result of a vote at a reconstruction or capital reduction meeting.

19. If Option 2 is adopted, Issues 1(a), (b) and (c) do not need to be considered.

Issue 1(a): Disclosure in foreign schemes

Note: The following options only need to be considered if option 1 in relation to Issue 1 is adopted. The following options are therefore based on the assumption that option 1 in relation to Issue 1 is adopted.

Option 1 – Provide class order relief from the prospectus requirement for foreign schemes of arrangement in certain jurisdictions, and provide case-by-case relief for foreign schemes of arrangement in other jurisdictions which provide adequate disclosure and investor protection

20. The class order aspect of this relief is analogous to the relief provided to offers made under Australian schemes of arrangement under s708(17) of the Corporations Act and in relation to secondary sales of such securities under Class Order [CO 04/671] *Disclosure for on-sale of securities and other financial products*.

21. This would involve ASIC issuing a class order listing various jurisdictions whose regulation of schemes of arrangement have the same essential characteristics as Pt 5.1 of the Corporations Act.

22. A key aspect of the proposed relief is the requirement for the regulation of the scheme process in the foreign jurisdiction to have the same essential characteristics in terms of procedure, court oversight and disclosure as Pt 5.1 of the Corporations Act. The following jurisdictions regulate schemes with these essential characteristics:

- (a) Hong Kong;
- (b) Malaysia
- (c) New Zealand;
- (d) Singapore;
- (e) South Africa; and
- (f) the United Kingdom.

23. ASIC may give relief for schemes in other jurisdictions on a case-by-case basis if an applicant demonstrates the local regulation of schemes has the same essential characteristics as Pt 5.1 or otherwise provides adequate disclosure and investor protection. Further jurisdictions may be added to the initial list if sufficient applications for case-by-case relief are received.

Option 2 – Provide case-by-case relief for all foreign schemes of arrangement which have been subject to regulation with the same essential characteristics as Pt 5.1 of the Corporations Act

24. All foreign schemes of arrangement that would previously have relied on [PN 40] would need to apply for case-by-case relief from the prospectus requirement on the same basis as in option 1. Class order relief may be considered appropriate in the future if ASIC receives sufficient applications for this relief. Entities that do not receive relief would need to prepare a prospectus for a foreign scheme involving an offer of securities.

Option 3 – Provide no relief for foreign schemes of arrangement

25. Foreign schemes that previously relied on [PN 40] would need to prepare a prospectus. This option would not prevent entities conducting foreign schemes applying for relief from the prospectus requirement. Relief may be considered in the future if ASIC receives sufficient applications for this relief to establish policy on when such relief is appropriate.

Issue 1(b): Disclosure in capital reductions

Note: The following options only need to be considered if option 1 in relation to Issue 1 is adopted. The following options are therefore based on the assumption that option 1 in relation to Issue 1 is adopted.

Option 1 – Grant class order relief from the prospectus requirement to all capital reductions

26. This option will effectively maintain the status quo. Entities offering securities as consideration in a capital reduction will need only comply with Div 1 of Pt 2J.1 of the Act in relation to disclosure, and will not need to prepare a prospectus. The class order would extend to capital reductions in foreign jurisdictions with similar regulation to Div 1 of Pt 2J.1.

Option 2 – Grant class order relief from the prospectus requirement to capital reductions involving distributions in specie

27. A capital reduction where securities held by the company are transferred to its members as consideration will not need a prospectus. This relief will benefit entities undertaking capital reductions that involve an offer that would otherwise require a prospectus under section 707 of the Act. The class order would extend to capital reductions in foreign jurisdictions with regulation similar to Div 1 of Pt 2J.1 of the Act.

28. The relief will not apply to capital reductions where members receive securities they previously had no exposure to (such as securities issued by another entity at the procurement of the company undertaking the capital reduction). Where such capital reductions require a prospectus, technical relief will be available in the same way as prospectuses in reconstructions.

Option 3 – Require prospectuses in all capital reductions involving an offer that is subject to the prospectus requirement but grant relief on a case-by-case basis where appropriate.

29. Capital reductions involving the issue (and, in some cases, transfer) of securities will need a prospectus. ASIC may give case-by-case relief from the prospectus requirement in circumstances where there is no new investment decision required of members.

30. As in option 2, technical relief will be available for prospectuses in capital reductions.

Issue 1(c): Disclosure in reconstructions involving no change to the underlying business

Note: The following options only need to be considered if option 1 in relation to Issue 1 is adopted. The following options are therefore based on the assumption that option 1 in relation to Issue 1 is adopted.

Option 1 – Provide class order relief from the prospectus requirement for reconstructions where there is no change to the underlying business or assets

31. This relief would exempt such reconstructions from Ch 6D because members would not be making any new investment decision. Relief may be conditional on the explanatory statement containing some specific disclosures.

Option 2 – Provide case-by-case relief for reconstructions where there is no change to the underlying business or assets

32. This option would include setting out the policy on which applications for relief would be decided. Class order relief may be considered in the future if ASIC receives sufficient applications for this relief.

