

14 June 2011

Ms Fiona Laidlaw
Senior Lawyer, Corporations
Australian Securities & Investments Commission
Level 5, 100 Market Street
SYDNEY NSW 2000

By email: policy.submissions@asic.gov.au

Dear Ms Laidlaw,

ASIC CONSULTATION PAPER 155
Prospectus Disclosure: Improving Disclosure for Retail Investors

I refer to the ASIC Consultation Paper 155 – *Prospectus Disclosure: Improving Disclosure for Retail Investors* released for public comment in April this year.

Thank you for the opportunity to comment on the Consultation Paper and for the extension of time in which to respond to the proposals contained in the attached draft Regulatory Guide. ACLA members deal on a day-to-day basis with ASIC and have a thorough working knowledge of the operations of the financial markets, the needs of investors and other stakeholders as well as the Corporations Act. Accordingly, and in view of the scope of the proposed Regulatory Guide, it is appropriate that in-house lawyers be given the opportunity to express their views in this regard and we welcome that opportunity.

Please find attached ACLA's submission on the Consultation Paper. Should you have any queries in this regard please do not hesitate to contact Tony de Govrik, ACLA's Legal Affairs and Communications Director, on 02 9953 1057.

Yours sincerely,



Trish Hyde
Chief Executive Officer

ACLA SUBMISSION ON ASIC CONSULTATION PAPER 155

Prospectus Disclosure: Improving Disclosure for Retail Investors

About ACLA

ACLA is a not-for-profit organisation and peak national association representing the interests of in-house lawyers working for corporations and government in Australia. It is estimated in-house lawyers constitute approximately 25% of the total Australian legal profession, or about 15,000 practitioners and are the fastest growing segment of the legal profession.

Background

In April 2011 the Australian Securities and Investments Commission (ASIC) released for public comment Consultation Paper 155 - *Prospectus disclosure: Improving disclosure for retail investors* together with an attached draft Regulatory Guide. According to ASIC, the aim of the proposed new Regulatory Guide is to bring greater clarity to prospectus disclosure by providing guidance to issuers as to how they can word and present prospectuses so that they are “clear, concise and effective” for retail investors. ASIC makes the point that the primary purpose of a prospectus is to help retail investors assess the risks and returns associated with an offer of securities and make informed investment decisions accordingly. A prospectus should not be regarded by an issuer as simply a marketing tool.

Submission

We respond using the same numbering as used in the Consultation Paper.

B Clear, Concise and Effective

“Clear, concise and effective” disclosure

B1Q1 We agree with ASIC’s explanation of the term ‘clear, concise and effective’ and its guidance on when a prospectus will generally be ‘clear, concise and effective’.

B2Q1 We agree with ASIC’s suggested communication tools in Table 3 for how to word a prospectus so that it is ‘clear, concise and effective’. In particular we find these tools, the explanations and examples given to be most helpful.

B2Q2 We agree with ASIC’s suggested communication tools in Table 4 for how to present a prospectus so that it is ‘clear, concise and effective’. We also find these tools and the explanations given to be useful. We have no further suggestions for any additional tools that might be included.

B3Q1 We agree with ASIC's proposed guidance that photographs (other than on the front cover) should only be included after the investment overview. Photographs in a prospectus can often be used in a misleading or deceptive way (whether intentional or not) and therefore should not be given greater prominence than the investment overview.

B3Q2 We suggest an appropriate statement be made at the beginning of the investment overview to ensure that retail investors are made aware that they should rely on the investment overview and the written contents of the prospectus rather than on marketing images (such as photographs of what may appear to be the issuer's assets, celebrity photographs and what may appear to be endorsements or testimonials by them). Investors should be clearly warned not to be distracted by such images when considering an investment.

B3Q3 Accordingly we agree with ASIC's proposed guidance that photographs should only be included where they are relevant to the issuer's business and should not be included where they are likely to misrepresent the nature, stage or scale of the issuer's business. Furthermore, all photographs appearing in a prospectus should be appropriately captioned to prevent any likely or possible misrepresentation.

B3Q4 We do not believe there should there be a restriction on the use of photographs of celebrities in prospectuses provided the statement and warning suggested in B3Q2 above is included.

B3Q5 If photographs of celebrities are included in a prospectus, the prospectus should also be required to disclose any interests or benefits paid to those celebrities (in money, equity or other value) in connection with the offer or as a consequence of their image being included in the prospectus.

B3Q6 We consider that ASIC's proposed guidance strikes the appropriate balance between disclosure and marketing in prospectuses.

