



**ASIC**

Australian Securities & Investments Commission

## REGULATORY GUIDE 228

# Prospectuses: Effective disclosure for retail investors

November 2011

### **About this guide**

This guide is for issuers and advisers on how to word and present prospectuses and other documents in a 'clear, concise and effective' manner.

This guide also sets out our guidance about how to prepare prospectuses that satisfy the content requirement in s710 of the *Corporations Act 2001* (Corporations Act).

## About ASIC regulatory documents

In administering legislation ASIC issues the following types of regulatory documents.

**Consultation papers:** seek feedback from stakeholders on matters ASIC is considering, such as proposed relief or proposed regulatory guidance.

**Regulatory guides:** give guidance to regulated entities by:

- explaining when and how ASIC will exercise specific powers under legislation (primarily the Corporations Act)
- explaining how ASIC interprets the law
- describing the principles underlying ASIC's approach
- giving practical guidance (e.g. describing the steps of a process such as applying for a licence or giving practical examples of how regulated entities may decide to meet their obligations).

**Information sheets:** provide concise guidance on a specific process or compliance issue or an overview of detailed guidance.

**Reports:** describe ASIC compliance or relief activity or the results of a research project.

## Document history

This regulatory guide was issued in November 2011 and is based on legislation and regulations as at the date of issue.

## Disclaimer

This guide does not constitute legal advice. We encourage you to seek your own professional advice to find out how the Corporations Act and other applicable laws apply to you, as it is your responsibility to determine your obligations.

Examples in this guide are purely for illustration; they are not exhaustive and are not intended to impose or imply particular rules or requirements.

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## A Overview

### Key points

This regulatory guide sets out our guidance on how to word and present prospectuses in a ‘clear, concise and effective’ manner.

This guide also sets out our guidance to issuers and their advisers on how to satisfy the content requirement for prospectuses.

Our guidance is general rather than prescriptive because the Corporations Act places responsibility on issuers to comply with the disclosure requirements.

Our guidance may also be relevant for other disclosure that requires shareholders to make an investment decision.

## Disclosure requirements for prospectuses

RG 228.1 Chapter 6D of the *Corporations Act 2001* (Corporations Act) regulates when an offer of securities in Australia requires a disclosure document. Most offers of securities to retail investors in Australia require a disclosure document. The purpose of a disclosure document is to help retail investors assess the risks and returns associated with an offer and make informed investment decisions.

RG 228.2 The most common type of disclosure document is a prospectus. When you prepare a prospectus, you must:

- (a) word and present it in a ‘clear, concise and effective’ manner (s715A);
- (b) include the information required by the general disclosure test (s710);
- (c) make specific disclosures, including disclosure about interests and benefits of persons involved in the offer (s711); and
- (d) ensure it is not misleading or deceptive (s728(1)).

Note: For offers of continuously quoted securities or options over continuously quoted securities, you may be able to comply with the reduced disclosure requirements in s713.

RG 228.3 The prospectus disclosure regime is focused on the needs of retail investors and their professional advisers. If an offer is not made to retail investors, a prospectus is generally not required: s708(8), (10) and (11). The policy underlying the Ch 6D disclosure regime is that it would be difficult for retail investors to obtain the information they need without mandatory disclosure.

RG 228.4 Prospectuses are also used by sophisticated and professional investors and they are an important basis for trading securities on Australia’s financial markets.

## Purpose of this guide

- RG 228.5 This guide aims to assist you, as an issuer, and your advisers to produce s710 prospectuses that help retail investors assess the offer and make informed investment decisions.
- RG 228.6 Table 1 summarises our guidance on prospectus disclosure. This guide explains:
- (a) how you can word and present your prospectus so it is ‘clear, concise and effective’ (see Section B);
  - (b) how you can use an investment overview to highlight key information about the offer for retail investors (see Section C); and
  - (c) the information retail investors generally require and expect to find in a prospectus. This is the information that is required under the general disclosure test in s710 and the specific disclosures required by s711 (see Sections D–H).
- RG 228.7 Our guidance is general rather than prescriptive because the Corporations Act places responsibility on you to comply with the disclosure requirements. You have the flexibility to determine what information the Corporations Act requires for your prospectus and you need to critically analyse how our general guidance applies to your offer and individual circumstances.
- RG 228.8 The guidance is also general because it applies to a broad spectrum of companies in different sectors. This guide does not require you to either include specified information in your prospectus or explain in the prospectus why it is not relevant.
- RG 228.9 We will consider this guide when we are reviewing prospectuses but we will not use it as a checklist: see RG 228.168 for our approach to reviewing prospectuses.

**Table 1: Summary of our guidance on prospectus disclosure**

Topic	What our guidance covers	Where to find it
'Clear, concise and effective'	Your prospectus must be worded and presented in a 'clear, concise and effective' manner.  You should consider incorporating by reference information that is not key to a retail investor's assessment of the offer.	Section B
Investment overview	The first substantive section of a prospectus should contain an investment overview for retail investors that: <ul style="list-style-type: none"> <li>• highlights key information about the issuer and offer in a balanced way; and</li> <li>• gives cross-references to more detailed information.</li> </ul>	Section C
Specific content guidance: Business model	Your prospectus should explain your business model—that is, how you propose to make money and generate income or capital growth for investors (or otherwise achieve your objectives).	Section D
Specific content guidance: Risks	Your prospectus should explain the risks associated with: <ul style="list-style-type: none"> <li>• you as the issuer, including the risks to your business model;</li> <li>• the security; and</li> <li>• the offer.</li> </ul>	Section E
Specific content guidance: Financial information	Your prospectus must explain your financial position, performance and prospects.	Section F  See also Regulatory Guide 170 <i>Prospective financial information</i> (RG 170) and Consultation Paper 150 <i>Disclosing financial information other than in accordance with accounting standards</i> (CP 150)
Specific content guidance: Directors and key managers, interests, benefits and related party transactions	Your prospectus should set out the experience and background of directors and key managers.  Your prospectus must also contain information on interests and benefits that persons connected with the issuer or offer will receive, as well as any related party arrangements.	Section G  See also Regulatory Guide 76 <i>Related party transactions</i> (RG 76)
Specific content guidance: Effect and terms and conditions of the offer	Your prospectus should clearly set out the effect of the offer on the issuer (including the proposed use of funds). Your prospectus must also set out the terms and conditions of the offer.	Section H
ASIC's role: How we monitor and assess prospectuses	When we review a prospectus, we will consider this guide and any other disclosure guide that is relevant to the offer or the issuer.	Section I

Note: The order of this guide is not intended to prescribe how you organise your prospectus.

## Other guidance you may need to consider

- RG 228.10 This guide focuses on the general disclosure test in s710 and other disclosures required in a s710 prospectus.
- RG 228.11 You may also need to consider guidance that we have published on specific aspects of Ch 6D disclosure and for particular sectors—for example, Regulatory Guide 69 *Debentures: Improving disclosure for retail investors* (RG 69) and Regulatory Guide 213 *Facilitating debt raising* (RG 213). These are referred to throughout this guide, where relevant, and are also listed in the ‘Related information’ section.
- RG 228.12 We have also published guidance that mainly relates to disclosure in Product Disclosure Statements (PDSs) under Pt 7.9 for registered managed investment schemes that operate in particular sectors—for example, Regulatory Guide 45 *Mortgage schemes: Improving disclosure for retail investors* (RG 45). For companies operating in these sectors that are preparing a prospectus, the more specific PDS guidance may also give a useful explanation of the type of information we consider to be relevant and important to investors in these sectors.

## Broader application of this guide

- RG 228.13 Our guidance on the information that will generally be required in a s710 prospectus may also be relevant to other disclosure that requires shareholders to make an investment decision relating to securities: see the examples set out in Table 2. The extent to which our content guidance is relevant will depend on the type of decision that shareholders are being asked to make and the information available in the market.
- RG 228.14 Our guidance on content may also help you comply with continuous disclosure requirements. Retail investors need the type of information set out in this guide to make an informed investment decision and they may also need to understand significant changes to that information to monitor your ongoing performance, whether as existing shareholders or as potential investors in the secondary market.
- RG 228.15 Our guidance on ‘clear, concise and effective’ disclosure is relevant to a broad range of corporate communications that you provide to retail investors: see Table 2. Some of these documents are not subject to a statutory requirement to be ‘clear, concise and effective’ but we consider similar duties arise under the general law (e.g. directors’ duty to inform members and prohibitions on misleading or deceptive conduct).

Note: See Santow J (in the context of an expert report for a scheme) in *Re Australian Cooperative Foods Ltd* (2001) 38 ACSR 71 at 77: ‘This is so those members can make an informed decision with the benefit of a report that is as simple, clear and useful as possible’. See also the Takeover Panel’s decision in *Northern Energy Corporation Limited* [2011] ATP 2 at paragraphs 111–112.

**Table 2: Application of this guide to other documents**

Document type	Sections of this guide that apply and other relevant guidance
A bidder's statement under Ch 6 where securities are being offered as consideration under a takeover offer: see s636(1)(g)	Sections B–H See also Regulatory Guide 159 <i>Takeovers, compulsory acquisitions and substantial holding notices</i> (RG 159)
An explanatory statement under Pt 5.1 where securities are being offered as consideration under a scheme of arrangement	Sections B–H See also Regulatory Guide 60 <i>Schemes of arrangement</i> (RG 60)
A Ch 6 takeover document or a Pt 5.1 scheme of arrangement (other than those described above)	Section B
A transaction-specific prospectus under s713 where the aim of the offer is to finance a transaction that involves a major change in the nature or scale of the entity's business or finances	Sections B–I See also Regulatory Guide 66 <i>Transaction-specific disclosure</i> (RG 66) including at RG 66.46
A transaction-specific prospectus under s713 (other than those described above)	Sections B, E and G–I See also RG 66
An offer information statement under s715	Sections B–I
A combined prospectus and Product Disclosure Statement for an offer of stapled securities	Sections B–I See also Regulatory Guide 168 <i>Disclosure: Product Disclosure Statements (and other disclosure obligations)</i> (RG 168)
An 'offer document' for a rights issue under s708AA	Section B
A notice of meeting under s249L	Section B
An independent expert report	Section B See also Regulatory Guide 111 <i>Content of expert reports</i> (RG 111) at RG 111.84–RG 111.86

## Industry guidance

RG 228.16 Industry guidelines, standards and codes have a useful role to play in determining the information required by s710 of the Corporations Act. This is because investors will generally expect you to comply with accepted industry guidelines and reasonably require compliant information in your prospectus.

Note: The Corporations Act has additional and more extensive disclosure requirements than those set out in an industry code or guidelines. You should ensure your prospectus complies with any relevant industry code and the Corporations Act.

RG 228.17 Two important industry codes are the JORC Code and the Valmin Code. The JORC Code covers the reporting of exploration results, mineral resources and ore reserves. The Valmin Code covers technical assessments and valuation reports. If you are a mining or exploration company, your prospectus should comply with these codes. Information that complies with these codes is considered to be information that investors require and expect to see in a prospectus. Failure to provide information in a manner that complies with the JORC Code or the Valmin Code may make your prospectus misleading.

Note: Australian Securities Exchange (ASX) Listing Rule 5.6 requires reports by mining companies to comply with the JORC Code.

RG 228.18 There are also other widely-accepted industry guidelines that relate to specific types of issuers or disclosure topics, such as hedging arrangements, prudential requirements or accounting treatments. If your prospectus diverges materially from these guidelines, you should prominently explain the reason for the divergence.

## B ‘Clear, concise and effective’: Does your prospectus help retail investors make informed investment decisions?

### Key points

Your prospectus must be worded and presented in a ‘clear, concise and effective’ manner. In this section, we suggest various communication tools to help you comply with this requirement.