Option 3 – Provide no relief where there is no change to the underlying business or assets

33. This option would save ASIC having to construct and publish principles it must follow for such relief at this time, but would not prevent entities from applying for relief in the future. Relief may be considered in the future if ASIC receives sufficient applications to establish policy on when such relief is appropriate.

Issue 2: Inconsistent treatment of Pt 5.1 schemes

Note: If Option 1 in relation to Issue 1(a) is adopted, this issue will also arise in relation to foreign schemes. Given the rationale for that Option, if it is adopted then the option chosen under this Issue 2 will apply equally to foreign schemes.

Option 1 – Grant class order relief from the PDS requirement to Pt 5.1 schemes

34. This option would mean Pt 5.1 schemes are exempt from the PDS requirement. Part 5.1 schemes involving the issue of interests would

have the same disclosure requirement as Pt 5.1 schemes involving the issue of securities.

Option 2 – Maintain the status quo

35. Part 5.1 schemes involving the issue of interests will require a PDS. This would not prevent entities applying for relief from the PDS provisions on a case-by-case basis.

Impact analysis

Affected parties

Issue 1: Ensuring adequate disclosure in reconstructions and capital reductions

36. Parties affected by the proposed policy would be:

a) Industry

- Entities seeking to conduct reconstructions – these entities have recently been from the listed property trust sector. We are aware of approximately 10 issuers in 2005 that sought to undertake reconstructions (not including foreign schemes or capital reductions) that would be affected by our policy statement.
- Entities seeking to issue shares as consideration in a reconstruction. These entities may or may not be the entities conducting the reconstructions.
- Advisers to affected entities – those involved in the preparation of disclosure documents for entities conducting a reconstruction or issuing shares as consideration in a reconstruction; such as lawyers, accountants and other advisers.

b) Investors who receive an offer of securities in any of the circumstances discussed in this RIS.

c) ASIC.

Issue 2: Inconsistent treatment of Pt 5.1 schemes

37. Parties affected by the proposed policy would be:

a) Industry

- Entities seeking to conduct Pt 5.1 schemes involving the issue of interests and their advisors.
- Entities seeking to issue interests as consideration in a Pt 5.1 scheme and their advisors. These may or may not be the entities conducting the Pt 5.1 schemes.

b) Investors who receive an offer of interests under a Pt 5.1 scheme.

c) ASIC.

Costs and benefits of each option**Issue 1: Ensuring adequate disclosure in reconstructions and capital reductions**

Option 1 – Require a prospectus for reconstructions and capital reductions involving the issue (or transfer) of securities

Benefits to industry

38. Option 1 will benefit industry by clarifying when a prospectus is required in reconstructions and capital reductions. With the proposed exemptions, it will be clear if a prospectus is required in each case based on the primary obligation to prepare a prospectus, rather than the application of the on-sale prohibition. This will save offerors in advisers' fees to consider the prospectus requirement.

39. This option should result in offerors making fewer applications to ASIC for prospectus relief in reconstructions and, through concurrent technical relief, will allow offerors to prepare prospectuses in reconstructions without applying to ASIC for technical relief (the costs of applying for relief include an application fee (currently \$1000) and advisers' fees (such as lawyers' and accountants' fees), as well as management and staff time).

Benefits to investors

40. The primary benefit to investors will be the availability of prospectuses in reconstructions involving the issue (or transfer) of securities. Without a prospectus, members would need to rely on fiduciary relationships not designed for investor protection in relation to making the decision to vote on the issue of securities. Members would receive an explanatory statement setting out matters known to the directors and material to the decision how to vote. In those circumstances it is possible members would not receive sufficient

information to understand and value the securities, and would only have recourse to the directors for any loss due to receiving insufficient or misleading information. The lodgement of a prospectus has the following disclosure and investor protection benefits over the preparation of an explanatory memorandum:

- (a) the offeror must lodge the prospectus with ASIC;
- (b) a statutory disclosure test applies to the offeror (including the company, the directors and proposed directors, and other persons named in the prospectus such as an underwriter or adviser), designed to provide information relevant to the decision to invest in securities;
- (c) there is a statutory obligation to update the prospectus;
- (d) ASIC is granted certain powers relating to the document and the offer, such as the stop order power; and
- (e) the offeror is subject to a specific statutory liability regime for incomplete, out of date or misleading prospectuses.

Benefits to ASIC

41. ASIC will likely receive fewer applications for relief because it will be clear when a prospectus is required and offerors will not need to apply for technical relief available under a class order. ASIC will also likely receive better quality applications when offerors apply for case-by-case relief because its policy on when it may grant relief will be published. This is because applicants will have the benefit of knowing ASIC's approach to giving relief and what considerations ASIC will take into account when assessing an application. Having better quality applications will mean ASIC would expect to take less time assessing each application, including less requisitions for further information from applicants and only having to consider relevant submissions from applicants. These benefits are difficult to quantify but would be expected to result in a noticeable reduction in the average time of dealing with an application for prospectus relief in the circumstances considered in this RIS.

