



MEMO

To: Board of Directors
From: Company Secretary
Subject: **DISCLOSING ENTITY: UNLISTED**

Definition

Part 1.2A of the Corporations Act relates to Disclosing Entities.

Under section 111AC a Disclosing Entity (“DE”) is a corporation that issues Enhanced Disclosure securities (“EDS”).

Briefly, sec.111AF defines EDS as shares or other securities issued where:

- a prospectus (or other disclosure document requiring lodgement with ASIC) has been published, and
- there are 100 or more shareholders

whether or not the corporation is listed on an Australian stock exchange.

As the Company falls into this category it is regarded as an ‘unlisted DE’.

Significance

The significance of being a DE is covered by Division 3 of Part 1.2A.

In summary:

- half-yearly statutory accounts (at least ‘audit-reviewed’) must be prepared (sec. 111AO) in accordance with Chapter 2M and lodged with ASIC – using Form 7051 – [in addition to the audited annual accounts requirement for ASIC lodgement and sending to shareholders applying to all public companies]
- it is subject to ‘continuous disclosure’ requirements (sec. 111AP).

Continuous Disclosure

Chapter 6CA covers the obligations of a DE to comply with ‘continuous disclosure’.



For an unlisted DE:

- sec. 675(2) requires, in summary, lodgement with ASIC of information
 - (a) that is not generally / publicly available; and
 - (b) that a 'reasonable person' would expect, if it were available, could have a material effect on the price or value of the Company's EDS (ie, 'price-sensitive information').
- sec. 677 provides that a 'reasonable person' would expect information to have a material effect on the price or value of the Company's EDS if the information would, or would be likely to, influence persons who commonly invest in securities in deciding whether to acquire or dispose of the EDS.

However, there are some 'carve outs' for unlisted DEs, as there are for Australian listed companies, relating to confidentiality, trade secrets, etc – Reg 6CA.1.01 – where such information does not have to be disclosed – but all limbs of the exception must be satisfied (again, as with the stock exchange) for it to be availed of.

Information Lodged with ASIC

Apart from the annual and half-yearly accounts, an unlisted DE would normally lodge with ASIC (using Form 1003) information such as:

- Shareholder Newsletter / Circular (whether distributed by post or email and/or made available on the Company's website)
- General Meeting documents, including:
 - Notice of Meeting / Explanatory Memorandum / Proxy Form
 - Chairman's speech
 - results of meeting / proxy votes
- Dividend amount & record/payment date
- Important events / actions (eg, business acquisition / disposal, senior staff changes, new office / geographical relocation)
- Significant expected variance to previous financial results or published forecast (eg, greater than 10 ~ 15% above or below)
- Information Memorandum / Offer Document / share placement.

In particular, the latter documents could easily contain information of the type referred to in sec. 677.

In my opinion, it would be prudent for the Directors of an unlisted (in Australia) DE to act as though the corporation was stock exchange listed in Australia and lodge with ASIC anything they would otherwise lodge with the Australian stock exchange if listed.



In fact, if an unlisted DE is listed on a foreign stock exchange (ie, but not listed in Australia), then anything that is lodged with that foreign stock exchange must also be filed with ASIC.

Supplementary Prospectus

In situations where the DE has a current prospectus (or other disclosure document) in the market it may be that price sensitive information should be lodged with ASIC – and made public – through a Supplementary Prospectus rather than simply lodged with ASIC as continuous disclosure on Form 1003. This is particularly so if a new circumstance has arisen that may be materially averse to potential investors or it is found that the prospectus contains information that might be considered misleading or deceptive.

Consequences of Default

Any contravention of the continuous disclosure provisions may be regarded as intentional, reckless or negligent action by the corporation and / or its officers; and an intentional or reckless omission could be deemed a criminal offence. Also, any person who has suffered loss or damage as a result may have an action for civil damages against the corporation and / or its officers.

The CA provides strong enforcement measures for non-compliance with continuous disclosure, including the ability for ASIC to issue 'infringement notices' against the corporation and / or its officers for contravention of sec 675(2) by an unlisted DE.

However, no contravention may have occurred if, in the circumstances, a person can prove that they took all reasonable steps to ensure that the DE complied with its continuous disclosure obligations. The establishment of a Continuous Disclosure Policy could assist in both ensuring compliance and assist Directors/officers in any due diligence defence.

DISCLAIMER

The comments in this memo reflect some commercial aspects and observations on the matter experienced or observed by the writer in practice as he understands them. The information is given as a guide only and does not represent a definitive or legal view of any of the issues raised, covered or referred to and the reader is urged to seek his own professional advice on all aspects of, or pertaining to, this and any related matter.