



ASIC

Australian Securities & Investments Commission

CONSULTATION PAPER 67

Disclosure in reconstructions

July 2005

Your comments

You are invited to comment on the proposals and issues for consideration in this paper, including the explanation sections.

We will not treat your submission as confidential unless you specifically request that we treat the whole or part of your submission as confidential.

Comments are due by Friday 19 August and should be sent to:

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Important note: The proposals, explanations and examples in this paper do not constitute legal advice. We encourage you to seek your own professional advice to find out how the Corporations Act applies to you. It is your responsibility to determine your obligations under the Corporations Act and regulations. The proposals, explanations and examples in this paper are at a preliminary stage only. Our conclusions and views may change as a result of the comments we receive or as other circumstances change.

Examples in this paper are purely illustrative; they are not exhaustive and are not intended to impose or imply particular rules or requirements.

What this paper is about

1 This policy proposal paper sets out our proposals on whether a prospectus is needed in a reconstruction and a Product Disclosure Statement is needed in a scheme of arrangement.

Note: 'Reconstructions' in this paper are transactions that are not formal schemes of arrangement under Part 5.1 of the Corporations Act 2001 (the Act), but are similar to them. A foreign scheme of arrangement or a trust scheme is a reconstruction.

2 The release of this paper has been prompted by the increasing trend for entities to engage in reconstructions (such as stapling transactions), which are effected through trust schemes.

Note: Trust schemes are reconstructions that involve the issue of securities or interests in managed investment schemes (interests) to members of managed investment schemes as a result of a vote of the members.

3 This policy proposal paper outlines:

- (a) the requirement for a prospectus to accompany an invitation to vote on an issue of securities at a reconstruction meeting (**Section A**).
- (b) what relief we propose from compliance with technical requirements under Ch 6D and Part 7.9 in reconstructions (**Section B**).
- (c) what relief we propose from the requirement to prepare a PDS where interests are issued under a Part 5.1 scheme of arrangement (**Section C**).

4 The issue of prospectuses for reconstruction meetings is currently dealt with in Practice Note 40 *Reconstruction Meetings* [PN 40]. Our review of [PN 40] follows substantial amendments to the Act since the practice note was first published in 1993. These changes mean that the approach in [PN 40] that notices of reconstruction meetings do not amount to 'offers' attracting the prospectus provisions is of limited use to offerors of securities. We propose to replace [PN 40] with a policy statement following consultation.

Policy proposals

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A. Prospectuses in reconstructions

Policy proposal	Your feedback
<p>Prospectus is required</p> <p>A1 An invitation to vote on the issue of securities at a reconstruction meeting amounts to an ‘offer’ for the purposes of Ch 6D. Therefore, the notice of meeting must be accompanied by (or form part of) a prospectus prepared by the offeror of the securities.</p> <p>Prospectus relief</p> <p>A2 We propose case-by-case prospectus relief where the offer is made under a foreign scheme of arrangement subject to regulation which has the same essential characteristics (in terms of member approval, disclosure and court oversight) as an Australian scheme under Pt 5.1.</p>	<p>A1Q1 Does compliance with our proposed policy cause any practical difficulties (note that s707(3) would require a prospectus for on-sale anyway)?</p> <p>A1Q2 Does the requirement for the prospectus to be prepared by the offeror of the securities cause practical difficulties where the offeror is different from the entity convening the meeting (e.g. in a stapling effected by trust scheme)?</p> <p>A2Q1 Does this relief raise any investor protection issues? Please provide reasons.</p> <p>A2Q2 Are the requirements applying to the foreign scheme of arrangement relief appropriate? Please provide reasons.</p> <p>A2Q3 Should we grant class order (rather than case-by-case) relief for foreign schemes of arrangement that meet these requirements (e.g. governed by United Kingdom or Hong Kong law)?</p>

