



20 March 2009

Clerk of the Committee
Commerce Committee
Select Committee Office
Parliament Buildings
WELLINGTON

Email: paul.weakley@parliament.govt.nz

By Email

To the Commerce Committee

**SUBMISSION ON THE SECURITIES DISCLOSURE AND FINANCIAL ADVISERS
AMENDMENT BILL 2009**

1. Introduction

- 1.1 Lowndes Jordan is pleased to make this submission on the Securities Disclosure and Financial Advisers Amendment Bill 2009 (Bill).
- 1.2 Lowndes Jordan was formed in 1986 and was set up to satisfy the demand for specialist corporate and commercial law expertise. We have significant experience in advising on public and wholesale issues of securities. We have advised both listed companies and non-listed companies on capital raising and securities law compliance matters that are the subject of the Bill.
- 1.3 We would be happy to appear before the Commerce Committee to speak to our submission if that would assist.
- 1.4 We can be contacted at:

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2. Summary

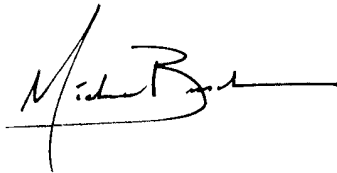
- 2.1 We fully support the overall intent of the Bill. We agree that it is important in the current economic climate to remove unnecessary impediments to capital raising whilst at the same time ensuring the timely disclosure of relevant information to prospective investors.
- 2.2 We agree that there is duplication in the information provided to investors under continuous disclosure rules and in the context of securities offerings by listed issuers. The Bill's provision for the use and regulation of a simplified disclosure prospectus for listed issuers will, no doubt, reduce the duplication of information provided to investors and thereby simplify capital raising for listed issuers without compromising disclosure. The detail of what will need to be included in a simplified disclosure

prospectus, and how prospective investors will be directed to relevant information already disclosed under continuous disclosure obligations, is the subject of proposed regulation that is yet to be promulgated. In formulating that regulation, Parliament should be careful to ensure that the simplified disclosure prospectus only reduces the duplication between forms of disclosure and not the amount or quality of information provided to investors. We do not make any further submissions on the proposal for a simplified disclosure prospectus for listed issuers other than to say that we fully support it in concept and look forward to seeing more detail on the proposed simplified disclosure obligations.

- 2.3 We also support the Bill's endeavour to improve the workability of rules for *eligible persons* and people deemed by the Securities Act 1978 not to be *members of the public*, for whom disclosure under that Act is not required. However, we believe that there are aspects of the Bill that should be improved in this regard. We also believe that Parliament should take this opportunity to effect additional amendments to the Securities Act 1978 to better achieve the Bill's objectives. We make a specific submission to address these points in the Annexure to this letter.

Thank you for this opportunity to make a submission on the Bill.

Yours faithfully
LOWNDES JORDAN

A handwritten signature in black ink, appearing to read "Michael Busch", with a long horizontal stroke extending to the right.

Michael Busch
Partner

ANNEXURE

**Lowndes Jordan submission on the
Securities Disclosure and Financial Advisers Amendment Bill 2009 (the Bill)**

1. Suggested amendments to existing clauses in the Bill - Clause 7(3) – Bundling of exemptions

1.1 **Issue:** Due to the wording of sections 3(2)(a) and 5(2CB) of the Securities Act 1978 (Act), issuers cannot currently offer securities under an offer made to both:

1.1.1 *eligible persons* as defined in section 5(2CC) of the Act; and

1.1.2 persons who fall within the exceptions in section 3(2)(a) of the Act (**non-public persons**),

unless they prepare an investment statement and prospectus. However, an offer made to only one of those classes of persons does not require an investment statement and prospectus.

1.2 We welcome clause 7(3) of the Bill, which provides that a bundled offer to both eligible persons and non-public persons can be made without a prospectus and investment statement.

1.3 However, clause 7(3) of the Bill proposes that bundled offers will be subject to sections 38B and 58 of the Act (relating to prohibitions on advertisements and criminal liability for misstatements). Currently, offers made only to non-public persons are not subject to sections 38B and 58 of the Act.

1.4 We do not see any policy reason for the extension of liability under sections 38B and 58 of the Act in relation to offers to non-public persons under a bundled offer. We also cannot see any good policy reason for why sections 38B and 58 of the Act should apply to offers to eligible persons when those provisions do not apply to offers to non-public persons. If the Bill is enacted in its current form, issuers will be incentivised to make distinctly separate offers to eligible investors and non-public persons, or restrict their offers to non-public persons, to minimise exposure to, or avoid, liability under sections 38B and 58 of the Act. This will undermine the purpose of this proposed amendment.

1.5 **Submission:** Clause 7(3) of the Bill should be amended to provide that sections 38B and 58 of the Act will not apply to bundled offers made under the proposed new section 5(2CBA).

