

PROSPECTUS DRAFTING

19 March 2012

KING & WOOD MALLESONS

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A Guide to Prospectus Drafting

Lessons from Australia

What will this presentation cover?

- Overview of the regulatory framework for disclosure in Australia
- ASIC Regulatory Guide 228 - “Prospectuses: Effective disclosure for retail investors”
- Office of Parliamentary Counsel’s “Plain English Manual”
- Lessons, hot topics and practical tips
- Questions?
- Appendix: ASIC guidance on communication tools for “clear, concise and effective” wording and presentation



Overview of the regulatory framework for disclosure in Australia

When is a prospectus required under Australian law?

‘The prospectus disclosure regime is focused on the needs of retail investors and their professional advisers... The policy underlying the Chapter 6D disclosure regime is that it would be difficult for retail investors to obtain the information they need without mandatory disclosure.’

ASIC Regulatory Guide 228.3

- Part 6D.2 of the Australian Corporations Act 2001 prescribes when an offer of securities in Australia requires a disclosure document
- Most offers of securities to retail investors in Australia will require a prospectus
- A prospectus is not required in certain circumstances - for example, for offers to sophisticated or professional investors
- The Australian Securities and Investments Commission (**ASIC**) may review the prospectus for compliance with the Corporations Act (ASIC does not undertake a pre-lodgment review and is not required to “approve” a prospectus)

Prospectus content

Summary of key requirements

General content requirement (section 710)

- All information that investors and their professional advisers would reasonably require to make an informed assessment of the offer

Specific content requirement (section 711)

- Terms and conditions of the offer
- Interests of and fees to be paid to certain parties involved in the offer
- Details of directors, proposed directors, promoters and underwriters
- Status of application for quotation of securities

Clear, concise and effective (section 715A)

- Prospectus must be worded in a “clear, concise and effective” manner

Prospectus content

Summary of key regulatory requirements (continued)

Incorporation by reference (section 712)

- Instead of setting out information that is contained in a document that has been lodged with ASIC, a prospectus may simply refer to the document.
- The document (or part) referred to is taken to be included in the prospectus.

Must not be misleading or deceptive, or omit disclosure (section 728)

- A person must not offer securities under a prospectus if:
 - it contains a misleading or deceptive statement;
 - it omits to include information required under the Corporations Act; or
 - a new circumstance has arisen which requires disclosure.
- A person must have a reasonable basis for making forecasts and other forward-looking statements.

Prospectus content

What happens if a prospectus is not “clear, concise and effective”?

- Failure to comply with the requirement to be “clear, concise and effective” is not an offence under the Corporations Act
- ASIC may issue a stop order if a prospectus is not “clear, concise and effective” (section 739)
- A company should issue a replacement prospectus if it becomes aware that information is not presented or worded in a “clear, concise and effective” manner (section 719(1A))
- If a prospectus is not “clear, concise and effective”, there is a higher likelihood that the content may also be misleading and deceptive



Prospectus content

General guidance from the courts

Fraser v NRMA Holdings Ltd (1995) 127 ALR 543 at 556

‘If every possible formulation of the commercial objective of the proposal, and arguments for and against every theoretical possibility were set forth, the total package of information to members would be likely to confuse rather than to **illuminate the issue for decision**, even for people having familiarity with corporate law and commerce. The need to make full and fair disclosure must be tempered by the need to **present a document that is intelligible to reasonable members of the class to whom it is directed**, and is likely to assist rather than to confuse...In complex cases it may be necessary to be selective in the information provided, confining it to that which is **realistically useful.**”



ASIC Regulatory Guide 228 - Prospectuses: Effective disclosure for retail investors

Effective disclosure

ASIC's role

Promoting confident and informed participation by investors and consumers in the financial system

