



**ASIC**

Australian Securities & Investments Commission

## REGULATORY GUIDE 23

# Updating and correcting prospectuses and application forms

### Chapter 7 — Securities (Part 7.12)

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*From 5 July 2007, this document may be referred to as Regulatory Guide 23 (RG 23) or Practice Note 60 (PN 60). Paragraphs in this document may be referred to by their regulatory guide number (e.g. RG 23.1) or their practice note number (e.g. PN 60.1).*

### Headnotes

*Sections 111AC; 111AD; 994; 995; 996; 999; 1001D; 1008A(4); 1017A; 1020; 1021; 1023A–1024E; 1024G; 1025; 1026; 1031; 1084; reg 7.12.15(6)(ba); purpose and use of supplementary and replacement prospectuses; applications made on outdated application forms; information included in application forms; Corporate Law Reform Act 1994.*

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## Purpose

RG 23.1 This guide explains how issuers can update or correct prospectuses and application forms under the Corporations Law (Law). It is set out in the following way.

- (a) Part I explains when supplementary and replacement prospectuses must and can be issued: RG 23.4–RG 23.13;
- (b) Part II explains the form and content requirements which apply to supplementary and replacement prospectuses: RG 23.14–RG 23.33;
- (c) Part III answers some of the questions which commonly arise when an issuer wants to update, correct or add to a prospectus: RG 23.34–RG 23.53. For example, it explains when ASIC will give relief allowing an issuer to make minor changes to a prospectus, and how an issuer can limit its liability for a defective prospectus. It also explains what consequences can arise when an issuer provides additional documents with a prospectus (eg a letter from the chairperson);
- (d) Part IV explains what information can be included in an application form rather than in a prospectus: s1024G and RG 23.54–RG 23.57;
- (e) Part V explains what happens when an issuer receives an outdated application form (ie an application form which is not current because the issuer has lodged another application form or issued a supplementary or replacement prospectus): s1024E and RG 23.58–RG 23.63.

RG 23.2 This guide has been published in part to explain how ASIC will administer some of the fundraising provisions introduced into the Law by the *Corporate Law Reform Act 1994* (CLRA).<sup>1</sup> However, it is not intended to be a substitute for reading those provisions. It should therefore be read together with them.

RG 23.3 In this guide, references to statutory provisions are to those in the Law. References to regulations are to the Corporations Regulations unless otherwise specified.

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<sup>1</sup> The CLRA repealed and replaced s1024, taking effect from 5 September 1994. The repealed section dealt with the issue of a supplementary prospectus and continues to apply to original prospectuses issued before 5 September 1994 (s1398). ASIC's view on the repealed section is set out in Superseded Practice Note 45 "Supplementary prospectuses" [SPN 45]. This practice note replaces [SPN 45] and relates to an original prospectus issued on or after 5 September 1994.

## Part I: Supplementary and replacement prospectuses

### When must they be used?

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RG 23.4 A supplementary or replacement prospectus must be lodged if, during the application period of a prospectus, the issuer becomes aware that the prospectus is deficient or outdated in that:

- (a) the prospectus contains a material statement that is false or misleading;
- (b) there is a material omission from the prospectus;
- (c) there has been a significant change affecting information in the prospectus; or
- (d) a significant new matter has arisen, and Pt 7.12 would have required information about that matter to have been included in the prospectus if the matter had arisen when the prospectus was being prepared.<sup>2</sup>

The issuer must lodge the supplementary or replacement prospectus as soon as practicable after becoming aware of that fact.

RG 23.5 The terms “material” and “significant” have not been defined in the Law. For these purposes, a statement or omission is material if it is objectively capable of influencing the decision making of a person who commonly invests in securities (see s1001D and 1002C). From the context, ASIC considers that an event or circumstance is significant if a statement concerning it would be material.

RG 23.6 The following paragraphs consider whether an issuer has to update its prospectus in particular circumstances by lodging a supplementary or replacement prospectus.

### Preparation and lodgment of accounts

RG 23.7 Must an issuer update a prospectus when it prepares and lodges accounts and associated documents (eg a directors’ report) during the life of the prospectus? This question will usually arise

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<sup>2</sup> See s1023A(2), 1023B(1) and 1024(1). The application period of a prospectus is generally the period between the issue and expiry dates of the prospectus (as defined in s9). See also RG 23.13, which explains the other purposes for which supplementary and replacement prospectuses can be used.

when a disclosing entity offers ED securities by prospectus. This is because disclosing entities must prepare and lodge both half-year and annual accounts under Pt 2M.3. The terms “disclosing entity” and “ED securities” are defined in s111AC and 111AD.

[*Historical note:* RG 23.7 amended 9/2/2000 by replacing reference to ‘Pt.36’ with ‘Pt 2M.3’]

RG 23.8 In general, accounts will only trigger the requirement to update a prospectus if they reveal information which is material:  
RG 23.4. Information is material if it might affect an investor’s decision to subscribe for the securities offered by the prospectus:  
RG 23.5.