Costs to industry

42. The offerors of securities will have to incur the costs involved with the preparation of a prospectus. These include advisers' fees (such as legal and accounting advisers), printing and postage costs, insurance premiums to cover liability on the prospectus and the costs of management and staff time in providing information to go in the prospectus. Many of these costs would have been incurred anyway in preparing an explanatory memorandum. It is difficult to estimate the

costs of preparing and distributing a prospectus, because it will differ in each case depending on the size and complexity of the offer. In 1999, the Australian Stock Exchange calculated that a prospectus could cost in the range from \$200,000 to over \$500,000¹. This is consistent with other estimates² and so should be considered an appropriate estimate for any reference to the costs to prepare a prospectus in this RIS (however in each case the marginal cost of preparing a prospectus over an explanatory statement is likely to be much lower).

43. Where the issuer is different from the entity convening the meeting practical difficulties will also arise in relation to liability for the prospectus. This difficulty arises in other contexts, such as takeovers/mergers by scheme where the bidder/acquirer has to provide information in the target's scheme booklet.

44. Given prospectuses are ordinarily being prepared for such reconstructions as a result of the on-sale prohibition at present, the adoption of this option would in fact cost most offerors no more than maintaining the status quo.

Costs to investors

45. There will be no direct costs to investors if Option 1 is adopted.

Costs to ASIC

46. There will be some initial costs for ASIC, in terms of staff time, involved in developing and drafting the policy and related instruments.

Option 2 – Maintain the status quo

Benefits to industry

47. Offerors can continue to rely on [PN 40] and, where not concerned with the on-sale prohibition, will not need to prepare a prospectus for a reconstruction or capital reduction involving an issue or transfer of securities. ASIC expects this will ordinarily only benefit entities conducting foreign schemes, because the on-sale prohibition will not ordinarily concern a foreign entity.

¹ *ASX Enterprise Market Newsletter*, October 1999.

² CipaNet International, *A study on the cost of small entities obtaining and maintaining an official listing on the Australian Stock Exchange*, November 1996, p7. This study found that floats between \$2m and \$4m incurred direct costs between 9% and 43%, but for floats over \$5m the costs were generally less than 10%.

Benefits to investors

48. This option will not directly benefit investors.

Benefits to ASIC

49. This option will not require ASIC to utilise resources in undertaking further policy work or consultation.

Costs to industry

50. Offerors will continue to face uncertainty whether a prospectus is required in reconstructions because of the inconsistency between the application of [PN 40] and the on-sale prohibition. This uncertainty can lead to unnecessary applications to ASIC for relief from the prospectus requirement. Offerors will also continue to need to apply to ASIC for technical relief when preparing a prospectus in a reconstruction.

Costs to investors

51. Investors will not have the benefit of a prospectus in a reconstruction or capital reduction unless the offeror is concerned to avoid the on-sale prohibition. This means investors will be making investment decisions without the standard of disclosure the legislature has determined appropriate for such circumstances.

Costs to ASIC

52. ASIC will continue to incur costs, in terms of staff time, in assessing applications for relief from the prospectus requirement or for technical relief.

Issue 1(a): Disclosure in foreign schemes

Note: This issue only needs to be considered if option 1 in relation to Issue 1 is adopted. Accordingly, the costs and benefits identified are costs and benefits of each option given that option 1 in relation to Issue 1 is adopted.

Option 1 – Provide class order relief from the prospectus requirement for foreign schemes of arrangement in certain jurisdictions, and provide case-by-case relief for foreign schemes of arrangement in other jurisdictions which provide adequate disclosure and investor protection

Benefits to industry

53. This option would create savings for offerors who do not have to prepare a prospectus under the class order. Offerors in other jurisdictions will have the benefit of published policy in making applications for case-by-case relief. Additional jurisdictions may be added to the class order in the future, meaning more offerors will have the benefit of not needing to prepare a prospectus.

Benefits to investors

54. Investors are less likely to be excluded from receiving securities under a foreign scheme (in which case they would generally receive the cash-equivalent of the securities they would have received, known as being 'cashed out'), allowing them the opportunity to participate in schemes on equal footing to local investors. The listed jurisdictions regulate schemes in a way similar to Australia, so investors will receive disclosure in the form of an explanatory statement and protection in the form of the requirement for shareholder and court approval. Investors will not receive a prospectus where their disclosure and protection needs are already met in the process for the foreign scheme. This will save investors time and prevent possible confusion arising from receiving duplicating information in a prospectus.

Benefits to ASIC

55. ASIC will save resources in assessing applications for relief from jurisdictions where the class order gives relief. ASIC will also receive better quality applications, and fewer applications not likely to succeed, by publishing the policy by which applications for case-by-case relief will be assessed.

Costs to industry

56. This option involves no costs to industry in most cases. Entities covered by the class order will automatically qualify for prospectus relief. Entities in other jurisdictions may apply for prospectus relief, incurring the costs of making an application (currently \$1,000 application fee and the costs of obtaining Australian legal advice and preparing what may be a complicated application for relief³) if they wish to avoid the costs of preparing a prospectus. The applications may be relatively lengthy and resource intensive to prepare because they will need to demonstrate that the regulation of schemes of arrangement in the foreign jurisdiction contains the essential characteristics of a Pt 5.1 scheme, or otherwise provides an adequate disclosure and investor protection mechanism.

