



**ASIC**

Australian Securities & Investments Commission

CONSULTATION PAPER 163

# Unlisted property schemes: Update to RG 46

July 2011

## About this paper

This consultation paper seeks your feedback on proposals to improve disclosure for retail investors in unlisted property schemes through the introduction of disclosure benchmarks.

It also includes a draft update to Section C of Regulatory Guide 46 *Unlisted property schemes—Improving disclosure for retail investors* (RG 46) showing proposed amendments to the existing disclosure principles.

### About ASIC regulatory documents

In administering legislation ASIC issues the following types of regulatory documents.

**Consultation papers:** seek feedback from stakeholders on matters ASIC is considering, such as proposed relief or proposed regulatory guidance.

**Regulatory guides:** give guidance to regulated entities by:

- explaining when and how ASIC will exercise specific powers under legislation (primarily the Corporations Act)
- explaining how ASIC interprets the law
- describing the principles underlying ASIC's approach
- giving practical guidance (e.g. describing the steps of a process such as applying for a licence or giving practical examples of how regulated entities may decide to meet their obligations).

**Information sheets:** provide concise guidance on a specific process or compliance issue or an overview of detailed guidance.

**Reports:** describe ASIC compliance or relief activity or the results of a research project.

### Document history

This paper was issued on 12 July 2011 and is based on the *Corporations Act 2001* (Corporations Act) as at the issue date.

### Disclaimer

The proposals, explanations and examples in this paper do not constitute legal advice. They are also at a preliminary stage only. Our conclusions and views may change as a result of the comments we receive or as other circumstances change.

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## The consultation process

You are invited to comment on the proposals in this paper, which are only an indication of the approach we may take and are not our final policy.

As well as responding to the specific proposals and questions, we also ask you to describe any alternative approaches you think would achieve our objectives.

We are keen to fully understand and assess the financial and other impacts of our proposals and any alternative approaches. Therefore, we ask you to comment on:

- the likely compliance costs;
- the likely effect on competition; and
- other impacts, costs and benefits.

Where possible, we are seeking both quantitative and qualitative information.

We are also keen to hear from you on any other issues you consider important.

Your comments will help us develop our policy on disclosure for unlisted property schemes. In particular, any information about compliance costs, impacts on competition and other impacts, costs and benefits will be taken into account if we prepare a Regulation Impact Statement: see Section E, 'Regulatory and financial impact'.

### Making a submission

We will not treat your submission as confidential unless you specifically request that we treat the whole or part of it (such as any financial information) as confidential.

Comments should be sent by 6 September 2011 to:

Corinne Mackenzie and Caitlin Hawkins  
Senior Analyst and Senior Lawyer  
Investment Managers and Superannuation  
Australian Securities and Investments Commission  
GPO Box 9827  
Melbourne VIC 3001  
facsimile: 03 9280 3444  
email: [unlistedpropertyconsultation@asic.gov.au](mailto:unlistedpropertyconsultation@asic.gov.au)

**What will happen next?**

<b>Stage 1</b>	12 July 2011	ASIC consultation paper released
<b>Stage 2</b>	6 September 2011	Comments due on the consultation paper
	September– November 2011	Drafting of regulatory guide
<b>Stage 3</b>	December 2011	Updated regulatory guide released

## A Background to the proposals

### Key points

This consultation paper sets out our proposals to improve disclosure for unlisted property schemes through the introduction of disclosure benchmarks and the clarification of the existing disclosure principles in Regulatory Guide 46 *Unlisted property schemes—Improving disclosure for retail investors* (RG 46).

Our proposed amendments to the disclosure principles are shown in the draft update to RG 46, Section C, 'Disclosure principles for unlisted property schemes', attached to this paper.

We developed the proposals in this paper to take into account the findings of our review of disclosure for unlisted property schemes following the release of RG 46.

### Disclosure principles for unlisted property schemes

- 1 Regulatory Guide 46 *Unlisted property schemes—Improving disclosure for retail investors* (RG 46) sets out eight disclosure principles covering information to help retail investors understand the risks associated with unlisted property schemes: see Table 1 for a summary of the disclosure principles.
- 2 Under RG 46, we expect responsible entities of unlisted property schemes to clearly and prominently disclose the disclosure principle information in any Product Disclosure Statement (PDS) and ongoing disclosures to enable retail investors to assess investments in unlisted property schemes.
- 3 In the existing RG 46, we state that we consider it good practice for responsible entities to update investors half yearly on the status of the disclosure principle information, including whether the information has been updated for any material changes since the previous investor report.

**Table 1: Disclosure principles for unlisted property schemes for retail investors**

<b>1 Gearing ratio</b>	A scheme's gearing ratio indicates the extent to which a scheme's assets are funded by external liabilities.
<b>2 Interest cover</b>	Information on a scheme's interest cover indicates the scheme's ability to meet interest payments from earnings.
<b>3 Scheme borrowing</b>	Information on a scheme's borrowing maturity and credit facility expiry and any associated risks should be disclosed to investors. It is also important that investors are kept informed and updated with information they would reasonably require on breaches of loan covenants.
<b>4 Portfolio diversification</b>	This information addresses a scheme's investment practices and portfolio risks.
<b>5 Valuation policy</b>	Key aspects of a scheme's valuation policy for real property assets should be disclosed so that investors can assess the reliability of the valuations.
<b>6 Related party transactions</b>	Investors need to be able to assess a responsible entity's approach to related party transactions.
<b>7 Distribution practices</b>	Information on a scheme's distribution practices helps investors to assess the sources of the distributions and be informed about the sustainability of distributions from sources other than realised income.
<b>8 Withdrawal arrangements</b>	If a scheme gives investors withdrawal rights, these rights should be clearly explained.

## Our review of disclosure to investors

- 4 In the existing RG 46, we also state that, subject to the transitional provisions outlined in the regulatory guide, we will review PDSs in use and ongoing disclosures for unlisted property schemes to check that the disclosure principle information has been adequately disclosed.
- 5 In addition to this review, we have been continuing to review disclosure documents issued by responsible entities of unlisted property schemes as part of our business-as-usual work.
- 6 Our review found that the disclosure issued in response to RG 46 varied in the form of disclosure used. Most responsible entities provided the disclosure in a stand-alone disclosure statement that contained only the disclosure principle information.
- 7 We have found that responsible entities generally disclosed information consistent with our guidance in RG 46. However, a number of key disclosures were not adequately addressed. These included disclosure of:
- (a) the risks associated with the borrowing maturity profile and the extent of hedging;

- (b) details about property development activities (primarily timetables and funding);
- (c) the basis of valuations and the risks associated with ‘as if complete’ valuations;
- (d) reasons for distributions being made from sources other than income and the sustainability of these distributions over the next 12 months; and
- (e) withdrawal rights and the risks associated with withdrawal arrangements promoted to investors.

8 We found a number of documents summarised information and referred investors to other sources for information on specific disclosure principles—however, a number of these did not provide accurate cross-referencing to enable investors to find the information. In other cases, investors were referred to other documents (including financial statements) that we consider did not specifically or clearly address the principles of RG 46. In these cases, we noted inconsistent levels of disclosure, which may have impaired an investor’s ability to compare products.