We also give guidance on how you can make your prospectus as short as possible and use incorporation by reference.

### Helping retail investors assess your offer

RG 228.19 Section 715A states that information in a disclosure document must be worded and presented in a ‘clear, concise and effective’ manner. This requirement applies to both the wording of information (i.e. choice of language) and the presentation (i.e. choice of communication tools). We may issue a stop order if this section is contravened: s739.

RG 228.20 The requirement for ‘clear, concise and effective’ disclosure is intended to help retail investors make informed investment decisions. The Explanatory Memorandum for the *Corporate Law Economic Reform Program (Audit and Corporate Disclosure) Bill 2003* (Explanatory Memorandum) explains the reasons for including s715A in the Corporations Act. The Explanatory Memorandum states that ‘a disclosure document’s main aim is to inform unsophisticated investors of relevant information’ and that s715A is intended to:

- (a) ‘ensure it effectively conveys the required information to the investing public’; and
- (b) ‘improve the comprehensibility and readability of disclosure documents’.

Note: See paragraphs 4.190 and 5.513 of the Explanatory Memorandum.

RG 228.21 Your prospectus should therefore focus on communicating with retail investors while also catering to the needs of professional advisers and other sophisticated investors. For suggestions about ways you can cater to these different audiences, see RG 228.25–RG 228.45.

## What is ‘clear, concise and effective’ disclosure?

RG 228.22 The requirement for ‘clear, concise and effective’ disclosure should be read as a compound phrase so that each word qualifies the other. This means that it is inappropriate to focus on one word in the phrase at the expense of others.

Note: See *Story v National Companies and Securities Commission* (1988) 13 NSWLR 661, where the court considered another compound phrase, ‘effectively, honestly and fairly’, which is now included in s912A(1).

RG 228.23 For example, complex information should not be omitted to make your prospectus more clear and concise because then your prospectus may not be effective.

Note: See paragraph 5.514 of the Explanatory Memorandum, which states that s715A is not intended to limit information or result in oversimplification.

RG 228.24 We consider that your prospectus will generally be ‘clear, concise and effective’ if it:

- (a) highlights key information (e.g. through an investment overview as explained in Section C);
- (b) uses plain language (see Table 3);
- (c) is as short as possible (see RG 228.30–RG 228.45);
- (d) explains complex information, including any technical terms (see Table 3); and
- (e) is logically ordered and easy to navigate (see Table 4).

## How can you achieve ‘clear, concise and effective’ disclosure?

RG 228.25 Table 3 and Table 4 set out some widely accepted methods and tools for creating ‘clear, concise and effective’ documents. These tools are not mandatory and will not always be appropriate. You should analyse how best to word and present your information in your particular circumstances.

RG 228.26 You should also consider using other tools to help you create ‘clear, concise and effective’ documents, including reviewing research on the communication needs of retail investors.

RG 228.27 We encourage you to critically evaluate your draft prospectus before finalising it. Some questions for you to consider include the following:

- (a) Is the key information prominent (see Section C)?
- (b) Is the disclosure on benefits and risks balanced?
- (c) Does the document flow logically?
- (d) Does the document convey clear messages? Does it explain concepts and terms? Would it be confusing to someone not familiar with the offer or the issuer?

- (e) Does the document contain unnecessary repetition? Can some of the information that is repeated be summarised or referenced to more detailed information?
- (f) Is every piece of information essential to a retail investor's assessment of the offer? Can any information be deleted, further summarised or incorporated by reference (see RG 228.30–RG 228.45)?

### Wording information so it is 'clear, concise and effective'

RG 228.28 Table 3 sets out some suggested methods for 'clear, concise and effective' wording of information. These tools are not mandatory but they may be useful in ensuring the document is not misleading.

**Table 3: Communication tools for 'clear, concise and effective' wording**

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.	'The Offer Information Line is available for more information' can be rewritten as, 'You should call the Offer Information Line for more information'.
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.	'Applicants should consider obtaining legal advice' can be rewritten as, 'You should consider obtaining legal advice'.
Use the positive and avoid double negatives	It is generally easier to understand sentences that are phrased positively rather than negatively.	'It is not unlikely that the company will have trouble paying its debts if the offer is not successful' can be rewritten as 'It is likely that the company will have trouble paying its debts if the offer is unsuccessful'.
Use verbs rather than nouns, where possible	Verbs and the present tense are usually simpler, more direct and concise.	'Payment should be made by cheque' can be rewritten as 'Please pay by cheque'.
Avoid overusing definitions	<p>Definitions are very useful in providing clarity of meaning, but should not be overused.</p> <p>Use one definition that is specific rather than a definition that will lead readers to other definitions, where possible.</p> <p>Avoid defining commonly understood terms.</p> <p>If a term is only repeated two or three times, it may not need to be defined (depending on the length of the definition).</p>	'Applicant' is a commonly understood term and may not require a definition.

Tool	Explanation	Examples
Choose simple words for definitions	<p>The defined terms should be short. Select a defined term that has meaning and facilitates easy reading of sentences that include the defined term.</p> <p>Avoid using a defined term that has a common meaning that is contrary to or not compatible with the meaning given in the definition.</p>	<i>'Eligible Investor'</i> and <i>'Takeover Event'</i> are meaningful labels.
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, <i>'The Offer Price is \$1.00 per share plus a further \$10.00 per share due on the Instalment Date'</i>. 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>	<i>'Closing date'</i> , defined as <i>'The date on which the offer closes. Applicants should ensure their application is submitted by the closing date'</i> could be rewritten as <i>'The date on which the offer closes, being 1 June 2011 unless extended'</i> .
Avoid jargon, where possible	If technical terms are necessary, they should be explained the first time they are used or in a glossary, or both.	Terms such as <i>'pari passu'</i> , <i>'swaps'</i> , <i>'passive portfolio management'</i> and <i>'leveraged'</i> should be defined or explained.
Use short sentences	Long sentences prevent readers from understanding information easily. Each idea should be presented in a separate sentence. You should also remove any surplus words.	<i>'Shortening the length of a prospectus'</i> can be rewritten as <i>'Shortening a prospectus'</i> .
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.	<i>'Ore reserve'</i> and <i>'mineral resource'</i> should be used in a way that is consistent with the JORC Code.
Disclaimers	<p>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.</p> <p>Note: Any disclaimer must not be inconsistent with the liability regime in Pt 6D.3.</p>	A disclaimer that the underwriter accepts no liability in connection with the prospectus is inconsistent with Pt 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.	

## Presenting information so it is ‘clear, concise and effective’

RG 228.29 Table 4 sets out suggested methods for ‘clear, concise and effective’ presentation of information. They are aimed at allowing retail investors to quickly access key information and identify where more detail can be found. The methods are not mandatory, but they may be useful in ensuring the document is not misleading.

**Table 4: Communication tools for ‘clear, concise and effective’ presentation**

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 for our guidance on preparing an investment overview (which is our term for a 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"> <li>• positive information is not given undue prominence in a way that is potentially misleading; and</li> <li>• information of equal importance to the investment decision is treated in a balanced way, with equal prominence: see RG 228.56.</li> </ul>
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"> <li>• page numbers are important;</li> <li>• 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’);</li> <li>• headings should be meaningful (e.g. ‘How is my shareholding affected?’). This will also help produce a useful table of contents; and</li> <li>• 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’.</li> </ul>
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>

Tool	Explanation and how to use tool
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>
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"> <li>• present tables, diagrams and other illustrative charts in the simplest way possible, providing clear captions and including key assumptions;</li> <li>• provide keys for more complex diagrams and graphs; and</li> <li>• 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.</li> </ul>
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>
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>

Tool	Explanation and how to use tool
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>

## Is your prospectus as short as possible?

- RG 228.30 Your prospectus should be as short as possible, while satisfying the disclosure requirements. This is because excessive length is problematic for retail investors and s715A requires a prospectus to be ‘concise’ (subject to also being clear and effective: see RG 228.22–RG 228.23).

Note: For an example of research that supports the proposition that excessive length is problematic for retail investors, see our report *Financial literacy and behavioural change* (REP 230) at [www.asic.gov.au/reports](http://www.asic.gov.au/reports) and Ramsay, Ian, ‘Use of prospectuses by investors and professional advisers’, (2003) University of Melbourne Legal Studies Research Paper No. 76, <http://cclsr.law.unimelb.edu.au/go/centre-activities/research/research-reports-and-research-papers>.

- RG 228.31 You can achieve a prospectus that is as short as possible by using the tools in Table 3 and Table 4, omitting extraneous information (see RG 228.32–RG 228.33) and using incorporation by reference (see RG 228.34–RG 228.45).

### Omitting extraneous information

- RG 228.32 Your prospectus should only contain information that investors need to make their decision. Extraneous information in a prospectus undermines the document’s compliance with s715A. As noted by Santow J in *Re Australian Co-operative Foods Ltd* (2001) 38 ACSR 71 at 77 in relation to an expert report, ‘A plethora of peripheral information is more likely to distract than illuminate’.
- RG 228.33 Whether information is relevant for investors will depend on all the circumstances. Examples of extraneous information might include the following:
- (a) repetitive summary sections;
  - (b) copies of ASIC relief instruments;
  - (c) long, descriptive summaries of contracts or reproducing the terms of an agreement (e.g. copying out the text of standard termination clauses from an underwriting agreement);
  - (d) the issuer’s constitution in its entirety or detailed extracts from the constitution;

- (e) claims about compliance with provisions of the Corporations Act or the ASX Listing Rules (investors should be able to presume you comply with these requirements);
- (f) general marketing statements that convey very little information;
- (g) photographs (e.g. one photograph of your factory may be sufficient);  
and
- (h) industry background of a general nature that is unlikely to affect your business model.

### Using incorporation by reference

RG 228.34 Section 712 allows information to be incorporated by reference into a prospectus. Incorporation by reference is designed to help reduce the length of prospectuses. Incorporation by reference can also help cater for the needs of different audiences.

Note: See *Corporate Law Economic Reform Program (CLERP) Proposals for Reform: Paper No. 2*, pp. 15–18; and Explanatory Memorandum, paragraphs 8.6–8.9. For example: ‘...fundraisers should be able to issue substantially shorter prospectuses for retail investors. Issuers should have the flexibility to omit information provided that it is made available on request and investors are provided with a fair indication of its character’. (*CLERP Paper No. 2: Proposals for Reform—Fundraising*, p. 16).

RG 228.35 We recommend you consider using s712 for information that is relevant but not key to an investor’s assessment of the offer. This might include detailed corporate governance policies, contracts, trust deeds, accounting policies and secondary specialist expert reports (such as an intellectual property report for minor intellectual property). For an international offering, it may be useful to incorporate the foreign offer document by reference.

Note: You should not use s712 for information that you would not otherwise include in your prospectus.

### Lodging incorporated documents with ASIC

RG 228.36 Section 712(1) requires that the information incorporated by reference is contained in a document lodged with ASIC. You can lodge a document with ASIC so that you can use incorporation by reference (even if the Corporations Act does not require the document to be lodged): s712(4).

RG 228.37 We also recommend that you include any incorporated document on your website, so that it is easy for investors to access.

### Including information about incorporated documents in your prospectus

- RG 228.38 A reference to an incorporated document in your prospectus must identify the document or part of the document that contains the information and tell investors about their right to obtain a copy under s712(5).
- RG 228.39 If the document is primarily of interest to professional analysts or advisers or investors with similar specialist information needs, your prospectus must state this and merely describe its contents: s712(2)(a). In any other case, your prospectus must include sufficient information to allow an investor to decide whether to obtain a copy of the incorporated document or part of it: s712(2)(b).
- RG 228.40 We consider that it is prudent for an issuer to provide ‘sufficient information’ about the incorporated document (i.e. rely on s712(2)(b)) if there is any doubt about the primary audience. We think it is highly unlikely that a court would decide that a document has not been validly incorporated because it is primarily of interest to professional investors and therefore the prospectus provides more information than may have been strictly necessary.

