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Australian Securities & Investments Commission

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Centre for Corporate Law & Securities Regulation

# **Multimedia prospectuses and other offer documents**

**Issues Paper**

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**and**

**ASIC**

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# Your comments

We invite your comments on the *issues for consideration* in this paper.

Comments are due by Friday 18 February 2000 and should be sent to:

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Your comments (and your name) will be made available to Dr Elizabeth Boros. Subject to legal limitations, your comments will be kept confidential by Dr Elizabeth Boros and ASIC.

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# 1. Introduction<sup>\*</sup>

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## Summary

1.1 This Issues Paper forms part of a collaborative project which investigates the impacts for the administration of corporate and securities law in Australia of developments in electronic communications. This Issues Paper examines one of these developments, namely the possibility of including multimedia material in prospectuses and other offer documents.

1.2 The questions being considered in this Issues Paper may require from ASIC:

- **an operational response** — for example, ASIC staff have traditionally regulated text-based prospectuses. Multimedia prospectuses may require ASIC staff to develop a new range of skills;
- **a policy response** — for example, consideration of the policy ASIC should adopt in relation to exercising its discretionary powers if issuers want to distribute a multimedia prospectus, but are only able to lodge a text-based prospectus;
- **a technological response** — for example, what technological capabilities does ASIC need to develop to best integrate the benefits of modern technology into its administration of the Corporations Law.

Moreover, some of the issues raised may also prompt debate about whether the Government should consider possible law reform.

1.3 ASIC will use comments received on the issues raised by the paper to assist it to identify which of the issues are likely to be most critical to ASIC and its stakeholders; to identify and prioritise the allocation of resources to deal with those issues; and to develop appropriate responses.

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1.4 The focus of this paper is on multimedia prospectuses for securities offerings, but the issues and questions raised are equally applicable to offer documents for superannuation and life insurance products as well as securities.

1.5 A related paper published by the Centre for Corporate Law and Securities Regulation entitled *The Online Corporation* examines the more general issues of:

- electronic delivery of documents such as annual reports, notices of meeting and prospectuses;
- electronic voting and company meetings; and
- electronic lodgment of documents with ASIC.

Both papers seek responses on specific issues relating to the areas they cover.

## Background to this Issues Paper

### Electronic prospectuses

1.6 The first Australian company to distribute its prospectus electronically was Hartley Poynton Limited, a Perth stockbroker. In July 1996 it distributed its prospectus for an initial public offering via the Internet as well as in paper form. Several other issuers have followed this lead. In addition, a number of fund managers now make prospectuses for their managed investments available online on an ongoing basis.

1.7 More recently, on 21 June 1999, Spike Networks Limited broke new ground by receiving ASIC relief to allow, among other things, a completely online application process including the use of an electronic payment system.<sup>1</sup>

### ASIC relief

1.8 ASIC Policy Statement 107, *Electronic Prospectuses*, was issued in September 1996. It is designed to facilitate the use of electronic media while giving effect to the fundamental objective of the prospectus provisions. That objective is to ensure that investors are able to make informed investment decisions on the basis of a

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<sup>1</sup> ASIC Class Order 99/0790, which was released shortly after this, also facilitates a completely online application process. See further ¶ 1.9.

prospectus containing all material information about the issuer and the securities being offered.

1.9 In June 1999, ASIC amended its electronic prospectus relief to allow hosts of Internet websites to act as service providers and publish third parties' electronic prospectuses on their websites.<sup>2</sup> The amendments also facilitate a completely online application process by allowing:

- hypertext links from the electronic application form to an electronic funds payment system, for the purpose of effecting an electronic transfer of funds; and
- the electronic communication of a completed application form by an applicant to the issuer.<sup>3</sup>

1.10 ASIC Policy Statement 141, *Offers of Securities on the Internet* was issued in February 1999. It sets out when ASIC intends to regulate offers, invitations and advertisements of securities that appear on the Internet and can be accessed in Australia. The release of Policy Statement 141 formed part of ASIC's continued cooperative efforts with international regulators<sup>4</sup> to coordinate regulatory approaches and develop effective enforcement strategies on the use of the Internet for fundraising.<sup>5</sup>

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<sup>2</sup> ASIC Class Order 99/0790 (second exemption) and Information Release 99/021.

<sup>3</sup> ASIC Class Order 99/0790 (first exemption), condition 1(d)(iii).

