

## SUMMARY OF AUSTRALIAN PRIVATE EQUITY

### CAPITAL RAISING RULES

---

#### **1 Private capital raising without a disclosure document**

- 1.1 As a general rule, any offer for the issue or sale of securities (such as shares, convertible notes and options) in a company, must be made under a disclosure document (such as a prospectus or an offer information statement). For the purpose of the fundraising rules, offering securities for issue or sale includes inviting applications for the issue of securities and inviting offers to purchase the securities.
- 1.2 There are exceptions to the general rule. Relevantly, those exceptions are:
- 1.2.1 small scale offerings under the 20/12/2 Rule;
  - 1.2.2 offers to sophisticated investors;
  - 1.2.3 offers to professional investors; or
  - 1.2.4 offers to executive officers of the company.

These exemptions are briefly discussed below.

#### **Small scale personal offerings – the 20/12/2 Rule**

- 1.3 Offers can be made without a disclosure document if:
- 1.3.1 they are made by way of a 'personal offer';

- 1.3.2 they do not result in more than 20 people in any 12 month period being issued securities by the issuer; and
- 1.3.3 they do not result in the issuer raising more than \$2 million in any 12 month period.
- 1.4 A 'personal offer' is one that may only be accepted by the person to whom it is made, and is made to a person who is likely to be interested in the offer, having regard to:
  - 1.4.1 previous contacts between the offerer and the offeree; or
  - 1.4.2 some professional or other connection between the offerer or offeree; or
  - 1.4.3 statements or actions by the offeree that indicate that they are interested in offers of that kind.
- 1.5 In counting the number of issues in any 12 month period (ie whether there have been 20 in any 12 month period) and the amount raised (ie whether more than \$2 million has been raised in that 12 month period), share issues or amounts raised which result from the following offers, can be disregarded:
  - 1.5.1 offers which are exempted from disclosure under any of the exemptions (eg offers made to sophisticated or professional investors); or
  - 1.5.2 offers which are not received in Australia; or
  - 1.5.3 offers which are otherwise made under an appropriate disclosure document.

For example, it would be permissible to raise \$7 million by raising \$2 million under the 20/12/2 rule and an additional \$5 million from sophisticated or professional investors.

## **Sophisticated Investors**

- 1.6 Offers can be made without a disclosure document if:
  - 1.6.1 the minimum amount payable by an investor for securities is at least \$500,000; or
  - 1.6.2 in relation to the investor - a qualified accountant provides a certificate no more than 6 months before the offer is made that the investor:
    - (a) has net assets of at least \$2,500,000; or
    - (b) has gross income for the last 2 financial years of at least \$250,000 a year.

## **Professional investors**

- 1.7 Offers can be made without a disclosure document if they are made to certain professional investors, such as:
- 1.7.1 licensed exempt security dealers acting as principal;
  - 1.7.2 licensed exempt investment advisers acting as principal; or
  - 1.7.3 certain institutional investors who have net assets of at least \$10 million or who control at least \$10 million for the purpose of investment in securities.

This is not an exhaustive list of professional investors. If the Company has any doubt as to whether a prospective investor is a professional investor, please let us know.

## **Executive officers of the Company**

- 1.8 Offers can be made without a disclosure document if they are made to:
- 1.8.1 an executive officer of the Company or a related body; or
  - 1.8.2 the spouse, parent, child, brother or sister of such an executive officer; or
  - 1.8.3 a body corporate controlled by any of the persons referred to above.
- 1.9 An 'executive officer' is a person who is concerned in, or takes part in, the management of the Company regardless of the person's designation and whether or not the person is a director of the Company.

## **2 Information memorandum content**

- 2.1 The private information memorandum will not be a 'disclosure document' under the *Corporations Law* (ie either a prospectus or an offer information statement). As a result, there are no specific legal requirements as to what the document must say.
- 2.2 The principal consideration is a commercial one, namely to ensure that there is sufficient and adequate information to enable prospective investors to make their investment decision.
- 2.3 In preparing the memorandum, however, the Company and its officers should ensure that:
- 2.3.1 there is nothing in the memorandum which may be regarded as false or misleading or likely to be false or misleading (by inclusion or omission); and

- 2.3.2 the memorandum does not breach the duty of any person to keep that information secret.

### **3 Liability for a defective information memorandum**

#### **Potential civil and criminal liability**

- 3.1 The fact that the document is not a formal prospectus does not mean that those responsible for preparing the information memorandum are free from potential liability. They are exposed to potential civil and criminal liability.

#### **Civil liability for damages**

- 3.2 Those responsible for the preparation of a private information memorandum will be exposed to potential *civil liability* for damages if they:
- 3.2.1 engage in misleading or deceptive conduct; or
  - 3.2.2 make false or misleading statements,
- either:
- 3.2.3 in the private information memorandum; or
  - 3.2.4 in connection generally with the Capital Raising.
- 3.3 Liability may arise under:
- 3.3.1 the general law of misrepresentation, breach of contract or negligence; or
  - 3.3.2 section 995 of the *Corporations Law*.
- 3.4 Importantly any representation with respect to any future matter (including the doing of, or the refusing to do, any act) made without reasonable grounds will automatically be taken to be misleading. The practical effect of this is that statements as to the future and statements of intention should be supported where possible by documentary evidence.

#### **Who can be found civilly liable**

- 3.5 Any person who suffers loss or damage by conduct of another person in contravention of section 995 of the *Corporations Law* may recover the amount of the loss or damage, by action against that other person or against any person ‘involved in the contravention’.

- 3.6 Those persons potentially liable are those who have:
- 3.6.1 aided, abetted, counselled or procured the contravention;
  - 3.6.2 induced, whether by threats or promises or otherwise, the contravention;
  - 3.6.3 in any way been by act or omission, directly or indirectly, knowingly concerned in, or party to, the contravention; or
  - 3.6.4 conspired with others to effect the contravention.
- 3.7 The net effect of these provisions is that the issuer, each of its directors and management, are potentially liable for misleading or deceptive conduct.

## **Criminal liability**

- 3.8 In addition to civil liability, there is *criminal liability* if:
- 3.8.1 a person has made a statement or disseminated information that is false in any material particular or is materially misleading and is likely to induce the purchase of securities;
  - 3.8.2 when the person made the statement or disseminated the information:
    - (a) the person did not care whether the statement or information was true or false; or
    - (b) the person knew or ought reasonably to have known that the statement or information was false in the material particular or is materially misleading; or
    - (c) in an attempt to induce an investor, makes or publishes a statement, promise or forecast that the person knows to be misleading, false or deceptive, or dishonestly conceals material facts or recklessly makes or publishes a statement, promise or forecast that is misleading, false or deceptive.
- 3.9 A criminal offence is punishable on conviction in the case of an individual by a fine of \$20,000 or imprisonment of 5 years or both and in the case of a corporation, by a fine of \$100,000. There are no defences that excuse criminal liability.