Policy proposal	Your feedback
<p>A3 We propose to grant this relief from:</p> <ul style="list-style-type: none"> (a) Parts 6D.2 and 6D.3 for offers contained in a notice of meeting to vote on the issue of securities in a reconstruction; and (b) the requirement under s707(3) to prepare a prospectus for the on-sale of securities issued as a result of that reconstruction meeting. 	<p>A3Q1 In addition, should we grant case-by-case prospectus relief where the reconstruction does not involve a change in the underlying assets or business of the entity in which the recipient of securities currently holds financial products (e.g. where a managed investment scheme converts to a company).</p> <p>A3Q2 If not, would you support relief so that the issuer could prepare a prospectus that complied with the disclosure requirements in s713 as opposed to a full prospectus?</p> <p>A3Q3 Do many changes of form involve a change to the underlying business e.g. because of different tax treatment?</p> <p>A3Q4 Are there other useful examples of reconstructions that do not change the underlying business?</p> <p>A3Q5 If you do not support any disclosure relief where there is no change in the business, please provide details of the information you would expect to be included in a prospectus.</p>

Explanation

1 This section only concerns reconstructions where securities are offered as consideration.

Why are we reviewing our policy?

On-sale prohibition: s707(3)

2 Practice Note 40 does not address the on-sale prohibition in s707(3). Under s707(3), recipients of securities that are issued without a prospectus must prepare one if they wish to sell those securities within 12 months of their issue. This requirement is significantly different from the form of on-sale prohibition in force when [PN 40] was first published (old s1030 of the *Corporations Law*).

PDS requirements

3 The introduction of PDSs under the financial services reform regime means that the position under [PN 40] for securities issued as a result of a reconstruction meeting is inconsistent with the position for interests in a managed investment scheme.

4 This is because the Act requires 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: s1012B. In contrast, the prospectus provisions only apply to 'offers' of securities. An issue of interests under a reconstruction requires a PDS regardless of whether an invitation to vote at the reconstruction meeting is an 'offer'.

5 This inconsistency is particularly stark in reconstructions involving the stapling of interests in a managed investment scheme to shares in a company. Our proposed policy will align the position for securities issued as a result of a vote at a reconstruction meeting with that for interests issued in the same manner.

Advantages of a prospectus

6 From an investor protection standpoint, there are a number of advantages involved in the offeror preparing a prospectus (rather than preparing an explanatory memorandum). These include:

- (a) the offeror must lodge the prospectus with us;
- (b) a statutory disclosure test applies to the offeror;
- (c) there is a statutory obligation to update the prospectus;
- (d) we are 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

7 Lodgment of a prospectus also gives the offeror the opportunity to take advantage of the ‘due diligence’ defence under s731.

Prospectus is required

What is an ‘offer’ requiring a prospectus?

8 It is our view that an invitation to vote on the issue of securities at a reconstruction meeting constitutes an ‘offer’ for the purposes of Ch 6D. This means the invitation must be accompanied by a prospectus.

9 ‘Offering securities’ for issue or sale for the purposes of Ch 6D ‘includes inviting applications for the issue [or sale] of the securities’: s700(2). The term ‘offer’ extends beyond a purely contractual meaning.

Note: See *Attorney-General for New South Wales v. Australian Fixed Trusts Ltd* [1974] 1 NSWLR 110 (the *Australian Fixed Trusts* case); *The Mutual Home Loans Fund of Australia Ltd v. Attorney-General for New South Wales* (1973) 130 CLR 103; *Amadio Pty Ltd and Anor v. Henderson and Ors* (1998) BC 9803177.

10 In the *Australian Fixed Trusts* case, Street CJ found that the words ‘offer to the public for subscription or purchase or invite the public to subscribe for or purchase any interest’ encompassed ‘any solicitation of the public to enter into a course of negotiations calculated to result in the issue of an interest’. The issue of a notice of meeting amounts to a solicitation of the public to enter into a process (the member approval process) designed to result in the issue of securities.

11 There is a counter argument to our view. This is that there is no ‘offer’ involved in the issue of securities as a result of a vote at a reconstruction meeting, as there are no contractual relations between the recipient and the offeror on an individual level. It is possible that an individual will be issued with securities even if that person did not vote in favour of the issue. However, the cases which are most often cited in favour of this argument considered the meaning of the term ‘offer’ in a different context to the fundraising provisions: *Re the Bank of Adelaide* (1979) 4 ACLR 393; *Re Wallace Dairy Co Ltd* [1980] VR 588. They focused on the different issue of whether there was an ‘offer’ which would trigger the application of the takeover provisions.