9 Where identified, we have raised concerns with responsible entities in relation to the disclosure principle information in PDSs and ongoing disclosures. Generally, we found responsible entities to be willing to make amendments to their disclosure to address these concerns.

10 We developed the eight disclosure principles in RG 46 to ensure that investors receive clear and prominent disclosure to help them compare relative risk and return in unlisted property schemes. Given the different forms of disclosure used by responsible entities within the documents reviewed, it was clear that this aim may not have been met where investors would have found it difficult to identify the document containing the information due to the different methods used to disclose the information. It was clear that making comparisons between like products would have been difficult and time-consuming for investors where the information was not contained in a single document or location, and where the cross-referencing of information was inadequate.

11 The recent effects of the global financial crisis on these schemes have also emphasised a number of areas where we think disclosure has been inadequate, indicating that it would be appropriate for us to review the disclosure principles to ensure they address current issues.

12 As a result, we consider there is a need to consult with industry on proposals to improve the comparability and consistency of disclosure, and to amend or clarify a number of the disclosure principles in RG 46 to improve disclosure to retail investors.



## Our proposals to improve disclosure

- 13 The proposals in this consultation paper are aimed at improving the level, comparability and consistency of disclosure provided to retail investors. We consider that one way to achieve this is to extend to unlisted property schemes our ‘if not, why not’ benchmark disclosure model used in Regulatory Guide 69 *Debentures and unsecured notes: Improving disclosure for retail investors* (RG 69) and Regulatory Guide 45 *Mortgage schemes—improving disclosure for retail investors* (RG 45), and to provide further guidance and clarification in RG 46 about the existing disclosure principles.
- 14 We have taken the findings from our review of disclosure for unlisted property schemes into account in developing the proposed amendments to the existing disclosure principles, as set out in the attached draft update to Section C of RG 46, as well as the new benchmarks in this consultation paper.
- 15 We will also review the investor guide *Investing in property trusts?* to reflect any amendments to RG 46.

### Benchmark disclosure

- 16 The benchmark disclosure model:
- (a) identifies, for a particular financial product, the key risk areas potential investors should understand before making a decision to invest;
  - (b) sets a benchmark for how a product issuer should address these risks in establishing its business model and compliance procedures; and
  - (c) involves an issuer stating in the PDS and other disclosures whether it meets the benchmark, and if not, why not.
- 17 This model of disclosure provides concrete standards by which retail investors can assess financial products for which there are typically few such external benchmarks.
- 18 We propose to extend the benchmark model of disclosure, which we have previously applied to other products, to unlisted property schemes.

### The six disclosure benchmarks

- 19 We have developed six disclosure benchmarks: see Table 2 and Section B. We propose that these benchmarks should be followed (as applicable) and, if not followed, addressed on an ‘if not, why not’ basis: see paragraphs 21–27. We also propose that any advertising should support the use of these benchmarks: see paragraph 24.
- 20 The six benchmarks address key issues that we think should be:
- (a) highlighted in disclosure relating to unlisted property schemes; and
  - (b) discussed in a manner that allows prospective retail investors to make an informed decision about whether to invest.

**Table 2: Benchmarks for unlisted property schemes for retail investors**

<b>1 Gearing policy</b>	Benchmark 1 addresses a scheme's policy on gearing at an individual asset level.
<b>2 Interest cover policy</b>	Benchmark 2 addresses a scheme's policy on the level of interest cover at an individual asset level.
<b>3 Interest capitalisation</b>	Benchmark 3 addresses whether the interest expense of a scheme is capitalised.
<b>4 Valuation policy</b>	Benchmark 4 addresses the way in which valuations are carried out by a responsible entity in relation to a scheme's assets.
<b>5 Related party transactions</b>	Benchmark 5 addresses a responsible entity's policy on related party transactions.
<b>6 Distribution practices</b>	Benchmark 6 addresses a scheme's practices in relation to paying distributions from realised income.

### Disclosure against the benchmarks—'if not, why not'

- 21 We are proposing that a responsible entity should address the benchmarks in its disclosure on an 'if not, why not' basis. This means stating that the responsible entity either:
- (a) meets the benchmark; or
  - (b) does not meet the benchmark, and explaining why not.
- 22 'Why not' means explaining how a responsible entity deals with the business factor or concern underlying the benchmark (including the alternative systems and controls a responsible entity has in place to deal with the concern). The disclosure expected in relation to each benchmark is summarised in Section B.
- Note: If a benchmark contains multiple expectations, and a responsible entity cannot meet all the components of the benchmark, it should state that it does not meet the benchmark and clearly explain why it does not meet each particular part of the benchmark.
- 23 Failing to meet one or more of these benchmarks does not mean a product provided by a particular responsible entity necessarily represents a poor investment. However, the responsible entity would need to explain the alternative measures it has in place to mitigate the concern underlying the benchmark.
- 24 We are proposing that disclosure against the benchmarks should be:
- (a) addressed up-front in the PDS;
  - (b) updated in ongoing disclosures as material changes occur (e.g. in a supplementary PDS); and
  - (c) supported in, and not undermined by, advertising material.

- 25 In the interests of ensuring that existing investors are well informed, a responsible entity may also choose to provide regular reports on the status of its benchmark information in other materials (e.g. monthly or quarterly fund updates), although providing updates in this form will not relieve the responsible entity from its disclosure obligations if any material changes occur.
- 26 We believe that our proposed approach balances:
- (a) the need to improve disclosure to allow investors to make better-informed decisions; and
  - (b) our aim of avoiding undue interference with the unlisted property market as a means for consumers to make investments.
- 27 Our proposed approach should not result in longer disclosures. Our experience indicates that investors need better quality and relevant disclosure, presented in a way best suited to investor understanding.

## B Disclosure benchmarks for unlisted property schemes

### Key points

We propose that responsible entities of unlisted property schemes for retail investors should:

- address certain key benchmarks; and
- provide information about these benchmarks on an ‘if not, why not’ basis in their PDSs and ongoing disclosures to retail investors from 1 July 2012.

### The proposed benchmarks

#### Proposal

**B1** We propose that responsible entities should address clear benchmarks for the following areas of potential risk for retail investors investing in unlisted property schemes:

- (a) Benchmark 1: Gearing policy;
- (b) Benchmark 2: Interest cover policy;
- (c) Benchmark 3: Interest capitalisation;
- (d) Benchmark 4: Valuation policy;
- (e) Benchmark 5: Related party transactions; and
- (f) Benchmark 6: Distribution practices.

#### *Your feedback*

**B1Q1** Have we identified the relevant benchmarks? Are there any other benchmarks that are missing? Have we included anything that is not relevant?

**B1Q2** Are there more effective ways of communicating the risks faced by retail investors other than by using benchmarks? Please give details.

#### Rationale

28 The six proposed benchmarks reflect information that we consider is key to enabling retail investors to analyse the risks of unlisted property schemes. The benchmarks reflect the findings of our review of disclosure for these schemes and our experience since the introduction of RG 46. The reasons why we believe it is important for a responsible entity of an unlisted property scheme to disclose against the benchmarks are explained in detail in this consultation paper under each of the proposed benchmarks.