Costs to investors

57. Where offerors use the class order, investors will rely on the offeror complying with the requirements for the scheme in the foreign jurisdiction to ensure there is sufficient disclosure and investor protection. It may be difficult for investors to enforce their rights in foreign jurisdictions where offerors do not comply with foreign regulation. The costs of enforcing rights will vary from jurisdiction to jurisdiction and is difficult to approximate.

58. It is possible that offerors in jurisdictions not covered by the class order will exclude Australian shareholders from voting in schemes or from receiving securities rather than apply for relief on a case-by-case basis. This will deny Australian holders opportunities they are entitled to have as holders of those shares. It is difficult to quantify the costs of being denied these opportunities, and it would vary in each case depending on how Australian holders are treated. Normally, excluded holders would be 'cash-out'.

Costs to ASIC

59. Assessing the regulation of schemes in jurisdictions around the world for the purposes of providing class order relief could involve

³ It is difficult to approximate the costs of preparing the application and obtaining Australian legal advice. This is because there are a number of variables involved, such as whether the entity has experience with Australian prospectus requirements or has an existing relationship with an Australian law firm; how expensive the Australian legal advice is; whether relief has been granted in respect of that jurisdiction previously; and whether the foreign regulation needs translating into English. These costs will vary from case to case but could be expected to be less than \$5,000 in the majority of cases, and certainly less than the costs of preparing a prospectus in all cases. This rough approximation will apply for any applications for relief referred to in this RIS (eg. relief for capital reductions or reconstructions involving no change to the underlying business).

significant resources in terms of staff time to locate and analyse foreign legislation. However there are jurisdictions known to have similar regulation to Australia (Hong Kong, New Zealand, Singapore, South Africa and the United Kingdom), and so limiting the class order to those jurisdictions will avoid any significant costs to ASIC.

60. In terms of assessing additional jurisdictions for case-by-case relief, the applicant, who as the entity conducting the foreign scheme will naturally be in a better position to understand the relevant foreign legislation, will undertake the required comparison, saving ASIC those costs of locating and analysing foreign legislation.

Option 2 – Provide case-by-case relief from the prospectus requirement for foreign schemes of arrangement which provide adequate disclosure and investor protection

Benefits to industry

61. As in option 1, offerors will have the benefit of published policy in making an application for case-by-case relief and, where they receive relief, will save the costs of preparing a prospectus.

Benefits to investors

62. This option will ensure investors receive adequate disclosure and protection as ASIC will determine on a case-by-case basis whether to relieve entities of the prospectus requirement.

Benefits to ASIC

63. ASIC will not need to incur resources to prepare a class order and assess which jurisdictions should be included in the class order - applicants will need to provide details of the foreign jurisdiction's regulation of schemes and perform the necessary comparison. This may over time provide sufficient information for ASIC to prepare a class order.

64. ASIC will also receive better quality applications for relief, and fewer applications not likely to succeed, by publishing the policy by which applications for case-by-case relief will be assessed.

Costs to industry

65. All entities conducting foreign schemes will need to incur the costs of applying for relief in order to avoid preparing a prospectus..

Costs to investors

66. It is more likely than under option 1 that offerors will exclude Australian holders from voting in schemes or receiving securities rather than incur the costs of applying for relief.

67. Where ASIC does grant relief on a case-by-case basis, investors will still be relying on the offeror complying with foreign regulation for investors to receive sufficient disclosure and protection. It may be difficult for investors to enforce their rights in foreign jurisdictions where offerors do not comply with foreign regulation.

Costs to ASIC

68. ASIC will need to use resources assessing applications for relief, and will be relying on applicants to provide accurate comparisons of foreign regulation.

Option 3 – Provide no relief for foreign schemes of arrangementBenefits to industry

69. This option provides no benefits to industry.

Benefits to investors

70. Investors will receive prospectus level disclosure in all foreign schemes involving the issue of securities.

Benefits to ASIC

71. ASIC will likely save resources because it will have fewer, if any, applications for relief to assess where it has publicly stated it will not give relief.

Costs to industry

72. Offerors conducting foreign schemes will have to incur the cost of preparing a prospectus in addition to complying with the scheme process in their home jurisdiction if they want to include Australian holders in the scheme.

Costs to investors

73. Offerors will more likely exclude Australian investors from voting in schemes or receiving securities rather than prepare an Australian prospectus.

Costs to ASIC

74. This option would involve minimal or no costs to ASIC.

Issue 1(b): Disclosure in capital reductions

Note: This issue only needs to be considered if option 1 in relation to Issue 1 is adopted. Accordingly, the costs and benefits identified are costs and benefits of each option given that option 1 in relation to Issue 1 is adopted.