Prospectus relief

Foreign schemes of arrangement

12 Our proposed relief for foreign schemes of arrangement is based on:

- (a) the prospectus exemptions for offers of securities made under an Australian scheme of arrangement: s708(17); and
- (b) on-sale relief for such securities under Class Order [CO 04/671] *Disclosure for on-sale of securities and other financial products*.

13 This relief is consistent with an example of a reconstruction given in [PN 40] where no prospectus is required. In this example, ABC plc proposes a scheme of arrangement under the *Companies Act 1985* (UK) under which shares would be issued to the creditors of ABC plc including certain debenture holders in Australia: [PN 40.1].

14 A key aspect of our proposed relief is the requirement that the regulation of the scheme in the foreign jurisdiction has the same essential characteristics (in terms of member approval, disclosure and court oversight) as Pt 5.1 requires for Australian schemes. Under Pt 5.1:

- (a) the company must distribute an explanatory memorandum and scheme documents to members;
- (b) there is court oversight of the content of the explanatory memorandum, the content of scheme documents and the member approval process; and
- (c) the members of the company must approve the scheme.

15 Examples of jurisdictions that share these characteristics are the United Kingdom and Hong Kong.

No change to business

16 We are considering whether we should grant case-by-case relief where the reconstruction does not involve a change in the underlying assets or business of the entity. Any relief would be restricted to changes in the form rather than the substance of the entity. The basis of any relief would be that the issue of the securities would not involve a new investment decision for the member.

17 Examples of such reconstructions are:

- (a) when a managed investment scheme converts into a company; or
- (b) a stapling transaction where the underlying assets or business do not change.

B. Technical relief in reconstructions

Policy proposal	Your feedback
<p>B1 We propose to grant class order relief for trust schemes from compliance with technical requirements under Ch 6D and Pt 7.9. This relief affects reconstructions where:</p> <ul style="list-style-type: none"> (a) securities are offered as consideration (see policy proposal paragraphs B3, B5 and B9); and (b) interests in managed investment schemes are offered as consideration (see policy proposal paragraphs B4, B6–B9). <p>B2 We propose that relief from the unsolicited offers provisions (Division 5A of Part 7.9) will apply to certain foreign schemes of arrangement as well as trust schemes (see policy proposal paragraph B9-B10).</p> <p>No application form with prospectuses</p> <p>B3 We propose to grant class order relief from s723(1), so that an offeror of securities can omit an application form from a prospectus in a trust scheme.</p> <p>No application form with a PDS</p> <p>B4 We propose to grant class order relief from s1016A(2), so that an offeror of interests can omit an application form from a PDS in a trust scheme.</p>	<p>B2Q1 Should the class order apply to any other types of reconstructions? Please provide details.</p> <p>B2Q2 Should the entire class order apply to foreign schemes of arrangement? If so, in what circumstances would an entity conducting a foreign scheme prepare a prospectus or PDS?</p>

Policy proposal	Your feedback
<p>Post-lodgment advertising and publicity</p> <p>B5 We propose to grant class order relief from s734(6)(b) so that advertisements or publications about an offer do not need to state that persons wishing to acquire the securities must complete an application form. This relief only applies to advertising or publicity after a prospectus has been lodged with us.</p> <p>PDS labelling</p> <p>B6 We propose to grant class order relief from s1013B(1), so that a PDS issued in a trust scheme can be entitled ‘Explanatory Memorandum’.</p> <p>B7 This relief would only be available where the PDS is in a document that includes other information about the trust scheme, such as a notice of meeting or prospectus.</p> <p>PDS distribution</p> <p>B8 We propose to grant class order relief from s1015C(1)(a), so that a PDS in a trust scheme can be sent to the address of the recipient of interests as it appears in a register of members.</p> <p>B9 We propose to grant class order relief from the application of Div 5A of Pt 7.9 to the offer of securities or interests in managed investment schemes as consideration in a trust scheme.</p>	<p>B5Q1 Should this relief be extended to advertising and publicity before the prospectus has been lodged? Please provide reasons.</p> <p>B5Q2 Does this relief raise any investor protection issues? Please provide reasons.</p> <p>B7Q1 Should our relief cover any other circumstances? Please provide reasons.</p> <p>B8Q1 Are there any occasions in a trust scheme where a PDS could be issued to a person who is not a member of the managed investment scheme? Please provide details.</p> <p>B9Q1 Should this relief be extended to the offer of any other financial products as consideration? Please provide details and reasons.</p>