- ASIC is focussed on how investors make decisions – appropriate disclosure is a core element of the Australian regulatory framework so as to produce confident and informed investors and financial consumers, and fair and efficient markets
- Prior to releasing Regulatory Guide 228 (**RG 228**), ASIC identified the following concerns with prospectuses:
 - front sections dominated by marketing statements and photographs
 - disclosure of descriptive information with little or no analysis on its relevance or impact
 - unnecessary length due to repetition and arguably irrelevant information
 - inclusion of complex information that is not properly explained
 - use of too much jargon
 - non-compliance with Corporations Act requirements for smaller offerings

Effective disclosure

for retail investors

- The purpose of RG 228 is to give guidance on how to word and present prospectuses in a “clear, concise and effective” manner, and how to satisfy content requirements
- RG 228 can also be used as helpful guidance for other forms of disclosure documents (see table 2 of RG 228)
- RG 228 provides helpful guidance on:



“Our guidance is general rather than prescriptive because the Corporations Act places responsibility on you to comply with the disclosure requirements... **you need to critically analyse how our general guidance applies to your offer and individual circumstances...** We will consider this guide when we are reviewing prospectuses but we will not use it as a checklist.”

ASIC Regulatory Guide 228.7-9

Guidance on content

What do I need to include in the prospectus?

Investment overview

- Highlights key information
- First section after Chairman's letter
- Balanced disclosure of benefits and risks
- Helps investors to navigate prospectus by explaining what they need to focus on and should include clear cross-referencing

Business model

- Key components, assumptions and risks
- Financing arrangements
- Important contracts
- Corporate structure
- Explanation of industry
- Capital management policy

Risks

- Identify and explain key risks
- Consider risks to the issuer, risks of the offer, industry risks and general risks
- Organise logically e.g. key risks first

Guidance on content

What do I need to include in the prospectus? (continued)

The Offer

- What is the effect of your offer?
- How will proceeds be used?
- What are the terms and conditions of the offer?
- What rights and liabilities attach to the securities?
- How much do investors need to pay?
- What is the allocation policy?
- Is there a minimum or maximum subscription amount?
- Will the securities be listed?
- Description of underwriting arrangements
- Description of capital structure and escrow arrangements

Financial Information

- Historical financial information
- Pro forma financial information
- Prospective financial information
- Financial ratios

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

- Role, expertise, independence or affiliations, interests and remuneration, legal or disciplinary action, insolvent companies
- Details of corporate governance framework
- How will comply with continuous disclosure requirements
- Interests held and fees or benefits given to directors, promoters, proposed directors, advisers named in prospectus and underwriters (section 711(4) Corporations Act)
- Details of related party transactions

Clear, concise and effective wording

Communication tools

Use the active voice

Use direct language

Use the positive and avoid double negatives

Use verbs rather than nouns, where possible

Avoid overusing definitions

Use simple definitions

Avoid additional content in definitions

Avoid jargon

Use short sentences

Use industry accepted terms

Disclaimers

Tailor boilerplate text

* Refer to Appendix for more details of communication tools recommended by ASIC

Clear, concise and effective presentation

Communication tools

Summaries:
Highlighting key
information

Balance and
prominence

Navigation aids

Logical order of
information

Layout

Tables, diagrams,
graphs, charts and
maps

Photographs

Examples and
case studies

Glossaries

Replacement
prospectus

*Refer to Appendix for more details of communication tools recommended by ASIC

Office of Parliamentary Counsel's
Plain English Manual

Drafting simply

- The Australian Government Office of Parliamentary Counsel (**OPC**) is responsible for drafting Bills for the Commonwealth Government
- In 2003, the OPC issued a Plain English Manual for legislative drafting, but it also serves as a general guide on how to draft simply
- Key lessons:
 - Plan your draft
 - Understand your audience and strike a balance between simplicity and precision
 - Substitute traditional or archaic language with simpler equivalents
 - Consider how to structure the information to aid understanding