Option 1 – Grant class order relief from the prospectus requirement to all capital reductions

Benefits to industry

75. Entities offering securities as consideration in a capital reduction will save the costs of preparing a prospectus.

Benefits to investors

76. This option does not provide any direct benefits to investors.

Benefits to ASIC

77. This option will save ASIC the costs of reviewing applications for case-by-case relief from the prospectus requirement.

Costs to industry

78. This option will not involve any costs to industry.

Costs to investors

79. Members will not receive the level of disclosure and investor protection of a prospectus where an offer would otherwise require a prospectus under Ch 6D.

Costs to ASIC

80. This option would involve minimal costs to ASIC in preparing the class order.

Option 2 – Grant class order relief from the prospectus requirement to capital reductions involving distributions in specie or conducted as part of a scheme of arrangement

Benefits to industry

81. Offerors will save the costs of preparing a prospectus where members:

- (a) receive securities they already had indirect exposure to; or
- (b) have the benefit of adequate disclosure and protection under the procedure for the scheme of arrangement.

Benefits to investors

82. Where members are effectively making a new investment decision outside of a scheme of arrangement, they will have the benefit of prospectus level disclosure and investor protection if the capital reduction involves an offer that requires a prospectus.

Benefits to ASIC

83. This option will save ASIC the costs of reviewing applications for case-by-case relief where offerors qualify for the class order relief.

Costs to industry

84. Offerors of securities in capital reductions other than where securities are offered as a distribution in specie or where the capital reduction is done in conjunction with a Pt 5.1 scheme will incur the costs of preparing a prospectus. In some cases, offerors may incur the costs of applying for relief from the prospectus requirement where they do not qualify for class order relief.

Costs to investors

85. Investors will not have the benefit of prospectus level disclosure where they receive securities they had an indirect exposure to through the company, although the capital reduction may involve an offer that would otherwise require a prospectus under Ch 6D.

Costs to ASIC

86. ASIC may receive applications for case-by-case relief where capital reductions involve an offer of securities but are not covered by the class order. ASIC will incur costs in terms of staff time in assessing these applications, however it is not expected there will be many such applications given there was only one capital reduction involving securities as consideration being conducted by a listed company in 2005 to ASIC's knowledge.

Option 3 – Require prospectuses in all capital reductions involving an offer that is subject to the prospectus requirement but grant relief on a case-by-case basis where appropriate

Benefits to industry

87. This option does not provide any benefits to industry.

Benefits to investors

88. Members will have the benefit of prospectus disclosure in all such capital reductions where it is appropriate.

Benefits to ASIC

89. ASIC will save the costs in terms of staff time to prepare a class order.

Costs to industry

90. Offerors in capital reductions will incur the costs of preparing a prospectus or in some cases of applying for case-by-case relief from the prospectus requirement.

Costs to investors

91. This option does not involve any direct costs for investors. Investors will rely on ASIC to ensure relief is given where a prospectus is not necessary or appropriate given the effect of the capital reduction on members.

Costs to ASIC

92. This option would only marginally increase the number of prospectuses for ASIC to process and perform compliance checks on, as well as applications for case-by-case relief from the prospectus requirement (based on only one capital reduction involving securities as consideration being conducted by a listed company in 2005 to ASIC's knowledge).

Issue 1(c): Disclosure in reconstructions where there is no change to the underlying business

Note: This issue only needs to be considered if option 1 in relation to Issue 1 is adopted. Accordingly, the costs and benefits identified are costs and benefits of each option given that option 1 in relation to Issue 1 is adopted.

Option 1 – Provide class order relief from the prospectus requirement for reconstructions where there is no change to the underlying business or assets

Benefits to industry

93. Offerors would save the costs of preparing a prospectus in such circumstances.

Benefits to investors

94. This option will save investors the time of reviewing a prospectus in circumstances where they are not making an investment decision.

Benefits to ASIC

95. This option will result in fewer prospectuses for ASIC to process and perform compliance checks on, as well as not having to assess applications for this relief on a case-by-case basis.

Costs to industry

96. This option will not result in any direct costs to offerors.

Costs to investors

97. Given the variety and complexity of reconstructions, this option may result in investors effectively making investment decisions without the benefit of the standard of disclosure and investor protection deemed appropriate by the legislature.

Costs to ASIC

98. ASIC would need to utilise resources to research the characteristics of such reconstructions in order to frame suitable conditions for the relief to prevent its misuse. This may involve some consultation with affected parties. Given the variety and complexity of reconstructions, it will be difficult to ensure no reconstruction qualifies for prospectus relief where prospectus disclosure would be desirable without making the relief too restrictive.

Option 2 – Provide case-by-case relief for reconstructions where there is no change to the underlying business or assets

Benefits to industry

99. Offerors would have the option of applying for relief from the prospectus requirement. In applying, offerors would have the benefit of published ASIC policy to determine the chances of success and to ensure their application deals with relevant considerations.

Benefits to investors

100. This option will allow ASIC to ensure investors receive a prospectus where ASIC believes they are making an investment decision when voting on a reconstruction, but where no investment decision is involved investors will be saved the time of reading a

prospectus and from possible confusion over why a prospectus is being provided where no investment decision is being made.