<sup>4</sup> For overseas regulatory guidance on extraterritorial application of securities laws, see: (UK) Financial Services Authority, Treatment of Material on Overseas Internet World Wide Web Sites Accessible in the UK but Not Intended for Investors in the UK 1998 <<http://www.sib.co.uk/pubs/guider.htm>>. See also H M Treasury, Financial Services and Markets Bill, Financial Promotion – A Consultation Document, March 1999, part II <<http://www.hm-treasury.gov.uk/pub/html/docs/finprom.html>>; (USA) SEC Release No 33-7516; 34-39779, IA-1710; IC-23071; International Series Release No 1125, Statement of the Commission regarding use of Internet Websites to offer securities, solicit securities transactions or advertise investment services offshore, 23 March 1998 <<http://www.sec.gov/rules/concept/33-7516.htm>>; and (Canada) The British Columbia Securities Commission has provided guidance on this issue, until national guidelines or rules are promulgated: Notice and Interpretation Notes No 97/09: Trading Securities and Providing Advice Respecting Securities on the Internet, effective 3 March 1997.

<sup>5</sup> ASIC currently has Memoranda of Understanding with regulators in Brazil, the Canadian provinces of Alberta, British Columbia, Ontario, and

## Electronic applications

1.11 In September 1999, ASIC issued a policy proposal paper on the use of electronic application forms by issuers of securities and intermediaries involved in the distribution of securities.<sup>6</sup> Under the policy proposal:

- issuers can receive electronic applications without using electronic copies of the paper application forms that are lodged with the prospectus; and
- dealers can use “personalised” application forms that are different from the application forms that issuers lodge with the prospectus. ASIC expects to finalise its policy on this issue shortly.

After ASIC has resolved some technical issues, it is proposed to extend the approach to offers of interests in superannuation and life insurance products.

## Legislative responses

1.12 Some significant steps have been taken by the legislature in recent times to facilitate electronic communications with and by issuers. The Corporate Law Economic Reform Program (CLERP) has as one of its core goals facilitating the more widespread use of electronic commerce.<sup>7</sup> The CLERP Act made amendments that will facilitate fundraising by electronic means.<sup>8</sup> In its document, *Corporate Law Economic Reform Program: Policy Reforms*, the

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*Quebec, China, France, Germany, Hong Kong, Indonesia, Italy, Malaysia, New Zealand, Papua New Guinea, South Africa, Spain, Thailand, the United Kingdom and the United States. These memoranda facilitate the sharing of enforcement information. More broadly, the Australian Government has entered into bilateral e-commerce policy agreements (joint statements on the online economy and electronic commerce) with China, Singapore, the Republic of Korea and the United States. Regarding ASIC recognition of aspects of other jurisdictions’ prospectuses and collective investments, see: ASIC Policy Statements 72 Foreign Securities Prospectus Relief, 65 Foreign Collective Investment Schemes and 136 Managed Investments: Discretionary Powers and Closely-Related Schemes.*

<sup>6</sup> ASIC Policy Proposal, Electronic Applications, September 1999.

<sup>7</sup> For example, one of the CLERP papers: Paper No 5, Electronic Commerce: Cutting cybertape - building business, was dedicated to these issues.

<sup>8</sup> See ASIC’s policy proposal paper released in July 1999 for public comment on implementing the CLERP Act entitled “Fundraising: disclosure document lodgment”. The policy proposal paper considers, among other things, the electronic lodgment of disclosure documents.

Department of Treasury has identified a number of additional e-commerce reforms. These include amending the current fee collection structure to ensure that the means and timing of fee collection accommodate the use of communications technology.<sup>9</sup>

## This Issues Paper

1.13 Policy Statement 107 is premised on the view that text-based information remains the frame of reference for many investors when assessing complex disclosure information. It notes that “[a]udio or video presentations of prospectus information may give rise to additional issues”.<sup>10</sup> This Issues Paper explores and seeks comment on these additional issues.