Policy proposal	Your feedback
<p>Unsolicited offers</p> <p>B10 This relief will also cover foreign schemes of arrangement where:</p> <ul style="list-style-type: none">(a) the offer is made in connection with a compromise or arrangement, between a foreign corporation and its creditors or any class of them or its members or any class of them, which is subject to court approval; and(b) the compromise or arrangement is conducted in the jurisdiction of an approved foreign market.	<p>B10Q1 Is the scope of foreign schemes of arrangement that will have the benefit of this relief too wide or too narrow?</p>

Explanation

1 Most of the proposed relief in this section has previously been granted by ASIC on a case-by-case basis.

2 We propose that the entire class order applies to a trust scheme (where members of managed investment scheme are invited to vote on a transaction that would result in the issue to them of interests or securities in another entity).

3 We propose that relief from Division 5A of Part 7.9 will apply to certain foreign schemes of arrangement as well as trust schemes (see paragraphs 13 and 14 below).

No application form with prospectuses

4 Under s723(1), if a prospectus must accompany an offer of securities, those securities may only be issued in response to an application form. Application forms will generally not be completed (or included in prospectuses) where securities are issued as a result of a vote at a reconstruction meeting.

No application form with a PDS

5 Section 1016A(2) imposes the same requirement as s723(1), but in the context of the issue of interests which must be accompanied by a PDS. Similarly, application forms will generally not be completed (or included in a PDS) where interests are issued as a result of a vote at a reconstruction meeting.

Post-lodgment advertising and publicity

6 Section 734(6) permits advertising and publicity for an offer following the lodgment of a prospectus, provided that the advertisement or publication states that:

- (a) offers of the securities will be made in, or accompanied by, the prospectus; and
- (b) anyone wishing to acquire the securities will need to complete the application form in, or accompanying, the prospectus.

7 As application forms will generally not be completed (or included in prospectuses) in trust schemes, we propose to grant relief from the requirement to include the statement in paragraph (b) above.

PDS labelling

8 Section 1013B(1) requires the title 'Product Disclosure Statement' to be used on the cover of, or near the front of, a PDS. We understand that

entities conducting a trust scheme will often seek to issue one document which includes the PDS as well as certain other information relevant to the trust scheme (e.g. information on how to vote at the meeting or a prospectus). Calling this composite document a 'Product Disclosure Statement' could be confusing to investors. It is more appropriate for the document to be entitled 'Explanatory Memorandum'.

PDS distribution

9 Under s1015C(1)(a), a PDS must either be given to a person or their agent personally, or sent to the person or their agent at an address or fax number nominated by the person or the agent.

10 A PDS in a trust scheme will generally only be sent to a person who already owns interests in the managed investment scheme. We believe that in this situation, sending the PDS to the address of the member in the members' register is an adequate substitute for contacting each member to ascertain their nominated address.

Unsolicited offers

11 Division 5A of Part 7.9 regulates unsolicited offers to purchase a financial product. We believe that the offer of securities or interests as consideration in a trust scheme or foreign scheme of arrangement could fall within this Division.

12 These provisions establish a disclosure regime. However an offer in a reconstruction will (subject to any applicable ASIC relief) be accompanied by a prospectus or PDS.

13 The relief will be available to foreign schemes of arrangement where:

- (a) the offer is made in connection with a compromise or arrangement, between a foreign corporation and its creditors or any class of them or its members or any class of them, which is subject to court approval; and
- (b) the compromise or arrangement is conducted in the jurisdiction of an approved foreign market.

14 For the purposes of paragraph 13(b), the relevant jurisdictions are: United States of America, Germany, Netherlands, Italy, Republic of South Africa, Malaysia, United Kingdom, New Zealand, Singapore, Hong Kong, Switzerland, Japan and Canada.

Note 1: This relief will cover a wider range of foreign schemes of arrangement than the full, prospectus disclosure relief in policy proposal paragraph A2 above.

