



**ASIC**

Australian Securities & Investments Commission

CONSULTATION PAPER 48

# **CLERP 9: Product disclosure**

April 2004

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### **Your comments**

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

**Comments are due by 18 May 2004 and should be sent to:**

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**You can also contact the ASIC Infoline on 1300 300 630 for information and assistance.**

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# What this policy proposal is about

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1 The Corporate Law Economic Reform Program (Audit Reform and Corporate Disclosure) Bill 2003 (the CLERP 9 Bill) will amend the existing disclosure regimes in Chs 6D and 7 of the *Corporations Act 2001* (the Act).

2 In particular, Schedule 7 of the CLERP 9 Bill:

- (a) amends the disclosure obligations in Ch 6D and in Ch 7 relating to the secondary sale of securities and the indirect issue of financial products, referred to throughout this policy proposal as the ‘secondary sales provisions’;
- (b) amends the Product Disclosure Statement (PDS) requirements in Ch 7 for continuously quoted securities, referred to throughout this policy proposal as the ‘transaction specific PDS provision’;
- (c) provides discretionary powers for ASIC to make a determination that an entity may not rely on the provisions in (a) or (b), as appropriate, referred to throughout this policy proposal as the ‘exclusion powers’; and
- (d) imposes a new obligation about the clear, concise and effective presentation of disclosure documents in Ch 6D, referred to throughout this policy proposal as the ‘presentation requirement’.

Note: Together we refer to these as the CLERP 9 product disclosure provisions.

3 This policy proposal discusses:

- (a) the effect of the CLERP 9 product disclosure provisions on our existing policy statements and practice notes, referred to throughout this policy proposal as ‘policies’ or ‘policy publications’ (**Section A**);
- (b) our approach to the use of the exclusion powers (**Section B**); and
- (c) our approach to monitoring compliance with the presentation requirement (**Section C**).

**4** This paper is part of a series of CLERP 9 policy publications and should be read in conjunction with *Building the CLERP 9 Administrative Framework: Policy to implement the Corporate Law Economic Reform Program (Audit Reform and Corporate Disclosure) Bill 2003—An ASIC guide*, February 2004 (the CLERP 9 Administrative Framework Guide).

**5** We do not expect the CLERP 9 disclosure provisions to commence until 1 July 2004 at the earliest. Clause 1470 of the CLERP 9 Bill provides that Schedule 7 will commence at the time the Bill is enacted and receives Royal Assent. This means the CLERP 9 product disclosure provisions will apply from that date.

**6** ASIC will amend the existing policies referred to in this paper in finalising its policy proposals set out below. Therefore, a final policy statement may not be issued as a result of this paper.

**Important note:** This paper is based on the CLERP 9 Bill as introduced into Parliament on 4 December 2003. It refers to proposed amendments to the Act set out in the CLERP 9 Bill. This paper is not final ASIC policy. The timing and content of ASIC's policy and other publications depends on the timing of the CLERP 9 Bill's progress through Parliament and whether amendments are made to it during the legislative process.

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# Policy proposals

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In this paper we have three sections:

- (a) **Section A** discusses how our pre-CLERP 9 Bill policies will apply to the CLERP 9 product disclosure provisions.
- (b) **Section B** discusses how we will approach use of the exclusion powers.
- (c) **Section C** discusses our approach to monitoring compliance with the presentation requirement.

For each section, we set out the proposals and identify issues we would like you to comment on. Where necessary, we have also included explanations of our proposals.

**Special note:** There may be other issues that you consider important. We are keen to hear from you on our general approach and any other issues you consider important, as well as your answers to our specific questions.

## A Impact on existing policies

Policy proposal	Your feedback
<p><b>Our approach</b></p> <p><b>A1</b> We will continue to apply existing disclosure policies except as set out in this paper.</p> <p><b>Separate reviews</b></p> <p><b>A2</b> We will conduct a separate review of some policies to determine whether further policy guidance is required as a result of significant changes in the CLERP 9 Bill.</p> <p><b>A3</b> Policies we will separately review are:</p> <ul style="list-style-type: none"> <li>(a) Practice Note 66 <i>Transaction specific prospectuses</i> [PN 66]; and</li> <li>(b) Policy Statement 173 <i>Disclosure for on-sale of securities and financial products</i> [PS 173].</li> </ul> <p><b>Secondary sales provisions</b></p> <p><b>A4</b> Pending our review, we will continue our existing class order relief to ensure that products issued to persons under disclosure exemptions may be readily on-sold where:</p> <ul style="list-style-type: none"> <li>(a) the basis for exemption from disclosure for the issue of the financial products extends to the on-sale of the products; and</li> <li>(b) any relief would not erode the anti-avoidance effect of the on-sale provisions.</li> </ul> <p>Note: This relief is discussed in Section C of [PS 173].</p> <p><b>A5</b> From the commencement of the CLERP 9 Bill, with the exception of facilitating the secondary sale of stapled securities, we will no longer provide class order relief where</p>	<p><b>A3Q1</b> Are there any other ASIC policies or guidance that should be separately reviewed as a result of the CLERP 9 disclosure provisions? If yes, what are they and why do they require separate review?</p> <p><b>A4Q1</b> Is there any reason why this relief should not continue permanently? If yes, give reasons.</p> <p><b>A5Q1</b> Is there any reason why this relief should continue? If yes, give reasons.</p>