Drafting simply

Examples of simpler equivalents – Extracts from OPC Plain English Manual

<i>6 o'clock in the morning</i> 6 am	<i>expiration/termination</i> end	<i>aggregate</i> total/sum	<i>exceeds</i> is more than/is over
<i>indicate</i> show/state	<i>submit</i> send/give	<i>in the event that</i> if	<i>notwithstanding</i> despite/in spite of
<i>sufficient, adequate</i> enough	<i>exclusively</i> only	<i>otherwise than</i> except	<i>alter, amend</i> change
<i>prior to</i> before	<i>not less than</i> at least	<i>as a result of</i> because of	<i>is constituted by</i> consists of
<i>per annum, per month</i> a year, a month	<i>assist</i> help	<i>allocate</i> give	<i>retain</i> keep

Lessons, Hot topics, & Practical tips

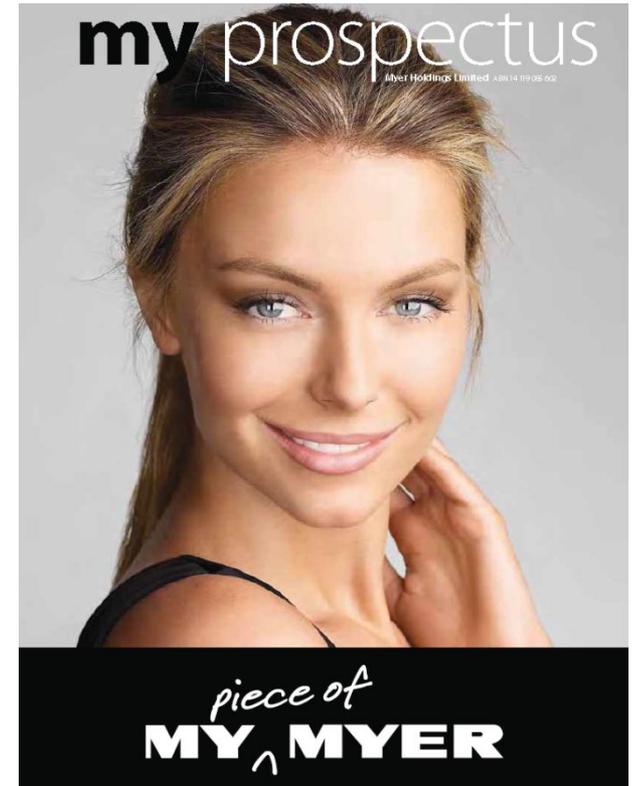
Lessons

DO: use photographs that relate to the business of the company
use labels to explain the relevance of the photograph



Major Coal Seam Exposed in Bayanteeg Coal Mine

DO: only use celebrity photos if you explain why they are relevant

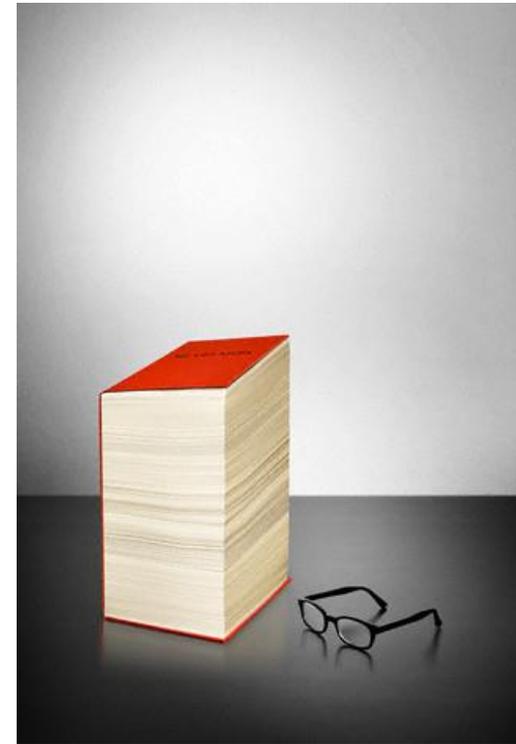


Lessons

DO: include an investment overview that highlights key risks near the front



DON'T: create an unnecessarily long and unwieldy prospectus



Hot Topics

Hybrid Securities - too complex for retail investors?