### Providing sufficient information: s712(2)(b)

- RG 228.41 Providing ‘sufficient information’ for investors under s712(2)(b) involves your prospectus disclosing the substance of matters that would be likely to take the investor by surprise if they read the incorporated document or part of it. Rather than merely summarising the incorporated document, your prospectus should focus on details that may affect the investor’s decision about whether to obtain a copy of the document, including how the information is relevant to the offer and an investor’s investment decision.
- RG 228.42 We think it is unlikely that a court would decide a document has not been validly incorporated where the issuer has made a good attempt to give investors a ‘fair indication’ of the document’s character. This would include highlighting any significant negative information and explaining the document’s relevance to the offer and an investor’s investment decision.

Note: Our guidance is based on Superseded Practice Note 63 *Incorporation by reference—s1024F* (SPN 63). Section 712(2)’s reference to ‘sufficient information’ was enacted to reflect the guidance in SPN 63: CLERP Paper No. 2, p. 17. CLERP Paper No. 2 also said that investors should be given a ‘fair indication of the character of the information’.

### Examples of providing ‘sufficient information’

#### Example 1: Incorporation of a trust deed

Providing sufficient information for incorporation of a trust deed may include a discussion of the role of the trustee and investor meetings. It would be unnecessary to list all the obligations of the trustee or describe the actual method of calling meetings. Your prospectus should also refer to any ongoing obligations that investors will have under the trust deed and any consequences of failing to comply.

**Example 2: Secondary specialist expert report**

Providing sufficient information about a secondary specialist expert report that is not key to an investor's assessment of the offer (such as an intellectual property report for minor intellectual property) is likely to mean explaining the scope and purpose of the report, the conclusions, methodologies and major assumptions. It would also include the expert's qualifications, any benefit that the expert will receive in connection with the report and any interests of the expert. You could include a concise specialist expert report in the prospectus itself and incorporate the entire report (including the more technical parts of the report) by reference.

Note 1: For guidance on what might be included in and excluded from a concise expert report, see Table 2 in Regulatory Guide 111 *Content of expert reports* (RG 111).

Note 2: These are examples of what may constitute 'sufficient information' for the purposes of s712(2)(b). They are a guide only.

**Incorporated document must comply with other provisions of the Corporations Act**

- RG 228.43 A document that is incorporated by reference under s712 is taken to be included in your prospectus: s712(3). This means that the incorporated document is subject to various provisions that apply to prospectuses. For example, the incorporated document is subject to Ch 6D's prohibitions on misleading and deceptive information.
- RG 228.44 Documents that are prepared for the purposes of incorporating information into the prospectus should be 'clear, concise and effective': s715A. Other documents that have not been prepared for the purpose of incorporation into a prospectus may not satisfy the 'clear, concise and effective' requirement. We do not think that these documents are precluded from being incorporated by reference. We consider it is unlikely that a court would decide that a prospectus does not comply with s715A merely because a contract incorporated by reference is not worded and presented in a 'clear, concise and effective' manner. In fact, the use of incorporation by reference should help to make the prospectus as a whole more 'clear, concise and effective'.

**Consent under s716 for incorporation by reference**

- RG 228.45 If you incorporate a document written by another person into your prospectus, you will need to obtain their consent under s716(2) for the information required by s712(2) and the document incorporated by reference. For example, consent will be required if you wish to incorporate by reference a specialist expert report. The consent requirement allows a person to control whether their document can be incorporated in your prospectus and the way you refer to their document.

Note: See also Regulatory Guide 55 *Disclosure documents and PDS: Consent to quote* (RG 55).

## C Investment overview: Have you highlighted key information for retail investors?

### Key points

You should use an investment overview to highlight key information to help retail investors make informed investment decisions.

This section has guidance on what information should be in your investment overview and how you should present the information.

### Why do retail investors need an investment overview?

RG 228.46 Your prospectus should contain an investment overview that helps retail investors make an informed investment decision by highlighting key information. An investment overview will ensure your prospectus is ‘clear, concise and effective’ for retail investors (while the prospectus also provides sufficient information for sophisticated and professional investors).

RG 228.47 An investment overview is an introduction to the issuer and the offer. It is not intended to replace the prospectus and investors should read the whole document. The investment overview should:

- (a) be the first substantive section of your prospectus—generally this will be after the Chairman’s letter;

Note: The Chairman’s letter should generally be short (one or two pages). Otherwise, it may detract from and repeat information that is in the investment overview.

- (b) highlight and provide a meaningful summary of information that is key to a retail investor’s investment decision (see Table 5); and
- (c) provide balanced disclosure of the benefits and risks.

RG 228.48 The investment overview should help retail investors navigate your prospectus by:

- (a) explaining what information they need to focus on; and
- (b) providing clear cross-references to where the key issues are more fully explained.

RG 228.49 An overview of this type is more useful to a retail investor than:

- (a) up-front sections that lack substantive information about the issuer and the offer and are dominated by general marketing statements and numerous photographs;

- (b) multiple summaries (such as ‘investment highlights’ followed by ‘frequently asked questions’) that are repetitive and add to the length of the prospectus; or
- (c) unbalanced information that only raises the benefits without explaining the associated risks.

## What information should be in your investment overview?

RG 228.50 The investment overview should highlight information that is key to a retail investor’s investment decision. Key information does not mean all information that is required under s710. Highlighting key information may involve explaining why the information is important or placing the information in some context. Descriptive information without an explanation is usually not sufficient.

RG 228.51 We have set out some categories of key information in Table 5 that should generally be explained in the investment overview. You need to use your judgement to decide what information will be relevant for your investment overview given your individual circumstances. Information included in broker reports and investor presentations may be a guide to the categories of information you should cover.

Note: Any significant information that you give sophisticated investors in investor presentations should also be included in the prospectus.

RG 228.52 The investment overview’s discussion of key benefits and risks should be balanced—with a balanced level of detail about both. Often the sections at the front of a prospectus have a lot of information about the benefits but only very cursory information about the risks. This can give retail investors the misleading impression that they do not need to pay much attention to the risks. The number of risks set out in the overview and the amount of detail will depend on the circumstances of the issuer and the offer.

Note: The need to be balanced applies to all sections at the front of your prospectus, including the Chairman’s letter.

RG 228.53 The investment overview should indicate if achieving your objectives is high-risk.

RG 228.54 Photographs (other than those on the front cover or title pages) should only be included after the investment overview.

**Table 5: Key information that you should generally explain in your investment overview**

Topic	What to include
Business model: How will you make money and generate income or capital growth for investors?	<p>Explain the key features of your business model—that is, how you propose to make money and generate income or capital growth for investors, or otherwise achieve your objectives.</p> <p>This will include any key dependencies—that is, factors you rely on in order to make money or achieve your objectives. For example, if your ability to make money is dependent on an important contract, the overview should explain this.</p>
Risks: What are the key risks associated with your business model, the security and the offer?	<p>Explain the key risks to your ability to make money and generate income or capital growth for investors, or otherwise meet your objectives (i.e. the risks inherent in your business model) and the key risks associated with the offer and the security. See RG 228.80 for our guidance on key risks.</p> <p>You may also need to explain a risk that specifically relates to a benefit that is included in the overview: see RG 228.91.</p> <p>It is not usually effective for the overview to list all the risks. Rather, it should focus on giving adequate information on key risks: see RG 228.89.</p> <p>It is not effective to give very brief information with no explanation. For example, it is not sufficient to simply say, 'Financing risk'.</p>
Financial information: What key financial information do investors need to know about your financial position, performance and prospects?	<p>Give key financial information about your financial performance (e.g. earnings before interest and taxes (EBIT), price/earnings (P/E) ratio), financial position (e.g. gearing, interest cover ratios) and prospects.</p> <p>Key financial information may include financial ratios (as indicated by the above examples). For some factors that we encourage you to consider when deciding which ratios may be relevant for your prospectus, see RG 228.104–RG 228.105.</p> <p>If you include financial ratios, we encourage you to include in the overview a brief explanation of what the ratio means and how it is calculated (or at least a clear cross-reference to this explanation in the financial information section if the formula is complex): see RG 228.106–RG 228.108.</p>
Directors and key managers: Who will be in control and do they have the appropriate expertise?	<p>If you are an investment company, a company that has a limited operating history or your shares have not previously traded on a stock exchange, give details about the relevant expertise and experience of your directors and key managers.</p>
Interests, benefits and related party transactions: Who will benefit?	<p>Explain any significant interests and benefits payable to directors and other persons connected with the issuer or offer and any significant related party transactions.</p> <p>These benefits and related party transactions will not always be significant and require disclosure in the overview. You need to determine whether they are significant in your circumstances (e.g. if the fees or other consideration paid to directors make up a large proportion of the offer proceeds).</p>

Topic	What to include
The offer: What will an investor get, how much will they pay?	<p>Describe the key terms and conditions of the offer (e.g. the consideration payable, any minimum or maximum subscription amounts).</p> <p>If the offer price is payable in instalments, this should be highlighted in the overview. You should also highlight key risks associated with an offer of this type (e.g. the risk that the amount owing on the securities at the instalment date(s) may exceed the trading price of the securities at that time).</p>
How will you use the offer proceeds?	<p>Briefly explain the effect of the offer. This would include the effect on your capital structure (e.g. the number of securities pre- and post-offer). Identify any shareholders that have a voting power of 20% or more (to the extent that this can be determined before the offer).</p> <p>Explain how you plan to use investors' funds.</p> <p>Clearly state if you will need to raise more equity or debt capital (if this is known at the date of the offer). For example, if the offer will fund 30 drill holes but your geologist report indicates you will need a minimum of 60 holes to establish whether you have a resource, you should flag the likelihood of raising further funds in the overview.</p>

## How should you present your investment overview?

- RG 228.55 Retail investors focus on the front sections of a prospectus so it is important that your investment overview is 'clear, concise and effective'. We encourage you to consider all the communication tools set out in Section B, in particular the use of:
- (a) cross-references so that retail investors can easily find further information;
  - (b) questions as headings, which can help explain how the information is relevant to an investor; and
  - (c) a table format, which can be effective for a summary section such as the investment overview (depending on the amount of information included).
- RG 228.56 Presentation of the benefits and risks in the overview should be balanced, with the risks having similar prominence to the benefits. For example, the benefits and risks should be presented in a similar way using similar layout and fonts.
- RG 228.57 Your investment overview should be short compared with your prospectus as a whole, but not so brief as to omit key information. Your investment overview should be a summary of information that is key to the investment decision, rather than a summary of the prospectus as a whole. An overview that is a mere sign-post to other parts of the prospectus will tend to be so brief as to be meaningless. An overview that attempts to provide all relevant information about each key issue will tend to be too long. We have not given any indication of how long your investment overview should be because this will depend on your circumstances and the circumstances of your offer.

## D Business model: How will you make money and generate income or capital growth for investors?

### Key points

Your prospectus should explain your 'business model'. This involves explaining the main components of your business and how they relate to each other: see RG 228.58–RG 228.62.

This section explains some common components of business models: see Table 6 and RG 228.66–RG 228.76.

### What is your business model and how should you explain it?

- RG 228.58 Your prospectus should explain your business model so that retail investors can assess the potential risks and returns associated with an investment in your securities. Your business model is how you propose to make money and generate income or capital growth for investors.
- RG 228.59 If you do not expect to make money or generate income in the short term (e.g. if you are an early stage exploration company), your business model may involve an explanation of your short-term objectives and how you propose to meet those objectives. Your prospectus should make it clear that you do not intend to make money or generate income in the short term.