RG 23.9 For example, the issuer will not have to update its prospectus if it is offering debentures, and the accounts do not provide additional information about the issuer’s ability to meet its principal and interest debenture obligations.

### **Varying offer made in prospectus (eg delaying issue of securities)**

RG 23.10 An issuer must lodge a supplementary or replacement prospectus to vary the terms of an offer made in a prospectus if the variation:

- (a) is material: RG 23.4 and RG 23.5 ; and
- (b) may affect the rights of investors who accept the offer before getting notice of the variation (ie by subscribing for securities).<sup>3</sup>

For example, the issuer must use a supplementary or replacement prospectus to make a variation reducing the minimum subscription level of its offer.

RG 23.11 An issuer may also have to use a supplementary or replacement prospectus to make a variation delaying the issue of securities or the return of application money by a significant amount of time. Similarly, this must be done if the variation (ie the delay) will affect the rights of investors who accept the offer before getting notice of the variation: see para (b) of RG 23.10. The following matters should also be noted.

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<sup>3</sup> Before an issuer varies the terms of its offers in a material way using a supplementary or replacement prospectus, it should carefully consider what potential liability may arise. For example, it may become liable if it issues securities to investors who subscribed *after* the offer was varied but without having seen the supplementary or replacement prospectus. Ways of limiting this type of potential liability are discussed in RG 23.42–RG 23.49.

- (a) A longer delay will be acceptable if the issuer is offering unlisted securities and pays interest on the application money.
- (b) If the issuer is offering securities to be listed, s1031(1)(b) may apply. If so, a significant extension of the latest deadline under that paragraph will generally trigger the requirement to lodge a supplementary or replacement prospectus: RG 23.4 and RG 23.5.<sup>4</sup> For general information about when and how s1031 applies, see Regulatory Guide 99 *Quotation of securities offered by prospectus (s1031)* (RG 99).

## Offering additional securities

RG 23.12 An issuer can use a supplementary or replacement prospectus to offer additional securities in the same class as those offered by the original prospectus. However, this will often make it necessary to update other information in the prospectus. For example, the issuer may have to provide additional information in the supplementary or replacement prospectus on:

- (a) the type and number of securities which have already been issued under the original offer;
- (b) the effect of the increased subscriptions on the issuer's gearing and cash position; and
- (c) how the issuer intends to use the money from the increased subscriptions.

## Updating investment return information

RG 23.12A An issuer of interests in a managed investment scheme must lodge a supplementary or replacement prospectus if there is a significant change in the investment return of the scheme when compared with the investment return information in the prospectus: RG 23.4. A change in investment return is significant if it might affect an investor's decision to subscribe for or continue to hold the securities offered by the prospectus: RG 23.5.

RG 23.12B For the purposes of this guide, "investment return" means any change in the value of an interest in a managed investment scheme, and any distribution from the scheme, including benefits such as franking credits or other taxation benefits. "Investment return information" has a corresponding meaning.

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<sup>4</sup> This extension may also be a material adverse change for the purpose of s1024E(6): see RG 23.58–RG 23.63.

RG 23.12C What is a significant change in the investment return of a scheme will depend on the circumstances. It is not possible to specify in advance all of the situations where updating of information by way of a supplementary or replacement prospectus would be required. Rather, in any particular instance, it is necessary to exercise judgment having regard to the circumstances.

RG 23.12D Given the potential volatility of investments in equities, the following is provided by way of guidance for issuers of interests in managed investment schemes that primarily involve investing or trading in equities.

RG 23.12E ASIC believes that there are some good practices for making available current investment return information that issuers should adopt wherever possible. It needs to be recognised that while adopting these practices would generally be sufficient to avoid the need to update equity prospectuses as a result of ordinary market volatility, ultimately the issue is whether the statutory requirements to lodge a supplementary or replacement prospectus have been triggered in any particular circumstance.

### **Good practice guidelines on investment return information**

RG 23.12F Good practices for making available and presenting investment return information include the following:

- (a) immediately before or after information about investment return is contained in the prospectus, the prospectus should include prominent statements referring to:
  - (i) the historical nature of the investment return information;
  - (ii) the volatility of investment returns;
  - (iii) an explanation of how the returns have been calculated; and
  - (iv) the fact that future investment returns may differ from past returns;
- (b) investors and potential investors should be able to obtain the latest investment return information from the issuer by a local telephone call. The information should cover the immediate past one year period and the average annual investment return for any longer periods described in the prospectus, both updated to the end of the last calendar quarter;
- (c) at the request of an inquirer of investment return information, the issuer should provide a free paper copy of the information;

- (d) the free paper copy of the information may cover more than one scheme, if the issuer reasonably believes that the information is provided in a way which would be clear and understandable to the reasonable unsophisticated inquirer;
- (e) the issuer should keep records (for up to 7 years) of investment return information made available to inquirers from time to time;
- (f) where investment return information is contained in promotional material, the issuer should include prominent statements as in paragraph (a) above.