- Increase in offers of hybrid securities
- ASIC has concerns that hybrids are being pushed on investors without an adequate explanation of the risks and terms
- Media has suggested that ASIC is planning to meet with industry participants to remind them that they need to highlight that investments come with risks
- ASIC has issued a media release setting out tips for investors who are thinking about investing in a corporate hybrid security
- High likelihood that hybrid prospectuses will be carefully scrutinised by ASIC

“Investors need to understand the conditions of these offers, such as terms and conditions that allow the issuer to exit the deal or suspend interest payments, and long term maturity dates of several decades. **We want to ensure that consumers are fully informed before they invest.**”

ASIC Chairman Greg Medcraft, 2011.

Practical tips

- Will “mum and dad” investors have all the information they need to make an investment decision?
- Have you used plain language to communicate information?
- If an offer is being made in Australia, have you considered RG 228 and the content requirements under the Corporations Act?
- Could any part of the prospectus be misleading or deceptive (including by omission)?
- Is your prospectus “clear, concise and effective”?



Questions?

Appendix:

ASIC guidance on communication tools
for “clear, concise and effective” wording
and presentation

Clear, concise and effective wording

Communication tools - Extracts from RG 228

Tool	Explanation	Examples
Use the active voice	Avoid using the passive voice, where possible, as it can hide details such as who is responsible for actions. In many cases, the passive voice also requires more words and is less engaging.	<i>'The Offer Information Line is available for more information'</i> can be rewritten as, <i>'You should call the Offer Information Line for more information'</i> .
Use direct language (personal pronouns)	It is more engaging to refer to an 'applicant' as 'you' and the 'company' as 'we'. It can also be more concise. You should ensure there is no confusion about who 'you' and 'we' are.	<i>'Applicants should consider obtaining legal advice'</i> can be rewritten as, <i>'You should consider obtaining legal advice'</i> .
Use the positive and avoid double negatives	It is generally easier to understand sentences that are phrased positively rather than negatively.	<i>'It is not unlikely that the company will have trouble paying its debts if the offer is not successful'</i> can be rewritten as <i>'It is likely that the company will have trouble paying its debts if the offer is unsuccessful'</i> .

Clear, concise and effective wording

Communication tools – Extracts from RG 228

Tool	Explanation	Examples
Use verbs rather than nouns, where possible	Verbs and the present tense are usually simpler, more direct and concise.	<i>'Payment should be made by cheque'</i> can be rewritten as <i>'Please pay by cheque'</i> .
Avoid overusing definitions	Definitions are very useful in providing clarity of meaning, but should not be overused. Use one definition that is specific rather than a definition that will lead readers to other definitions, where possible. Avoid defining commonly understood terms. If a term is only repeated two or three times, it may not need to be defined (depending on the length of the definition).	<i>'Applicant'</i> is a commonly understood term and may not require a definition.
Choose simple words for definitions	The defined terms should be short. Select a defined term that has meaning and facilitates easy reading of sentences that include the defined term. Avoid using a defined term that has a common meaning that is contrary to or not compatible with the meaning given in the definition.	<i>'Eligible Investor'</i> and <i>'Takeover Event'</i> are meaningful labels.