### Components of your business model

- RG 228.60 Your prospectus should explain the main components of your business model, the key assumptions underlying the model (e.g. 'interest rates do not rise') and the associated risks. Table 6 lists some common components of business models. Each component listed may not be relevant for every issuer and you should also consider whether there are other components relevant to your business model.
- RG 228.61 Your prospectus should contain a substantive analysis of your business model's components rather than simply a description. You should also explain how your business model works (i.e. how the components relate to each other) and your ability to make money and generate income or capital growth for investors, or otherwise meet your objectives.
- RG 228.62 The investment overview of your prospectus should include a summary of the key components, assumptions and risks associated with your business model (with cross-references to more the detailed content provided elsewhere

in the prospectus): see Section C. Sophisticated and professional investors may have the expertise to understand your business model, and the risks to this model, from separate disclosures throughout your prospectus and elsewhere, but retail investors require a clear explanation in the overview.

### Confidential information about your business model

- RG 228.63 Section 710 may require disclosure of confidential information relating to your business model—especially if the information might deter investors from acquiring the securities if that information were generally known.
- RG 228.64 If you do not disclose confidential information in your prospectus, insiders may be prohibited from trading under Div 3 of Pt 7.10 (if the information satisfies s1042A’s definition of ‘inside information’). You may also be liable under Pt 6D.3 for omitting required information: see also RG 170.67.
- RG 228.65 However, although there is no express exception for confidential information in the prospectus disclosure requirements, this will not automatically mean that you need to disclose commercially-sensitive information or trade secrets. For example:
- (a) Often confidential information may not be relevant to the investor’s investment decision (e.g. investors may need to understand how a key contract affects your business model and earnings but they may not need the detailed pricing terms).
  - (b) It may also be unreasonable for investors to expect you to disclose commercially-sensitive information that could be used by competitors to harm your business: s710(1)(a). It will be necessary to weigh the usefulness of information to investors against the potential harm to your business.

**Table 6: Business models: Common components**

Components	What to include
Nature of your business	<p>Explain what you do and the main function of your business.</p> <p>It may also be relevant to discuss:</p> <ul style="list-style-type: none"> <li>• the stage of development; and</li> <li>• the sector or industry in which your business operates (see RG 228.72–RG 228.73), provided the disclosure is specific and relevant to the investment decision (see RG 228.33(h)).</li> </ul>
Significant dependencies	<p>Explain the factors you depend on to make money (or achieve your main objective).</p> <p>Some common examples are:</p> <ul style="list-style-type: none"> <li>• important contracts (see RG 228.68–RG 228.69);</li> <li>• key suppliers or customers and distribution channels;</li> </ul>

Components	What to include
	<ul style="list-style-type: none"> <li>• intellectual property and its legal status (e.g. whether you have a patent or rely on a licence);</li> <li>• income such as dividends from investments (other than wholly owned subsidiaries);</li> <li>• key personnel (see Section G); and</li> <li>• essential assets and whether they are owned or leased. For exploration companies that have tenement assets, this may include, at a minimum, the history of tenement assets, the seller of the asset, how much it was sold for, why it was not previously developed and the amount spent on exploration to date.</li> </ul>
Your strategy and plans	<p>Explain your business strategy, even if this needs to be at a high level. For example, 'We plan to expand the business through acquiring an interest in exploration tenements in the X region and by conducting additional drilling on existing tenements'.</p> <p>Also explain if your business strategy has recently changed or will change after the offer. For example, 'Having been in the cardboard industry for 55 years, we plan to vertically integrate by acquiring key supplier X and expanding our market share further'.</p>
Corporate structure	Explain the key features of your corporate structure (if it is relevant to investors): see RG 228.70–RG 228.71.
Finance	Explain how you finance your start-up and ongoing operations: see RG 228.66–RG 228.67.
Competition	Analyse the competition facing your business—this might include discussing the barriers to entry and your key competitors: see RG 228.73.
Capital management policy	See RG 228.74–RG 228.76.

## Finance arrangements

- RG 228.66 Your prospectus should explain your financing arrangements. This may involve an explanation of how you finance your start-up, cash flow and ongoing operations, and the extent to which you depend on equity finance, external or internal debt finance or trade finance.
- RG 228.67 If you rely on debt financing, your prospectus should explain any aspects that are key to the investment decision. This may include:
- your level of debt or gearing;
  - your ability to meet interest payments from earnings or otherwise;
  - financial stability ratios (see RG 228.103–RG 228.108);
  - any key terms or conditions;

- (e) any current or likely significant breaches of loan covenants or debt obligations (e.g. how close you are to breaching a gearing covenant), and possible consequences of such a breach (e.g. the lender's termination rights) as well as any material breaches that occurred during the previous two years .
- (f) when key financing needs to be renewed—and if any key loans require refinancing within 12 months:
  - (i) comment on the prospects of refinancing or possible alternative actions (such as asset sales or equity fundraising); or
  - (ii) if there are no reasonable grounds for commenting on the prospects for refinancing, state this and explain why (see RG 170.91); and
- (g) the existence of any 'market capitalisation clauses', which mean that the financier can terminate the debt financing or change the terms if your market capitalisation drops below a particular figure or level. The existence of these clauses should also be highlighted in the risk section.

## Important contracts

RG 228.68 Your prospectus should explain the key features of your important contracts. These are the contracts that:

- (a) are critical to your ability to make money and generate income or capital growth for investors, or to meet your objectives (e.g. a key customer or supply contract, a key licence agreement or a joint venture agreement); or
- (b) contain significant obligations or restrictions on achieving your objectives.

RG 228.69 Your prospectus should discuss:

- (a) how the contract is relevant to your ability to make money or meet your objectives;
- (b) any key terms (e.g. the length and expiry date of the contract, the ability of the parties to terminate, any conditions to the completion of matters in the contract, any conditions for renewal and any other terms that might affect a retail investor's investment decision);
- (c) the status of the arrangement (e.g. whether or not the contract is legally binding);
- (d) when a contract needs to be renewed—and if a contract requires renewal in the next 12 months:
  - (i) comment on the prospects of renewal or possible alternatives and the implications if the contract cannot be renewed; or
  - (ii) if there are no reasonable grounds for commenting on the prospects for renewal, state this and explain why (see RG 170.91);

- (e) for joint venture agreements, the identity of the joint venture parties, and each party's financial and other capacity to carry out their obligations under the joint venture agreement; and
- (f) whether the contract is a related party agreement (see RG 228.132–RG 228.135).

## Corporate structure

- RG 228.70 Your prospectus should explain your corporate structure if it is likely to be relevant to the investment decision.
- RG 228.71 This might include explaining:
- (a) the reason for your corporate structure;
  - (b) the nature of income flow within the group structure (e.g. if you depend on dividend income or management fees from subsidiaries);
  - (c) any external management arrangements; and
  - (d) the key assets and liabilities or obligations, explaining whether these are held directly or by another entity in the group.

## Explanation of industry

- RG 228.72 Your prospectus should include an explanation of the industry in which you operate but only to the extent that it affects your business model and the investor's investment decision.
- RG 228.73 This might involve providing disclosure on the following factors and explaining how they are relevant to your business model:
- (a) the industry maturity and size;
  - (b) key customers and key suppliers;
  - (c) your market share, key competitors and barriers to entry;
  - (d) the regulatory framework in which you operate—if you operate in a foreign jurisdiction, you should explain the laws and regulatory structures and how they differ from those in Australia to the extent they are relevant to the investment decision;
  - (e) any external threats (e.g. a high level of terrorist threat in the country where your key supplier operates); and
  - (f) any external opportunities (e.g. a new government initiative that is likely to increase demand for your product).

## Capital management policy

- RG 228.74 If there are reasonable grounds for anticipating that you will have surplus funds, your prospectus should explain how you intend to deal with these funds. An example might be whether you intend to return surplus funds to investors (e.g. by way of dividend) or whether you intend to re-invest surplus funds.
- RG 228.75 Your prospectus should explain your dividend policy (provided that the policy has a reasonable basis). If you do not intend to pay a dividend, this should be clearly stated.
- RG 228.76 If you intend to pay dividends, your prospectus should explain where the funds will come from. If you intend to pay dividends other than out of profits, your prospectus should make this clear.

## E Risks: What are the risks associated with your business model, the security and the offer?

### Key points

Your prospectus should explain the risks associated with your business model and the risks associated with the security and the offer.

Your prospectus should help retail investors to understand the key risks they should focus on.

Your risk disclosure should be specific rather than general.

### What risks do you need to disclose?

- RG 228.77 Your prospectus should disclose risks inherent in your business model: see Section D for our guidance on business models. Your prospectus should also disclose the risks associated with the security and the offer. Some examples of common risks are set out in Table 7.
- RG 228.78 In deciding what risks to include in your prospectus, you should consider:
- (a) any existing risk management processes;
  - (b) any risks raised during the due diligence process for the prospectus;
  - (c) your business model in order to identify the risks inherent in that model;
  - (d) the risks included in any expert report and assess whether the risks should also be included in the prospectus; and
  - (e) any relevant broker reports and investor presentations.
- RG 228.79 Your prospectus will probably need to disclose a range of risks. You should help retail investors to make informed investment decisions by identifying which of these risks are the key risks facing your business (and the offer itself, if these are significant). You should explain to investors why these risks are the key risks from the investors' perspective.
- RG 228.80 The key risks will generally be the strategic and operational risks that directors and management focus on when they are managing your business. They are usually the type of events that:
- (a) have a reasonable likelihood of occurring;
  - (b) are difficult to mitigate; and
  - (c) if they did occur, would have a very significant effect on your financial position and the value of shareholders' investment.

RG 228.81 Apart from key risks, your prospectus should also generally disclose a risk that would have a significant effect, even if it has a low probability of occurring (i.e. it is a remote risk): see RG 170.48. You do not need to disclose a remote risk that is likely to have a limited impact.

## Examples of common risks that may need to be disclosed

RG 228.82 Table 7 sets out a non-exhaustive list of some common risks that may affect an issuer or the security. This list is not a checklist (i.e. your prospectus should not refer to a risk listed in Table 7 if it is not relevant to you or your offer). All risks should be disclosed in a way that is specific to your circumstances: see RG 228.83–RG 228.87

**Table 7: Examples of risks that may need to be included in your prospectus**

Type of risk	Examples to consider
<i>Risks to the issuer (including your business model)</i>	
Operations or business	Loss from systems failure
Stage of development	Early stage development mining or bio-tech companies that do not have, or may never have, a product available for sale  A company with a mature product that may have reached a market saturation point where sales of their product are flat
Supplier or customer	Losing a major supplier or customer
Asset or equipment	Loss due to outdated equipment  Inability to source essential equipment
Distribution channel	Reliance on one distribution channel, or having distribution channels in politically unstable regions, or the inability to transport product to distribution points
Important contract	Early termination of an important contract that your business is highly dependent on.
Key personnel	Losing personnel with experience key to the success of the business
Intellectual property	The adverse impact on the company's ability to compete due to the inability to obtain, maintain and enforce intellectual property protection covering its products
Corporate structure	Loss because subsidiaries that are responsible for major operations or hold key assets are not 100% owned
Finance risks	Being unable to obtain finance. Relying on hedging to sustain profit
Counterparty risk	Loss as a result of a major creditor or counterparty defaulting