## The 'if not, why not' approach

- 29 The 'if not, why not' approach means explaining how a responsible entity deals with the business factor or concern underlying the benchmark. This includes explaining the alternative systems and controls a responsible entity has in place to deal with the concern underlying the benchmark where the benchmark itself is not met.
- 30 We are proposing to apply this approach to:
- (a) up-front disclosure in the PDS; and
  - (b) ongoing disclosures.

### Up-front disclosure

#### Proposal

- B2** We propose that a relevant PDS should address each of the benchmarks set out in this consultation paper on an 'if not, why not' basis, and either state that the responsible entity:
- (a) meets the benchmark; or
  - (b) does not meet the benchmark, and explain how the responsible entity deals with the concern underlying the benchmark in another way.

#### *Your feedback*

- B2Q1 Do you agree with our proposed guidance on up-front disclosure? Please give reasons.
- B2Q2 Are there practical problems for responsible entities in meeting our disclosure expectations? If so, what alternative measures would ensure that investors are adequately informed?
- B2Q3 If you are a responsible entity, will implementing our proposed guidance result in:
- (a) changes to the schemes you operate;
  - (b) changes to the structure of your business; or
  - (c) any other changes to your business?
- B2Q4 If your answer to question B2Q3 is 'yes', please describe the changes and likely costs involved.

## Ongoing disclosure

### Proposal

- B3** Where there are material changes to the information a responsible entity has disclosed against a benchmark, we propose that the responsible entity should notify investors of these changes in ongoing disclosures. We encourage responsible entities to communicate this information to investors as soon as practicable by the most effective means possible (e.g. by providing updates on the issuer's website).

#### *Your feedback*

- B3Q1** Are there practical problems with expecting a responsible entity to disclose against the benchmarks on an ongoing basis? If so, what alternative measures would ensure that investors are adequately informed about the scheme's ongoing performance?

- B4** A responsible entity should also consider whether it would help investors to give them regular updates of the benchmark information. We propose that a responsible entity should update investors on the status of the benchmark information at least every six months.

#### *Your feedback*

- B4Q1** If you are a responsible entity, how often do you provide investors with regular updates of this kind?
- B4Q2** Does our proposed guidance result in additional cost or compliance issues that we should consider? If so, please provide details.

## Timing for implementing disclosure against the benchmarks

### Proposal

- B5** We propose 1 July 2012 as the commencement date for responsible entities to disclose against the benchmarks, on an 'if not, why not' basis, in all up-front and ongoing disclosures for new and current PDSs for unlisted property schemes.

#### *Your feedback*

- B5Q1** Do you agree with the proposed timetable for implementation of the benchmark approach in new and current PDSs? If not, please explain why and whether there is a more suitable timeframe.
- B5Q2** Are there likely to be any practical problems in meeting this timetable? If so, what alternative measure would ensure that prospective investors are adequately informed?

- B6** We propose that, by 1 July 2012, responsible entities of existing unlisted property schemes should provide updated disclosure for existing investors that addresses each of the benchmarks on an ‘if not, why not’ basis.

*Your feedback*

- B6Q1** Do you agree with the proposed timetable for implementation of the benchmark approach for updating disclosure to existing investors? If not, please explain why and whether there is a more suitable timeframe.
- B6Q2** Are there likely to be any practical problems in meeting this timetable? If so, what alternative measure would ensure that existing investors are adequately informed?

### Rationale

- 31 We think that it is important for prospective and existing retail investors to have access to improved disclosure on unlisted property schemes as soon as possible. The process of implementing our approach should include providing updated PDSs for prospective investors and updated disclosure for existing investors, both of which reflect the benchmark approach.

## Benchmark 1: Gearing policy

### Proposal

- B7** We propose that, in addition to providing the information already outlined under Disclosure Principle 1 of RG 46, a responsible entity should disclose against the following benchmark on an ‘if not, why not’ basis:

**Benchmark 1: Gearing policy**

The responsible entity maintains and applies a written policy that governs the level of gearing at an individual asset level.

*Your feedback*

- B7Q1** Do you agree with this proposal? If not, please explain why.
- B7Q2** Would you meet this benchmark? If not, please explain why.
- B7Q3** Is there a more relevant or useful measure that we should consider to address the impact on the scheme of gearing risk at an individual asset level? If so, please explain.
- B7Q4** Are there cost, competition or compliance implications associated with the implementation of this proposal? If so, please provide details.

## PDS disclosure

- 32 If a responsible entity meets this benchmark, it should disclose its gearing policy and whether or not the scheme currently complies with this policy.
- 33 If the benchmark is not met, the responsible entity should explain why not and disclose the risks associated with this approach.

## Rationale

- 34 We consider that the disclosure of an overall gearing ratio for a scheme may not adequately highlight to investors the risks associated with the different levels of gearing against different assets that may exist within the scheme. These differences in levels of gearing may expose the scheme to a greater level of risk than is reflected in the overall gearing of the scheme. To address this issue, we consider that it is appropriate that investors understand whether the responsible entity monitors and manages the gearing levels of individual assets within the scheme.

## Benchmark 2: Interest cover policy

### Proposal

- B8** We propose that, in addition to providing the information already outlined under Disclosure Principle 2 of RG 46, a responsible entity should disclose against the following benchmark on an ‘if not, why not’ basis:

#### **Benchmark 2: Interest cover policy**

The responsible maintains and applies a written policy that governs the level of interest cover at an individual asset level.

#### *Your feedback*

- B8Q1 Do you agree with this proposal? If not, please explain why.
- B8Q2 Would you meet this benchmark? If not, please explain why.
- B8Q3 Is there a more relevant or useful measure that we should consider to address the impact on the scheme of risks associated with interest cover at an individual asset level? If so, please explain.
- B8Q4 Are there cost, competition or compliance implications associated with the implementation of this proposal? If so, please provide details.



## PDS disclosure

- 35 If a responsible entity meets this benchmark, it should disclose its interest cover policy and whether or not the scheme currently complies with this policy.
- 36 If the benchmark is not met, we expect the responsible entity to explain why not and disclose the risks associated with this approach.

## Rationale

- 37 We consider that the disclosure of an overall interest cover ratio for a scheme may not adequately highlight to investors the risks associated with the different levels of gearing against different assets that may exist within the scheme. These differences in levels of gearing may expose the scheme to a greater level of risk than is reflected in the overall interest cover ratio of the scheme. To address this issue, we consider that it is appropriate that investors understand whether the responsible entity monitors and manages gearing levels of individual assets within the scheme.

## Benchmark 3: Interest capitalisation

### Proposal

- B9** We propose that, in addition to the information already outlined under Disclosure Principle 2 of RG 46, a responsible entity should disclose against the following benchmark on an 'if not, why not' basis:

#### **Benchmark 3: Interest capitalisation**

The interest expense of the scheme is not capitalised.