## Policy proposal

alternative disclosure to a prospectus or PDS is made available to retail clients.

Note: This relief is discussed in Section B of [PS 173].

### **'Stapled' securities**

**A6** The definition of 'quoted securities' in the CLERP 9 Bill does not extend to 'stapled' securities, as only one part of the security is quoted. We will continue to provide relief for these securities on terms similar to cl 708A of the Bill.

Note: We currently provide class order relief for the sale of 'stapled' securities where the other conditions of our class order are met.

### **Transaction specific PDS**

**A7** Pending our review, we will apply Practice Note 66 *Transaction specific prospectuses* [PN 66] (with any necessary adaptations) to the issue of a transaction specific PDS under cl 1013FA of the CLERP 9 Bill.

## Your feedback

**A6Q1** Do you agree with this approach? If not, briefly explain why you disagree and what approach you prefer.

**A7Q1** Is there any reason why we should not apply this policy? If yes, give details.

# Explanation

## Our approach

**1** Our aim is to give certainty to industry by clarifying how our existing policy publications under the Act will apply under the CLERP 9 Bill.

**2** Where necessary, we will amend our existing class orders and execute any new class orders to give effect to our policy proposals and to reflect any incidental changes that are made by the CLERP 9 Bill.

## Separate reviews

**3** We will separately review Policy Statement 173 *Disclosure for on-sale of securities and financial products* [PS 173] and Practice Note 66 *Transaction specific prospectuses* [PN 66] to update them for changes made by the CLERP 9 Bill and other legislative change. Other disclosure policies will continue to apply.

## Secondary sales provisions

**4** Broadly speaking, two types of class order relief are currently granted under [PS 173] and Class Order [CO 02/1180] *Disclosure for on-sale of securities and other financial products*. These are:

- (a) Relief to facilitate cost-effective fundraising in wholesale markets where retail clients have, through some alternative means, the benefit of disclosure comparable to that which might otherwise have been contained in a prospectus or PDS ('disclosure-based relief'). This can occur through disclosure of previously withheld information or prospectus or PDS disclosure made at or after the time of issue of the securities.

Note: See category 1 to 4 (inclusive) of our Class Order [CO 02/1180].

- (b) Relief to ensure that products issued to persons including retail clients under separate disclosure exemptions may be readily on-sold ('exemption-based relief').

Note: See category 5 to 11 (inclusive) of our Class Order [CO 02/1180].

**5** Clause 708A of the CLERP 9 Bill is an exemption from the secondary sale disclosure requirements in s707(3). The Explanatory Memorandum to the CLERP 9 Bill states:



‘The basis of the proposed amendments is that no further disclosure is required where investors have the benefit of information that is comparable to that otherwise available in a prospectus’: para 5.532.

**6** A similar disclosure exemption applies for financial products other than securities under cl 1012DA of the CLERP 9 Bill.

**7** Since cls 708A and 1012DA provide a similar exemption to that previously covered by our disclosure-based relief, we will generally revoke our disclosure-based class order relief. This applies to both disclosure-based relief previously granted where there was disclosure of previously withheld information and also relief where there was prospectus or PDS disclosure at or after the time of issue of a financial product, but before sale. However, we will continue disclosure-based relief for stapled securities.

**8** We will continue our exemption-based class order relief. The Explanatory Memorandum to the CLERP 9 Bill states new cls 708A and 1012DA:

‘...will not inhibit ASIC’s ability to provide relief under its existing exemption and modification powers such as section 741’: para 5.545.

**9** Taking this into account, we will continue our exemption-based relief because:

- (a) the basis for exemption from disclosure for the issue of financial products covered by this exemption extends to the on-sale of the products; and
- (b) any relief should not erode the anti-avoidance effect of the on-sale provisions.