Note 2: The list of “approved foreign markets” for the purposes of paragraph 13(b) can be found in *Class Order 02/259 – Downstream acquisitions: foreign stock markets*. The use of the “approved foreign market” concept as a basis of providing disclosure relief is consistent with *Class Order 00/185 – Foreign Securities and Corporations Regulation* 1.2A.02.

C. PDS relief in schemes of arrangement

Policy proposal	Your feedback
<p>C1 We propose to grant class order relief from the application of Part 7.9 for:</p> <ul style="list-style-type: none"> (a) the offer and issue of interests as consideration under a Part 5.1 scheme of arrangement; and (b) the on-sale of those interests. 	<p>C1Q1 Is there any information which would otherwise be included in a PDS which would not be included in a Part 5.1 explanatory memorandum in these circumstances?</p>

Explanation

1 This section only concerns the offer and issue of interests as consideration under a Part 5.1 scheme of arrangement.

Alignment of disclosure

2 This proposed relief aligns the disclosure requirement for the offer or issue of interests as consideration under a Part 5.1 scheme of arrangement with the disclosure requirement for the offer of securities in the same context.

3 Our proposed relief is based on:

- (a) the prospectus exemption for offers of securities made under a Part 5.1 scheme of arrangement:s708(17); and
- (b) on-sale relief for such securities in [CO 04/671].

4 The basis of the above relief is that the combination of court oversight, member participation and disclosure in a Part 5.1 scheme of arrangement renders the application of the prospectus requirement unnecessary. However, there is no equivalent statutory relief from the application of the disclosure requirements in Pt 7.9 to the offer or issue of interests as consideration under a Part 5.1 scheme of arrangement.

Regulatory and financial impact

1 We have considered the regulatory and financial impact of the policy proposals in this paper. Based on the information that we currently have, we believe that our proposals strike an appropriate balance between facilitating commercial activity and investor protection.

2 To ensure that we have achieved an appropriate balance, we are also developing a Regulation Impact Statement (RIS). All RISs are submitted to the Office of Regulation Review. The RIS will identify the alternative options that could achieve our objectives. The RIS will also include analysis of the benefits and costs of each of the options.

Important details sought from you

3 So that we can more fully assess the financial and regulatory impact of our proposals, in seeking your views, we specifically invite you to comment on:

- (a) possible options that would achieve our objectives; and
- (b) the likely financial impact of the proposals. In particular, give consideration to the costs and benefits of these proposals. Where possible, we are seeking both quantitative and qualitative data.

Any comments that we receive will be taken into account when preparing our RIS.

Development of policy proposals

We have developed this policy proposal paper based on:

- (a) applications we have received; and
- (b) issues that have been raised about the types of reconstructions that are being effected through resolutions at meetings (in particular, those which are effected by way of trust schemes).

We have also considered:

- (a) our policy under [CO 04/671]; and
- (b) relevant case law.

Note: See Attorney-General for New South Wales v. Australian Fixed Trusts Ltd [1974] 1 NSWLR 110, The Mutual Home Loans Fund of Australia Ltd v. Attorney-General for New South Wales (1973) 130 CLR 103, Amadio Pty Ltd and Anor v. Henderson and Ors (1998) BC 9803177, Re the Bank of Adelaide (1979) 4 ACLR 393, Re Wallace Dairy Co Ltd [1980] VR 588.

Key terms

In this policy proposal, terms have the following meaning:

Act The *Corporations Act 2001* including regulations made for the purposes of the Act.

[CO 04/671] ASIC Class Order 04/671 *Disclosure for on-sale of securities and other financial products*.

interest An interest in a managed investment scheme.

Part 5.1 scheme of arrangement A scheme of arrangement conducted under Part 5.1 of the Act.

PDS Product Disclosure Statement.

[PN 40] ASIC Practice Note 40 *Reconstruction Meetings*.

Trust scheme An arrangement between a responsible entity of a managed investment scheme and its members where the members are invited to vote on certain matters including the issue to them of interests or securities in another entity.

What will happen next?

Stage 1

July 2005

Policy proposal paper released

Stage 2

19 August 2005

Comments due

Stage 3

November 2005

Policy statement and class order released

Your comments

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We will not treat your submission as confidential unless you specifically request that we treat the whole or part of your submission as confidential.

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