RG 23.12G As noted above, while compliance with these practices would generally be sufficient to avoid the need to update equity prospectuses as a result of ordinary market volatility, whether a supplementary or replacement prospectus is necessary as a result of changes in investment returns will depend on the particular circumstances. In this regard the following are also relevant:

- (a) the content of the prospectus as a whole;
- (b) the content of any advertising or other promotional activity in relation to the scheme;
- (c) any changes in market conditions or particular investments that potentially affect the investment returns of the scheme beyond the variations that could be expected as a result of normal volatility having regard to the investment strategy of the scheme as represented in the prospectus and any advertising and promotional activity;
- (d) the issuer's judgement whether any change in investment returns represents a short-term fluctuation, or a longer-term change in value or price.

RG 23.12H ASIC will also have regard to whether any relevant industry standards or guidelines on the calculation and presentation of investment returns have been complied with. In this regard, ASIC notes in particular Investment Financial Services Association Limited's Standard No 6.00 *Product Performance — Calculation and Presentation of Returns (July 1999)*. Apart from setting out a methodology for the consistent calculation and presentation of returns, that standard indicates that return for periods of less than one year should not be annualised.

RG 23.12I These good practice guidelines set out in RG 23.12F apply to:

- (a) any prospectus issued after the publication date of the amendments to this guide; and

- (b) any updating supplementary prospectus for a managed investment scheme issued in compliance with Regulatory Guide 127: *Additional investments in managed investment schemes*; and
- (c) any advertisement, irrespective of the date of the relevant prospectus, which is issued after the publication date of the amendments to this guide.

RG 23.12J While this guidance is specifically framed for issuers of interests in managed investment schemes that primarily involve investing or trading in equities, ASIC considers that it is also substantially relevant in relation to any other schemes involving investing or trading in assets with similar or greater volatility.

[*Historical note:* RG 23.12A–RG 23.12J inserted 9/2/2000]

## When can they be used?

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RG 23.13 The Law requires an issuer to lodge supplementary and replacement prospectuses in specified circumstances: RG 23.4. However, their use is not limited to these cases. They can be used (and lodged) whenever an issuer wants to do any of the following things.<sup>5</sup>

- (a) They can be used to correct a deficiency in the original prospectus. This means any sort of deficiency; eg a material omission, a material statement which is false or misleading, or some error which is not material. This function was introduced by the *Corporate Law Reform Act 1994*.
- (b) They can be used to update the original prospectus by providing information about something which has happened since the prospectus was prepared. This is the case whether or not the information is material. For example, they can be used to tell investors that there has been a change in the issuer's directors or the address of its registered office.
- (c) They can be used to provide additional information, whether or not the information is new or material.

Supplementary and replacement prospectuses can also be used to correct, update or add to the original prospectus at any time; eg before the start of the application period of the prospectus (compare with RG 23.4). For example, they can be used to update a prospectus which has been lodged or registered but not yet issued: see also RG 23.36–RG 23.41.

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<sup>5</sup> See s1024A(1) and 1024B(1), the notes to those sections, and the definition of “deficiency” in s1024A(5) and 1024B(4).

## Part II: Form and content requirements

RG 23.14 This part discusses the form and content requirements which apply to supplementary and replacement prospectuses. As far as practicable, supplementary and replacement prospectuses should be treated in the same way because:

- (a) they serve the same function: see RG 23.4 and RG 23.13; and
- (b) in effect, a replacement prospectus is merely an integrated version of a supplementary and an original prospectus. A supplementary prospectus accompanies or is attached to an original prospectus, while a replacement prospectus replaces it.

### General requirements

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#### Dated and signed

RG 23.15 A supplementary prospectus must be dated and signed as specified in s1021(3) and 1021(13). This must be done before it is lodged (s1024A(4)(c)).

RG 23.16 A replacement prospectus should also be dated and signed as specified in s1021 (s1024D(3)). The date and signatures from the original prospectus should not be kept in the replacement prospectus. This is an implied exception to s1024B(3): see RG 23.20.

#### Lodgment and registration

RG 23.17 There is no fee payable for the lodgment of a supplementary or replacement prospectus (see item 10(b) of the Schedule to the Corporations (Fees) Regulations).

RG 23.18 ASIC considers that supplementary and replacement prospectuses need not be registered for the following reasons.

- (a) The Law does not expressly require them to be registered (see also para 334 of the Explanatory Memorandum to the Corporate Law Reform Bill 1993).
- (b) A supplementary prospectus is not a self-contained document which could meet the requirements of s1020A. Similarly, in the case of a replacement prospectus:
  - (i) the additional material in the replacement could not on its own meet the requirements of s1020A; and

- (ii) any material carried over from the original to the replacement prospectus is treated as good if it complied when the original was lodged or registered (s1024D(4)).
- (c) A supplementary prospectus is not a prospectus for the purposes of s1020A (s1024A(4)). Although there is no corresponding exclusion for a replacement prospectus, there is an implied legislative intention that supplementary and replacement prospectuses should be treated in the same way: RG 23.14.

