

# CLAYTON UTZ

## **ASIC shines the spotlight on Africa and other emerging markets**

by Heath Lewis, **CLAYTON UTZ**

### **Companies with assets and operations in Africa and other emerging markets should expect greater ASIC surveillance in the future as ASIC identifies concerns over governance and disclosure.**

In the context of the collapse of some emerging market issuers (albeit not in Australia) and following the lead of overseas regulators, on 27 August 2013 (coincidentally (or not) the day before the annual Africa Down Under conference in Perth), the Australian Securities and Investments Commission (**ASIC**) published Report 368 *Emerging market issuers* addressing the challenges faced by emerging market issuers and risks to retail investors, particularly in relation to corporate governance and disclosure.

Many of these challenges are ones that AAMIG members and other companies with African interests would be very familiar with.

Whilst it will continue to work within the current regulatory framework, ASIC intends to shine a light on Australian companies (or Australian listed companies) that have significant assets and operations in Africa and other emerging markets.

### **Emerging market issuers**

ASIC considers that an emerging market issuer is a company with material assets (including subsidiaries) in, or revenue streams from, emerging markets. Emerging markets include Africa, Asia and the Pacific (excluding New Zealand, Singapore, Japan and Hong Kong), Eastern Europe, South America and the Middle East.

ASIC identifies approximately 760 emerging market issuers listed on ASX (approximately 36% of all companies listed) with more than half involved in the extractive (minerals and oil & gas) industries. A very significant proportion of those issuers have projects in Africa.

ASIC reiterates that the primary regulation of emerging market issuers in Australia in terms of corporate governance and disclosure is through the Corporations Act and market listing rules (e.g. the ASX Listing Rules). This regulatory framework covers the raising of funds and the conduct other transactions, as well as and the corporate governance and reporting obligations that apply to them.

ASIC is not proposing to revisit, nor introduce, any regulation specifically aimed at emerging market issuers. However, it is clear that African and other emerging market issuers have been "put on notice" and should be particularly vigilant in relation to the specific challenges (or areas of concern) that ASIC has identified.

### **ASIC's key observations**

ASIC identifies the following key challenges for emerging market issuers:

- challenges in implementing good corporate governance and management systems often due to board structure, financial resources, disclosure policies and the difficulties surrounding operating in foreign jurisdictions such as Africa;
- complex ownership or contractual arrangements (often to accommodate restrictions on the foreign ownership of assets which are particularly common in African jurisdictions);
- reliance on the guidance and connections of one or two key individuals located in the emerging market);

- high incidence of related party transactions with those key individuals (ASIC observed a high level of concentrated ownership, often with parties associated with a related party director); and
- difficulty in accessing or verifying reliable information about an entity's operation and performance.

ASIC concluded from its review that almost a third of emerging market issuers did not make frequent or meaningful continuous disclosure. Also, in many cases, companies did not seek shareholder approval for related party transactions.

Following a review of disclosure documents lodged with ASIC by emerging market issuers, ASIC indicated that it had sought and secured additional or corrective disclosure in relation to the matters identified above.

### **Response to those challenges**

ASIC's report recommends that emerging market issuers respond to these challenges by implementing effective internal controls and risk management systems. ASIC wants entities to focus on making appropriate disclosures to investors consistent with exchange listing rules and ASIC's regulatory guidance. African issuers must ensure that they and their key personnel are fully aware of their relevant legal obligations in Australia.

### **Risks to retail investor**

ASIC identifies that an important factor for African issuers is maintaining investor confidence through compliance with the Australian regulatory system.

ASIC urges retail investors to consider the risks before investing in an emerging market issuer, particularly where the company is listed in Australia but incorporated abroad (thereby not being subject to the Australian Corporations Act and the protections afforded by it).

African issuers must provide adequate description of key risks faced by operating in the relevant African jurisdiction(s). This includes ensuring that investors know that they may not have the same protections when investing in an African issuer that is listed in Australia but incorporated abroad (e.g. related party transaction provisions, takeover laws, financial reporting obligations) and that enforcement of Australian regulatory requirements may be more difficult in African jurisdictions.

### **Overseas regulators**

ASIC also noted the work done by overseas regulators (in Canada, UK, US, Hong Kong and Singapore) with respect to emerging market issuers. In particular, the Ontario Securities Commission and Toronto Stock Exchange has issued guidance and consultation papers on emerging market issuers.

Unsurprisingly, the challenges identified by overseas regulators echoed those identified by ASIC. Companies with African operations that are dual listed on an overseas exchange ought take steps to ensure that regulatory and market expectations are being adhered to in both relevant jurisdictions.

### **What should you do?**

ASIC has flagged that it will use its surveillance and review powers to ensure adequacy of disclosure and corporate governance of emerging market issuers. ASIC will also continue to focus on its audit inspection program. With that in mind, companies with operations in Africa (and other emerging markets) should consider the following steps in response to ASIC's review:

- ensure a thorough understanding of the Australian regulatory regime and, in particular, how it interacts with the relevant African legal regimes or practices. Be proactive and prepared in respect of identified areas of tension between the regimes;
- review disclosure policies, both the terms and the practice (with particular focus on systems that are in place to ensure that information that must be disclosed to the market is communicated promptly to the board and other persons authorised to disclose);
- to ensure a disclosure document is not misleading and provides an accurate reflection of the business undertaken by the entity and the risks involved, involve jurisdictional experts and undertake adequate verification of assets and ownership as part of fundraising due diligence programs;
- put in place 'foreign corrupt practices' policies appropriate to both the Australian regime and relevant overseas jurisdictions;
- with assistance from jurisdictional experts (legal and otherwise), consider what unique risks African operations pose and ensure these are disclosed at appropriate times (eg. when raising funds, during M&A activity etc);
- develop effective strategies to deal with these unique risks, and implement those strategies; and
- ensure transactions involving connected/key personnel are subjected to a legal review under the related party transaction provisions and to robust consideration by the board - when in doubt, it is often appropriate to put the matter to shareholders for approval.