## Terminology

1.14 Unless otherwise indicated, the following expressions when used in this Issues Paper have the meanings set out below:

“ASCOT” is ASIC’s national corporate database. It also provides access to DOCIMAGE;

“ASX” means The Australian Stock Exchange Limited;

“CLERP Act” means the Corporate Law Economic Reform Program Act 1999 (Cth). The amendments which it makes to the Corporations Law are expected to come into force on 13 March 2000;

“DOCIMAGE” is ASIC’s document image system and stores digitised copies of all documents lodged with ASIC since 1 January 1991;

“electronic communication” includes media such as audiotapes, videotapes, facsimiles, CD-ROM, email, bulletin boards, Internet websites and computer networks;

“issuer” includes both corporations (public and, where appropriate, proprietary) and registered managed investment schemes;

“investor” means a potential investor as well as a current holder of securities;

“SEC” means the United States Securities and Exchange Commission.

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<sup>9</sup> *Reform No 48. See generally reforms 46-51.*

<sup>10</sup> *ASIC Policy Statement 107, Electronic Prospectuses, para 107.5.*

## 2. Multimedia prospectuses and other offer documents<sup>11</sup>

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### Background

2.1 Prospectuses is the area in which electronic media have had perhaps the greatest impact on communications between issuers and investors in Australia to date. Text-based electronic prospectuses are no longer novel. Multimedia prospectuses raise a new set of opportunities for communication with investors and corresponding regulatory challenges.

### ASIC's electronic prospectuses policy

2.2 An appropriate starting point is ASIC Policy Statement 107, *Electronic Prospectuses*. Policy Statement 107 was issued in September 1996. It focuses on electronic prospectuses distributed via the Internet or other computer networks, CD-ROM and floppy disk. In essence, ASIC considers that electronic prospectuses should be allowed when the policy underlying the prospectus provisions of the Corporations Law is satisfied. That policy is to ensure that investors are able to make informed investment decisions on the basis of a prospectus containing all material information about the securities being offered and the issuer. Policy Statement 107 is premised on the view that text-based information remains the frame of reference for many investors when assessing complex disclosure information.<sup>12</sup>

### Electronic prospectuses class order relief

2.3 ASIC relief to allow the use of electronic prospectuses is given by Class Order 99/0790.<sup>13</sup> Class Order 99/0790 contains three exemptions relating to:

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<sup>11</sup> The term "prospectus" is used throughout this document. When the CLERP Act commences, there will be several new types of disclosure document. The issues raised by this Issues Paper are equally relevant to these new disclosure documents.

<sup>12</sup> ASIC Policy Statement 107, *Electronic Prospectuses*, para 107.5.

<sup>13</sup> Class order 96/1578 applied from 3 October 1996. This was revoked and replaced by Class Order 99/0790 on 23 June 1999. It applies

- electronic dissemination of prospectuses by issuers and intermediaries;
- electronic dissemination of prospectuses by Internet website hosts; and
- dissemination of print-outs of the electronic prospectus and the electronic application form by third parties such as investment advisers.

2.4 The first exemption is the most relevant for present purposes. The relief that it provides reflects the “text-based” premise of Policy Statement 107. A condition of the relief is that the electronic application form and the electronic prospectus can only differ from the paper application form and paper prospectus lodged with ASIC in restricted ways relating to:

- the different technological tools available to readers of electronic as distinct from paper documents;<sup>14</sup>
- the difference between the paper and electronic environments;<sup>15</sup> and
- investor protection mechanisms.<sup>16</sup>

2.5 ASIC’s policy proposal paper on electronic applications, which was released on 8 September 1999, proposes to give more flexibility to issuers in designing their electronic application processes. Further, Policy Statement 107 is being reviewed in light

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*where paper prospectuses are lodged with ASIC on or after 1 September 1999. (Issuers could elect to comply with the new class order as of 23 June 1999).*

<sup>14</sup> *For example, prompts to assist a person to read the electronic prospectus and hypertext links within the electronic prospectus or electronic application form or from the electronic application form to an electronic funds payment system.*

<sup>15</sup> *For example, the absence from (or simplification in) the electronic prospectus or the electronic application form of graphics of a promotional or decorative nature (as opposed to those presenting substantive information including headings, graphs and tables).*

<sup>16</sup> *For example, the electronic application form must contain a prominent statement to the effect that the Corporations Law prohibits any person from passing on to another person the application form unless it is attached to or accompanied by the complete and unaltered electronic prospectus and any relevant supplementary prospectus. In addition, the electronic application form or the electronic prospectus must contain a statement to the effect that the issuer will send a copy of the paper prospectus and the paper application form free of charge to anyone who asks for it during the application period.*

of the CLERP Act. The CLERP Act will facilitate the issue of a disclosure document in electronic form as well as paper.