ASIC therefore considers that supplementary and replacement prospectuses do not fall within the general rule concerning the registration of prospectuses. This general rule says that a prospectus must be registered as well as lodged except in specified circumstances (s1017A and 1020A).<sup>6</sup>

RG 23.19 The following paragraphs explain some of the particular form and content requirements that apply to replacement and supplementary prospectuses.

## Replacement prospectuses

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RG 23.20 A replacement prospectus must have the same wording as the original prospectus, except for:

- (a) the provision of new or additional information; and
- (b) the correction of deficiencies in the original prospectus.

This may involve the deletion of the relevant outdated or incorrect information (see s1024B(3) and RG 23.16).

RG 23.21 Each page of a replacement prospectus must contain a clear statement in bold type saying that the document is a replacement prospectus which replaces the original prospectus. The statement must also identify that prospectus (s1024B(2)). This should preferably be done by mentioning the securities, the issuer and the date of the prospectus (ie similar to the way that s1025(2)(b) and 1025(2)(c) requires a prospectus to be identified). For example, the statement could read:

“This is a replacement prospectus dated [*insert date*]. It replaces a prospectus dated [*insert date*], relating to shares of [*insert name of issuer*].”

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<sup>6</sup> This general rule is supported by the fact that references in the Law to a prospectus having been lodged commonly include it having been registered if necessary. For example, see s1023(1)(a), 1023B(1), 1024(1) (both before and after the CLRA), 1024G(1)(a), 1025(2)(b), and 1026(2)(e)(i).

RG 23.22 Although not strictly required by the Law, investors would also benefit from a replacement prospectus drawing attention to the differences between it and the original prospectus. This could be done by highlighting or summarising those differences.

## Supplementary prospectuses

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RG 23.23 Each page of a supplementary prospectus must contain a clear statement in bold type saying that the document is a supplementary prospectus to be read in conjunction with the original prospectus and any other supplementary prospectus already issued. The statement must also clearly identify those documents (s1024A(2) and 1024A(3)). This should preferably be done by mentioning the securities, the issuer and the date of each document (ie similar to the way that s1025(2)(b) and 1025(2)(c) require a prospectus to be identified). For example, the statement could read:

“This is a supplementary prospectus intended to be read with the prospectus dated [*insert date*] and supplementary prospectuses dated [*insert date*] and [*insert date*], relating to shares of [*insert name of issuer*].”

RG 23.24 The following paragraphs explain the different ways in which an issuer can prepare a supplementary prospectus. They also explain what relief ASIC will give in those circumstances.

### Sticker or pages bound with the prospectus

RG 23.25 An issuer can prepare a supplementary prospectus in a number of different ways under the Law. Two of these ways are as follows.

- (a) The supplementary prospectus can be in the form of a sticker (page sized or smaller) attached to a prospectus. However, the sticker must be attached to the prospectus in a prominent and otherwise blank space. That is, it cannot be used to cover outdated or incorrect information in the prospectus.
- (b) The supplementary prospectus can be in the form of additional pages bound with a prospectus.

If the copies of the supplementary prospectus are stuck to *or bound with* copies of the prospectus, there may be no need for them to contain copies of the signatures required by s1021(13), bear the annotations required by s1021(14) (as applied by s1024A(4)(c)) and include the statement required by s1024A(2): see RG 23.23. If so,

ASIC will give relief from these requirements for copies of the supplementary prospectus which are stuck onto, or attached to, copies of the original prospectus, on a case by case basis. An issuer wanting this relief should apply for an exemption in the form of Pro Forma 122 [PF 122].

*[Historical note: RG 23.25 amended 17/6/1996 by replacing the last paragraph which formerly read:*

*”In these cases, the particular form of the supplementary prospectus may make it unnecessary for the document to include the statement required by s1024A(2) (see para 23). If so, ASIC will give relief from that requirement. This will be given by exemption on a case by case basis (s1084(2)). An issuer wanting this relief should apply for an exemption in the form of Pro Forma 122.”*

*Further amended 8/10/1997 by deleting the last two sentences of the paragraph. These read:*

*”ASIC will also give relief from s1024C(3) to the effect that the copies of the supplementary prospectus which are issued need not comply with s1021(13) and (14). The relief from s1021(13), s1021(14) and s1024A(2) will be given by exemption under s1084(2) and the relief from s1024C(3) will be given by modification under s1084(6).”*

**RG 23.25A** The relief contemplated under Pro Forma 122 [PF 122] applies only to the copies of the supplementary prospectus which are issued with copies of the principal prospectus. The original supplementary prospectus which is lodged with ASIC must be signed in accordance with s1021(13), include the statement required by s1024A(2) and comply with the relevant provisions applied under s1024A(4)(c).