Type of risk	Examples to consider
Legal or regulatory	<p>Loss or timetable implications due to an inability to obtain regulatory and other approvals</p> <p>Change in taxation laws or other relevant laws, regulations or industry codes that adversely affect the company's financial position or ability to conduct its business</p>
Litigation	<p>An explanation of any material litigation to which you are, or are likely to be a party. Previous litigation should also be disclosed if it is of ongoing relevance to investors.</p> <p>Disclosure on litigation might involve:</p> <ul style="list-style-type: none"> <li>• explaining the nature of the litigation;</li> <li>• estimating when the litigation is likely to be resolved (to the extent there is a reasonable basis for this estimate); and</li> <li>• explaining the likely impact or consequences (e.g. the amount that may be payable by you), to the extent there is a reasonable basis for such estimates.</li> </ul>
Foreign regulatory structures and laws	<p>If you are a foreign entity or operate in a foreign jurisdiction, your risk disclosure should explain if laws in that jurisdiction provide fewer rights to investors than equivalent Australian laws to the extent relevant to the investment decision. See also RG 228.73(d).</p>
Environmental risk	<p>Being unable to pursue a project due to environmental concerns, regulations or requirements, or costs associated with environmental rehabilitation</p>
Native title risk	<p>The company's tenements or property becoming the subject of a native title claim</p>
Commodity prices	<p>A change in commodity prices affects your ability to make money or achieve your objectives. For example, a fall in gold prices below a specified level may make it harder for a gold exploration company to raise funds for their next project. For a gold producing company, there is likely to be reduced revenue and some tenements may become unviable (because the cost of extraction is higher than the likely return).</p>
<i>Risks to the security offered</i>	
All significant risks specifically associated with the type of security being issued	<p><i>For options:</i> relevant performance hurdles not being met or trigger events occurring, or the options being out of the money</p> <p><i>For convertible notes:</i> the lack of priority on winding up if the notes are unsecured, interest rates increasing above any fixed rate applicable to the notes, or the company redeeming the notes before the maturity date</p>
Dilution risk	<p>A member's interest being diluted if they do not participate in the fundraising or due to future fundraisings (if there is a reasonable likelihood you will need to raise further capital in the future)</p>

## How should you disclose risks?

### Specific rather than general disclosure

- RG 228.83 The risk disclosure in your prospectus should be specific and tailored to your circumstances rather than generic. For this reason, it is not sufficient to copy risk disclosure from another company's prospectus, even if your business is subject to similar risks. This is the case even for general risks. If you can only provide very general information about these risks, then query whether they should be included: see also Table 8.
- RG 228.84 Risk disclosure can be made specific by explaining the likely consequences if the risk did occur; often there will be reasonable grounds for explaining the consequences at least at a high level. In considering the consequences of a risk occurring, we encourage you to consider the question 'So what?'. In other words, after you have identified a particular risk, consider what impact this could have on the issuer. When explaining likely consequences, do not assume too much knowledge on the part of investors. Investors may not realise that when 'x' happens, 'y' almost always follows. For example, it is not helpful to simply state that 'interest rates may rise' without explaining whether this will result in an increase in your finance repayments, and the impact on your financial position. In limited cases, a sensitivity analysis may be appropriate and useful (e.g. to demonstrate the effect of a change in interest rates).
- RG 228.85 Information on the likelihood of a risk occurring may be helpful information for investors. Often such disclosure would be general and at a high level.
- RG 228.86 The consequences of a risk occurring and the likelihood of the risk are also factors that may be used to prioritise risks: see RG 228.88–RG 228.89.
- RG 228.87 Table 8 sets out two examples of general versus specific risk disclosure. These examples are hypothetical and the specific risk disclosure is therefore less detailed than will usually be required in practice. These examples are given to show how even relatively high level disclosure about risk consequences can help put a risk in some context.

**Table 8: General risk disclosure compared with specific risk disclosure (hypothetical examples only)**

General risk disclosure	Specific risk disclosure
<p><i>ABC Exporter's performance is influenced by a range of macro economic conditions including inflation, interest rates, exchange rates and government fiscal policy. A decline in these economic conditions would have a material adverse impact on ABC Exporter.</i></p> <p>Note: This statement is correct but it is not helpful. A sophisticated investor already understands how these economic factors affect a company like ABC Exporter (so the statement is obvious), but it is too general to help a retail investor.</p>	<p>ABC Exporter's main customers are located in the Middle East. These customers pay for our products in US dollars, which we convert to Australian dollars for operational and financial reporting purposes.</p> <p>If the Australian dollar is high compared with the US dollar, ABC Exporter will have lower net profits in Australian dollars (after converting US dollars to Australian dollars). If we raise the price of our products in order to compensate, it is likely that our customers will source similar products from our competitors (who are mostly located in the US) and we will achieve fewer sales.</p> <p>ABC Exporter has a policy of only paying dividends from profits and therefore a high Australian dollar that reduces profits, also tends to reduce dividend payments.</p>
<p><i>There is a risk of terrorism, war, flood, natural disaster and other force majeure events that may occur in or outside Australia and any one of these events, should they occur, may adversely affect the company.</i></p> <p>Note: It is commonsense that these events are risks but unless you can say more, this very general disclosure merely detracts from relevant risk disclosure. Many readers will tend to think 'This section is just going to point out the obvious; there is no point reading it'. We have given a hypothetical example that relates to one of these types of events.</p>	<p>Coal Company's main mines are located in desert regions and are not affected by flood. However, the Queensland mine, which contributes to 20% of Coal Company's earnings, was unable to operate for three months in 2010 due to flooding. This caused us to default under our contract with our key customer and reduced earnings for that quarter. A further default in supply would entitle this customer to terminate the contract. This would further reduce Coal Company's earnings, at least until another contract could be negotiated. The ability to negotiate a replacement contract would depend on the demand for coal at that time and whether Coal Company can obtain payment terms that make extraction profitable.</p>

### 'Clear, concise and effective' risk disclosure

- RG 228.88 You should organise your risk disclosure logically. One example is explaining key risks first and then categorising other risks, such as risks specific to the issuer (including your business model), risks specific to the industry, risks specific to the offer, risks specific to the security, and any relevant general risks.
- RG 228.89 Your prospectus should give more prominence to key specific risks than less important risks and general risks relating to investing in shares. Key risks should be identified in the investment overview and they should also be given more prominence in the risk section of your prospectus. It may be misleading to give prominence to less important risks at the expense of key risks. For example, if you are a mining company and your main tenement is about to expire, you should disclose risks associated with this expiry and renewal before disclosure on the risk of a general fall in the share market.

- RG 228.90 Risks that relate directly to a potential benefit should be disclosed, or at least referred to, near information on the benefit. For example, if your company has no current right to use essential infrastructure, you need to point this out where you say that proximity to the infrastructure is a potential advantage. In this example, it would not be effective or logical to discuss proximity to infrastructure in your investment overview and only disclose the risk relating to access in the risk section.
- RG 228.91 Your risk disclosure should be consistent throughout the prospectus. You should also review your other disclosures (e.g. on your website) to ensure they are consistent with risk disclosure in the prospectus. Section B contains more general guidance on ‘clear, concise and effective’ disclosure.

## F Financial information: What is your financial position, performance and prospects?

### Key points

Your prospectus should explain your financial position, performance and prospects: s710.

Information about your financial position, performance and prospects is often the most important consideration for investors.

### What to disclose if you have an operating history

#### Historical financial information

RG 228.92 If you have, or a business or entity you propose to acquire has, an operating history, you should generally include in your prospectus:

- (a) a consolidated audited statement of financial position for the most recent financial year (or audited or reviewed half-year depending on the date of your prospectus: see RG 228.94) showing the major asset, liability and equity groups and a corresponding pro forma statement of financial position showing the effect of the offer;
- (b) the following audited financial information for at least the three most recent financial years (or two and a half financial years depending on the date of your prospectus: see RG 228.94):
  - (i) a consolidated income statement showing major revenues and expense items, and profit or loss, including earnings before interest and taxes (EBIT) and net profit after tax (NPAT);

Note: You should also consider providing pro-forma income statements for this period, especially if the company has undergone significant changes during the relevant period.

- (ii) other information that is material from the notes to the financial statements and other documents attached to the financial report. Examples of other information will depend on the specific circumstances and may include matters such as details of material exposures through financial instruments and contingent liabilities and details of any related party transactions or unusual transactions; and
- (iii) any modified opinion by the auditor (e.g. a going concern emphasis of matter or qualification);
- (c) all events that have had a material effect on the company since the date of the most recent financial statements; and
- (d) a warning that past performance is not a guide to future performance.

- RG 228.93 Disclosure of less than three years' (or two and a half years if applicable: see RG 228.94) historical financial information is not generally appropriate. If there has been a significant restructure of the company in the last three years, this should be demonstrated by the use of pro forma information or otherwise explained. If you believe that the disclosure of less historical financial information is justified because of the particular circumstances of your company, you should disclose these circumstances in the prospectus.
- RG 228.94 You should include current financial information in your prospectus. Where a company's most recent financial statement relates to a half year, your prospectus should include financial information based on those audited or reviewed half-year financial statements.

### Forecast financial disclosure

- RG 228.95 It is common market practice for companies with an operating history to provide prospective financial information at least to the end of the current financial year (where there are reasonable grounds to do so: see RG 228.100). Often this information is accompanied by an investigating accountant's report.
- RG 228.96 In some cases, companies may provide prospective financial information for a longer period of time (if there are reasonable grounds to do so: see RG 228.100).

## What to disclose if you have no operating history

- RG 228.97 If you are a start-up company that does not have an operating history, you should include your most recent statement of financial position. You should also provide a pro forma statement of financial information showing the effect of the offer.

## Pro forma financial information

- RG 228.98 Pro forma financial information may be useful and is sometimes necessary to satisfy the disclosure requirements of the Corporations Act (e.g. to show the effects of a proposed transaction). If pro forma financial information is included in your prospectus, it may be appropriate to give it more prominence than statutory financial information.
- RG 228.99 Our more detailed guidance on the use of pro forma financial information in prospectuses and other transaction documents that is not prepared in accordance with accounting standards will be explained in guidance produced following Consultation Paper 150 *Disclosing financial information other than in accordance with accounting standards* (CP 150). This guidance will explain how to ensure that pro forma information is not used in a misleading way. It will also contain our guidance on presenting financial information for overseas entities that is prepared under foreign generally accepted accounting principles (GAAP) and translated into Australian currency.

## Prospective financial information

RG 228.100 Prospective financial information can be useful for investors if it has reasonable grounds. You must have reasonable grounds for any prospective financial information and other forward-looking statements included in your prospectus—otherwise, the information will be taken to be misleading: see s728(2) and RG 170. The assumptions underlying forward-looking statements should be explained in your prospectus.

Note: While stated to apply to prospective financial information, the guidance in RG 170 is useful to the inclusion of all forward-looking statements in a prospectus.

RG 228.101 The use of warnings and other cautionary language will not always be sufficient to prevent particular information being misleading and importantly will not, of itself, affect the requirement for there to be reasonable grounds to state the information: see RG 170.89.

RG 228.102 If you cannot include detailed prospective financial information you must still provide investors with disclosure on your prospects: see Section D of RG 170 for examples of information that may satisfy this disclosure requirement.

## Financial ratios

RG 228.103 Financial ratios (where appropriate) can provide retail investors with a useful snapshot of your financial position and prospects.

Note: Financial ratios cannot be meaningfully calculated for all companies. For example, ratios that require earnings information cannot be calculated for an exploration company that does not have historical or forecast earnings.

RG 228.104 Three common categories of financial ratios are ratios that relate to financial stability, market performance/pricing and profitability. We encourage you to consider which ratios (if any) are appropriate to your circumstances and useful to potential investors. For example:

- (a) Companies that have earnings or forecast earnings often provide market performance ratios such as price/earnings (P/E), earnings per share (EPS), dividend yield and dividend per share (DPS).
- (b) Gearing and interest cover ratios are generally useful for retail investors and their importance is heightened when a company is in financial difficulty, there is financial volatility or less access to the debt capital markets.