2. Further suggested amendments to the Act for incorporation into the Bill

2.1 One “rotten apple” spoils the barrel

2.1.1 **Issue:** Section 3(5) of the Act provides that *proof of an offer of securities to one person selected as a member of the public shall be prima facie evidence of an offer of securities to the public*. The effect of this section, when read in conjunction with the opening words to section 3(2)(a), is that each and every person to whom an offeror offers securities must fall within one of the categories of persons referred to section 3(2)(a) if there is to be no offer to the public. If an offeror intends to only offer securities to non-public persons without a registered prospectus and an investment statement, but any one

person to whom an offer is made and securities are allotted is a member of the public (i.e., falls outside section 3(2)(a)), then the entire offer and allotment will have been undertaken in breach of the Securities Act. The consequence of such a breach is that the offer is void vis-a-vis each investor (section 37(4)), including those who are genuinely non-public persons. In these circumstances, an issuer would need to apply to the court for a mandatory or discretionary relief order under sections 37AA to 37AL of the Act. This is a harsh (and costly) consequence for what may be an inadvertent breach with respect to one offeree.

2.1.2 Interestingly, this will not be the consequence if one allottee under a bundled offer, that is made under the proposed new section 5(2CBA) of the Act, is inadvertently a member of the public (i.e., falls outside section 3(2)(a)) and is not otherwise an eligible person. The effect of the wording of section 5(2CBA) is that the offer will only be void with respect to the securities allotted to that allottee.

2.1.3 **Submission:** The Act should be amended so that if an offeror intends to only offer securities to non-public persons, but any person to whom an offer is made and securities are allotted is a member of the public (i.e., falls outside section 3(2)(a)), the allotment is only void with respect to the securities issued to members of the public.

2.2 Eligible persons – aggregation of wealth

2.2.1 **Issue:** A person can qualify as an eligible person by being certified as *wealthy* by an independent chartered accountant. Section 5(2CD) of the Act provides that a person is wealthy if they have net assets of at least \$2,000,000 or an annual gross income of at least \$200,000 for each of the past two financial years. People often structure their asset holdings through the use of trusts. We have encountered situations where a person and/or the person's trust may not meet the wealthy criteria individually but do in aggregate. While the Bill (clause 7(6)) now clarifies that a trust can be certified as wealthy, it will still not be possible for an individual to aggregate their net assets or income with the net assets or income of their related trust for the purposes of determining whether they are wealthy under section 5(2CD). We see no policy reason for this.

2.2.2 **Submission:** Section 5(2CD) of the Act should be amended to allow the aggregation of a person's wealth with that of his or her related trusts for the purposes of that section. Consideration will, of course, need to be given to what constitutes 'related' for these purposes.

2.3 Eligible persons – investment vehicles

2.3.1 **Issue:** An issuer that makes an offer of securities to eligible persons under section 5(2CB) of the Act must ensure that the actual subscriber for the securities is an eligible person (refer to section 5(2CB)(b)). However, a person who meets the eligible person criteria may wish to make their investment through an investment vehicle that they control but which may not meet the eligible person criteria in its own right. This can prevent eligible persons from structuring their investments in a manner that best suits their commercial objectives.

2.3.2 **Submission:** Section 5(2CB)(b) of the Act should be amended to allow issuers to accept subscriptions from eligible persons or their related investment vehicle. Again, consideration will need to be given to what constitutes 'related' for these purposes.

2.4 Eligible persons – unnecessary requirement

2.4.1 **Issue:** For a person to be an eligible person by virtue of being *experienced* under section 5(2CE) of the Act, the person must (amongst other things) sign a written acknowledgement that the financial service provider (who has provided the requisite statements as to their experience) has given the person neither an investment statement nor a registered prospectus in relation to the security. This requirement does not appear to add anything. Also, there is no similar requirement for persons who qualify as eligible persons by virtue of being wealthy.

2.4.2 **Submission:** Repeal section 5(2CE)(c) of the Act (which contains the requirement for the person to provide this written acknowledgement). Alternatively, section 5(2CE)(c) of the Act should be amended so that the person is required to acknowledge that, as an eligible person, they will not receive disclosures typically required in relation to a public offering, namely, a prospectus and/or an investment statement. If this latter suggestion is adopted, it would make sense to extend it also to persons who want to qualify as eligible persons under the wealthy criteria.

2.5 Minimum subscription of \$500,000 under s 3(2)(a)(iia)

2.5.1 **Issue:** Section 3(2)(a)(iia) of the Act currently excludes persons from being a member of the public if they are required to pay a minimum subscription of \$500,000 upfront, prior to allotment. There is no allowance for this amount to be paid in instalments (as called by the issuer). This is an issue for private equity funds. Private equity offerings are typically structured so that investors commit to make a certain level of investment, but are only required to pay the committed amount in instalments as called from time to time by the fund manager to meet investment commitments.

2.5.2 **Submission:** Amend section 3(2)(a)(iia) so that it covers persons who either are required to pay the \$500,000 subscription prior to allotment or have, prior to allotment, committed to paying at least \$500,000 in subscriptions as called by the issuer.

2.6 Limited Partnerships – statutory supervisors

2.6.1 **Issue:** Interests in a limited partnership are classified as participatory securities for the purposes of the Act. Accordingly, where interests in a limited partnership are offered to the public, the Act requires the appointment of a statutory supervisor and a deed of participation to be entered into. We consider that these requirements impose undue compliance costs, add complexity and are not suited for limited partnerships looking to raise capital from the public. In our experience, people avoid using limited partnerships when raising capital from the public because of these requirements.

2.6.2 **Submission:** We consider that limited partnerships are more akin to companies. Accordingly, the offer of interests in a limited partnership should be treated as an offer of equity securities rather than participatory securities. The definition of *equity securities* in the Act should be expanded to include interests in a limited partnership. Alternatively, limited partnerships should be exempted from the need to appoint a statutory supervisor.