*[Historical note: RG 23.25A inserted 17/6/1996.]*

## **Substituting or consolidating supplementary prospectuses**

**RG 23.26** ASIC has given class order relief under s1084 for issuers which expect to issue a number of supplementary prospectuses during the application period of a prospectus (see Class Order [CO 95/1258] and the definition of “application period” in s9). The relief allows an issuer to issue one supplementary prospectus, and substitute or consolidate it with other supplementary prospectuses from time to time. The relief means that only the latest version of the supplementary prospectus must accompany the original prospectus at any time. This is instead of a number of successively issued supplementary prospectuses.

**RG 23.27** The class order gives this relief if the latest version of the supplementary prospectus:

- (a) prominently states that it is a substitute for any old supplementary prospectuses, each of which is clearly identified; and

- (b) contains all the substantive information in the old supplementary prospectuses, except where it corrects deficiencies in or updates that information. This may involve the deletion of outdated or incorrect information.

## Attaching application forms

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RG 23.28 An application form can only be issued if it is attached to a copy of the prospectus (s1020(a) and 1020(b)).<sup>7</sup> This applies to supplementary and replacement prospectuses as follows.

### Supplementary prospectuses

RG 23.29 Section 1020 requires an issuer to attach application forms to copies of the original prospectus, even after the issue of a supplementary prospectus. This is because:

- (a) the supplementary prospectus is not a prospectus in its own right; and
- (b) the reference in s1020 to “the prospectus” does not include the supplementary prospectus (by implication under s1024A(4)).

RG 23.30 ASIC has given class order relief from this requirement under s1084(2). This has been given so that an issuer can attach application forms to copies of a supplementary prospectus rather than the original prospectus (see Class Order [CO 95/1257]). The relief applies if:

- (a) the supplementary prospectus accompanies the original prospectus (ie as required by s1024C(3)); and
- (b) the supplementary prospectus or the application form states that an investor should apply for the securities by completing the form attached to the supplementary rather than any form which is still attached to the original prospectus.

The relief is appropriate because it will help the issuer to determine which subscribers have subscribed for securities using outdated application forms (ie without seeing the supplementary prospectus): see s1024E(1) and RG 23.58. It will therefore help the issuer comply with its obligations under s1024E in relation to those subscribers: see RG 23.58–RG 23.63. An issuer relying on the class order relief may

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<sup>7</sup> If the prospectus relates to debentures, the prospectus can merely accompany the application form (s1020(a)). See also RG 23.35–RG 23.41 for ASIC’s view on s1020 and how it applies to application forms and prospectuses generally.

also remove old application forms still attached to copies of the original prospectuses. Alternatively, it may alter those forms to indicate that they should no longer be used.

## Replacement prospectuses

RG 23.31 If a replacement prospectus has been lodged, the application form must be attached to a copy of the replacement prospectus. This is because a replacement prospectus is a prospectus in its own right (s1024D(3)).

## Statements by experts

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RG 23.32 Section 1032 applies to a supplementary or replacement prospectus which contains a statement purporting to be made by an expert or based on a statement made by an expert.<sup>8</sup> It also applies if:

- (a) the original prospectus includes a statement made by an expert or based on a statement made by an expert (ie a statement to which s1032 applies); and
- (b) that statement is affected by the supplementary or replacement prospectus. This effect may be direct, indirect, express or by implication. For example, the supplementary or replacement prospectus may contain information affecting the particular context of the expert's statement in the original prospectus.

RG 23.33 In both cases, the issuer must obtain the relevant expert's consent to the issue of the supplementary or replacement prospectus. For general information about when and how s1032 applies, see Regulatory Guide 55 *Disclosure documents and PDS: Consent to quote* (RG 55).

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<sup>8</sup> See s1024A(4) in relation to supplementary prospectuses and s1024D(3) in relation to replacement prospectuses.

## Part III: Updating, correcting or adding to prospectuses

RG 23.34 This part answers some of the questions which often arise when an issuer wants to update, correct or add to a prospectus.

### Making changes to application forms

RG 23.35 An application form may not be issued unless a copy has been lodged with ASIC (s1020(c)). The application form need not be exactly the same as the lodged copy. There may be differences concerning:

- (a) the *presentation* of the document, whether substantial or not; and
- (b) the *content* of the document, if these differences are trivial.

For example, it is acceptable if some of the copies issued have identifying marks, dates, colours or numbers so that the issuer can distinguish forms issued at different dates. This is acceptable because it will help an issuer comply with its obligations under s1024E after lodging a supplementary or replacement prospectus: see RG 23.58–RG 23.63.

