

## **EXPLANATORY STATEMENT**

### **Select Legislative Instrument 2009 No. 103**

#### **Issued by the authority of the Minister for Superannuation and Corporate Law**

##### *Corporations Act 2001*

##### *Corporations Amendment Regulations 2009 (No. 5)*

Subsection 1364(1) of the *Corporations Act 2001* (the Act) provides that the Governor-General may make regulations prescribing matters required or permitted by the Act to be prescribed by regulations or necessary or convenient to be prescribed by regulations for the carrying out or giving effect to the Act.

Division 5A, Part 7.9 of the Act sets out a disclosure regime in relation to unsolicited off-market offers (that is, offers made directly to individuals to purchase their financial products, generally shares). Section 1019I in Division 5A sets out what an offer document must contain and paragraph 1019I(2)(f) provides that any other information may be specified in regulations for the purposes of this paragraph.

The regulations specify additional disclosure requirements for offer documents where an unsolicited offer is made to purchase a financial product off-market and where payment is to be made by instalments over a period of time.

The Act's disclosure regime applies to offerors/purchasers making an unsolicited offer to purchase a financial product from an offeree (that is, the receiver of an offer), off-market. It applies where the unsolicited offer was made in the course of the business of purchasing financial products and the offeror was not in a personal or business relationship with the offeree. The regime includes provisions relating to the withdrawal of such offers, the contents of the offer document, variations to the offer, updates to the market value and the rights of offerees if the provisions are not complied with.

For example, in relation to shares, the disclosure regime applies where an offeror obtains shareholder details from a company's register and writes to individual shareholders (generally targeting small shareholders), offering to acquire their shares for a stated price, which is usually well below market price. The offer document must disclose the offer price, as well as the market price, for the shares and ensure that the offer is open for at least one month.

The regime was introduced in January 2004 to address off-market offers falling below the market or fair value price, with the objective of providing the offeree with sufficient information to make an objective and informed judgment about the offer. It is considered that these measures have improved investor awareness of the risks of accepting such offers, as reflected in the apparent lower take-up.

However, more recently, offers have been made where payment is to be made over a period of time, including as long as 20 years. This practice has raised additional concerns about whether consumers fully appreciate the true value of offers, as payment will not be completed for a considerable period of time, thereby eroding the value of the offer compared with a situation where full payment is made immediately.

For example, say a shareholder holds 10 shares and the offeror offers \$300, but the offer states that this amount is to be paid over a 20-year period at \$15 per year. If the

market price of the shares is currently \$20 per share, this may, on the face of it, appear to be a reasonable deal, as the market value would only be \$200. However, as money loses value over time, the total current value (calculated by using the formula set out in the Regulations) of the amount that will be paid over the 20 years is only \$113.

To date, court action has been successful in forcing disclosure of the details of instalment payments in offer documents. However, it is desirable that these requirements are clearly specified in law and also include the total present value of the offer (that is the total consideration to be received in instalments in today's money), so that offerees can make an informed decision about accepting the offer.

The Regulations amend the *Corporations Regulations 2001* (the Principal Regulations) to provide that offerors must:

- include additional information in the offer document, if payment is to be made by instalments, in particular:
  - the amount of each instalment;
  - when each instalment will be paid – for example, yearly on the anniversary of acceptance of the offer;
  - how many instalments will be paid - for example, if the payments are to be made over a number of years, precisely how many instalments would be paid;
  - how the instalments will be paid, for example into a nominated bank account or by a cheque in the mail; and
  - the total present value of the offer.

Further details on the Regulations are set out in the Attachment.

An earlier version of the regulations was exposed for targeted consultation in May 2008, with 13 parties with interests in the issue consulted. The draft legislation, together with a commentary on the draft, including its background and some discussion on specific issues for comment, were provided to each stakeholder by email. Targeted parties included industry representative groups such as the Australian Financial Management Association (AFMA) and the Securities and Derivatives Industry Association (SDIA), as well as the Investment And Financial Services Association (IFSA), the Financial Planning Association, as well as firms frequently targeted by such offers, such as AXA and IAG. Consumer groups such as Choice and the Australian Investors Association (AIA) were also consulted.

Four submissions were received, from IAG, AXA, CBA and AMP. Views were generally in support of the proposed increased disclosure requirements, although some had doubts regarding the consumer's ability to understand the present value issue. It is for this reason that a text has been prescribed in the regulations to assist consumers in better understanding this concept.

The Regulations are a legislative instrument for the purposes of the *Legislative Instruments Act 2003*.

The Regulations commence on the day after they are registered on the Federal Register of Legislative Instruments.

**Details of the Corporations Amendment Regulations 2009 (No. 5)**

**Regulation 1 — Name of Regulations**

This regulation provides that the name of the Regulations is the *Corporations Amendment Regulations 2009 (No. 5)*.

**Regulation 2 — Commencement**

This regulation provides that the Regulations commence on the day after they are registered.

**Regulation 3 — Amendment of *Corporations Regulations 2001***

This regulation provides that Schedule 1 of the Regulations amends the *Corporations Regulations 2001* (the Principal Regulations).

**Schedule 1**

**Item [1] – After regulation 7.9.97**

Item [1] inserts a new regulation 7.9.97A in the Principal Regulations.

Subregulation 7.9.97A(1) provides for additional information to be provided in an offer document if payment for the product is to be made in instalments, being:

- a) the amount of each instalment;
- b) when each instalment will be paid;
- c) how many instalments will be paid;
- d) how each instalment will be paid; and
- e) text setting out the total present value of the instalments and the total current value of the financial product in prescribed paragraphs.

This additional disclosure enables shareholders or other financial product holders to better understand the terms of the offer and compare it with the current market price of the financial product to allow them to better determine whether they wish to accept it.

The prescribed paragraphs provide an explanation to the offeree about the offer being made and set out the total present value of the offer and the total current or market value of the financial product (generally shares). This text directs attention to the offeree that if the total present-day value of the offer is less than the total market or current value of the financial product, the offer may not be fair.

Subregulation (2) provides the method by which the total present value of the instalment payments is to be calculated. The formula provides consumers with an indication of the difference between the simple sum of the instalment payments and their present day value. The formula can be applied to a wide range of instalment payment structures; for example, varying payment frequencies and amounts. The

formula is equivalent to an average compound interest rate of around 14 per cent per annum. The rate would not be expected to require revision unless there was a major shift in market interest rates.

Subregulation (3) describes the meaning of *total current value* of a financial product, being either the market value of the product or the fair estimate of the value of the product on the date the offer is made as set out in section 1019I of the Act.

Subregulation (4) notes that all money amounts in an offer document must be in Australian currency.