RG 228.105 The financial ratios that are appropriate will depend on a number of factors. We encourage you to consider the following:

- (a) the ratios that are commonly cited for your industry or sector;
- (b) the ratios that brokers and analysts use for your company or companies in similar circumstances;

- (c) the type of ratios that you target or use for internal management purposes;
- (d) the ratios you plan to provide to investors on an ongoing basis to explain or benchmark your performance over time;
- (e) any ratios included in your loan covenants (see RG 228.107); and
- (f) your financial position—for example, s710 may require you to give some information about your loan covenant ratios if you have breached them or it is reasonably foreseeable that you will breach them (see RG 228.67).

Note: Only include financial ratios that will be useful and relevant for retail investors in your circumstances. A few well chosen and explained ratios may be more useful than a long list of ratios.

- RG 228.106 If your prospectus has financial ratios, you should explain how they are calculated and any material assumptions. When you are calculating a ratio, you will need to consider whether it is appropriate to use historical statutory, historical pro forma or prospective financial information for that ratio. For example, a gearing ratio should generally be based on the pro forma statement of financial position showing the effect of the offer.
- RG 228.107 If you provide a financial stability ratio (such as gearing or interest cover) you should inform investors if it is calculated in a different way from a similar ratio under your loan covenants and why you have used a different ratio in the prospectus.
- RG 228.108 We also encourage you to briefly explain what the ratio means. For example, retail investors may not understand that:
- (a) a P/E ratio is a comparison between the company's share price and its earnings per share;
  - (b) an interest cover ratio gives an indication of an issuer's ability to meet its interest payments from earnings and therefore provides important information about the issuer's financial sustainability and the risks associated with the issuer's level of borrowing; and
  - (c) a gearing ratio indicates the extent to which an issuer is funded by debt and gives an indication of the potential risks the issuer faces in terms of its level of borrowings due, for example, to an increase in interest rates.

## Meaning of financial terms

- RG 228.109 Prospectuses should define and explain any financial terms that are used. Disclosure of financial information should avoid accounting jargon: see Table 3. Retail investors will often not understand these terms and disclosure should cater for their needs.

## **G Directors and key managers, interests, benefits and related party transactions: Do those in control have the appropriate expertise and who will benefit?**

### **Key points**

Your prospectus should explain whether directors and key managers have the appropriate expertise and background.

Your prospectus should explain the interests of people involved in the offer, including any benefits they might receive, and any related party transactions, especially how these might conflict with the interests of the investor.

### **What should you disclose about directors and key management?**

- RG 228.110 An investment in a company is often considered to be an investment in the skill and expertise of its directors and key managers.
- RG 228.111 Table 9 provides general guidance on the type of information that s710 may require about directors and key managers. You need to determine what information s710 requires in your circumstances. The role that the officer will undertake in your company is relevant to this analysis. For example, more information will usually be required about a director who will be responsible for the day-to-day running of a small start-up company with a broad investment mandate, compared to a non-executive director of a large, established company.
- RG 228.112 The background and track record of management can raise complex issues if an officer has been subject to relevant disciplinary action or has previously managed an insolvent company: see Table 9. A preliminary step is ensuring that directors and key managers give the Board and due diligence committee sufficient information about their background so that they can make an informed decision about what to disclose in the prospectus. Potential investors' right to know and assess information about the people who will be managing the company should take precedence over other considerations, such as potential embarrassment or prejudice to the director. There is a risk of liability under Pt 6D.3 if required information is omitted.
- RG 228.113 For these reasons, we recommend including potentially relevant information about an officer's background together with any appropriate explanation of the context. This allows investors to assess what weight, if any, they choose to place on the information about an officer's background.

RG 228.114 The disclosure about directors and management should be balanced. For example, disclosure about a director's management of companies that have gone into administration due to insolvency should be given appropriate prominence compared to disclosure on the director's achievements.

**Table 9: Directors and key management**

Topic	What to include
Role	<p>Give the person's full name.</p> <p>Describe the role the person will perform (e.g. chairman, executive director, non-executive director). A brief description of their duties and any committees they serve on (e.g. the audit committee) may also be relevant for investors.</p> <p>State the person's anticipated availability to perform their role and constraints on that availability (e.g. roles in other organisations).</p>
Expertise	<p>Give details of the person's qualifications, experience and expertise that are relevant to the role they have in your company. You should explain how their qualifications, experience and expertise are relevant to the role (unless this is self-evident).</p> <p>Note: For specific guidance for cash box and investment companies, see Regulatory Guide 70 <i>Prospectuses for cash box and investment companies</i> (RG 70).</p>
Independence or affiliations	<p>Explain whether the person is a nominee or representative of a substantial shareholder.</p> <p>If a person fulfils the role of an independent director, your prospectus should state that either:</p> <ul style="list-style-type: none"> <li>the person is free from any business or other relationship that could materially interfere with, or reasonably be perceived to materially interfere with, the independent exercise of the person's judgement; or</li> <li>notwithstanding the existence of business or other relationships, the board considers the director to be independent and why.</li> </ul> <p>Note: Your prospectus should explain what you consider would materially affect directors' independence in your circumstances. For guidance on the relationships that might affect independence, see the ASX Corporate Governance Council's Corporate Governance Principles and Recommendations, Principle 2.</p>
Interests and remuneration	<p>Explain the interests that the person has in the company's securities and their remuneration (including salary, bonus entitlements and non-cash benefits such as options): see RG 228.121.</p>
Legal or disciplinary action	<p>Disclose any legal or disciplinary actions against the person (or against companies that the person was a director of at the relevant time) that are less than 10 years old and are relevant to the role to be undertaken and to the investment decision (i.e. the question of whether to invest in the company), including:</p> <ul style="list-style-type: none"> <li>criminal convictions;</li> <li>declarations under s1317E;</li> <li>personal bankruptcies;</li> <li>disqualifications;</li> <li>civil penalty proceedings or other enforcement proceedings by any government agency;</li> <li>disciplinary action by a securities exchange or other authority responsible for regulating securities markets;</li> </ul>

Topic	What to include
	<ul style="list-style-type: none"> <li>• refusal, suspension or cancellation of membership of a professional organisation; or</li> <li>• other disciplinary action within Australia or other jurisdictions.</li> </ul> <p>For example, on disciplinary action relevant to the role to be undertaken and the investment decision:</p> <ul style="list-style-type: none"> <li>• action that concerns the person's conduct in a personal capacity (i.e. their private life) and that does not involve dishonesty may not be relevant (e.g. driving offences, public order offences); or</li> <li>• action that concerns the person's professional conduct is more likely to be relevant, especially if the person will perform a similar role in your company (e.g. the fact that the Australasian Institute of Mining and Metallurgy (AusIMM) or the Australian Institute of Geoscientists (AIG) have upheld a formal complaint against a geologist in relation to a previous report may be relevant if the person is a director of a mining company).</li> </ul> <p>Generally, information about legal or disciplinary action that relates to the person's honesty or competence to manage the company and other people's money will be relevant for investors to know and assess (with 'honesty and competence' being two factors considered when assessing a disqualification order: see <i>Australian Securities &amp; Investments Commission v Adler (No 5)</i> (2002) 42 ACSR 80.)</p>
Insolvent companies	<p>Disclose if the person has been an officer of a company that entered into a form of external administration because of insolvency and this occurred during the time the person was an officer or within a 12-month period afterwards.</p> <p>Sections 206D and 206F provide some indication of when a person's prior management of an insolvent company will be relevant to their ability to manage other companies. However, the duty to disclose under s710 is not restricted to where the person has been disqualified or would be eligible for disqualification. For example, investors may reasonably expect to be informed:</p> <ul style="list-style-type: none"> <li>• that the Chief Financial Officer (CFO) managed one company that failed 6 years ago owing significant amounts to creditors in circumstances where a liquidator's report was lodged under s533(1) noting potential offences by the CFO and inadequate financial record keeping; or</li> <li>• that a director managed one company that failed 5 years ago and two others that failed 8 and 9 years ago respectively, all unable to pay creditors more than 50 cents in the dollar.</li> </ul> <p>Note: Under s206D and 206F, a person may be disqualified from managing corporations due to previous involvement with 2 or more corporations in last 7 years that have failed or been wound up unable to pay their debts (if the other requirements of those sections are satisfied).</p> <p>Generally previous insolvencies will be relevant unless it is clear that the manner in which the company was managed was not responsible in any way for the company failing (e.g. XYZ company goes into external administration because its major customer fails and defaults on a critical payment). Recent insolvencies will usually be more relevant than insolvencies that occurred a long time ago (e.g. over 10 years ago).</p>

## Corporate governance

RG 228.115 Your prospectus should explain how the directors will manage the business. If you are seeking listing on a market that requires disclosure against a corporate governance framework, your prospectus should include information on:

- (a) the framework that you are reporting against;
- (b) any departures or anticipated departures from the recommended framework; and
- (c) why the board believes that each of the departures is reasonable (if relevant).

Note: These are similar to the reporting obligations required by ASX Guidance Notes 9 and 9A on disclosure on corporate governance practices.

RG 228.116 We suggest you tell investors how to obtain a copy of your corporate governance policies and post them on your website, rather than including detailed policies in your prospectus. If your prospectus does need to cover your corporate governance policies in detail, we encourage you to incorporate them by reference: see RG 228.35.

## Continuous disclosure

RG 228.117 Continuous disclosure announcements, as required under the Corporations Act and the ASX Listing Rules, are a key source of information for investors. RG 228.14 explains how this guide may help you comply with continuous disclosure requirements.

RG 228.118 Your prospectus should explain how you will comply with your continuous disclosure obligations. In addition to the requirements under the Corporations Act and ASX Listing Rules, we encourage both listed and unlisted entities to make continuous disclosure announcements available on their websites, and for investors to be alerted to those announcements by email.

Note: See Regulatory Guide 198 *Unlisted disclosing entities: Continuous disclosure obligations* (RG 198) for how an unlisted entity can comply with its continuous disclosure obligations through disclosure on its website in certain circumstances. See also the ASX Corporate Governance Council's Corporate Governance Principles and Recommendations, Principle 6.

## What should you disclose about interests and benefits?

RG 228.119 Under the Corporations Act, a prospectus must disclose the interests held and fees or benefits given or agreed to be given in connection with the issuer's formation or promotion or the offer of the securities: s711(2)–(4).

- RG 228.120 Further disclosure on interests may be required under the general disclosure test in s710. For example, your prospectus should also explain any interests that may conflict with the interests of investors. Your prospectus should also explain why the board believes these conflicts of interests are acceptable.

### Whose interests and benefits must be disclosed?

- RG 228.121 You need to disclose certain interests held and fees or benefits given or agreed to be given to directors, proposed directors, advisers named in the prospectus, promoters and underwriters: s711(4).
- RG 228.122 The meaning of a ‘promoter’ is broad. It includes persons who take part in the formation or promotion of a company or the offer. One example of a promoter is a person who contributes the initial capital to enable the early development of a venture. The term ‘promoter’ can also extend to ‘persons who leave it to others to get up the company upon the understanding that they also will profit from the operation’: see *Tracy v Mandalay Pty Ltd* (1953) 88 CLR 215.

### What interests and benefits should be disclosed?

- RG 228.123 The interests and benefits you need to disclose under s711(2) and (3) include any interest or benefit that a relevant person might derive from your formation or promotion, including indirect benefits and benefits derived passively: see the consideration of interests in *Tracy v Mandalay Pty Ltd* (1953) 88 CLR 215.
- RG 228.124 Table 10 gives some examples of situations where you should disclose indirect interests or benefits. These examples are neither exhaustive nor representative of the broad spectrum of interests.