#### *Your feedback*

- B9Q1 Do you agree with this proposal? If not, please explain why.
- B9Q2 Would you meet this benchmark? If not, please explain why.
- B9Q3 Is there a more relevant or useful measure that we should consider to address the impact on the scheme of risks associated with capitalisation of interest at an individual asset level? If so, please explain.
- B9Q4 Are there cost, competition or compliance implications associated with the implementation of this proposal? If so, please provide details.

## PDS disclosure

- 38 If a responsible entity meets this benchmark, it should disclose that the interest expense of the scheme is not capitalised.
- 39 If the benchmark is not met, we expect the responsible entity to explain why not and disclose the risks associated with this approach. It should also provide details about how it intends to meet its repayment obligations for any borrowing undertaken on behalf of the scheme.

## Rationale

- 40 After the release of RG 46, we received a number of inquiries from responsible entities suggesting that they might not be able to disclose an interest cover ratio where the property was not earning any income (i.e. when a property is under development).
- 41 A number of property development schemes have disclosed that interest cover was not relevant because interest on the facilities was capitalised and there were no earnings until the end of the projects, but did not discuss how this related to their ability to cover the interest obligations of the scheme or how the scheme would meet interest payments. We consider this information to be important to investors in deciding whether to invest in a scheme, and that the introduction of this benchmark will highlight this issue to investors.

## Benchmark 4: Valuation policy

### Proposal

**B10** We propose to remove existing RG 46.68 and RG 46.71 under Disclosure Principle 5: Valuation policy, as per the attached draft update to Section C of RG 46, and that, in addition to providing the remaining information outlined under this disclosure principle, a responsible entity should disclose against the following benchmark on an 'if not, why not' basis:

#### **Benchmark 4: Valuation policy**

The responsible entity maintains and applies a written valuation policy that requires:

- (a) a valuer to:
  - (i) be registered or licensed in the relevant state, territory or overseas jurisdiction in which the property is located;
  - (ii) subscribe to a relevant industry code of conduct in the jurisdiction in which the property is located; and
  - (iii) be independent;
- (b) procedures to be followed for dealing with any conflicts of interest;

- (c) rotation and diversity of valuers; and
- (d) for each property, an independent valuation to be obtained:
  - (i) before the property is purchased:
    - (A) for a development property, on an 'as is' and 'as if complete' basis; and
    - (B) for all other property, on an 'as is' basis; and
  - (ii) within two months after the directors form a view that there is a likelihood that a decrease in value of the security property may have caused a material breach of a loan covenant.

#### *Your feedback*

B10Q1 Do you agree with this proposal? If not, please explain why.

B10Q2 Would you meet this benchmark? If not, please explain why.

B10Q3 Is there a more appropriate way to address this issue that we should consider? If so, please explain.

B10Q4 Are there cost, competition or compliance implications associated with the implementation of this proposal? If so, please provide details.

B10Q5 Do you agree with the proposal that a valuer should be registered or licensed in the relevant state, territory or overseas jurisdiction in which the property is located? If not, please explain why. Does this cause issues in some jurisdictions where there may not be an appropriate professional body? If so, please explain.

### **PDS disclosure**

- 42 If a responsible entity meets this benchmark, it should disclose its valuation policy and whether or not the scheme currently complies with this policy.
- 43 If the benchmark is not met, we expect the responsible entity to explain why not and disclose the risks associated with this approach.

### **Rationale**

- 44 Our review of disclosure documents resulted in a number of key findings in relation to valuations, including:
  - (a) some disclosure documents not providing information on the frequency of valuations, or whether valuations are independent or comply with industry standards;
  - (b) a lack of disclosure about the risks associated with 'as if complete' valuations; and
  - (c) a lack of disclosure about how the timing of valuations relates to the ability of investors to withdraw from the scheme.

- 45 We think it is important that up-to-date valuations are obtained for properties prior to purchase by a scheme, and that existing assets of the scheme are valued at relevant times by appropriately qualified independent experts.
- 46 We consider that the proposed benchmark provides clearer guidance on specific aspects of a scheme's valuation policy, so that investors may better assess the reliability of the valuations. In particular, the appointment and rotation of valuers, the independence of valuers, and the frequency of valuations undertaken have been identified as areas where further disclosure would help investors better understand the practices of the responsible entity for the scheme.

## Benchmark 5: Related party transactions

### Proposal

**B11** We propose that, in addition to providing the information already outlined under Disclosure Principle 6 of RG 46, a responsible entity should disclose against the following benchmark on an 'if not, why not' basis:

#### **Benchmark 5: Related party transactions**

The responsible entity maintains and applies written policies on related party transactions, including the assessment and approval processes for such transactions and arrangements to manage conflicts of interest.

#### *Your feedback*

B11Q1 Do you agree with this proposal? If not, please explain why.

B11Q2 Would you meet this benchmark? If not, please explain why.

B11Q3 Is there a more relevant or useful measure that we should consider? If so, please explain.

B11Q4 Are there cost, competition or compliance implications associated with the implementation of this proposal? If so, please provide details.

### PDS disclosure

- 47 If a responsible entity meets this benchmark, it should provide disclosure about its related party policy and state whether or not the scheme currently complies with this policy.
- 48 If the benchmark is not met, we expect the responsible entity to explain why not and disclose the arrangements it has in place and the risks associated with this approach.

### Rationale

- 49 We identified deficiencies in the disclosure of the assessment, approval and monitoring of related party transactions, such as failure to disclose loans from related parties, disclosure referring investors to other documents that

are unavailable, failure to disclose the responsible entity's policy on the assessment and approval processes to manage conflicts of interests, and failure to disclose how the process and arrangements regarding related party transactions are monitored.

- 50 We consider that our proposed benchmark will help to identify those responsible entities that may not have adequate arrangements in place to identify, monitor and manage related party transactions.

## Benchmark 6: Distribution practices

### Proposal

- B12** We propose that, in addition to providing the information already outlined under Disclosure Principle 7 of RG 46, a responsible entity should disclose against the following benchmark on an 'if not, why not' basis:

#### **Benchmark 6: Distribution practices**

The scheme will only pay distributions from the realised income of the scheme.

#### *Your feedback*

- B12Q1 Do you agree with this proposal? If not, please explain why.
- B12Q2 Would you meet this benchmark? If not, please explain why.
- B12Q3 Is there a more relevant or useful measure that we should consider? If so, please explain.
- B12Q4 Are there cost, competition or compliance implications associated with the implementation of this proposal? If so, please provide details.

### PDS disclosure

- 51 If a responsible entity meets this benchmark, it should disclose that the scheme will only pay distributions from the realised income of the scheme.
- 52 If a responsible entity does not meet this benchmark, it should explain why not. It should provide details of the sources of funds it intends to use to meet distributions, and outline any risks to the scheme of using these funds for this purpose.

### Rationale

- 53 Our review identified insufficient disclosure of the reasons for the payment of distributions from sources other than realised income.
- 54 We consider that the introduction of this proposed benchmark would mean that responsible entities should highlight to investors their distribution practices and, in particular, the source of their distribution payments.

## C Amendments to Section C of RG 46 (disclosure principles)

### Key points

We propose to amend RG 46 to clarify a number of issues and provide further guidance on our expectations for applying the disclosure principles: see the draft update to Section C of RG 46 attached to this consultation paper.