Benefits to ASIC

101. Having published policy on when ASIC will grant case-by-case relief should ensure ASIC receives better applications and only in circumstances where relief may be appropriate. This means ASIC will take less time to assess applications and will also have published policy by which to assess such applications.

102. This option will also save ASIC having to frame a detailed class order where there is uncertainty over its reach and the purposes behind conducting such reconstructions.

Costs to industry

103. Offerors would incur the costs of applying for relief from the prospectus requirement. Compared to option 1, it is possible ASIC would not grant some offerors relief although they might have qualified under a class order. Those offerors would incur the costs of preparing a prospectus.

Costs to investors

104. This option involves no direct costs to investors. Investors would be relying on ASIC to ensure they receive a prospectus only when they are making an investment decision, and on offerors to apply for relief in appropriate circumstances.

Costs to ASIC

105. ASIC will need to utilise resources to assess applications for case-by-case relief and initially to research such reconstructions in order to set out the circumstances in which it may grant such relief in the new policy statement.

Option 3 – Provide no relief where there is no change to the underlying business or assets

Benefits to industry

106. This option provides no benefits to industry.

Benefits to investors

107. Investors will have the benefit of a prospectus in all reconstructions (subject to other relief).

Benefits to ASIC

108. ASIC will not need to utilise further resources in framing and publishing policy on such reconstructions, and will likely have very few applications for relief to assess in the absence of published policy.

Costs to industry

109. Offerors will incur the cost of preparing a prospectus in all reconstructions (subject to other relief).

Costs to investors

110. Investors will receive a prospectus in circumstances where they may not be making an investment decision, which may result in unnecessary time spent reading a prospectus or possible confusion over why a prospectus is being provided.

Costs to ASIC

111. This option involves no direct costs to ASIC.

Issue 2: Inconsistent treatment of Pt 5.1 schemes

Option 1 – Grant class order relief to Pt 5.1 schemes from the PDS requirement

Benefits to industry

112. Entities conducting Pt 5.1 schemes involving the issue of interests will save the cost of preparing a PDS. For the purposes of this RIS, it is assumed the costs of preparing and distributing a PDS are similar to the costs of preparing and distributing a prospectus, in the range from \$200,000 to \$500,000 (see paragraph 43).

Benefits to investors

113. Investors will benefit from consistency between the application of the PDS provisions and the prospectus provisions to Pt 5.1 schemes, and will be saved the time reading a PDS in circumstances where their disclosure and protection needs are met by the process for Pt 5.1 schemes.

Benefits to ASIC

114. ASIC will save resources because it will have less PDSs to process and perform compliance checks on.

Costs to industry

115. This option involves no direct costs to industry.

Costs to investors

116. Investors who receive interests under a Pt 5.1 scheme will not receive PDS disclosure.

Costs to ASIC

117. This option involves no direct costs to ASIC.

Option 2 – Maintain the status quo

Benefits to industry

118. This option involves no benefits to industry.

Benefits to investors

119. Investors who receive interests under a Pt 5.1 scheme will have the benefit of a PDS.

Benefits to ASIC

120. This option involves minimal costs to ASIC in terms of staff time to prepare a class order.

Costs to industry

121. Entities conducting Pt 5.1 schemes involving the issue of interests will incur the cost of preparing a PDS. Entities may also incur the cost of applying for relief from the PDS provisions, either from the requirement to prepare a PDS or for technical relief if option 1 in relation to Issue 1 is not adopted (such as the requirement to have an application form).

Costs to investors

122. Investors may receive unnecessary disclosure in the PDS where there is already a disclosure requirement for Pt 5.1 schemes that Parliament has determined is an adequate basis for investment decisions (as shown by the exemption for Pt 5.1 schemes from the prospectus requirement in s708(17)).

Costs to ASIC

123. Compared to option 1, this option will result in additional costs to ASIC because it will have more PDSs to process and perform compliance checks on.

Consultation

124. ASIC released a policy proposal paper (PPP) on 6 July 2005 inviting comments from interested parties on this proposed policy. ASIC received three submissions in response to the PPP – from the Law Council of Australia, an Australian law firm and a UK law firm. The submission from the UK law firm responded only to the part of the PPP relating to foreign schemes. The submission from the Australian law firm was consistent with the submission from the Law Council.

125. The Law Council agreed with ASIC's aim of seeking to impose additional disclosure obligations in reconstructions to promote investor protection. However, the Law Council did not agree with ASIC's view that an invitation to vote on the issue of securities at a reconstruction meeting constitutes an offer for the purposes of Ch 6D of the Act.

126. The Law Council's view applies a strict contractual meaning to the term "offer" in Ch 6D. However, it has been established that "offer" in Ch 6D is significantly broader (*Attorney-General for New South Wales v Australian Fixed Trusts Ltd* (1974) 1 NSWLR 110). Further, it is clear the legislative intent of the prospectus requirement is that "all issues, offers and invitations with respect to securities other than those which are specifically excluded, are to be made pursuant to a prospectus" (Corporations Bill 1988 (Cth)). A broad interpretation of "offer" as proposed in this RIS ensures reconstructions and capital reductions involving the issue (or transfer) of securities, although not involving an "offer" in the contractual sense, are subject to the prospectus requirement as Parliament intended.