Clear, concise and effective wording

Communication tools - Extracts from RG 228

Tool	Explanation	Examples
Avoid including additional content in definitions and using the defined term within the definition	<p>You should avoid including important information about the offer in a definition. You should also avoid including important qualifications in a definition: for example, 'The Offer Price is \$1.00 per share plus a further \$10.00 per share due on the Instalment Date'. If you include important information in the definition, it is likely the information will not be given appropriate prominence and may be missed.</p> <p>The definition should make sense each time it is used. You should avoid using the defined term within its own definition as this can be circular and confusing.</p>	<p>'Closing date', defined as 'The date on which the offer closes. Applicants should ensure their application is submitted by the closing date' could be rewritten as 'The date on which the offer closes, being 1 June 2011 unless extended'.</p>
Avoid jargon, where possible	<p>If technical terms are necessary, they should be explained the first time they are used or in a glossary, or both.</p>	<p>Terms such as 'pari passu', 'swaps', 'passive portfolio management' and 'leveraged' should be defined or explained.</p>
Use short sentences	<p>Long sentences prevent readers from understanding information easily. Each idea should be presented in a separate sentence. You should also remove any surplus words.</p>	<p>'Shortening the length of a prospectus' can be rewritten as 'Shortening a prospectus'.</p>

Clear, concise and effective wording

Communication tools – Extracts from RG 228

Tool	Explanation	Examples
Use industry accepted terms	You should use terminology that is consistent with widely accepted industry guidelines, and use it in the same sense that it is used in the guidelines.	“Ore reserve’ and ‘mineral resource’ should be used in a way that is consistent with the JORC Code.
Disclaimers	A disclaimer will be more effective if it is prominent. A disclaimer should generally be able to be seen and understood by those who might otherwise be misled.	A disclaimer that the underwriter accepts no liability in connection with the prospectus is inconsistent with Part 6D.3.
Tailor boilerplate text; omit it where possible	Boilerplate text should be reviewed for relevance to each offer and should be tailored to reflect the offer.	

Clear, concise and effective presentation

Communication Tools – Extracts from RG 228

Tool	Explanation and how to use tool
Summaries: Highlighting key information	<p>Summaries introduce a reader to a matter and highlight key information.</p> <p>See Section C of RG 228 on preparing an investment overview (i.e. summary of key information in a prospectus).</p>
Balance and prominence	<p>You should give appropriate prominence to positive and negative or less positive information (e.g. a loss for the previous year, retirement of key personnel, poor weather conditions affecting continued operations, and risks). This is particularly important when highlighting key information in an overview or summary.</p> <p>You should ensure that:</p> <ul style="list-style-type: none">▪ positive information is not given undue prominence in a way that is potentially misleading; and▪ information of equal importance to the investment decision is treated in a balanced way, with equal prominence: see RG 228.56.
Navigation aids	<p>Investors will find your prospectus easier to read if it is logically organised and has good 'signposts' to different sections of the document.</p> <p>For example:</p> <ul style="list-style-type: none">▪ page numbers are important;▪ a table of contents should be sufficiently detailed to enable retail investors to locate key information on specific topics (e.g. 'use of funds' rather than simply 'the offer'); www.kwm.com

Clear, concise and effective presentation

Communication Tools – Extracts from RG 228

Tool	Explanation and how to use tool
Navigation aids continued	<ul style="list-style-type: none">▪ headings should be meaningful (e.g. ‘How is my shareholding affected?’). This will also help produce a useful table of contents; and▪ cross-references should be meaningful and include page numbers. For example, unless it is otherwise obvious from the text, say ‘See Table 5 on page 150 for a list of substantial shareholders’, rather than simply ‘See Table 5’.
Logical order of information	<p>For information to be accessible to readers, the information in your prospectus should flow logically and related information should be grouped together (if possible).</p> <p>Important information should be given more prominence than less important information, for example, by using an investment overview at the front of your prospectus (see Section C) and emphasising key risks (see RG 228.88–RG 228.91).</p>
Layout	<p>A well laid-out document is more accessible to retail investors.</p> <p>White space is important in creating pages that are easy to read. ‘White space’ refers to the amount of space on a page resulting from the use of margins, paragraph breaks and spacing between lines and headings.</p> <p>Different levels of headings, fonts, underlining, italics and colour can help indicate the importance of information. For example, placing text in very small font may give readers the impression they do not need to read it.</p>