**Table 10: Examples of when indirect interests or benefits should be disclosed in your prospectus**

Situation	What your prospectus should disclose
Your directors are also directors of your holding company and only receive fees from your holding company.	You should disclose the fees paid and payable to the directors by your holding company.
Your underwriter or an adviser named in the prospectus receives fees in connection with a contemporaneous placement or related business acquisition.	You should disclose the fees paid and payable in connection with the placement or business acquisition.
One of your directors has an interest in a company that you will transact with upon the completion of your fundraising.	You should disclose the nature of this interest, how the director is connected with the transaction and the significant features of the transaction.

- RG 228.125 There may be other situations where indirect interests or benefits exist, but there are no reasonable grounds to quantify these benefits. It is still important in these situations that the relevant circumstances are disclosed (e.g. where one of your promoters has an interest in property next to the development to be carried out by you).

### **Particulars must be disclosed under s711(3)**

- RG 228.126 Your prospectus should disclose the nature of an interest or a fee in enough detail for an investor to evaluate its possible impact on the person's contribution to the entity. It must quantify the interest in terms of a cash amount, number of shares, or other commercial terms. This may involve explaining other transactions.
- RG 228.127 It is not sufficient to say that a person has been paid normal, usual or standard fees: s711(3). It is also not sufficient to aggregate all benefits or fees to be paid. If disclosure needs to be settled before final accounts are rendered, an approximate figure is adequate if it is not misleading.
- RG 228.128 Disclosure under s711(3) must be made regardless of when the benefits are given or when the agreement to give the benefits was made. This contrasts with s711(2), which limits the disclosure required to interests held in the last two years.

### **Relief from s711(3)**

- RG 228.129 We may give case-by-case relief from s711(3) where disclosure would be impractical or unreasonable, or the cost of disclosure would not result in a commensurate benefit to investors.
- RG 228.130 We may give relief where records that would support disclosure no longer exist. We will consider whether it is reasonable to require this information to be obtained in light of the date the information was created and, where possible, the significance of the benefit given.
- RG 228.131 We will not give relief merely because the information was created more than two years ago. We have provided case-by-case relief for material benefits given more than five years before the offer of securities, and other benefits given more than two years before the offer.

## **Related party transactions**

- RG 228.132 Your prospectus should include disclosure on related party arrangements that exist for an entity or within a corporate structure, as this is information that investors reasonably require to make informed decisions about whether to acquire a security.

RG 228.133 Related party transactions may include employment contracts with key directors as well as commercial contracts for the supply of goods or services with persons that are your related parties. They may also comprise larger transactions, such as asset acquisitions or disposals.

RG 228.134 Your prospectus should disclose:

- (a) the value of the financial benefit;
- (b) the nature of the relationship;
- (c) whether the arrangement is on arm's length terms, is reasonable remuneration, some other Ch 2E exception applies or we have granted relief;
- (d) whether member approval for the transaction has been sought and, if so, when;
- (e) the risks associated with the related party arrangement; and
- (f) the existence of any policies and procedures in place for entering into related party transactions.

RG 228.135 You should disclose information about existing related party transactions in disclosure documents except to the extent that:

- (a) such disclosure may confuse investors by dealing with inconsequential matters; or
- (b) investors already have adequate information about the related party transactions as a result of past disclosures so it is not reasonable for the information to be repeated in full.

Note: For guidance on disclosing related party transactions in prospectuses, see Section E of Regulatory Guide 76 *Related party transactions* (RG 76).

## H The offer: What are the effect and terms and conditions of your offer?

### Key points

Your prospectus should explain the effect of the offer (including the proposed use of funds) and the terms and conditions of the offer.

Your prospectus must also comply with all other legislative requirements.

### What is the effect of your offer?

RG 228.136 Your prospectus should disclose the effect of the offer. This would include:

- (a) the proposed use of funds (see RG 228.137–RG 228.138);
- (b) your current financial position and a pro forma statement of financial position that has been adjusted to show the impact of the offer on a minimum subscription and fully subscribed basis (see RG 228.92 and RG 228.97);
- (c) your capital structure (see RG 228.159); and
- (d) the potential effect of the fundraising on the future of the company.

Note: It is not sufficient to merely state that the effect of the offer is to raise funds. See also RG 66.47.

### How you will use investors' funds

RG 228.137 The proposed use of funds is an important consideration for investors because it is often relevant to your prospects.

RG 228.138 You should include the following type of information when explaining your proposed use of funds:

- (a) any minimum or maximum subscription amounts (see RG 228.148–RG 228.149);
- (b) how you will use the funds raised for the minimum, maximum and oversubscription positions;
- (c) if the funds are to be used for a variety of purposes, a breakdown of how much will be applied to each purpose (both in dollar value and percentage of funds raised);

Note: If a significant portion of the funds will be allocated to working capital, you should explain what constitutes working capital. It is not sufficient to aggregate the costs of the offer.

- (d) the timeframes during which funds will be used (if there is a reasonable basis for predicting this);
- (e) whether the full offer amount and/or the minimum subscription amount are sufficient to meet your objectives (see RG 170.96 for disclosure of cash burn that may be required for companies with little or no revenue);
- (f) if the minimum subscription is less than the full amount, or the fundraising is not fully underwritten, your financial position and prospects if the full offer amount is not raised—for example, it might affect your ability to continue as a going concern, or materially alter your debt levels; and
- (g) unless the offer is underwritten, how you will use the funds if less than the full offer amount is raised. For example, your prospectus should state:
  - (i) whether some or all of the stated activities will be scaled back, and how this will be done. If you cannot explain how activities will be scaled back, you should explain why and indicate what type of factors are likely to influence which activities are scaled back. It is not helpful to investors if you merely state that the activities will be scaled back, for example, ‘as appropriate’ or ‘as the directors determine’; and
  - (ii) whether the funds will be allocated to stated activities in any particular priority until each activity is fully funded, or whether they will be allocated pro rata, or a combination of these approaches.

## What are the terms and conditions of your offer?

RG 228.139 Section 711(1) requires your prospectus to set out the terms and conditions of the offer. This will include:

- (a) the type of security being offered;
- (b) the rights and liabilities attached to the security being offered (see RG 228.140–RG 228.143);
- (c) the consideration payable for each security (see RG 228.144–RG 228.147);
- (d) the offer period (including the date of your prospectus, any exposure period, and the expiry date);
- (e) whether the offer is for the issue of new securities or the sale of existing securities;
- (f) any minimum or maximum subscription amounts (see RG 228.148–RG 228.149);
- (g) your allocation policy (see RG 228.150);

- (h) whether the securities will be listed (see RG 228.151–RG 228.155);
- (i) any underwriting arrangements (see RG 228.156–RG 228.157);
- (j) the capital structure and any escrow arrangements (see RG 228.159);
- (k) whether any ASIC relief or ASX waivers have been obtained or are being relied on; and
- (l) any significant taxation implications (see RG 228.161).

### **Rights and liabilities attached to the security being offered**

- RG 228.140 Section 710(1) requires your prospectus to contain all information that investors and their professional advisers would reasonably require to make an informed assessment of the rights and liabilities attaching to the securities offered.
- RG 228.141 We recommend that you focus on explaining the key rights and liabilities of the securities in plain language and from the perspective of investors (i.e. an explanation of what these rights and liabilities mean in practice). This would include voting rights, dividend rights and how different classes of shares rank against each other. A plain language explanation of this type is likely to be more helpful to investors than repeating the detailed provisions of your constitution, which may be drafted in technical or legal terms.
- RG 228.142 If the offer involves options, you should disclose any restrictions on issuing shares on exercise of the options. If your prospectus relates to debt securities such as debentures or unsecured notes, you will need to disclose the material terms of the notes, including how such notes rank against your other debt: see also RG 69.
- RG 228.143 Your prospectus should highlight any unusual features of the securities offered, such as a requirement for the investor to commit to a future financial obligation (e.g. in partly paid securities).

### **How much investors must pay**

- RG 228.144 Your prospectus should set out the consideration payable (i.e. how much investors must pay) because this is a key term of the offer. More detailed disclosure may be required if the offer price is not finalised by the time for acceptances (see RG 228.145) or the consideration is payable in instalments (see RG 228.146–RG 228.147).

### **Offer price not final at the time for acceptances**

- RG 228.145 If retail investors will not know the offer price at the time they are required to submit their acceptance or bid, your prospectus should disclose:
- (a) how the final price will be set;

- (b) any significant aspects of that process, including any way in which retail and institutional investors are treated differently;
- (c) that investors will not know what they are paying per share at the time they make their investment decision and (if relevant) may not have an opportunity to withdraw their application once the price is set;
- (d) that, if subscribing for a set dollar value of shares, investors will not know the number of shares they will receive at the time they make their investment decision;
- (e) that the final price may be outside the range indicated (where relevant); and
- (f) that the final price may differ significantly from the market price when the securities are quoted (especially where retail investors are involved in the price-setting process).

#### **Offer price payable in instalments**

- RG 228.146 If the offer price will be payable in instalments, your prospectus should provide clear disclosure on the key repayment terms, including:
- (a) the likely timing of instalments and the amount of each instalment; and
  - (b) your rights if the investor defaults on an instalment.
- RG 228.147 Your prospectus should prominently caution investors to consider their financial capacity to meet instalment liabilities.

#### **Minimum subscription condition**

- RG 228.148 Your prospectus should state whether there are any minimum or maximum subscription amounts. This is because the amount to be raised and the use of funds are important considerations for investors.
- RG 228.149 If your prospectus contains a minimum subscription condition, you cannot issue any securities until that condition is satisfied: s723. You will be required to offer withdrawal rights if the condition is not satisfied within four months after the date of your prospectus: s724. This protects investors from being locked into a company that cannot achieve its objectives as a result of insufficient funds.

#### **Allocation policy**

- RG 228.150 If you have a share allocation policy, your prospectus should disclose the key details. For example, your prospectus should disclose:
- (a) if you will allocate securities to certain investors at lower prices (under your prospectus offer or any contemporaneous fundraising such as a placement);

- (b) how priorities between applicants will be determined where the offer is oversubscribed, who will make those decisions and whether any ‘in-principle’ allocations have been made; and
- (c) any allocation of shares to underwriters, existing substantial holders, directors and officers and their ‘friends and family’.

### Indication of listing or quotation

RG 228.151 Your prospectus should state if you will be listed on a financial market and/or your securities may be quoted and trade on such a market (if you have a reasonable basis for such statements). The quotation of securities will generally be fundamental to their future marketability and liquidity. An indication of quotation also suggests to the investor that you will be subject to compliance with the listing rules and to supervision by the financial market.

RG 228.152 If your prospectus states or implies that the securities will be able to be traded on a financial market, your prospectus must state that:

- (a) the securities have been admitted to quotation on that financial market;
- (b) an application for admission of the securities to quotation on that financial market has been made to the operator of that market; or
- (c) an application for admission of the securities to quotation on that financial market will be made to the operator of that market within seven days after the date of your prospectus: s711(5).

RG 228.153 If you cannot include any of these statements without misleading an investor, you cannot give an indication of listing.

RG 228.154 You may be required to refund investors’ application money if your prospectus contains an indication of listing or quotation and:

- (a) an application for quotation is not made within seven days after the date of your prospectus; or
- (b) the securities are not admitted for quotation within three months after the date of your prospectus (see s723(3) and 724).

Note: In s723(3) and 724, the date referred to is the date of the original prospectus.

RG 228.155 The requirements in s711(5), 723(3) and 724 apply broadly to any statements implying listing or quotation. For example, these requirements apply if:

- (a) the prospectus says you may seek admission after some period has lapsed; or
- (b) the prospectus says that a material contract requires you to issue shares to a substantial holder if the company is listed in the future.