127. The Law Council supported the various types of relief proposed in the PPP, in many instances supporting broader relief than ASIC proposed. For example:

- favouring class order relief for foreign schemes of arrangement from specified jurisdictions, including analysing regulatory requirements in significant jurisdictions to determine if they provide adequate disclosure and protection for investors (class order relief is now proposed in this RIS);
- extending proposed relief from the unsolicited offers provisions (Div 5A of Pt 7.9 of the Corporations Act) to reconstructions where there is no change to the underlying business or assets (this relief may be considered on a case-by-case basis along with relief from the prospectus requirement); and

- extending proposed technical relief to foreign schemes of arrangement to the extent relevant (technical relief is now proposed for any prospectus issued with an invitation to vote on a reconstruction or capital reduction, and so will cover foreign schemes).

128. The submission from the UK law firm strongly supported class order relief from the prospectus provisions for UK schemes. The submission argued the requirement to prepare a prospectus in addition to complying with UK regulation would operate to deny Australian shareholders direct participation in such transactions on the same basis as UK shareholders. This submission also proposed granting similar relief to UK takeovers, but that is beyond the scope of the proposed policy.

Conclusion and recommended options

Issue 1: Ensuring adequate disclosure in reconstructions and capital reductions

129. The preferred option is Option 1 – Require a prospectus for reconstructions and capital reductions involving the issue (or transfer) of securities. Option 1 best serves the objectives of ensuring adequate disclosure and investor protection in reconstructions and aligning published policy with ASIC's interpretation that an invitation to vote at a meeting that results in members being issued or transferred securities is an 'offer' for the purposes of Ch 6D of the Corporations Act.

130. By adopting an approach of requiring prospectuses in reconstructions and capital reductions involving an offer of securities, with class order relief in some circumstances and clear policy for case-by-case relief in others, option 1 is consistent with the development of the prospectus provisions, intended as they were to require prospectuses for all issues of securities unless specifically exempt.

131. Option 1 also involves providing class order technical relief for prospectuses issued in a reconstruction. Previously, entities issuing a prospectus in connection with a reconstruction have applied for technical relief from certain provisions of the Ch 6D (such as the requirement that a prospectus be accompanied by an application

form). Option 1 will facilitate adequate disclosure in reconstructions without the need to apply for relief in ordinary circumstances.

132. Because of the on-sale prohibition, ASIC does not expect option 1 will result in additional disclosure, and therefore additional costs, in ordinary circumstances. Even when compared to situations where the offeror would not have had to prepare a prospectus previously, much of the cost of preparing a prospectus would have been incurred in preparing an explanatory statement. In conjunction with the other preferred options, option 1 (and the associated technical relief) should result in fewer applications for relief because entities will have clear guidance on when a prospectus is required and when relief is appropriate.

133. Responses to the PPP suggested option 1 would have a significant impact on foreign schemes. Unlike entities conducting trust schemes, entities conducting foreign schemes have relied on [PN 40] and not prepared prospectuses. These entities are not concerned by the on-sale prohibition because section 700(4) of the Corporations Act provides that Ch 6D applies to offers received in this jurisdiction. Arguably, transactions on foreign exchanges do not fall within the coverage of Ch 6D in ordinary circumstances, despite a counterparty being resident in Australia. Accordingly, there is a risk entities conducting foreign schemes will 'cash-out' Australian security holders if option 1 is adopted. The exemption for schemes in jurisdictions known to have the same level of disclosure and investor protection as Pt 5.1 of the Act will avoid Australian holders being cashed out in the majority of foreign schemes whilst maintaining a sufficient level of disclosure.

134. Option 2 would not ensure adequate disclosure and investor protection in reconstructions and capital reductions involving offers of securities. Although some entities (for example an entity conducting a foreign scheme or capital reduction where prospectus relief is refused) would incur the costs of preparing a prospectus under option 1 but not under option 2, it is accepted by Parliament that where appropriate the costs to an offeror of preparing a prospectus are justified given the benefits to investors of having prospectus disclosure and the protection provided by Ch 6D of the Act.

135. If option 2 were adopted, prospectus disclosure in reconstructions would continue to depend upon whether entities conducting reconstructions were concerned to avoid the on-sale prohibition. ASIC would have no role in ensuring adequate disclosure in those circumstances, including most, if not all, foreign schemes. Adopting option 2 would not provide clarity for disclosure in reconstructions where entities do wish to avoid the on-sale prohibition

and would result in more applications for relief from the prospectus provisions, including technical relief, than under option 1.