The disclosure principles we propose to update include:

- Disclosure Principle 1: Gearing ratio;
- Disclosure Principle 2: Interest cover ratio;
- Disclosure Principle 3: Scheme borrowing;
- Disclosure Principle 4: Portfolio diversification;
- Disclosure Principle 5: Valuations;
- Disclosure Principle 6: Related party transactions;
- Disclosure Principle 7: Distribution practices; and
- Disclosure Principle 8: Withdrawal arrangements.

- 55 Our ongoing review of PDSs and other disclosures provided by responsible entities of unlisted property schemes has highlighted a need to clarify some of the disclosure principles and provide further guidance on how responsible entities should apply the principles. We have also identified some areas that could benefit from additional disclosure.

### Timing for implementing updated disclosure principles

#### Proposal

- c1 We propose 1 July 2012 as the commencement date for responsible entities to apply the updated disclosure principles in all up-front and ongoing disclosures for new and current PDSs for unlisted property schemes.

#### *Your feedback*

- c1Q1 Do you agree with the proposed timetable for implementation of the updated disclosure principles for unlisted property schemes?
- c1Q2 Are there likely to be any practical problems in meeting this timetable? If so, what alternative measure would ensure that investors are adequately informed?

#### Rationale

- 56 We think it is important for existing and prospective investors to have access to improved disclosure on unlisted property schemes as soon as possible.

The process of implementing our approach should include updating PDSs for prospective investors as well as providing existing investors with updated disclosure that reflects the updated disclosure principles.

## Disclosure Principle 1: Gearing ratio

### Proposal

- c2 We propose to clarify that:
- (a) where a responsible entity does not base the gearing ratio and/or 'look through' gearing ratio on the latest financial statements, it should disclose the source(s) of the information, and the date of the information, used to calculate the ratio;
  - (b) when explaining what these ratios mean in practical terms, a responsible entity should ensure that the explanation addresses the risks associated with the level of gearing within the scheme; and
  - (c) where a responsible entity is unable to calculate the gearing ratio and/or 'look through' gearing ratio, this should be disclosed with:
    - (i) the reasons why the ratio(s) cannot be calculated;
    - (ii) an explanation of the risks and impact of being unable to calculate the ratio(s); and
    - (iii) the steps being undertaken by the responsible entity to address these risks.

#### *Your feedback*

C2Q1 Do you agree with this proposal? If not, please explain why.

C2Q2 Are there other issues relating to this disclosure principle that require clarification? If so, please explain.

C2Q3 Are there any cost, competition or compliance implications associated with the implementation of this proposal? If so, please provide details.

### Rationale

- 57 We consider that responsible entities could improve the explanation of the gearing ratio and how investors can use this ratio to determine a scheme's level of risk. We consider that the provision of the proposed information is one way that responsible entities may assist investors to better compare and understand the risk associated with the level of borrowing by a scheme.
- 58 A number of responsible entities of property securities schemes have raised concerns with us about their ability to provide reliable information, where they have been unable to confirm the details of the borrowing in the underlying scheme(s) with complete certainty, in response to the guidance in existing RG 46.45(a) that the 'look through' gearing ratio should be disclosed.

- 59 As a result, we are proposing that, in these circumstances, a responsible entity should disclose that they are unable to determine the ‘look through’ gearing ratio with certainty, and provide the reasons why they are unable to do so. In addition, we consider it appropriate for investors to be provided with information to assist them to understand the potential risks and impact of a responsible entity not being able to determine this ratio, and the steps being taken by the responsible entity to obtain the information required to enable it to do so.
- 60 We consider that disclosure of the source(s) and date of the information underlying the calculation of the gearing and/or ‘look through’ gearing ratios is important for investors so they can determine the age and reliability of the information.

## Disclosure Principle 2: Interest cover ratio

### Proposal

- c3 We propose to clarify that:
- (a) where a responsible entity does not base the interest cover ratio on the latest financial statements, it should disclose the source(s) of the information, and the date of the information, used to calculate the ratio;
  - (b) when explaining what this ratio means in practical terms, a responsible entity should ensure that this explanation addresses the relationship between the income received by the scheme and the amounts required to be paid under the terms of any relevant finance facility, and the ability of the scheme to meet its other financial obligations; and
  - (c) where a responsible entity is unable to calculate the interest cover ratio—for example, in a property development or in circumstances where the interest is capitalised—it should disclose the reasons why and provide an explanation of the arrangements it has entered into to meet the payment obligations related to the borrowed funds and the risks associated with these arrangements.

#### *Your feedback*

- C3Q1 Do you agree with this proposal? If not, please explain why.
- C3Q2 Are there other issues relating to this disclosure principle that require clarification? If so, please explain.
- C3Q3 Are there any cost, competition or compliance implications associated with the implementation of this proposal? If so, please provide details.



## Rationale

- 61 We consider that responsible entities could improve the explanation of the interest cover ratio and how investors can use this ratio to determine a scheme's level of risk. We consider that the proposed disclosure may enable investors to better compare the risk of a particular scheme in relation to this factor. We also consider that responsible entities should disclose the risks or impact on investors that may arise from a breach of the scheme's interest cover ratio.
- 62 After the release of RG 46, we received a number of inquiries from responsible entities suggesting that they might not be able to disclose an interest cover ratio where the property was not earning any income (i.e. when a property was under development). In existing RG 46.122 and RG 46.123, we state that:
- If the application of a disclosure principle to an unlisted property scheme's particular business model or circumstances would be likely to mislead investors or is clearly inappropriate, then the information should be omitted.
- If key information is omitted, the responsible entity should tell investors the information has been omitted and explain why it would be misleading or inappropriate to include the information.
- 63 We note that a number of property development schemes have relied on this as a reason for not providing information on the interest cover ratio for the scheme.
- 64 The responsible entities of some of these property development schemes stated that the interest cover was not relevant because interest on the facilities was capitalised and there were no earnings until the end of the project—however, they did not discuss how this related to their ability to cover interest obligations or the ability of the schemes to meet interest payments. We consider this information to be important to investors in considering whether to invest in a scheme.
- 65 We consider disclosure of the source and date of the information underlying the calculation of the interest cover ratio is also important for investors to enable them to determine the age and reliability of the information.

## Disclosure Principle 3: Scheme borrowing

### Proposal

- c4 We propose that responsible entities should disclose additional information about their finance facilities, including:
- (a) whether a scheme would breach any covenants in any credit facility if either the operating cash flow or the value of the asset(s) used as security for the facility were to fall by 10% or more;
  - (b) for each credit facility:
    - (i) the aggregate undrawn amount;
    - (ii) the assets to which the facility relates;
    - (iii) the loan-to-valuation and interest cover covenants under the terms of the facility;
    - (iv) the interest rate of the facility; and
    - (v) whether the facility is hedged; and
  - (c) details of any terms within the facility that may be invoked as a result of investors exercising their rights under the constitution of the scheme.

#### *Your feedback*

C4Q1 Do you agree with this proposal? If not, please explain why.

C4Q2 Are there any other issues relating to this disclosure principle that require clarification? If so, please give details.

