

CORPORATE FUNDRAISING

Continuous Disclosure Obligations

- **Section 674** – companies are required to notify investors through the ASX of any information, to generally available that a reasonable person would expect, if it were generally available, to have a material effect on the price or value of the securities
- **Make sure you draw a distinction between listed and non listed companies** (if listed, the problem question will mention the ASX)
- **ASX Listing Rules Chapter 3, Rule 3.1** – requires market sensitive information to be disclosed immediately upon the entity becoming aware of it

Is a disclosure document required?

- **Is there an offer or invitation?** - Consider **section 706** – is there an offer of securities for issue?
 - **Exemption under s708, s708AA** – under section 706 if there is an offer there has to be disclosure
 - **offer** is defined to include “inviting applications for the issue of securities” **s700(2)**.
 - Therefore it includes: Distributing material that would encourage someone to enter into negotiations which would result in the purchasing of securities
 - There can be an offer in contract and also an invitation to offer
 - could include distributing material to encourage a person to enter into a course of negotiations calculated to result in the issue of securities: *Attorney-General (NSW) v Australian Fixed Trusts Ltd [1974]*
 - a person must not make an offer of securities or distribute an application form for an offer without first lodging a disclosure document with ASIC – **s721(1)**
 - **note that the disclosure provisions apply to public companies rather than proprietary companies** (as they are inhibited from this type of capital raising) – **s113(3)**
 - a proprietary company it not allowed to engage in any activities that would require lodging a disclosure document
 - As a result, none of the exemptions under s708AA apply
 - Under s165 of the Act, ASIC can force the company to become public
- **Does the offer of invitation deal with securities as defined in s700?**
 - **securities** covered by the fundraising rules are shares of a body, debentures of a body (or legal or equitable interests in them) and options to acquire (by way of issue) any such securities: s700.
 - The disclosure provisions applies to the securities of a body corporate (not just a corporation)
 - A body is defined as any body with a corporate or unincorporated and includes societies, associations and societies
 - **What kind of fundraising is it?**
 - Using a debt or equity instrument?
 - **Debt:** loan finance from a bank, issue of debentures, private finance
 - Is it secured? If it is secured then the borrower pledges a specific asset or property which the lender can seize in the cause of default
 - Is it a fixed or circulating interest? Fixed is like a mortgage or a charge over a land, chattels or marketable securities whereas circulating is more assets, something that the company can dispose of and deal with in the ordinary course of business
 - **Equity:** primarily the issuing of shares
 - **S1070A** – shares are personal property

- **S761A** – Definition of what a security is
 - (a) a share in a body
 - (b) a debenture of a body
 - (c) a legal or equitable right or interest in a security covered by paragraph (a) or (b)
 - (d) an option to acquire, by way of issue, a security covered by paragraphs (a), (b) or (c)
 - see section

- **Is there an offer of securities for issue? – section 706 - Does the offer relate to a primary offering (issue) or secondary trading (sale)? If secondary trading, is a disclosure document required?**

- Note that the disclosure information primarily applies to initial offerings or public offerings not secondary trading of securities (existing securities)
- **issue** means the initial or primary offers of securities, not secondary sales
- certain secondary sales will require disclosure: **see s707**
 - e.g. the person making the offer controls the body and securities not listed on ASX, or, if quoted, not in the course of trading: **s707(2) – see section**
- in most circumstances, the conclusion would be that a disclosure document is required

- **Do any of the exceptions in ss708, 708 or s708AA apply so that a disclosure document is not required?**

- Most try to fall within one of these exceptions so they don't have to go through the time and expenses associated with the preparation of the disclosure documents
- **Under s708**, excluded offering include the following:- you will be motivated as a company to consider these because you don't want to go through the time/costs to create a disclosure documents.
 - **small scale** – personal offers which fall in what is called the 2012 rule, a personal offer is one that can only be accepted by the person to whom the offer has been made – occurs as a result of previous contact with the offeror or follows an indication of interest by that particular investor – this offer must fall within the 20 investor and 2 million dollar ceiling. **This means that over a 12 month period, the company may not offer securities to no more than 20 investors and the amount raised can be no more than 2 million dollars**. Has to be **directed at a particular person** and accepted by that person. 20 investors, 2 million dollars over a 12 months.
 - *ASIC v Cyclones Magnetic Englines*
 - **sophisticated investor** – sophisticated investors are those who can make their own inquiries and therefore don't really need the protection afforded by a disclosure regime. There is something called the large investor. **If the investor is paying more than 500k or has a gross income that exceeds the prescribed minimum which is 250k over a two year period and 2.5 million in assets**. Then the offer is exempt. People that are so experienced that we don't need to protect them.
 - **professional investor** - a sophisticated investor to whom the offer is made via a financial service licensee. Exempt under s11. Minimum net income threshold.
 - *ASIC v Maxwell* – the licensee must be satisfied on all reasonable grounds ... they have a statutory duty to make inquiry about all matters relevant to the opinion ... to classify a sophisticated investor” – Brereton J
 - **associated party** – disclosure is exempt if the offer is made to a person with specified relationship to the offeror. Including: a senior manager of the body or related body corporate, a spouse, a parent, child brother etc.
 - **existing holder** – existing shareholders for fully paid shares under a dividend reinvestment plan, or a bonus share plan, a managed investment scheme or to existing debenture holder
 - **no consideration** – disclosure is not required if no consideration is provided by that offeree,