### Making changes to a prospectus

RG 23.36 The following table summarises the changes which can be made to a prospectus after it has been lodged without breaching the Law: see RG 23.37–RG 23.38. It also summarises the relief which ASIC will give from the Law to allow an issuer to make changes to the content of a prospectus before it is issued: see RG 23.38–RG 23.41.

|  | <i>Substantial changes to the document as a whole</i> | <i>Individual changes which are material</i>             | <i>Trivial changes</i> |
|--|---|--|------------------------|
| What changes can be made to the <i>presentation</i> of a prospectus?           | ✓<br>para 37(a)                                       | not applicable   | ✓<br>para 37(a)        |
| What changes can be made to the <i>content</i> of a prospectus without relief? | ✗<br>para 37  | ✗<br>para 37   | ✓<br>para 37(b)        |
| What changes can be made to the <i>content</i> of a prospectus with relief?    | ✗<br>para 40(a)                                       | ✓<br>if prospectus not yet issued: RG 23.38–<br>RG 23.41 | not applicable         |

## What types of changes can be made without relief?

RG 23.37 Section 1020 prohibits a person from issuing an application form unless it is attached to or accompanied by (as applicable) a *copy* of the prospectus which was lodged and (if necessary) registered. This does not require the copy to be exactly the same as the lodged document. There may be differences in:

- (a) the *presentation* of the document, whether substantial or not (eg its general layout and formatting); and
- (b) the *content* of the document, if these differences are indisputably trivial (eg typographical and spelling mistakes, and corrections of those mistakes, if they do not affect the sense).

However, an issuer will breach s1020 if it distributes copies containing more significant differences relating to the document's content: see RG 23.39–RG 23.41.

RG 23.38 ASIC will generally not give relief from s1020 in relation to a prospectus which has already been issued. However, it may give relief where an issuer wants to change a prospectus before it is issued but after it has been lodged or registered. This relief is explained at RG 23.39–RG 23.41.

## What types of changes can be made with relief?

RG 23.39 If an issuer has lodged or registered but not yet issued a prospectus, it can make changes to the content of the prospectus by:

- (a) lodging a supplementary or replacement prospectus: RG 23.4 and RG 23.13; or
- (b) applying for relief from s1020(b).<sup>9</sup> ASIC may give this relief in appropriate circumstances where an issuer wants to make changes to the document's content which are more than trivial (compare with para (b) of RG 23.37). This includes relief to allow individual changes which are material.

RG 23.40 However, ASIC will only give this relief if the changes are relatively minor in the context of the document as a whole. For example, relief may be given to allow a particular figure to be changed even though the figure is material. However, ASIC will not give relief to allow an issuer to make major changes to the document.

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<sup>9</sup> See also RG 56.53 for an explanation of when ASIC will allow or request the amendment of a prospectus which has been lodged but is awaiting registration.

A fresh prospectus should be lodged instead. ASIC will make appropriate arrangements to ensure that an investor relying on a copy of the prospectus obtained by searching ASIC's register (see s1274) is aware that the issued prospectus differs from the version on ASIC's database. ASIC will arrange for any prospectus obtained from the database to be accompanied by the relevant instrument of relief. An issuer wanting this relief should apply for a modification under s1084(6) in the form of Pro Forma 123 [PF 123].

[*Historical note:* RG 23.40 amended 17/6/1996. The paragraph formerly read: "RG 23.40 However, the ASC will only give this relief if: (a) the changes are relatively minor in the context of the document as a whole. For example, relief may be given to allow a particular figure to be changed even though the figure is material. However, the ASC will not give relief to allow an issuer to make major changes to the document. A fresh prospectus should be lodged instead; (b) the issuer discloses that the issued version of the prospectus is different from the lodged version. This must be disclosed in a prominent place on each application form issued. This is to ensure that an investor does not rely on a copy of the prospectus obtained by searching the ASC register (see s1274) rather than the amended version of the prospectus attached to the application form. An issuer wanting this relief should apply for a modification under s1084(6) in the form of Pro Forma 123 at page *PF 1229* in the *ASC Digest*."] ]

RG 23.41 ASIC will give this relief in appropriate circumstances because the Law only *requires* an issuer to lodge a supplementary or replacement prospectus to make material changes to a prospectus' content, if the prospectus has already been issued: RG 23.4. In addition, there is no mischief in allowing an issuer to make material changes before the prospectus is issued, as long as the application forms disclose that those changes have been made.

## Limiting liability for outdated or deficient prospectuses

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RG 23.42 An issuer can limit its potential liability for an outdated or deficient prospectus by issuing a supplementary or replacement prospectus. This effectively gives the issuer a defence to claims by investors who received the supplementary or replacement prospectus before subscribing. However, it does not give the issuer a defence to claims by other investors: ie investors who did not receive the supplementary or replacement prospectus before subscribing and who therefore invested on the basis of the original prospectus alone.<sup>10</sup> These investors can be divided into two categories.

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<sup>10</sup> This is because the Law does not deem an investor to have received or relied on a supplementary or replacement prospectus, merely because it has been issued. See s1024C(2), 1024C(4), 1024D(3).

## First category

RG 23.43 The first category includes investors whose application forms were received by the issuer *after* the issue of the supplementary or replacement prospectus. The issuer can use s1024E to limit its potential liability to these investors. Section 1024E is discussed in RG 23.58–RG 23.63.