C4Q3 Are there any cost, competition or compliance implications associated with the implementation of this proposal? If so, please provide details.

### Rationale

- 66 We have noted that disclosure of the risks associated with the financing facilities obtained by a scheme, its borrowing maturity profile and whether borrowings have been hedged could be improved as this has not been adequately addressed in a number of documents we have reviewed.
- 67 We consider that the proposed amendment to this disclosure principle may help to better highlight the risks associated with a scheme's financing facilities.
- 68 The global financial crisis has highlighted problems with finance facilities for a large number of unlisted property schemes. We consider there is merit in responsible entities providing additional disclosure about the finance facilities of unlisted property schemes to enable investors to better understand the borrowing/debt profile of any finance facility.

## Disclosure Principle 4: Portfolio diversification

### Proposal

- c5** We propose that responsible entities should disclose the following additional information about a scheme's portfolio:
- (a) whether the current assets of a scheme conform to the investment strategy of the responsible entity for the scheme, and an explanation of any significant variance from this strategy;
  - (b) the current value of the development and/or construction assets of a scheme as a percentage of the current value of the total assets of the scheme; and
  - (c) in the case of a scheme involved in property development, for each significant development asset:
    - (i) the development timetable with key milestones;
    - (ii) a description of the status of the development against the key milestones identified;
    - (iii) a description of the nature of the funding arrangements for the development (including the sources of funding and repayment strategies where borrowing is used to fund the development);
    - (iv) the total amounts of pre-sale and lease pre-commitments, where applicable;
    - (v) whether the loan-to-valuation ratio for the asset(s) under development exceeds 70% of the 'as is' valuation of the asset(s); and
    - (vi) the risks associated with the property development activities being undertaken.

#### *Your feedback*

C5Q1 Do you agree with this proposal? If not, please explain why.

C5Q2 Are there any other issues relating to this disclosure principle that require clarification? If so, please explain.

C5Q3 Are there any cost, competition or compliance implications associated with the implementation of this proposal? If so, please provide details.

- c6** We propose to give guidance that any scheme that has over 20% of its property assets in development should be clearly identified as a development and/or construction scheme: see the attached draft RG 46.71.

#### *Your feedback*

C6Q1 Do you agree with this proposal? If not, please explain why.

C6Q2 Are there any cost, competition or compliance implications associated with the implementation of this proposal? If so, please provide details.

## Rationale

- 69 Our review identified issues with the disclosure of the responsible entity's investment strategy for a scheme, including its strategy on investing in other unlisted property schemes and the description of any significant non-direct property assets of the scheme, including the value of such assets.
- 70 We consider a comparison of the scheme's assets with the responsible entity's investment strategy will enhance an investor's understanding of the investment strategy and the responsible entity's ability to implement this strategy.
- 71 We also consider that it would assist investors' understanding if responsible entities clearly identified those schemes involved in property development and construction.
- 72 We have noted that, for property development schemes, there were problems with disclosure documents:
- (a) including limited or no information on key milestones and project timetables;
  - (b) not providing any information on the funding of property development, other than the level of borrowing of the scheme; and
  - (c) not providing information on the status of the development.
- 73 We consider investors may be better served if the disclosure of funding arrangements describes the nature of the arrangements (i.e. borrowings plus investor funds and proceeds from the sale of properties as stages in the development are completed) rather than just the level of borrowings of the scheme.
- 74 For property development schemes, we expect more detail about the development timetable and key milestones, and consider that better disclosure may be achieved if there is disclosure of the status of the development by reference to key milestones in the process and progress against development timetables.

## Disclosure Principle 5: Valuation policy

### Proposal

- c7 We propose to remove existing RG 46.68 and RG 46.71 under Disclosure Principle 5: Valuation policy, as per the attached draft update to Section C of RG 46, if we introduce Benchmark 4, as proposed in B10 above.

Note: If we do not include Benchmark 4 in the updated regulatory guide, we will revert back to the existing wording in Disclosure Principle 5.

#### *Your feedback*

- C7Q1 Do you agree with this proposal? If not, please explain why.
- C7Q2 Are there any other issues relating to this disclosure principle that require clarification? If so, please explain.

## Rationale

- 75 Our rationale for the proposal to introduce a benchmark relating to this issue is set out in paragraphs 44–46 of this consultation paper. We consider that the introduction of the benchmark would mean the disclosure principle information in existing RG 46.68 and RG 46.71 would be unnecessary.

## Disclosure Principle 6: Related party transactions

### Proposal

- c8 We propose to amend Disclosure Principle 6: Related party transactions to state that responsible entities should provide information consistent with Section E of Regulatory Guide 76 *Related party transactions* (RG 76). The disclosure should address:
- (a) the value of the financial benefit;
  - (b) the nature of the relationship (i.e. the identity of the related party and the nature of the arrangements between the parties, in addition to how the parties are related for the purposes of the Corporations Act or ASX Listing Rules—for group structures, the nature of these relationships should be disclosed for all group entities);
  - (c) whether the arrangement is on arm’s length terms, is reasonable remuneration, some other exception applies, or we have granted relief;
  - (d) whether scheme member approval for the transaction has been sought and, if so, when (e.g. where member approval was obtained prior to the issue of interests in the scheme);
  - (e) the risks associated with the related party arrangement; and
  - (f) the policies and procedures that the responsible entity has in place for entering into related party transactions, including how compliance with these policies and procedures is monitored.

#### *Your feedback*

- C8Q1 Do you agree with this proposal? If not, please explain why.
- C8Q2 Are there any other issues relating to this disclosure principle that require clarification? If so, please explain.
- C8Q3 Are there cost, competition or compliance implications associated with the implementation of this proposal? If so, please provide details.

## Rationale

- 76 We have identified deficiencies in the disclosure of the assessment, approval and monitoring of related party transactions, such as failure to disclose loans from related parties, disclosure referring investors to other documents that

are unavailable, failure to disclose the responsible entity's policy on the assessment and approval processes to manage conflicts of interests, and failure to disclose how the process and arrangements for related party transactions are monitored.

77 We consider that the proposed amendments will help to address these issues because responsible entities should specifically address the policies and procedures they have in place for entering into and monitoring related party transactions. This means investors can assess the size of any related party transaction and the potential conflicts that may arise from these transactions.

78 We note that the existing RG 46.75(a) does not specify that responsible entities should disclose the value of related party transactions—however, the explanation in RG 46.76 implies that investors would need to know the value of any related party transactions to enable them to understand the financial position of the related group as a whole and the risk of potential conflicts of interest. We consider that RG 46.75(a) should be amended to specify disclosure of the value of the related party transactions.

Note: The term 'related party' is defined in s228 (as modified by Pt 5C.7 for registered schemes) and includes the responsible entity. Responsible entities should refer to our guidance in Regulatory Guide 76 *Related party transactions* (RG 76) including, among other things, the content requirements for prospectuses, PDSs and other disclosure documents.