- **takeovers** – under Chapter 6, a takeover bid is exempt from disclosure
- **DOCA – deeds of company arrangement** – if an offer is made under a Part 5.1 arrangement, it is exempt, a 5.1 arrangement deals with arrangements between the company and its creditors or between members of the company and it requires court approval
- * debentures
- * exempt bodies and public authorities - an exempt body is one that is incorporated under a state or territory law such as a NFP or co-operative
 - Where the investor does not need protection or limited protection
 - ASIC can reach a different conclusion and hold the company liable
 - We have to determine what is exactly an excluded offer
- **Under 708AA:** rights issue for quoted securities
 - S708AA(2) the offer does not need disclosure to investors if (a) the relevant securities are being offered under a rights issue and the class of the relevant securities are quoted securities at the same time at which the offer is made (c) trading in that class of securities on a prescribed financial market
 - This exemption is subject to:
 - statement to ASX that company complied with continuous disclosure obligations
 - securities not suspended in prior 12 months
- **Under 708A:** secondary sales of existing securities
 - Exempt:
 - if investors already have access to prospectus-type information
- securities must have been listed and quoted for 3 months

What kind of disclosure document is required/ what kind of information should it contain?

- **The general disclosure obligation under s710** – the disclosure documents must contain all the information that investors and their professional advisors would reasonably require to make an informed assessment of certain matters set out in the legislation
 - Rights and responsibilities attaching to the securities, assets and liabilities
- **The specific disclosure obligation under s711** – terms and conditions of the offer, interests and fees of the people involved, details of any application to be quoted on the securities, expiry date of the prospectus

Is there an issue regarding a restriction on advertising?

- Companies are allowed to advertise however, they must direct those interested to the disclosure document
- **S734(2)** – if an offer for securities requires a disclosure statement, a person must not advertise it or publish a statement that directly or indirectly refers to the offer, or is reasonably likely to induce people to apply for the securities unless one of the exceptions applies

Is the advertising become done in the pre-disclosure period?

- **S734(5)** – advertising is allowed and does not contravene subsection 2 if
 - Investors are provided with a statement that states that a disclosure document will be available and states anyone willing to purchase shares/ subscribe will need to fill out any application form
- **S734(5)(a)** – sets out additional information that is required in the pre-disclosure period:
 - Identity of the issuer or vendor of the securities
 - That the disclosure document will be made available
 - When and where the disclosure document will be made available
 - The investor should consider the disclosure document if they wish to purchase securities

- Investor must purchase securities through the application form contained in the disclosure document

- **Is the advertising being completed post disclosure?**

- **s734(6)** – advertising is permitted, provided that the advertising refers to a disclosure document and states that anyone wishing to subscribe will need to complete an application form

Has there been defective disclosure? – when disclosure is shady, who is to blame?

Remember that sections 728 and s729 only apply when there has been a prospectus distributed.

- **s728** provides that a person must not offer securities under a disclosure document if there is:
 - a misleading or deceptive statement in the disclosure document – **s1041H(1)**
 - **an omission from the disclosure** document of material required by the content rules set out in **ss710-715**; or
 - - **a new circumstance** that has arisen since the disclosure document was lodged, which would have been required to be included in the disclosure document had it arisen before the disclosure document was lodged
 - **A person has made a misleading statement** (in relation to forecasts) if they did not have reasonable grounds for making that statement – **s728(2)**
- Ask if the following has occurred:
 - Is there a misleading statement?
 - Is there an omission?
 - Is there a changes circumstance?
- A breach of **s728** will constitute a criminal offence (s1311) only if the misleading or deceptive statement, the omission or the new circumstance is 'materially adverse' from the point of view of the investor: **s728(3)**
 - Failure to disclose fully, any bad news, can give rise to criminal liability
- Chapter 6D prohibits other conduct including:
 - Making offers that require disclosure without lodging a disclosure document: **s727(1)**
 - **ASIC v Cyclone Magnetic Engines**
 - Remember that it is on the onus of the company to prove that they fall into one of the exceptions under s108
 - Accepting applications within the 7 or 14 day waiting period after lodgement of the disclosure document: **s727(3)**
 - Issuing or transferring securities in breach of the 20 investor or the \$2 million ceiling: **s727(4)**.
 - **s730** places the onus on those parties in **s729** to notify the offeror, in writing, as soon as they become aware of any defect in disclosure.
 - Liability most of the time arises for the issuing body, the directors and the underwriter
 - Accountants, lawyers etc are only liable in relation to their drafting of clauses in the disclosure document (that they have made, and have consented to being known), those who aided or abetted in the contravention can be held liable (knowledge of the contravention – this is accessory liability)
 - Knowingly concerned in
 - Knowledge of the essential facts
 - Some sort of involvement
 - **s79 – Involvement in Contraventions**
 - A person is involved in a contravention if, and only if, the person

(a) aided, abetted, counselled