### ***‘Stapled’ securities***

**10** We will continue to provide disclosure-based relief for the sale of stapled securities on terms similar to cl 708A of the CLERP 9 Bill. Relief is required as stapled securities are not included in the definition of ‘quoted securities’ in the CLERP 9 Bill and are therefore not covered by cl 708A. We can see no reason why the provisions in cl 708A should not apply merely because the quoted security offered is stapled to another unquoted financial product.

## B Using the exclusion powers

Policy proposal	Your feedback
<p><b>Our approach</b></p> <p><b>B1</b> We will follow the approach in [PN 66.33] when using our exclusion powers to either:</p> <ul style="list-style-type: none"> <li>(a) exclude an entity from relying on the secondary sale exemptions in cls 708A and 1012DA of the CLERP 9 Bill; or</li> <li>(b) exclude a financial product issuer from using a transaction specific PDS under cl 1013FA of the CLERP 9 Bill.</li> </ul> <p>Note: [PN 66.33] was revised in October 2002 and the amended paragraph is set out in Information Release [IR 02/20] <i>ASIC reviews Practice Note 66</i>.</p> <p><b>B2</b> In particular, before using the exclusion powers, we will generally offer the disclosing entity an opportunity to make submissions about whether an order should be made.</p>	<p><b>B2Q1</b> Are there any reasons why we should not use this approach? If so, give details.</p>

# Explanation

**1** We will interpret and apply the exclusion powers according to the objectives of the legislature. In discussing the exclusion powers under cls 708A(2), 713(6) and 1013FA of the CLERP 9 Bill, the Explanatory Memorandum to the Bill notes:

‘The determination powers are intended to prevent issuers accessing relief where there have been breaches of the law and provide an incentive from a reputation standpoint to ensure the notice [if any is required to be given to the relevant market operator] is correct’: para 5.547.

**2** Our exercise of the exclusion powers is restricted by criteria set out in the legislation: see cls 708A(2), 1012DA(2) and 1013FA(3) of the CLERP 9 Bill. We cannot make an exclusion order unless we are satisfied that in the previous 12 months the body has contravened one or more of the specified provisions.

**3** When using the exclusion powers we will follow the policy set out in [PN 66.33]. Particularly, when considering whether to make an instrument of exclusion, we will generally offer the disclosing entity an opportunity to make submissions about whether the instrument should be made. We will not usually regard it as a sufficient argument against making an instrument of exclusion that the breach of the relevant obligation has since been rectified in some way.

Note: [PN 66.33] was revised in October 2002 and the amended paragraph is set out in Information Release [IR 02/20] *ASIC reviews Practice Note 66*.

## C The presentation requirement

Policy proposal	Your feedback
<p><b>Our approach</b></p> <p><b>C1</b> We will apply our policy guidance in Policy Statement 168 <i>Disclosure: product disclosure statements (and other disclosure obligations)</i> [PS 168] when assessing compliance with the new presentation requirement for Ch 6D disclosure documents.</p> <p><b>C2</b> In particular, we will apply our policy that the body issuing the securities or other financial products should focus on investor information needs in meeting the ‘clear, concise and effective’ presentation requirement (e.g. in terms of structure, length, language and readability of a disclosure document).</p> <p style="text-align: center;">Note: See also Media Release [MR 04–062] <i>FSR disclosure to be clear, concise and effective</i> (issued 10 March 2004) and Information Release [IR 04–11] <i>ASIC’s approach to regulation of financial services: breach notification and disclosure</i> (issued 25 March 2004).</p>	<p><b>C1Q1</b> Do you agree with this approach? If not, give reasons.</p> <p><b>C2Q1</b> Should we also consider the information needs of professional investors and professional advisers? Why or why not?</p>
<p><b>Non-compliance</b></p> <p><b>C3</b> We may make a stop order on the basis of a breach of the presentation requirement. In considering making a stop order or extending the exposure period for a breach of the presentation requirement we will apply our general policy in Policy Statement 152 <i>Lodgment of disclosure documents</i> [PS 152] at [PS 152.48]–[PS 152.49].</p>	<p><b>C3Q1</b> Should we apply this general approach to the presentation requirement? If not, give reasons.</p>

# Explanation

## Our approach

**1** Clause 715A in the CLERP 9 Bill introduces a requirement that disclosure documents be worded and presented in a clear, concise and effective manner. The Explanatory Memorandum to the CLERP 9 Bill states:

‘This amendment is intended to improve the effectiveness of documents such as prospectuses as a useful source of information for investors and is consistent with requirements for a Product Disclosure Statement (PDS) under subsection 1013C(3). It is intended to improve the comprehensibility and readability of disclosure documents’: para 5.513.

