

# Corporate Advisory Alert

28 July 2009

## Securities Disclosure and Financial Advisers Amendment Bills Passed

Commerce Minister Simon Power announced on Friday 24 July 2009 that both the Securities (Disclosure) Amendment Bill and the Financial Advisers Amendment Bill had been passed.

### Securities (Disclosure) Amendment Act 2009 ("Amending Act")

The Amending Act is an Act that will make it easier for businesses to raise capital while ensuring prospective investors have all the appropriate information, Commerce Minister Simon Power said.

As discussed in our corporate alert of 25 February 2009 ("Government Responds to the Economic Downturn") the Amending Act amends the Securities Act 1978 ("Act"). The most significant feature of the Amending Act is that it allows offers of securities to be made to the public where the offer is made by or on behalf of an issuer in, or accompanied by, a simplified disclosure prospectus in place of a full investment statement and prospectus. This simplified disclosure prospectus would reference any relevant material released under the continuous disclosure regime rather than being required to reproduce that material in full. However, the option of releasing such a simplified document is only available to issuers that are subject to the continuous disclosure regime.

The Regulations, prescribing the content of the simplified disclosure prospectus, have not yet been released.

It is expected that unit trusts, where the manager has previously issued securities to the public, will be able to use the simplified disclosure prospectus. As the Regulations have not yet been issued it is currently unclear if a unit trust will be able to issue debt securities under this regime as the "issuer" for this purpose will be the trustee, who is not

subject to the continuous disclosure regime. It is also not yet clear what securities a debt only issuer can offer.

Until the Regulations are issued, it is not known what information must be disclosed, or the final statement the directors of the issuer will need to give, in the simplified disclosure prospectus and therefore the level of due diligence an issuer may wish to undertake before issuing a simplified disclosure prospectus. We note that the liability provisions of the Act have not been amended. At this time we would expect that the level of due diligence will be akin to that of a rights issue.

The Bill also amends the various categories of persons who are exempt from the full disclosure requirements, including:

- » correcting an anomaly to allow a single offer of securities to both categories of persons who are exempt from disclosure requirements (ie "habitual investors" who fall within section 3(2) of the Act and wealthy or experienced persons who fall within section 5(2CB) of the Act) without requiring the issuer to prepare a full prospectus;
- » requiring an experienced investor to whom an offer is made to additionally sign a written acknowledgement that they will not receive information usually provided by an issuer in respect of an offer of securities to the public;
- » allowing further incremental offers to be made to those persons who have invested \$500,000 with that issuer in the past 18 months, without requiring the issuer to prepare a full prospectus;
- » clarifying that a family trust is a person for the purposes of applying the eligible person criteria, and so is therefore eligible for the disclosure exemptions mentioned above; and
- » allowing certification that a person is wealthy, and so eligible for disclosure exemptions, every 12 months rather than every 6 months.

### Issues raised by Submitters on the Bill

Certain issues were raised by submitters about streamlining the disclosure regime however the Select Committee chose not to make amendments to reflect these submissions. The main issue being that submitters believed that investors would be disadvantaged by the change to the simplified disclosure prospectus as it would reduce the amount of information available to investors. The Select Committee did not believe this would be the case, just that it would reduce duplication of information between two forms of disclosure.

They also gave consideration to the potential for a gap between all information that is material to new securities being issued, and that which is "material information". Information that may be material to the securities being issued, but not to the securities already listed, could include information about the terms of the new securities or information that is specific to the new issue that may not have been disclosed on the basis that it was not material to the price of the existing listed securities. The Committee however, felt that the extent of the enquiries needed to ensure that all information material to the new issue had been disclosed would be reduced if the issuer had good systems for continuous disclosure and that the simplified disclosure prospectus approach is appropriate.

### Financial Advisers Amendment Act 2009 ("FAA Act")

The Financial Advisers Act 2008 ("**Financial Advisers Act**") was passed in 2008 and, together with the Financial Service Providers (Registration and Dispute Resolution) Act 2008, introduced a new regulatory regime for financial advisers ("**Financial Advisers**") and providers. The Act regulates financial advisers who are individuals that perform a "financial adviser service" ("**Financial Adviser Service**").

An individual will be regarded as performing a Financial Adviser Service if, in the course of business, they:

- » give "financial advice" (that is, make a recommendation or give an opinion or guidance in relation to acquiring or disposing of a "financial product" ("**Financial Product**")); or
- » makes an "investment transaction" (that is, receives, handles, pays or invests money or other property on behalf of another person in relation to acquiring or disposing of a Financial Product); or
- » provides a "financial planning service" (that is, analyses an individual's current financial situation, identifies his or her financial goals, and develops options for realising these goals).

The Financial Advisers Act exempts certain persons from being regarded as providing Financial Adviser Services and clarifies that Financial Advice does not include the provision of information unless accompanied by a recommendation, opinion or guidance. The Financial Advisers Act also categorises Financial Products into two categories - Category 1 Products and Category 2 Products depending on the type of product being offered such as securities or interests in land. For more detailed information on the product categories and the regime please refer to our newsletter of November 2008 - "Financial Advisers Act".

The FAA Act was formerly part of the Securities Bill. The FAA Act amends the Financial Advisers Act by correcting several errors of a technical nature, such as cross-references, syntax and punctuation. The Select Committee had no issues with these changes and made some further changes to correct further errors.

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