Clear, concise and effective presentation

Communication Tools – Extracts from RG 228

Tool	Explanation and how to use tool
Tables, diagrams, graphs, charts and maps	<p>These tools can help present information in a way that is easy for retail investors to absorb.</p> <p>You should:</p> <ul style="list-style-type: none">▪ present tables, diagrams and other illustrative charts in the simplest way possible, providing clear captions and including key assumptions;▪ provide keys for more complex diagrams and graphs; and▪ select scales, time periods and other inputs that fairly represent the information and do not give skewed outputs. Where graphs or maps are used to compare information, the same scale should be used, or the document should explain that the same scale has not been used and the reasons for this.
Photographs	<p>Photographs can break up large sections of text.</p> <p>Photographs (other than those on the front cover) should only be included after the investment overview.</p> <p>Photographs should be meaningfully labelled and only included where they are relevant to the issuer's business or the offer. You may also need to explain how the image is relevant to your business or the offer if this is not self-evident. For example, if you include a photograph of a celebrity, you should label the photograph and explain why the celebrity is relevant.</p> <p>Photographs should not be used if they are likely to misrepresent the nature, stage or scale of your business. This is the case whether or not the photograph has a disclaimer.</p> <p style="text-align: right;">www.kwm.com </p>

Clear, concise and effective presentation

Communication Tools – Extracts from RG 228

Tool	Explanation and how to use tool
Examples and case studies	<p>Examples present information in a way that retail investors can more easily relate to and understand (e.g. to illustrate how formulae work).</p> <p>Examples should be provided on a consistent basis. They should be accompanied by a clear explanation about the purpose for which they are included and the assumptions on which they are based. If an example is used to show an increase or upward change, an example showing a decrease or downward change should also be included (and vice versa).</p> <p>Case studies can effectively demonstrate various concepts, such as investment strategies.</p>
Glossaries	<p>Glossaries explain the meaning of defined terms in one place. They should be easy to find. If your prospectus includes other reports, the reports should use the same terms as those used throughout your prospectus, where possible.</p>
Replacement prospectus	<p>Give a short explanation at the front of the replacement prospectus about the key differences between the replacement prospectus and the original one. This will help investors navigate the replacement prospectus if they have already read the original prospectus.</p> <p>For example, this may involve explaining that you have removed certain forecast information or provided more information about the risks associated with your major project in the investment overview and risk section.</p>

KING & WOOD MALLESONS

Better Together

Meredith Paynter

Meredith Paynter is a Partner in the Sydney office of King & Wood Mallesons, and is the Sector Leader for the Industrials, Consumer and Health sector practice.

Meredith specialises in major corporate transactions including fundraisings, mergers and acquisitions and private equity. Meredith's experience includes IPOs (including dual track exits), entitlement offerings and hybrid offerings, public company takeovers, mergers by scheme of arrangement and private treaty acquisitions and disposals. She regularly deals with financial intermediaries and investment banks.

Meredith also regularly advises on general corporate, governance, securities law and listing rule matters.

Meredith has been recognised in the IFLR 1000.

Meredith is co-author of the Directions Reports on current issues facing Australian directors and boards, and is a regular speaker on corporate governance, shareholder activism, class actions, mergers and acquisitions and capital markets issues.



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REPUTATION

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IFLR Asia Awards (2004-07, 2009, 2010)
- **China National Firm of the Year**
Chambers Asia Awards (2010)
- **Australian Law Firm of the Year**
IFLR Asia Awards (2003-09, 2011)
- **Law Firm of the Year**
INSTO Distinction Awards (2012)
- **Most Desirable Employer in China**
Antal International (2011)

- **Social Responsibility Firm of the Year**
ALB Australasian Law Awards (2009-11)
- **Law Firm of the Year (China)**
Who's Who Legal (2010, 2011)
- **China Local Firm of the Year**
PLC Which Lawyer Awards (2010)
- **PRC Firm Hong Kong Office of the Year**
ALB Hong Kong Law Awards (2011)
- **Corporate Legal Services Firm of the Year**
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