2.6 The multimedia prospectus is likely to require a different range of regulatory responses from ASIC. This Issues Paper examines the issues raised by multimedia prospectuses under three broad headings:

- equality of access;
- the relevance of lodgment to dissemination; and
- multimedia information that is not reducible to text.

# Issues for consideration

## Equality of access

2.7 Electronic dissemination of information has the potential to reduce significantly the information asymmetry that currently exists between individual and institutional shareholders. For example, this might permit a CD-ROM containing the electronic prospectus to also include a copy of a presentation given to institutional shareholders about the offering. This means that all potential investors would get access to the same information.

2.8. However, although this would benefit many non-institutional investors, it may disadvantage those who cannot access the electronic material. Paper-based prospectuses are readily accessible to most potential investors interested in obtaining them. By contrast, notwithstanding rapidly growing access to the Internet, access to facilities for viewing or listening to a multimedia prospectus is not universal. A decision would need to be made whether Australia should continue to treat text-based information as the primary means for disseminating disclosure information until access to the technology needed to receive multimedia material is more widespread. This need not necessarily exclude multimedia material from being disseminated. It could be made available to supplement disclosure that is required by law on the basis that all information that investors and their professional advisers would reasonably require, and reasonably expect to find in the prospectus<sup>17</sup> is contained in the text part of the prospectus.

2.9 A related issue is that of consistency in the medium in which information is presented. What would be the situation if, for example, an investor received supplementary material in a different medium from the prospectus? In the United States, one commentator<sup>18</sup> has noted that “slick illustrated annual reports to shareholders tend to dominate investors’ interest, to the detriment of plainer, drab proxy statements”. He queries whether this pattern will translate to the prospectus context, asking: “Will investors read the traditional paper documents and treat the electronic information as deserving of little attention, or will they focus upon the electronic information and treat the paper documents as boiler-plate nuisances?”

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<sup>17</sup> This paraphrases the disclosure obligation in section 1022 of the Corporations Law.

<sup>18</sup> Howard M Friedman, *Securities Regulation in Cyberspace* (2<sup>nd</sup> edn, 1997, Bowne, New York, looseleaf service) p 3-25.

## ***Overseas approaches***

2.10 Canada and the United States have both addressed the issue of inclusion of multimedia material in prospectuses but they have adopted different approaches.

### **Canada**

2.11 In broad terms, the approach that is proposed in Canada is that there should be no prohibition on multimedia communications being used to present information. But all recipients must receive the same information that is required by Law, regardless of their multimedia capabilities. Thus, it is proposed that material required by Law should not be in multimedia form (until multimedia technology is more prevalent).<sup>19</sup>

### **United States**

2.12 A more liberal approach to multimedia material is taken in the United States.<sup>20</sup> Where documents contain graphic, audio and video material, the issuer must provide a fair and accurate description, tabular presentation or transcript of that material in the version filed with the SEC, either at the point in the text where the omission occurs or in an appendix to the electronic filing.<sup>21</sup> However, with respect to documents delivered to investors, such as prospectuses, there may be different versions, some containing multimedia material and others that do not. The only requirement is that each version of the prospectus must contain all information necessary to comply with the statutory requirements. It is not necessary to describe the multimedia material in text-only versions of the prospectus. Rather, it is enough to indicate that there are other versions of the prospectus and provide information on how to obtain them. Issuers are, however, cautioned to be mindful of the possibility that multimedia material will not be received because of the technical constraints of the receiver's equipment or an election not to receive these types of communications.

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<sup>19</sup> *Proposed National Policy 11-201, Delivery of Documents by Electronic Means, para 3.4.*

<sup>20</sup> *See SEC Release No 33-7234; 34-36346; IC-21400, Use of Electronic Media for Delivery Purposes – Proposed Rules, 6 October 1995 <<http://www.sec.gov/rules/proposed/33-7234.txt>> and SEC Release No 33-7289, 34-37183, IC-21946, Use of Electronic Media for Delivery Purposes – Final Rules, 9 May 1996 <<http://www.sec.gov/rules/final/33-7289.txt>>.*

<sup>21</sup> *Rule 304 of Regulation S-T, General Rules and Regulations for Electronic Filings.*

## Issues

- (a) Should multimedia material be able to be included in documents distributed to investors? Why?
- (b) If multimedia material should be able to be included in documents distributed to investors, should it be restricted to information that is not required by Law? Why?
- (c) Should there be any other limits on the non-text information that can be distributed in or in conjunction with an offering of securities? On what basis might such limits be set?
- (d) Would there be any advantages to issuers or investors if mandatory disclosure material could be presented in multimedia form? If so, what would they be?
- (e) Does it matter that some investors may not have access to the facilities necessary to access multimedia material? Why?
- (f) Should there be an obligation to provide a transcript or description of audio or visual material in the lodged version and/or any text-based version of the prospectus? Why?
- (g) Should any supplementary prospectus be required to be provided in the same format as the original prospectus? Why?