Prospectuses should be as short as possible

B4Q1 We agree with ASIC's suggestions for making prospectuses as short as possible. However, we would also like to see greater flexibility given by ASIC in relation to documents that can be reasonably incorporated by reference into a prospectus. It is often the requirement to include highly technical independent expert's reports (e.g. geological reports) in full which make prospectuses as lengthy and unwieldy as they are for retail investors. A fair and reasonable summary of such a report should provide sufficient information for retail investors - with the full report being made available on request or via the issuer's website.

B5Q1 We also agree with ASIC's proposed guidance that issuers should consider incorporating by reference contracts, trust deeds, detailed corporate governance policies, secondary specialist expert reports and foreign offer documents. We can see no practical difficulties in incorporating by reference these suggested documents.

B5Q2 Other documents that can be usefully incorporated by reference (other than those suggested in B4Q1 above) might include the issuer's constitution.

B5Q3 Although s.712 may, in some instances, be problematic, we do not think information that would otherwise be incorporated by reference should be set out in an appendix to the prospectus with a cross-reference at the front of the prospectus. While this might help to ensure the first sections of the prospectus are more concise because there would be no

concern that the information is not formally included in the prospectus, this will only add to the size of the prospectus and make it even more unwieldy.

B5Q4 We suggest ASIC should encourage issuers to include on their website any documents incorporated by reference (as well as lodging that information with ASIC).

B6Q1 We agree with ASIC's proposed guidance on the prudent course of action in these circumstances and find this guidance useful. We do not see any concerns or practical difficulties with this guidance.

B7Q1 We agree with ASIC's proposed guidance on what constitutes 'sufficient information' for the purposes of s712(2)(b).

B7Q2 We agree with ASIC's proposed guidance on what constitutes 'sufficient information' when incorporating trust deeds and secondary specialist expert reports by reference and find this guidance helpful. We do not see any practical difficulties with following this guidance. We do not have other suggestions for what might constitute 'sufficient information'.

B8Q1 We agree that documents incorporated by reference should comply with other requirements of the Corporations Act including those in Chapter 6 in relation to misleading and deceptive provisions. We do not see any practical difficulties with following this guidance.

B8Q2 We also agree the documents incorporated by reference should comply with s715A. We do not see any practical difficulties with following this guidance.

C Investment Overview

Need for an investment overview

C1Q1 We consider that an investment overview is an effective way to help retail investors to identify and understand the information that is key to their investment decision and should come at the front of the prospectus. However, some guidance should be given as to whether or not the overview should appear ahead of the Chairman's Letter.

It is noted that some issuers place their glossary of terms at the front of a prospectus while others include the glossary at the end. We suggest that ASIC provide some guidance on the placement of the glossary. Furthermore, we also suggest that in order to assist investors, all words defined in the glossary be highlighted in bold or italics throughout the prospectus.

C1Q2 We also consider that an investment overview is a meaningful replacement for the multiple levels of summaries currently included in many prospectuses (such as 'Investment highlights' and 'Frequently asked questions' sections).

C1Q3 We do not agree that as an alternative to an investment overview, ASIC should encourage a two-part prospectus with one part aimed at retail investors and the other aimed at professional and sophisticated investors. While sophisticated and professional investors are usually very adept at obtaining and analysing information, retail investors should still have the benefit of a suitable investment overview.

Content of the investment overview

C2Q1 We agree with the key categories of information ASIC has suggested should generally be included in the investment overview.

In addition, we strongly suggest that ASIC consider including a section in Table 5 (key information in the investment overview) that discloses directors (and possibly even “key managers”) remuneration (or proposed remuneration) and other non cash benefits up front. This information should be shown against named individuals and not just as a total or collective amount.

We further suggest that the date of incorporation of the issuer (where this is applicable) be included in the investment overview as this can often be a relevant piece of information that is either not included, or is difficult to find, in the prospectus.

C3Q1 We also agree that key financial information and key financial ratios should be included in the investment overview. However, there may be some limitations on how much financial information (especially financial ratios) can be provided by some issuers such as start-up companies and mining exploration companies where there is no previous financial history or any likelihood of an immediate cash flow.

C3Q2 We consider that the proposed key financial information and financial ratios are appropriate.

C3Q3 We agree with ASIC’s proposed methods for calculating these financial ratios.

C4Q1 While we agree that ASIC should give guidance, the onus should be on the issuer to identify key information that needs to be included in the investment overview. We do not think that ASIC should be overly prescriptive about the contents of an investment overview. To do so would be tantamount to reverting back to the prescriptive “shopping list” of items required to be disclosed in a prospectus under the Companies Act 1961.

C5Q1 ASIC’s proposed guidance on the concept of balanced disclosure appears useful and easy to apply in practice.

C6Q1 We strongly agree that the investment overview should indicate if the investment is speculative or if the achievement of objectives is high risk.

Presentation of the investment overview

C7Q1 Other than our suggestions in C2Q1 above, we have no additional suggestions for how an investment overview should be worded and presented.

