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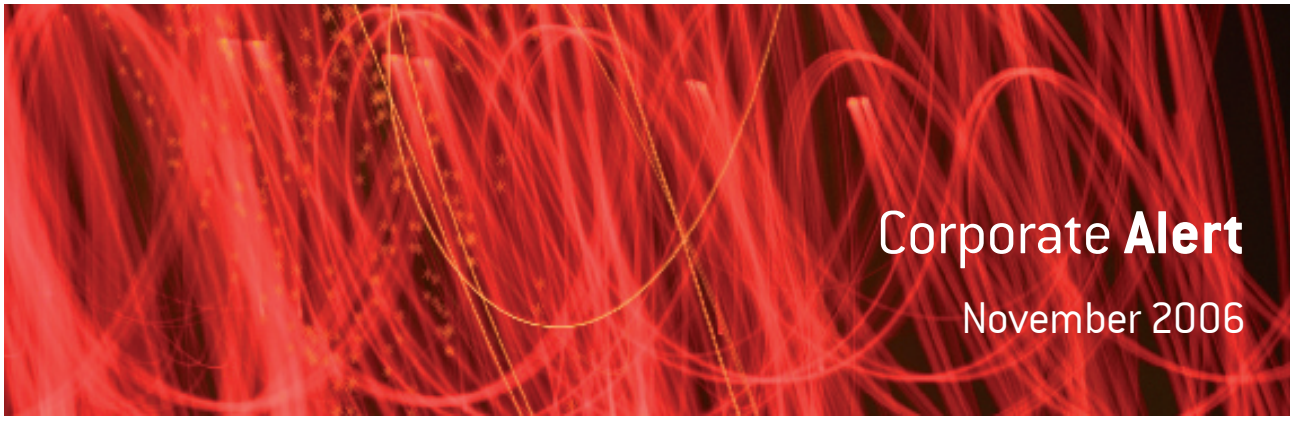

Fundraising and the Corporations Act

"This alert is a summary of parts of the fundraising provisions of the *Corporations Act 2001* (the "Act"). In particular, we explain when offers of securities require disclosure to investors, what types of disclosure documents can be utilised in particular situations and we provide a brief overview of relevant prohibitions and potential liability issues."

Disclosure Requirements

Offers of Securities

The fundraising and disclosure requirements that regulate the offer of shares in Australia are contained in Chapter 6D of the Act. The general proposition is that a person must not make an offer of securities or distribute an application form for an offer of securities that needs disclosure to investors until a disclosure document (such as a prospectus) for the offer has been lodged with the Australian Securities and Investments Commission ("ASIC") unless such an offer is exempted from disclosure.

We note, however, that a proprietary company is prohibited by the Act from engaging in any activity that requires disclosure to investors under Chapter 6D. Therefore, a proprietary company may only raise funds from investors in Australia through the offers of securities that are exempted from disclosure.

Offers Received Outside of Australia

Section 700(4) of the Act provides that Chapter 6D applies to offers of securities that are received in Australia, regardless of where the resulting issue, sale or transfer occurs. Conversely, therefore, offers of securities received outside of Australia are not subject to the fundraising provisions of the Act even if the securities are issued in Australia or are securities in companies located in Australia. Please note, however, that offers received outside of Australia are likely to be regulated by the laws of the country in which the offers are received.

Offers that do not need Disclosure (Exempt Offers)

Section 708 of the Act sets out a number of different types of offers of securities that do not need disclosure and include:

> small scale offerings ("personal" offers of a body's securities where no more than 20 investors acquire securities and no more than $2 million is raised by the issue of securities in any 12 month period);

> offers to sophisticated investors (eg. investors who pay a minimum of $500,000 upon the acceptance of an offer or investors who, as it appears from a certificate given by a qualified accountant no more than 6 months before the offer is made, have net assets of at least $2,500,000 or have had a gross income for each of the last two financial years of at least $250,000);

> offers to professional investors

(eg. financial services licensees, listed entities, trustees of super funds which have net assets of at least $10 million and other persons who control at least $10 million);

> certain offers made through a financial service licensee;

> offers to certain people who are associated with the issuing body (such as senior managers); and

> certain offers to present holders of securities in the issuing body.

This is not an exhaustive list of the relevant exceptions. As referred to above, a proprietary company will be prohibited from raising any funds from investors in Australia where none of the exceptions apply.

Information Memorandum

It is important to note that, whilst the disclosure requirements contained in Chapter 6D of the Act may not be applicable for the reasons specified above, conduct in relation to offers or shares may still be subject to other provisions of the Act and the common law.