## Underwriting agreements

RG 228.156 Where underwriting arrangements are in place, your prospectus should describe:

- (a) those underwriting arrangements;
- (b) the identity of the underwriters;
- (c) the underwriting fees payable and, if underwriting fees are payable in securities, the price and total number of securities that will be issued to the underwriter (for more guidance on the disclosure of interests and benefits, see RG 228.119–RG 228.128);
- (d) the potential effects on control of the underwriting arrangements; and

Note: In *Bisalloy Steel Group Limited* [2008] ATP 29, the Takeovers Panel found that a prospectus for a rights issue should include details about the intentions of a person who might become a substantial holder as a result of underwriting the rights issue.

- (e) any significant termination rights.

RG 228.157 If the underwriter is a related party of the issuer or is (or may become) a substantial holder of the issuer, your prospectus should clearly explain this and provide disclosure on their capacity to fulfil their obligations under the agreement. You should also identify any sub-underwriter who is a related party of the issuer or is (or may become) a substantial holder of the issuer, disclose the fact that they are a related party or substantial holder and explain their capacity to fulfil their obligations.

RG 228.158 If you are listed, or you are a company with more than 50 members and the underwriting arrangements may result in the underwriter breaching the takeover threshold in s606, we will consider our policy in Section R of RG 159, as well as the Takeovers Panel Guidance Note 17 *Rights issues*.

## Capital structure and escrow arrangements

RG 228.159 Investors need to understand your capital structure before and after the offer. Your prospectus should clearly set out:

- (a) the number of shares on issue at the date of the prospectus;
- (b) the number of options on issue, the exercise period and exercise price;
- (c) details of any other convertible securities on issue;
- (d) the number of shares and options that may be issued under the offer and any other contemporaneous placement (minimum and maximum if applicable);
- (e) the share capital after the offer on an undiluted basis and on a fully diluted basis (i.e. presuming all convertible securities are exercised);
- (f) details of directors' voting power and options; and
- (g) details of any substantial shareholders.

- RG 228.160 Your prospectus should disclose the details of any escrow arrangements covering both voluntary escrow agreements and escrow agreements imposed by external parties like the ASX. Your prospectus should disclose:
- (a) shares and shareholders that are subject to escrow agreements (or an estimate if the final numbers have not been determined); and
  - (b) the details of the restrictions (including the reason for the restrictions and the events that will trigger their release).

### Taxation implications

- RG 228.161 Any claims about material tax advantages should be accompanied by statements from experts or a tax ruling from the Australian Taxation Office.

## Other requirements that apply to your prospectus

- RG 228.162 Your prospectus must comply with a number of other technical requirements under the Corporations Act. These are set out in Table 11.

**Table 11: Other requirements in the Corporations Act about prospectuses**

Topic	Corporations Act requirement
Date	Your prospectus must be dated and this must be the date it is lodged with ASIC: s716(1).
Expiry	Your prospectus must state that no securities will be issued on the basis of your prospectus after the expiry date specified. The expiry date must not be later than 13 months after the date of your prospectus and the expiry date of a replacement prospectus must be the same as that of the original prospectus: s711(6). See also s725.
Lodgement	Your prospectus must state that a copy of your prospectus has been lodged with ASIC and that ASIC takes no responsibility for the content of your prospectus: s711(7). Section 718 requires prospectuses to be lodged with ASIC.
Consents	Your prospectus may only include a statement by a person, or a statement said in the document to be based on a statement by a person, if the person has consented to its inclusion, the document states that this consent has been given and the person has not withdrawn the consent: s716(2).
Application form	Offers of securities for which your prospectus is being used must be made in, or accompanied by, your prospectus: s721(1). The application form should be included in, or accompanied by, your prospectus: see s723(1).

## I ASIC's role: How do we monitor and assess prospectuses?

### Key points

Your prospectus must be lodged with ASIC. We may review your prospectus.

When we review a prospectus, we will consider this guide and any other regulatory guide on disclosure that is relevant to the offer or the issuer.

If we have concerns with a prospectus, we may seek corrective disclosure and/or take further action.

### Lodging your prospectus with ASIC

RG 228.163 You must lodge your prospectus with ASIC: s718. We may refuse to receive a document for lodgement on a number of grounds, including if we are of the opinion that the document contravenes the Corporations Act: s1274(8).

### Our compliance reviews

RG 228.164 We do not generally review or provide advice on draft prospectuses or help you to prepare your prospectus. We do not verify the content of prospectuses.

RG 228.165 We do not always review all prospectuses. For example, we may use a form of risk rating to determine which type of prospectuses we focus on.

RG 228.166 If a prospectus has an exposure period, we aim to review it during the exposure period but may commence a review at any time: see Section B of Regulatory Guide 152 *Lodgment of disclosure documents* (RG 152). We may also raise concerns at any point if we consider this is necessary to protect retail investors or market integrity.

RG 228.167 We may also conduct a surveillance to assess how the prospectus was prepared. We may ask the issuer to show us the due diligence and verification procedures implemented to ensure the prospectus complies with the Corporations Act. Based on our experience, where a prospectus is defective, it is often the case that the issuer cannot demonstrate appropriate due diligence and verification procedures.

## What does ASIC look for when reviewing a prospectus?

- RG 228.168 When we review a prospectus, we will analyse what information the Corporations Act requires in the context of the issuer and the offer. We will consider this guide on the information that will generally be required under Ch 6D but we will not apply it as a checklist. We will also consider any other regulatory guide on disclosure that is relevant to the offer or the issuer: see ‘Related information’.
- RG 228.169 You are generally best placed to determine what information the Corporations Act requires for your prospectus. Because we do not have extensive background information about the company and the offer and were not involved in preparing the prospectus, we may need to ask you questions about your prospectus.
- RG 228.170 Our guidance covers key issues but we may raise issues specific to your offer that are not covered in our guidance.
- RG 228.171 If we review a prospectus, the areas we generally focus on are:
- (a) the sections at the front of the prospectus—to ensure that:
    - (i) the prospectus highlights key information about the offer to help retail investors make informed investment decisions; and
    - (ii) the disclosure of benefits and risks is balanced (see Section C);
  - (b) the risk disclosure—to ensure that the directors have identified key risks and that these are highlighted and clearly explained. We check that the prospectus does not deflect attention from key risks by giving undue prominence to very general risks (see Section E);
  - (c) any significant forward-looking statements, especially those relating to the issuer’s financial prospects—to check these statements have reasonable grounds, otherwise they are taken to be misleading (see s728(3), RG 170 and Section F);
 

Note: While stated to apply to prospective financial information, the guidance in RG 170 is useful to the inclusion of all forward-looking statements in a prospectus.
  - (d) the wording and presentation to ensure the prospectus is ‘clear, concise and effective’; and
  - (e) any disclaimers—to ensure they are not inconsistent with the liability regime in Pt 6D.3.
- RG 228.172 We do not raise concerns about the same things in all prospectuses because, for example, whether something misleading depends on the content of the statement and all the circumstances surrounding the issuer and the offer.
- RG 228.173 When we review a prospectus, we also review any related advertisements, media articles, broker reports and continuous disclosure announcements.

## What does ASIC do when there are disclosure concerns?

- RG 228.174 If we have concerns with a prospectus, we may seek corrective disclosure (see RG 152.12) and extend the exposure period (if relevant): s727(3).
- RG 228.175 If we have concerns and either the extended exposure period has expired or there is no exposure period, we will generally notify the issuer and submit our concerns to an ASIC delegate. The delegate may impose an interim stop order under s739(3).
- RG 228.176 If our concerns are not resolved, we will usually hold a hearing within 21 days after issuing the interim stop order in accordance with s739(2). After considering any submissions by the issuer, an ASIC delegate may:
- (a) revoke the original interim stop order (if it does not expire that day without a formal revocation);
  - (b) make a further interim stop order under s739(4); or
  - (c) issue a final stop order under s739(1A) on the basis that we are satisfied that information in a prospectus is not worded and presented in a 'clear, concise and effective' manner, or that the prospectus contains a misleading or deceptive statement or omits required information.
- RG 228.177 If the issuer is required to give corrective disclosure under s724(1), we will also ensure the issuer gives investors any withdrawal rights required by s724.
- RG 228.178 The fact that we have not raised any concerns with a prospectus should not be taken as an indicator that we consider that the prospectus complies with the disclosure requirements. It also does not preclude us from starting an investigation.

## Key terms

Term	Meaning in this document
ASIC	Australian Securities and Investments Commission
ASX	The exchange market known as ASX, operated by ASX Limited
Ch 3 (for example)	A chapter of the Corporations Act (in this example, numbered 3)
[CO 00/44] (for example)	An ASIC class order (in this example numbered 00/44)
Corporations Act	<i>Corporations Act 2001</i> , including regulations made for the purposes of that Act
EBIT	Earnings before interest and taxes
Explanatory Memorandum	Explanatory Memorandum for the Corporate Law Economic Reform Program (Audit and Corporate Disclosure) Bill 2003
JORC Code	The Australasian Code for Reporting of Exploration Results, Mineral Resources and Ore Reserves
NPAT	Net profit after tax
offer document	A document that is sent to investors that sets out the terms of a rights offer conducted without Ch 6D disclosure under s708AA
P/E ratio	Price/earnings ratio
Pt 5.1 (for example)	A part of the Corporations Act (in this example, numbered 5.1)
RG 69 (for example)	An ASIC regulatory guide (in this example, numbered 69)
s710 (for example)	A section of the Corporations Act (in this example, numbered 710)
s710 prospectus	A prospectus that complies with the disclosure requirements in s710 of the Corporations Act
s713 prospectus or transaction-specific prospectus	A prospectus that complies with the disclosure requirements in s713 of the Corporations Act
Valmin Code	Code for the Technical Assessment and Valuation of Mineral and Petroleum Assets and Securities for Independent Expert Reports
you (or the issuer)	The issuer of securities under a prospectus

## Related information

### Headnotes

clear, concise and effective; disclosure; incorporation by reference; prospectus; securities

### Regulatory guides

RG 23 *Updating and correcting prospectuses and application forms*

RG 45 *Mortgage schemes: Improving disclosure for retail investors*

RG 55 *Disclosure documents and PDS: Consent to quote*

RG 56 *Prospectuses*

RG 60 *Schemes of arrangement*

RG 66 *Transaction-specific disclosure*

RG 69 *Debentures: Improving disclosure for retail investors*

RG 70 *Prospectuses for cash box and investment companies*

RG 72 *Foreign securities prospectus relief*

RG 76 *Related party transactions*

RG 99 *Quotation of securities offered by prospectus (s1031)*

RG 107 *Electronic prospectuses*

RG 111 *Content of expert reports*

RG 152 *Lodgment of disclosure documents*

RG 155 *Debenture prospectuses*

RG 159 *Takeovers, compulsory acquisitions and substantial holding notices*

RG 168 *Disclosure: Product Disclosure Statements (and other disclosure obligations)*

RG 170 *Prospective financial information*

RG 198 *Unlisted disclosing entities: Continuous disclosure obligations*

RG 213 *Facilitating debt raising*

## **Legislation**

Corporations Act Pt 5.1, Ch 6, Ch 6D, Pt 7.9, Pt 7.10 Div 3

## **Cases**

*Australian Securities & Investments Commission v Adler (No 5)* 2002 42 ACSR 80

*Bisalloy Steel Group Limited* [2008] ATP 29

*Northern Energy Corporation Limited* [2011] ATP 2

*Re Australian Cooperative Foods Ltd* (2001) 38 ACSR 71

*Tracy v Mandalay Pty Ltd* (1953) 88 CLR 215

## **Consultation papers**

CP 150 *Disclosing information other than in accordance with accounting standards*

CP 155 *Prospectus disclosure: Improving disclosure for retail investors*

## **Media and information releases**

06-027 *ASIC releases draft guidance on shorter, better prospectuses*,  
8 February 2006