**2** The presentation requirement supplements the obligation to comply with other relevant content requirements for disclosure documents in Ch 6D. It does not limit or expand the information that must be included in a disclosure document.

**3** We will, with any necessary adaptations, apply [PS 168] to the presentation requirement. We recognise that it is not possible to completely integrate the disclosure regimes in Chs 6D and 7. However, we will apply [PS 168] to the extent that it provides guidance about achieving the main objective of the presentation requirement. The objective is that disclosure should be made in a way that can be readily used and understood by investors.

**4** [PS 168] includes the following good disclosure principles at [PS 168.24]–[PS 168.25] and [PS 168.48]–[PS 168.61]. Disclosure should:

- (a) be timely;
- (b) be relevant and complete;
- (c) promote ... [investment] understanding;
- (d) promote ... [investment] comparison;
- (e) highlight important information; and
- (f) have regard to consumers’ needs.

## Non-compliance

**5** While a breach of the presentation requirement is not an offence, we may issue a stop order or extend the exposure period if a disclosure document is not worded and presented in a clear, concise and effective manner.

**6** Clause 719(1A) will allow a person to lodge a supplementary or replacement document with us if they become aware that a document previously lodged does not comply with the presentation requirement.

**7** Following our general policy in [PS 152], we may issue a stop order if satisfied that the presentation requirement has not been met. Where valid prima facie disclosure concerns are detected or brought to our attention within the first seven days following lodgment of a disclosure document, we will usually attempt to resolve these with the offeror during that period. If it becomes apparent that the issues cannot be resolved, any exposure period will be extended to 14 days.

**8** However, if at any stage after becoming aware of prima facie disclosure concerns, a delay may be seen to be prejudicial to the public interest, we may impose an interim stop order, pending resolution of our concerns at a hearing.

# Regulatory and financial impact

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We have considered the regulatory and financial impact of the policy proposals in this paper. Based on the information currently available to us, we believe that implementing the proposals will strike an appropriate balance between facilitating fundraising and investor protection.

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) the likely financial impact of the proposals, including the impact on small business; and
- (b) whether the proposals provide sufficient investor protection.

# Development of policy proposal

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We have developed this policy proposal paper by considering:

- (a) the *Corporate disclosure: strengthening the financial reporting framework* discussion paper issued by Treasury in September 2002 and submissions received in response to that discussion paper;
- (b) a review of the Exposure Draft CLERP 9 Bill and public submissions made in response to that Bill;
- (c) a review of transcripts of public hearings held as part of the inquiry into the Exposure Draft CLERP 9 Bill by the Parliamentary Joint Committee on Corporations and Financial Services;
- (d) the Explanatory Memorandum to the CLERP 9 Bill and the Second Reading Speech in the House of Representatives on the introduction of the CLERP 9 Bill into Federal Parliament and subsequent Parliamentary debate about the CLERP 9 Bill; and
- (e) a review of existing ASIC policies and practices relevant to the disclosure regimes in Chs 6D and 7 of the Act.



# Key terms

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In this policy proposal, terms have the following meaning:

**Act** The *Corporations Act 2001* (Cth).

**ASIC** Australian Securities & Investments Commission.

**clause 708A or cl 708A** (for example) A clause of the CLERP 9 Bill (in this example cl 708A).

**CLERP 9 Administrative Framework Guide** *Building the CLERP 9 Administrative Framework: Policy to implement the Corporate Law Economic Reform Program (Audit Reform and Corporate Disclosure) Bill 2003—An ASIC guide*, February 2004.

**CLERP 9 Bill or Bill** The Corporate Law Economic Reform Program (Audit Reform and Corporate Disclosure) Bill 2003, as introduced into the House of Representatives on 4 December 2003.

**CLERP 9 product disclosure provisions** Together, the secondary sales provisions, the transaction specific PDS provision, the exclusion powers and the presentation requirement in the CLERP 9 Bill.

**disclosure-based relief** Relief where retail clients have, through some alternative means, the benefit of disclosure comparable to that which might otherwise have been contained in a prospectus or PDS ('disclosure-based relief'). This can occur through disclosure of previously withheld information or the prospectus or PDS disclosure at or after the time of issue of the securities.

Note: See category 1 to 4 (inclusive) of our Class Order [CO 02/1180].

**exclusion powers** Power allowing ASIC to make an order under cls 708A(2), 1012DA(2) or 1013FA(3) of the CLERP 9 Bill.

**exemption-based relief** Relief to ensure that products issued to persons including retail clients under separate disclosure exemptions may be readily on-sold.