## Relevance of lodgment to dissemination

2.13 In both Canada and the United States, allowing multimedia material to be distributed to investors has been contemplated at a time when the central filing system of the respective regulators does not have the capacity to accept this material. ASIC's database currently has similar limitations. The Australian regulatory regime requires that the copy of the prospectus lodged with ASIC and the copy circulated to investors be the same. Section 1018 of the Corporations Law prohibits a person from offering securities for subscription (or inviting subscription for securities) unless a

prospectus in relation to the securities has been lodged.<sup>22</sup> Thus, if Australia were to permit the dissemination of multimedia prospectuses, there would be a number of additional regulatory implications:

- the lodged document would not necessarily be the same as (all versions of) the selling document. This would be likely to impact on the examination of prospectuses by ASIC. It could also have implications for enforcement actions and any subsequent litigation because at present the lodged copy of the prospectus provides a record copy;
- the prospectus as retrieved from ASCOT would not be the same as that received by the recipients of the multimedia version.

## Issues

- (h) Does it matter if the lodged document is not necessarily the same as (all versions of) the selling document? Why? Is this an issue for investors or issuers, or both?
- (i) If issuers prepare more than one prospectus for the same offer of securities (a text-based one for lodgment purposes and a multimedia non-text based one for distribution purposes) will this make it more difficult for issuers to comply with their disclosure obligations? If so, in what ways? What are the implications for investors?

## Multimedia information not reducible to text

2.14 Multimedia material may contain information that is not capable of being reduced to text. This raises issues about the way the law applies to multimedia material.

2.15 Provisions such as sections 995 and 996<sup>23</sup> of the Corporations Law (which deal respectively with misleading or deceptive conduct in connection with any dealing in securities and false or misleading statements in or omissions from a prospectus)

<sup>22</sup> Section 727 of the CLERP Act is in similar terms.

<sup>23</sup> The CLERP Act repeals s 996 of the Corporations Law. See s 728 of the CLERP Act.

would seem to be sufficiently widely drafted to extend to multimedia prospectuses. In particular, “conduct” for section 995 is wider than verbal communication and section 9 of the Corporations Law defines “statement” for the purposes of these provisions to include “matter that is not written but conveys a message”.

2.16 However, assessment of whether conduct evidenced by multimedia prospectuses contravenes such provisions may require a different regulatory approach. For example, an audio or visual message may conflict with or colour the message conveyed by the words used in a way that is not apparent from a transcript of the prospectus. Regulators, who have been used to fine analysis of purely text-based documents, may need:

- to adopt an approach to determining whether these provisions have been breached based more on the overall impression created by the prospectus; and
- to develop different skills to assess the possibly different and manipulative effects of multimedia material.

2.17 This issue also has implications for issuers, their advisers and people named in the prospectus in that a similarly impressionistic approach (in addition to the usual line-by-line approach) may need to be adopted to due diligence.

## Issues

- (j) Are issuers likely to change their approach to due diligence to deal with multimedia prospectuses? What changes, if any, in their internal due diligence process will be required?
- (k) Are there evidential or other issues ASIC will need to be alert to in relation to the liability regime when applied to multimedia prospectuses?
- (l) Are there any additional issues relating to the administration of the provisions relating to false and misleading information for multimedia as compared to text-based documents? What new regulatory approaches might be needed to deal with these issues?
- (m) In its administration of a multimedia prospectus regime, are there new areas of risk for investors or particular groups of investors that ASIC may need to focus on in its regulatory activities?

## Your comments

We invite your comments on the *issues for consideration* in this paper.

Comments are due by Friday 18 February 2000 and should be sent to:

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Your comments (and your name) will be made available to Dr Elizabeth Boros. Subject to legal limitations, your comments will be kept confidential by Dr Elizabeth Boros and ASIC.

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