## Disclosure Principle 7: Distribution practices

### Proposal

- c9 We propose that responsible entities should disclose the following additional information about their distribution practices:
- (a) whether the current or forecast distributions are sustainable over the next 12 months;
  - (b) if the current or forecast distributions are not solely sourced from realised income, the sources of funding and the reasons for making the distributions from these other sources; and
  - (c) the impact of, and any risks associated with, the payment of distributions from the scheme from sources other than realised income.

#### *Your feedback*

C9Q1 Do you agree with this proposal? If not, please explain why.

C9Q2 Are there any other issues relating to this disclosure principle that require clarification? If so, please explain.

C9Q3 Are there cost, competition or compliance implications associated with the implementation of this proposal? If so, please provide details.

## Rationale

- 79 Our review identified problems with insufficient disclosure about the reasons for payment of distributions from sources other than realised income. The proposed amendments would mean that responsible entities should specifically address this issue.
- 80 We consider that it is important for investors to understand the impact that making payments of distributions from sources other than realised income may have on the financial position of the scheme. The existing RG 46 provides that a responsible entity should clearly and prominently disclose the sustainability of distributions paid from capital and/or unrealised gains where cash is available from either within the fund or from borrowings. We have reviewed this and consider that it would be appropriate to extend this to all distributions.

## Disclosure Principle 8: Withdrawal arrangements

### Proposal

- c10** We propose that responsible entities should disclose the following additional information about their withdrawal arrangements:
- (a) whether the constitution of the scheme makes provision for investors to withdraw from the scheme and the circumstances in which investors are able to withdraw; and
  - (b) any significant risk factors that may affect the unit price at which a withdrawal will be made.

#### *Your feedback*

C10Q1 Do you agree with this proposal? If not, please explain why.

C10Q2 Are there any other issues relating to this disclosure principle that require clarification? If so, please explain.

C10Q3 Are there any cost, competition or compliance implications associated with the implementation of this proposal? If so, please provide details.

## Rationale

- 81 Our review identified a number of issues relating to the disclosure of withdrawal rights, including that:
- (a) disclosure of investors' rights to withdraw from a scheme was poor due either to the disclosure being inconsistent with the terms of the scheme's constitution or not clearly disclosing investors' withdrawal rights; and
  - (b) there was a tendency to confuse 'withdrawal rights' under the scheme's constitution and the ability to withdraw under a 'withdrawal offer' made by the responsible entity, as outlined in a PDS or other material provided to investors.

- 82 We also noted that there were only a small number of schemes in the sample that offered investors the right to withdraw from the scheme.
- 83 We consider that the proposed amendments will assist in making it clear to investors what their withdrawal rights are.



## D Form of disclosure

### Key points

We propose to provide additional guidance on how responsible entities can word and present PDSs and other documents in a 'clear, concise and effective' manner to help retail investors assess the offer and make informed investment decisions.

Disclosure documents for an unlisted property scheme should highlight key information in an investment overview in the first few pages of the document, including clear and prominent disclosure of a summary of the benchmark and disclosure principle information with clear references to where additional information can be found.

We propose that responsible entities should specify the date that any ongoing disclosure is issued.

## 'Clear, concise and effective' disclosure

### Proposal

- D1 We propose to revise our guidance about 'clear, concise and effective disclosure' to be consistent with our guidance in Consultation Paper 155 *Prospectus disclosure: Improving disclosure for retail investors* (CP 155)—that is, that a PDS will generally be 'clear, concise and effective' if it helps retail investors make informed decisions because it:
- (a) highlights key information (e.g. through an investment overview: see proposal D2);
  - (b) uses plain language;
  - (c) is as short as possible;
  - (d) explains complex information, including any technical terms; and
  - (e) is logically organised and easy to navigate.

We also propose to refer to the guidance in CP 155 on the use of communication tools that can help responsible entities to word and present the information in a PDS in a 'clear, concise and effective' manner.

### Your feedback

- D1Q1 Do you agree with this proposal? If not, please explain why.
- D1Q2 Do you agree with our explanation of the term 'clear, concise and effective'?
- D1Q3 Is there a better way for us to provide this guidance? If so, please explain.

## Rationale

- 84 PDSs must be worded and presented in a ‘clear, concise and effective’ manner: s1013C(3). This requirement is intended to help retail investors assess the offer and make informed investment decisions.
- 85 CP 155 sets out our proposed guidance on how issuers of prospectuses can meet their obligations, including how to ensure those documents are clear, concise and effective. We think it will be helpful to update our guidance in RG 46 about clear, concise and effective disclosure in line with the clear, concise and effective proposals outlined in CP 155.
- 86 Our proposed guidance will set out the main elements of a ‘clear, concise and effective’ PDS in the context of unlisted property schemes, and will also refer to some communication tools that may assist in the preparation of a PDS.

Note: At the time of publication, we are consulting on, among other things, the content requirements for prospectuses: see CP 155.

## Investment overview

### Proposal

- D2 We propose to give guidance that a PDS should include an investment overview within the first few pages that highlights information that is key to a retail investor’s investment decision. The investment overview should include disclosure of the benchmark and disclosure principle information.

#### *Your feedback*

- D2Q1 Do you agree with this proposal? If not, please explain why.
- D2Q2 Are there cost, competition or compliance implications associated with the implementation of this proposal? If so, please provide details.

## Rationale

- 87 The purpose of the proposed amendments to RG 46 is to address issues identified in our review of disclosure documents issued since the release of RG 46, and to achieve consistent disclosure about particular aspects of unlisted property schemes in a format that allows investors to compare different schemes easily.
- 88 We have noted, through our review of PDSs generally, that the location and prominence of the information provided in response to the disclosure principles vary significantly. Our proposed amendments to RG 46, including our guidance on the investment overview, aim to ensure that investors are better able to compare different products.

- 89 Responsible entities may want to consider making disclosure, whether in a PDS or ongoing disclosure documents, in the form of a table with a separate section for each of the disclosure principles and each of the benchmarks.
- 90 We consider that it may be appropriate for this table to refer investors to information in other sections of the document.
- 91 Through our guidance, we are aiming to change market practice so that issuers provide retail investors with one useful, balanced summary in the form of an investment overview. This summary will help retail investors focus on important information and easily locate more detailed information.

## Dating of disclosure

### Proposal

- D3 We propose that responsible entities should specify the date on any ongoing disclosure to which RG 46 applies.

#### *Your feedback*

- D3Q1 Do you agree with this proposal? If not, please explain why.
- D3Q2 Are there cost, competition or compliance implications associated with the implementation of this proposal? If so, please provide details.

### Rationale

- 92 We have identified a number of disclosure documents (other than PDSs) containing the disclosure principle information where the document was not dated. The omission of the date may prevent investors from determining whether the document that they are considering contains the most up-to-date information available, or from determining the period to which the information in the disclosure document applies.
- 93 We believe that investors need to be provided with the date the document was published to assist them in identifying the date the information was prepared and whether the information is out of date.

## E Regulatory and financial impact

94 In developing the proposals in this paper, we have carefully considered their regulatory and financial impact. On the information currently available to us, we think they will strike an appropriate balance between:

- (a) our aim of ensuring that retail investors have appropriate information to make fully informed investment decisions; and
- (b) ensuring that the efficiency of the market in executing transactions is not inhibited through unnecessary and overly burdensome disclosure requirements.