## Second category

RG 23.44 The second category includes investors whose application forms were received by the issuer *before* the issue of the supplementary or replacement prospectus.

RG 23.45 The issuer cannot use s1024E to limit its potential liability to an investor in the second category (see s1024E(1) and 1024E(2)). In addition, the issuer is not expressly prohibited from issuing securities to those investors at a time when it knows that the prospectus needed updating or correcting (see s1023A(2)). This is the case even if the issuer has prepared or lodged (but not yet issued) a supplementary or replacement prospectus updating or correcting the prospectus.

RG 23.46 However, the issuer will probably incur civil liability for issuing securities in these circumstances (s995).<sup>11</sup> This may enable the investor to either:

- (a) rescind its subscription contract with the issuer (s1325); or
- (b) sue the issuer or its directors for any damage suffered as a result of the breach (s1005).

The directors will not have a defence under s1008A(4) to this claim for damages if, at the time that the securities were issued to that investor, they did not believe or have reasonable grounds for believing that there was no defect in the prospectus.

## How should an issuer treat investors in the second category?

RG 23.47 An issuer should therefore not issue securities in these circumstances to an investor in the second category: see RG 23.44. Instead, it should take the following steps.<sup>12</sup>

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<sup>11</sup> See *Jones v Dumbrell* [1981] VR 199, *With v O’Flanagan* [1936] Ch 575 and JG Fleming’s *The Law of Torts*, 8th ed (The Law Book Company, Sydney, 1992) at pp 630-631. See also the Eggleston Committee’s Fifth Interim Report (October 1970), at para 32 on pp 11–12.

- (a) The issuer should issue a supplementary or replacement prospectus as required by s1023B(2) or 1024(2): RG 23.4.
- (b) The issuer should offer investors who applied under the original prospectus the opportunity of reconsidering their investment. Wherever possible, this should be done *before* securities are issued to those investors. For example, it may be done using a notification procedure similar to that described in s1024E(3). This would involve the issuer sending the relevant investors a notice:
  - (i) explaining that the original prospectus has been updated or corrected; and
  - (ii) explaining how and by when investors may withdraw their applications for securities.

This notice should be sent with a copy of the supplementary or replacement prospectus and a new application form, as applicable: RG 23.58–RG 23.63.

- (c) For investors who advise the issuer that they want to withdraw their applications, the issuer should repay their application money as soon as possible with any interest that has accrued in respect of that money.

RG 23.48 An issuer which *does* issue securities in these circumstances may similarly avoid breaching the Law by giving the relevant investors the opportunity of reconsidering their investments. This may be done using a procedure similar to that described in s1024E(5).

RG 23.49 ASIC may give case by case relief to facilitate the use of this procedure; eg the cancellation of issued shares. However, this will only be given:

- (a) if the issuer's directors sign a statement saying that the issuer's solvency will not be prejudiced by the issuer repaying all of the relevant application money (see also s1308); and
- (b) in rare and extenuating circumstances. This is because it will generally be more appropriate for the issuer to apply to the court for orders cancelling the issue of the securities (see s1024E(7), 195, 212 and Pt 9.5).

In particular, relief will generally be inappropriate where s1031 applies to the prospectus. This is because a cancellation of securities in those circumstances may affect the issuer's ability to satisfy the

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<sup>12</sup> This is at least the case if (for example) the prospectus is outdated because there has been a material adverse change within the meaning of s1024E(6).

spread requirement of the relevant stock exchange. (For general information about s1031, see Regulatory Guide 99 RG 99, *Quotation of securities offered by prospectus (s1031)*.)

## Providing additional documents with a prospectus

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RG 23.50 The Law does not expressly prohibit an issuer from attaching additional documents to or issuing additional documents with a prospectus. For example, the prospectus can be issued with a covering letter from the issuer's chairperson. However, this will have the following consequences.

RG 23.51 First, the additional document will become part of the prospectus for the purpose of Pt 7.11 (s994). This means (for example) that the issuer will contravene s996 if there is a false and misleading statement in the additional document.

RG 23.52 Second, if the additional document is not a supplementary prospectus, the issuer should carefully consider whether it is breaching s1025 or 1026 by publishing the document.<sup>13</sup> If the issuer attaches copies of the document to copies of the prospectus, it should also consider whether it is breaching s1020 (ie by circulating copies of the prospectus which are different to the prospectus as lodged: see RG 23.36 and RG 23.37. In both cases, the issuer can avoid breaching the Law by lodging the document as a supplementary prospectus: RG 23.13. Alternatively, it may apply to ASIC for relief from these provisions (s1084).

RG 23.53 Third, the courts will probably characterise the additional document as a supplementary prospectus if it:

- (a) updates or corrects information in the prospectus; or
- (b) provides additional information to that in the prospectus (ie rather than a chairperson's letter which simply summarises information already contained in the prospectus).