C7Q2 We consider ASIC’s guidance on presenting benefits and risks in a balanced way is useful and reasonably easy to apply in practice.

C8Q1 We agree that ASIC should not be prescriptive about the length of the investment overview. While we do not consider that there is an ideal length for an investment overview, there may be some merit in suggesting to issuers in the Regulatory Guide that they limit the length to, say, 2 pages to assist retail investors focus on the more substantive disclosures.

D Specific Contents Guidance

Specific content issues

D1Q1 We consider that it may be useful for ASIC to give some detailed guidance on some specific content issues as outlined in sections D-H of the draft Regulatory Guide.

D1Q2 We agree that s710 generally requires disclosure of the issues ASIC has given guidance on. Other than our suggestions in C2Q1 above, we are not aware of any other key matters that should also generally be disclosed in a s710 prospectus?

Business models

D2Q1 We agree that a prospectus should explain the issuer's business model - that is:
(a) how the issuer plans to make money and generate income or capital growth for investors;
or
(b) if the issuer does not intend to make money in the short term, their short term objectives and how they propose to meet those objectives.

D2Q2 There may be some practical difficulties involved with an issuer explaining its business model. Provided ASIC is not requiring detailed financial modelling that would be acceptable. Also, if this were to require the disclosure of confidential information there may be concerns (cf. the carve-outs available under ASX Listing Rule 3.1 which deals with continuous disclosure by listed companies). Accordingly, we suggest that ASIC provide further guidance on the extent of disclosure required in respect of confidential information relating to the business model.

D2Q3 The potential consequences of requiring an issuer to disclose very detailed, or what might be considered confidential, information is that the issuer might decide to exit the market, change their business model or exclude retail investors from offers.

D3Q1 We agree that ASIC has identified the components that will be relevant to most business models. We are not aware of any components that should be removed from or added to ASIC's proposed guidance.

D3Q2 We consider that the guidance that ASIC has given on each component is adequate and useful.

D3Q3 We agree that in respect of the dividend policy, if an issuer intends to pay dividends other than out of profits, this should be stated in the prospectus together with any associated risks. We do not see any practical difficulties in doing this.

D3Q4 We agree that a prospectus should include an explanation of how the components of a business model relate to each other and to the business model as a whole, rather than simply describing the components.

Risks

D4Q1 We agree with ASIC's proposed guidance that a prospectus should help retail investors work out which risks are the key risks associated with the issuer's business model, the security and the offer.

D4Q2 We agree with ASIC's explanation of what the key risks are likely to be.

D4Q3 We do not see that there any practical difficulties with following ASIC's guidance on key risks.

D5Q1 We agree with the proposed examples of risks.

D5Q2 We consider that it will be useful for ASIC to include examples in ASIC's guidance.

D5Q3 There may be other general risks that ASIC should consider including such as fluctuations in commodity prices (especially for resource issuers), share markets and interest rates.

D6Q1 We agree that a prospectus should explain the likelihood of a risk occurring and the consequences if it did occur as some risks are more likely to occur than others and some risks will be significantly higher than other less likely risks.

D6Q2 We consider that a sensitivity analysis will sometimes be appropriate particularly for issuers which are heavily reliant on markets which may be subject to significant movement such as interest rates. We do not see any practical difficulties in doing this.

D7Q1 We consider that ASIC's proposed guidance helps issuers to make their risk disclosure more 'clear, concise and effective'.

D7Q2 We do not see any practical difficulties with following this guidance on 'clear, concise and effective' risk disclosure?

D7Q3 We do not have any additional suggestions for how to make risk disclosure 'clear, concise and effective'.

Financial information

D8Q1 We agree with ASIC's proposed guidance for issuers with an operating history.

D9Q1 We also agree with ASIC's proposed guidance for issuers with no operating history.

D9Q2 There may be other financial information that issuers should include in their prospectus. Guidance should be given by ASIC as to the need for pro forma balance sheets in prospectuses based on minimum subscription, full subscription and oversubscriptions.

Directors and key managers, interests, benefits and related party transactions

D10Q1 We do not agree with ASIC's proposed guidance on the information about directors and key managers that should be included in a prospectus. We are firmly of the view that it is far too broad and uncertain even though such disclosures need to be "relevant to the role undertaken and the investment decision" (a fairly subjective determination).

For instance, in section G of the draft Regulatory Guide, there are references to "directors", "key management", "chairman", "executive director" and "non-executive director" rather than to "officer" (a term which is clearly defined in the Corporations Act). However, in the absence of the word "officer" and a clear definition, it is not certain if the term "key manager" is meant to also embrace a company secretary. We strongly suggest that ASIC clarify whether Table 8 in the Regulatory Guide is intended to apply in full to a company secretary.