Part 7.10 of the Act, for example, prohibits certain types of conduct relating to financial products and financial services such as the making of false or misleading statements or engaging in misleading or deceptive conduct.

As such, it is common practice for a company seeking investors to prepare an information memorandum about the company. This is not a formal disclosure document required by the Act. Rather its purpose is to minimise the risk that an investor may later complain that they have been mislead or deceived into investing in a company's securities.

Disclosure Documents

If a disclosure document is required in respect of a particular offer of securities, the general rule is that a prospectus must be prepared for the offer unless an offer information statement can be used.

A prospectus is the principal and most common type of disclosure document although there are different varieties of prospectus including a full prospectus, a short form prospectus and a special prospectus for continuously quoted securities (which is also known as a transaction specific prospectus).

Full Prospectus

A full prospectus will be required, for example, where a company seeks to list on a stock exchange. The Act contains a general disclosure requirement for full prospectuses which provides that a prospectus must contain all of the information that investors and their professional advisors may reasonably require to make an informed assessment of:

> the rights and liabilities attaching to the securities offered; and

> the assets and liabilities, financial position and performance, profits and losses and prospects of the body that is to issue the securities.

The prospectus must contain this information to the extent to that relevant persons involved in the preparation of the prospectus actually know the information or ought reasonably to have obtained the information by making inquiries. In addition to the general disclosure requirement, the Act also sets out

a number of specific requirements for particular information to be disclosed.

Short Form Prospectus

A short form prospectus is the same as a full prospectus except that it incorporates certain documents already lodged with ASIC by reference in the prospectus. Therefore, rather than setting out all of the details of a document in the prospectus, the prospectus may simply refer to a document that has been lodged with ASIC. The prospectus must adequately identify the document and provide sufficient information about the contents of it to allow a person to decide whether or not to obtain a copy of it.

The primary use of short form prospectuses is for very large distributions to unsophisticated investors.

Transaction Specific Prospectus

Transaction specific prospectuses have lesser disclosure requirements than a normal prospectus and may only be issued by bodies that are listed on a stock exchange. This type of prospectus is only available for an offer of continuously quoted securities of a body. The term "continuously quoted securities" means securities that:

> are in a class of securities that have been quoted at all times in the 12 months before the date of the prospectus; and

> are securities of an entity that has not relied on certain exemptions or relief from the continuous disclosure requirements at any time in the preceding 12 months.

Offer Information Statements

An offer information statement is a disclosure document that may be used by a body where the amount of money to be raised, when added to all amounts previously raised by the body under an offer information statement, is $5 million or less.

There is no general disclosure test for offer information statements. Instead the Act lists specific information that must be included, such as a description of the nature of the securities and a description of what the funds raised will be used for. An offer information statement must also include a copy of an audited financial report with a balance date no greater than 6 months old.

Prohibitions, Liability and Defences

The Act sets out a number of prohibitions in connection with the offering of securities. These include offering securities in a body that doesn't exist, offering securities without a current disclosure document and, most importantly, offering securities under a disclosure document if there is a misleading or deceptive statement in the disclosure document or if there is an omission from the disclosure document of material which was required to be included.

The prohibition concerning misleading or deceptive statements is particularly relevant in respect of disclosures about the "prospects" of a body. By their very nature, prospectuses are documents that relate to the future and contain statements and opinions as to future matters. The Act provides that a person is taken to make a misleading statement about a future matter if they don't have reasonable grounds for making the statement.

A contravention of the prohibitions could lead to both criminal and civil liability. Chapter 6D of the Act includes a special civil liability regime under which the company making the offer, each current or proposed director of the company and an underwriter to the issue may all be held liable in respect of a misstatement or omission in a prospectus. A person who suffers loss or damage as a result of such a contravention may recover the amount of that loss or damage from any of those persons even if they did not commit and where not involved in the particular contravention.

There are a number of defences that apply in relation to both civil and criminal liability for a misstatement or omission in a disclosure document. The most important is the due diligence defence for prospectuses. It provides that a person will not be liable because of a misleading or deceptive statement in a prospectus or an omission from a prospectus if a person can prove that:

> they made all inquiries (if any) that were reasonable in the circumstances; and

> after doing so believed, on reasonable grounds, that either the statement was not misleading or deceptive or that there was no omission from the prospectus in relation to a particular matter.

In order to ensure that this defence is available and to minimise the risk of any contravention to begin with, it is standard practice for a company issuing a prospectus to carry out a due diligence process.

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