Note: See category 5 to 11 (inclusive) of our Class Order [CO 02/1180].

**Exposure Draft CLERP 9 Bill** The Corporate Law Economic Reform Program (Audit Reform and Corporate Disclosure) Bill 2003, as published by Treasury on 8 October 2003.

**exposure period** The period of time after lodgment with ASIC of a disclosure document before the lodging entity may process applications for certain securities.

Note: The relevant period of time is specified in s727(3) or 1016B of the Act.

**financial product** Generally, a facility through which, or through the acquisition of which, a person does one or more of the following:

- (a) makes a financial investment (see s763B);
- (b) manages financial risk (see s763C); and/or
- (c) makes non-cash payments (see s763D).

Note: This is a definition in s763A subject to exceptions in Pt 7.1 of the Act.

**indirect issue** A sale of a financial product that complies with s1012C(6) and 1012C(7) of the Act.

**old Act** The Act immediately before amendment by the CLERP 9 Bill.

**on-sale** A secondary sale of securities or an indirect issue of a financial product.

**PDS** A product disclosure statement.

**[PN 66]** (for example) An ASIC practice note (in this example numbered 66).

**Policies or policy publications** ASIC policy statements and practice notes.

**presentation requirement** The requirement in cl 715A of the CLERP 9 Bill that the information in a disclosure document must be worded and presented in a clear, concise and effective manner.

**Product Disclosure Statement** A document that must be given to a retail client for the offer or issue of a financial product in accordance with Pt 7.8 Div 2 of the Act (a PDS).

Note: This is a definition in s761A of Act.

**[PS 173]** (for example) An ASIC policy statement (in this example numbered 173).

**quoted security** A security that is quoted on a prescribed financial market.

Note: This is a definition to be inserted by the CLERP 9 Bill into s9 of the Act.

**secondary sale** A sale of securities that complies with s707(3) and 707(4) of the Act.

**secondary sales provisions** The requirements in cls 708A and 1012DA of the CLERP 9 Bill.

**stapled security** Two or more financial products (at least one of which is a quoted security) which, under the terms on which each is traded, must be transferred together.

**stop order** An order made under s739 or 1020E of the Act.

**section 707 or s707 (for example)** A section of the Act (in this example numbered 707).

**transaction specific PDS** A PDS prepared to comply with cl 1013FA of the CLERP 9 Bill.

**transaction specific PDS provision** Clause 1013FA of the CLERP 9 Bill.

**transaction specific prospectus** A prospectus prepared to comply with s713 of the Act.

# What will happen next?

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## Stage 1

5 April 2004                      ASIC policy proposal paper released

## Stage 2

18 May 2004                      Comments due on the policy proposal

## Stage 3

23 June 2004                      Policy finalised

**Important note:** The timing and content of ASIC's policy and other publications depends on the timing of the CLERP 9 Bill's progress through Parliament and whether amendments are made to it during the legislative process.

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### Your comments

**You are invited to comment on the proposals and issues for consideration in this paper.**

**Comments are due by 18 May 2004 and should be sent to:**

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# Related policy proposal papers

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This policy proposal paper is part of a set of CLERP 9 policies, including the CLERP 9 Administrative Framework Guide issued in February 2004, the policy proposal paper *Licensing: managing conflicts of interest* issued in October 2003 and three policy proposal papers issued together in April 2004 on the implementation of the CLERP 9 Bill. As outlined in the CLERP 9 Administrative Framework Guide, we will issue further proposal papers and guides in the coming months on the implementation of the CLERP 9 Bill.

The other CLERP 9 policy documents issued as at 5 April 2004 are:

- policy proposal paper *Auditor and financial reporting obligations*; and
- policy proposal paper *Auditor registration*.

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Go to [www.asic.gov.au/clerp9](http://www.asic.gov.au/clerp9) for the latest information about CLERP 9.

## Email us for general inquiries

Email your general inquiries about our plans to implement the CLERP 9 Bill to [CLERP9@asic.gov.au](mailto:CLERP9@asic.gov.au). These inquiries are allocated to people best placed to answer them. We will aim to respond to your inquiries as soon as we can.

## Use professional bodies, industry associations and consumer groups

We also suggest that you channel inquiries and comments through your professional body, industry association or a relevant consumer group. We are working closely with a number of these bodies in preparing to administer the new regime. These bodies act as a central point for collecting information and questions on how the CLERP 9 Bill will affect members of each group. It makes sense for us to use them as a way of communicating with each other.