FUNDRAISING LAWS

SUBJECT TO A NUMBER OF EXEMPTIONS, A PERSON **MUST NOT MAKE AN OFFER OF FINANCIAL PRODUCTS** UNLESS A DISCLOSURE DOCUMENT IS PREPARED

Australia is generally regarded as having an issuer-friendly legal regime in respect of fundraising which over the years has been conducive to primary and secondary equity capital raisings when market conditions have permitted.

The Corporations Act regulates all fundraising activity within Australia. It applies to all financial products offered within Australia whether or not the financial products are issued by an Australian or a foreign issuer. “Financial products” is defined to include shares, units in a trust, partnership interests, debentures and many other financial instruments. The rules apply to offers of, or invitations to subscribe for, financial products that are received in Australia, regardless of where any resulting issue, sale or transfer occurs.

NO OFFERS WITHOUT DISCLOSURE TO INVESTORS

Subject to a number of exemptions, a person must not make an offer of financial products unless a disclosure document is prepared and in certain circumstances lodged with ASIC. The disclosure document must comply with the content requirements set out in the Corporations Act, and a number of procedural steps must be followed.

Unless an exception applies, disclosure to investors is required for an off-market offer of new or existing financial products.

Disclosure is not generally required for an offer for sale of existing financial products, but in the case of sales within 12 months of the issue of securities (ie. shares or debentures) and off-market sales of securities by controllers, disclosure may be required. There are two types of disclosure documents for securities in Australia: offer information statement (**OIS**) and a prospectus.

If a disclosure document is required, the general rule is that a prospectus must be prepared for the offer unless an OIS can be used. There are different varieties of prospectus including a full prospectus, a short form prospectus and a transaction specific prospectus.

FULL PROSPECTUS

A full prospectus is typically used for an initial public offering of securities on ASX. The Corporations Act provides general disclosure requirements for full prospectuses which include all of the information that investors and their professional advisers 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.

AUSTRALIA IS GENERALLY REGARDED AS HAVING AN ISSUER-FRIENDLY LEGAL REGIME IN RESPECT OF FUNDRAISING

SHORT FROM PROSPECTUS

A short form prospectus is the same as a full prospectus except that it incorporates by reference certain documents already lodged with ASIC. Therefore, rather than setting out all of the details of a document in the prospectus, it may simply refer to a document that has been lodged with ASIC.

TRANSACTION SPECIFIC PROSPECTUS

Transaction specific prospectuses have lesser disclosure requirements than a normal prospectus and may only be issued by bodies that are already listed on a stock exchange.

An OIS can be used to raise up to A$5 million and has fewer information content requirements.

A disclosure document for financial products other than securities is called a Product Disclosure Statement (**PDS**).

The Corporations Act also contains restrictions on unsolicited offers of financial products and advertisements regarding offers of financial products.

EXCEPTIONS

An offer of financial products does not require disclosure if the offer is excluded under the Corporations Act or ASIC grants general or specific relief for certain offers (eg. in relation to certain employee incentive schemes). These exceptions include:

- where the amount payable on acceptance of the offer for the financial product exceeds A$500,000 or when added to amounts previously paid by a person for the same class of financial product that is held by that person adds up to at least A$500,000;
- an offer to an investor whose gross income for each of the previous two financial years was at least A$250,000 or who has net assets of at least A$2.5 million, certified by a qualified accountant; and
- offers to other specified sophisticated or institutional investors (including stockbrokers, certain pension and life insurance funds, and persons who control at least A$10 million for the purpose of investment in securities).

There are also a range of exceptions potentially open to foreign issuers and for issues under takeovers or schemes of arrangement. In eligible cases, rights issues and entitlement offers can be conducted without formal disclosure documents. Similarly, security purchase plan offers are able to be conducted without formal disclosure documents in eligible cases.

The combination of these exceptions means that the legal regime in Australia is more favourable to equity capital raising activity compared to many overseas jurisdictions and facilitates offers to be conducted relatively quickly and, in the case of secondary offerings (ie. placements, rights issues, entitlement offers), often without a formal prospectus or PDS.

LIABILITY

There are two main ways in which an issuer can be liable in connection with offering securities under the Corporations Act:

- by offering securities without a disclosure document when one is required; or
- by incorporating misstatements in, or making omissions of required information from, a disclosure document.

Contravention may give rise to civil or criminal liability. In certain circumstances, the issuing company's directors, advisors and underwriters may also be exposed to liability.

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