D10Q2 For the reason set out in D10Q1, we do not agree that details of **any** convictions, declarations under s1317E of the Corporations Act, personal bankruptcies, disqualifications or disciplinary action within Australia or other jurisdictions as described in proposal D10(c) should be included in the prospectus. While there may be a justifiable case for Court

declarations, personal bankruptcies and disqualifications which are less than 10 years old to be disclosed, whether disciplinary action or criminal convictions (of any nature and in any jurisdiction within Australia or overseas) should also be disclosed may prove problematic for an issuer to determine. Additionally, undertaking due diligence and verification of these matters may also prove time consuming and difficult. Accordingly, this is one area where we strongly suggest that ASIC take a more prescriptive approach particularly in relation to the offences and disciplinary action necessary to be disclosed.

D10Q3 We agree that a prospectus should disclose if a director or key manager has previously been an officer of a company that has gone into external administration because of insolvency (although the person concerned should be able to provide an explanation for this if desired as some external administrations are for legitimate business reasons such as a corporate reconstruction).

D10Q4 We consider that a prospectus should only have to disclose relatively recent insolvencies that a director or key manager has been involved with.

However, the guidance as it stands is open-ended and could require disclosure going back many decades. We strongly suggest that a time limit be placed on this disclosure and that ASIC consider a period covering the previous 10 years as being adequate disclosure for this purpose – it being noted that this would be consistent with the 10 year period applicable to disclosure of those matters referred to in D10Q2 above.

D11Q1 We agree with ASIC's proposed guidance on the information about corporate governance that should be included in a prospectus. We do not see any practical difficulties with including this information?

D11Q2 We agree that issuers should consider incorporating detailed policies by reference.

D12Q1 We agree with the proposed guidance that the interests of, and benefits paid to, persons involved in the offer should be disclosed. We also agree with ASIC's examples of indirect interests or benefits that should be disclosed.

D12Q2 We agree with ASIC's broad approach to the meaning of a 'promoter'.

Effect and terms and conditions of the offer

D13Q1 We agree with ASIC's proposed guidance on the effect of the offer, including use of funds. We do not see any practical difficulties in following ASIC's proposed guidance. There are no other matters that we would like guidance on.

D14Q1 We agree with ASIC's proposed guidance on the terms and conditions of the offer. We do not see any practical difficulties in following ASIC's proposed guidance. There are no other matters that we would like guidance on.

D14Q2 We note that ASIC's proposed guidance requires disclosure about any process to set the final offer price for the securities (e.g. a book build process). We agree there should be disclosure about such a process.

D14Q3 If the offer price will not be finalised until after the deadline for acceptances, we agree that the prospectus should warn that the final price may not accurately reflect the market value of the securities and may differ significantly from the market price when the

securities are quoted (especially where retail investors are involved in the price-setting process).

E Disclosure Issues not Covered

Transaction specific prospectuses

E2Q1 We agree that ASIC's proposed guidance is relevant to s713 prospectuses as described in proposals E1 and E2.

E2Q2 We consider that RG 66 together with ASIC's draft regulatory guide give adequate guidance on these prospectuses (including content).

"Low doc" rights issues

E3Q1 We agree that ASIC's proposed guidance is relevant to 'offer documents' in the way described.

E3Q2 We believe that it would be helpful if ASIC could give guidance on the content of "offer documents". In this regard, we draw ASIC's attention to previous AASE (the predecessor of ASX) Listing Requirements which prescribed the contents to be included in a Letter of Offer and Acceptance Form in respect of rights issues.

E3Q3 We strongly consider it would be useful for ASIC to give guidance that an "offer document" should contain an investment overview as described in Section C of the attached draft regulatory guide with cross-references to where more detailed information can be found (either in the offer document or in continuous disclosure announcements).

Electronic prospectuses and other technological developments

E4Q1 We do not see any barriers to issuers using electronic prospectuses in the way they would like to. We do not consider any ASIC relief is required (either similar to [CO 00/44] or otherwise).

E4Q2 We do not see a need for ASIC guidance on electronic prospectuses.

E4Q3 We are not aware of any other prospectus issues that have arisen as a result of other technological developments.

Other prospectus or disclosure issues

E5Q1 We are not aware of any other prospectus and/or disclosure issues that we presently would like to see guidance on.

E5Q2 Other than the matters covered in the draft Regulatory Guide, we are not aware of any other issues that issuers encounter when preparing a prospectus. Should any such matters come to our attention we will further advise.

E5Q3 Other than the matters covered in the draft Regulatory Guide, we are not aware of any other issues that retail investors encounter when reading a prospectus. Should any such matters come to our attention we will further advise.

E5Q4 Other than the matters covered in the draft Regulatory Guide, we are not aware of any other information that retail investors focus on in a prospectus or otherwise look for when making an investment decision. Should any such matters come to our attention we will further advise.