That is, the document will be likely to be a supplementary prospectus if it serves one of the purposes mentioned at RG 23.13 (see also s1024A(1)). In this case, the issuer must comply with s1024A and 1024C when issuing the document. The issuer must also comply with s1024E: see RG 23.58–RG 23.63.

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<sup>13</sup> See Superseded Policy Statement 101 [SPS 101] (Prospectus advertising provisions (s1025 and 1026)).

## Part IV: Information in application forms (s1024G)

RG 23.54 Certain information in an application form is considered to be included in a prospectus under s1024G if the following two requirements are satisfied.<sup>14</sup>

- (a) The prospectus must state that the specified information will be set out in the application form. For this purpose, the information must be precisely specified. For example, it will be sufficient if the prospectus says that the terms and rates of debentures will be set out in the form. However, it is not sufficient for the prospectus to merely say that “any late-breaking information will be provided in the form”.
- (b) The prospectus and a copy of the application form must have been lodged (s1024G(1) and 1024G(3)). However, the form does not have to be registered.

RG 23.55 The information included in the application form is considered to be included in the prospectus only while the application form is current (see s1024G(3), although note the exception in s1024G(5)). An application form is current from the time that it is lodged until the time that a new form is lodged (s1024G(2)).

RG 23.56 An issuer may update or correct information in an application form by issuing a fresh application form (s1024G). For example, a debenture prospectus may state that the accompanying application form will provide:

- (a) the interest rate payable on the debentures; and
- (b) the current gearing of the issuer.

This information may then be updated by lodging a fresh form (s1024G(2) and 1024G(3)). However, a fresh form cannot be used to update other information in the prospectus.

RG 23.57 If an issuer issues a fresh application form to update or correct information in the original form, the issuer need not lodge a supplementary or replacement prospectus to update or correct the same information. This is because the issue of the fresh form serves the same function as the issue of a supplementary or replacement prospectus. It also has the same consequences; eg it attracts s1024E (s1024E(1)(b)). Section 1024G therefore operates as an implied exception to s1023B and s1024: see RG 23.4.

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<sup>14</sup> In relation to a prospectus offering debentures, see Superseded Policy Statement 97 [SPS 97] (Debenture prospectuses) and Class Order [CO 95/887].

## Part V: Outdated application forms (s1024E)

RG 23.58 In this part, an application form which is not current within the meaning of s1024E(1) is referred to as an “outdated application form”. An application form becomes outdated when:

- (a) a new application form is lodged (see s1024G and RG 23.54–RG 23.57); or
- (b) a supplementary or replacement prospectus is issued. This means that an application form does not become outdated merely because:
  - (i) the issuer is preparing a supplementary or replacement prospectus; or
  - (ii) the issuer has lodged (but not yet issued) a supplementary or replacement prospectus (see s1024E(1), but note RG 23.42–RG 23.49).

### Notices under s1024E(3)

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#### Contents of notice

RG 23.59 As soon as practicable after receiving an outdated application form, the issuer must give the investor a written notice (s1024E(3)). That notice must:

- (a) advise that the relevant application form was not current;
- (b) state which option the issuer has decided to follow; and
- (c) explain that option.

RG 23.60 The issuer has the following two options.

- (a) The first is to treat the investor’s application as withdrawn. The issuer must then refund the investor’s application money and any interest (s1024E(4)). This may be sent either with the notice or as soon as practicable afterwards.
- (b) The second is to issue the securities to the investor. This must be done either at the time that the notice is sent to the investor or as soon as practicable afterwards.

If there was a material adverse change in relation to the securities since the issuer issued the outdated application form, the issuer must

also give investors the opportunity of obtaining a refund of their application money and any interest (s1024E(5) and 1024E(6)).

## **Documents accompanying notice**

RG 23.61 The notice must be accompanied by each relevant supplementary or replacement prospectus and a current application form (s1024E(3)(c)). However, ASIC has granted relief from s1024E(3)(c) so that an issuer need not provide a copy of the current application form with the notice if:

- (a) the issuer decides to follow the second option; and
- (b) the application form has not changed.

ASIC has granted this relief by class order under s1084(2) (see Class Order [CO 95/1256]).

RG 23.62 Section 1020 does not apply to a current application form sent to an investor with a notice under s1024E(3). This is because s1024E(3) specifies precisely what documents must accompany the notice. It therefore impliedly excludes s1020. This means that the current application form need not be attached to or accompanied by a fresh copy of the original prospectus.

## **How does it interact with reg 7.12.15(6)(ba)?**

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RG 23.63 An argument has been raised that s1024E conflicts with the covenant required by reg 7.12.15(6)(ba). The two provisions deal with different problems, which will only occasionally coincide. Where they do coincide, it is possible to comply with both: the management company should simply return the application money to the applicant. This is consistent with both s1024E(4) and the first alternative in the covenant.

## **How to lodge an application for relief**

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RG 23.64 Applications for relief under this guide should be lodged at an ASC Regional Office. They should be accompanied by the appropriate fee and any supporting information required by this guide.