Issue 1(a): Disclosure in foreign schemes

136. The preferred option is Option 1 – Provide class order relief from the prospectus requirement for foreign schemes of arrangement in certain jurisdictions, and provide case-by-case relief for foreign schemes of arrangement in other jurisdictions that provide adequate disclosure and investor protection. Option 1 will reduce the risk that entities conducting foreign schemes (in the listed jurisdictions) will 'cash-out' Australian security holders to avoid the expense of either or both of preparing a prospectus and applying for relief on a case-by-case basis. Option 1 will effectively maintain the status quo for entities in listed jurisdictions. Option 1 will also establish a framework that will allow additional jurisdictions to be added to the class order if it is established their regulation of schemes provides adequate disclosure and investor protection. Note that whatever option is preferred in relation to Issue 2 will also apply to foreign schemes covered by class order relief under this Option 1.

137. Option 2 would require entities conducting foreign schemes to make complex applications for relief in circumstances where it is clear the regulation of schemes in their jurisdiction includes the essential characteristics of Pt 5.1 of the Corporations Act. It might also result in some entities preferring to cash-out Australian holders rather than applying for relief or preparing a prospectus. This would be more so the case if Option 3 were adopted.

Issue 1(b): Disclosure in capital reductions

138. The preferred option is Option 3 – Require prospectuses in all capital reductions involving an offer that is subject to the prospectus requirement but grant relief on a case-by-case basis where appropriate. This option strikes a balance between the costs to business of preparing prospectuses in capital reductions and the benefits to investors of prospectus grade disclosure where securities are offered as consideration in a capital reduction. It is appropriate to only give relief on a case-by-case basis because where a capital reduction involves securities as consideration, it is usually a part of a larger transaction. Class order relief might lead to members receiving securities in capital reductions without Ch 6D disclosure where it would be appropriate for a prospectus given the effect of the total transaction on the overall investment of members.

139. There may be capital reductions where shareholders are not making a new investment decision by voting and so a prospectus is not necessary. Entities will need to apply for this relief and ASIC will be able to ensure that relief is only given where appropriate. The cost of these applications will be significantly less than the costs of preparing and distributing a prospectus.

Issue 1(c): Disclosure in reconstructions involving no change to the underlying business

140. The preferred option is Option 2 – Provide case-by-case relief for reconstructions where there is no change to the underlying business or assets.

141. Option 2 will most likely result in adequate disclosure and protection for investors. Option 2 allows ASIC to set out its policy on relief for reconstructions that do not involve a change in the underlying business or assets, giving some clarity to when a prospectus may not be required. Considering relief on a case-by-case basis also allows ASIC to grant relief on conditions appropriate to specific of circumstances in order to ensure adequate disclosure is made.

142. Option 1 would require ASIC to frame a class order where it may not be appropriate to do so. Reconstructions are complex, unique transactions that may not always fall within a defined set of circumstances. Accordingly, giving class order relief might result in investors not receiving a prospectus in circumstances where it would be appropriate for there to be prospectus disclosure (i.e. they are making an investment decision).

143. Option 3 will result in unnecessary disclosure where members do not need or want prospectus level disclosure as they are not asked to make a new investment decision.

Issue 2: Inconsistent treatment of Pt 5.1 schemes

144. The preferred option is Option 1 – Grant class order relief from the PDS requirement to Pt 5.1 schemes. The legislature has determined that Pt 5.1 schemes provide an adequate mechanism for disclosure and investor protection in relation to the issue or transfer of securities, as shown by their exemption from the prospectus requirement (s708(17)). There is no reason to require additional disclosure where an interest, rather than a security, is offered in a Pt 5.1 scheme. Members will receive sufficient disclosure and protection through the Pt 5.1 scheme process. This Option and its rationale

applies equally to foreign schemes where class order relief from the prospectus requirement is available under Option 1 in relation to Issue 1(a).

Implementation and review

Implementation

145. ASIC will implement the preferred options by revoking [PN 40] and releasing a Policy Statement on disclosure in reconstructions. The following instruments will supplement the Policy Statement:

- a class order providing relief from the prospectus requirement for entities conducting schemes in certain jurisdictions where the regulation of schemes includes the essential characteristics of Pt 5.1 of the Corporations Act;
- class orders providing technical relief from the prospectus provisions for all prospectuses issued in connection with a reconstruction or capital reduction; and
- a class order providing relief from the PDS provisions for entities conducting Pt 5.1 schemes and foreign schemes in certain jurisdictions where the regulation of schemes includes the essential characteristics of Pt 5.1 of the Corporations Act.

146. The Policy Statement will set out ASIC's policy on providing case-by-case relief from the prospectus provisions for entities conducting:

- reconstructions where there is no change to the underlying business or assets;
- foreign schemes that contain the same essential characteristics as Pt 5.1 schemes or otherwise provide for adequate disclosure and investor protection; or
- capital reductions.

Review

147. ASIC will monitor compliance with the Policy Statement and use of the class orders.

148. In assessing the impact and progress of this policy, ASIC will take into consideration:

- trends regarding reconstruction and capital reductions;
- the types and number of applications for relief from the disclosure requirements we receive (and the circumstances and frequency in which that relief is granted); and
- feedback from industry and consumer groups.