95 Before settling on a final policy, we will comply with the Australian Government's regulatory impact analysis (RIA) requirements by:

- (a) considering all feasible options, including examining the likely impacts of the range of alternative options which could meet our policy objectives;
- (b) if regulatory options are under consideration, notifying the Office of Best Practice Regulation (OBPR);
- (c) if our proposed option has more than minor or machinery impact on business or the not-for-profit sector, preparing a Regulation Impact Statement (RIS).

96 All RISs are submitted to the OBPR for approval before we make any final decision. Without an approved RIS, ASIC is unable to give relief or make any other form of regulation, including issuing a regulatory guide that contains regulation.

97 To ensure that we are in a position to properly complete any required RIS, please give us as much information as you can about our proposals or any alternative approaches, including:

- (a) the likely compliance costs;
- (b) the likely effect on competition; and
- (c) other impacts, costs and benefits.

See 'The consultation process', p. 4.

## Key terms

Term	Meaning in this document
advertising material	Includes comment and promotion of unlisted property schemes in media programs or publications (generally known as 'advertorials') and statements about the schemes published by responsible entities on their websites that are intended to promote the scheme to retail investors (but does not include statements in a PDS)
AFS licensee	A person who holds an Australian financial services licence under s913B of the Corporations Act  Note: This is a definition contained in s761A of the Corporations Act.
ASIC	Australian Securities and Investments Commission
'as if complete' valuation	An estimate of the market value of a property, assuming certain specified improvements are made
'as is' valuation	An estimate of the market value of a property in its current state (i.e. without any further improvements)
Corporations Act	<i>Corporations Act 2001</i> (Cth) including regulations made for the purposes of that Act
CP 155	An ASIC consultation paper (in this example, numbered 155)
disclosure benchmarks	The proposed six disclosure benchmarks for unlisted property schemes outlined in Table 2 and Section B of this consultation paper
disclosure principles	The eight principles listed in Section C of RG 46 for improving disclosure for retail investors in unlisted property schemes
Product Disclosure Statement (PDS)	A document that must be given to a retail client in relation to the offer or issue of a financial product in accordance with Div 2 of Pt 7.9 of the Corporations Act  Note: See s761A for the exact definition.
Pt 5C.7 (for example)	A part of the Corporations Act (in this example, numbered 5C.7)
related party	Has the meaning given to that term in s228, or as modified by Pt 5C.7 for registered schemes, as the case may be
RG 76	An ASIC regulatory guide (in this example, numbered 76)

Term	Meaning in this document
s1013C(3)	A section of the Corporations Act (in this example, numbered 1013C(3))
unlisted property scheme	An unlisted managed investment scheme that has or is likely to have at least 50% of its non-cash assets invested in real property and/or in unlisted property schemes Note 1: For the purposes of this definition, 'real property' does not include infrastructure assets. Note 2: The proposals in this consultation paper and the attached draft update to Section C of RG 46 do not apply to listed property schemes.

## List of proposals and questions

Proposal	Your feedback
<p>B1 We propose that responsible entities should address clear benchmarks for the following areas of potential risk for retail investors investing in unlisted property schemes:</p> <ul style="list-style-type: none"> <li>(a) Benchmark 1: Gearing policy;</li> <li>(b) Benchmark 2: Interest cover policy;</li> <li>(c) Benchmark 3: Interest capitalisation;</li> <li>(d) Benchmark 4: Valuation policy;</li> <li>(e) Benchmark 5: Related party transactions; and</li> <li>(f) Benchmark 6: Distribution practices.</li> </ul>	<p>B1Q1 Have we identified the relevant benchmarks? Are there any other benchmarks that are missing? Have we included anything that is not relevant?</p> <p>B1Q2 Are there more effective ways of communicating the risks faced by retail investors other than by using benchmarks? Please give details.</p>
<p>B2 We propose that a relevant PDS should address each of the benchmarks set out in this consultation paper on an 'if not, why not' basis, and either state that the responsible entity:</p> <ul style="list-style-type: none"> <li>(a) meets the benchmark; or</li> <li>(b) does not meet the benchmark, and explain how the responsible entity deals with the concern underlying the benchmark in another way.</li> </ul>	<p>B2Q1 Do you agree with our proposed guidance on up-front disclosure? Please give reasons.</p> <p>B2Q2 Are there practical problems for responsible entities in meeting our disclosure expectations? If so, what alternative measures would ensure that investors are adequately informed?</p> <p>B2Q3 If you are a responsible entity, will implementing our proposed guidance result in:</p> <ul style="list-style-type: none"> <li>(a) changes to the schemes you operate;</li> <li>(b) changes to the structure of your business; or</li> <li>(c) any other changes to your business?</li> </ul> <p>B2Q4 If your answer to question B2Q3 is 'yes', please describe the changes and likely costs involved.</p>
<p>B3 Where there are material changes to the information a responsible entity has disclosed against a benchmark, we propose that the responsible entity should notify investors of these changes in ongoing disclosures. We encourage responsible entities to communicate this information to investors as soon as practicable by the most effective means possible (e.g. by providing updates on the issuer's website).</p>	<p>B3Q1 Are there practical problems with expecting a responsible entity to disclose against the benchmarks on an ongoing basis? If so, what alternative measures would ensure that investors are adequately informed about the scheme's ongoing performance?</p>
<p>B4 A responsible entity should also consider whether it would help investors to give them regular updates of the benchmark information. We propose that a responsible entity should update investors on the status of the benchmark information at least every six months.</p>	<p>B4Q1 If you are a responsible entity, how often do you provide investors with regular updates of this kind?</p> <p>B4Q2 Does our proposed guidance result in additional cost or compliance issues that we should consider? If so, please provide details.</p>

Proposal	Your feedback
<p>B5 We propose 1 July 2012 as the commencement date for responsible entities to disclose against the benchmarks, on an 'if not, why not' basis, in all up-front and ongoing disclosures for new and current PDSs for unlisted property schemes.</p>	<p>B5Q1 Do you agree with the proposed timetable for implementation of the benchmark approach for new and current PDSs? If not, please explain why and whether there is a more suitable timeframe.</p> <p>B5Q2 Are there likely to be any practical problems in meeting this timetable? If so, what alternative measure would ensure that prospective investors are adequately informed?</p>
<p>B6 We propose that, by 1 July 2012, responsible entities of existing unlisted property schemes should provide updated disclosure for existing investors that addresses each of the benchmarks on an 'if not, why not' basis.</p>	<p>B6Q1 Do you agree with the proposed timetable for implementation of the benchmark approach for updating disclosure to existing investors? If not, please explain why and whether there is a more suitable timeframe.</p> <p>B6Q2 Are there likely to be any practical problems in meeting this timetable? If so, what alternative measure would ensure that existing investors are adequately informed?</p>
<p>B7 We propose that, in addition to providing the information already outlined under Disclosure Principle 1 of RG 46, a responsible entity should disclose against the following benchmark on an 'if not, why not' basis:</p> <p><b>Benchmark 1: Gearing policy</b> The responsible entity maintains and applies a written policy that governs the level of gearing at an individual asset level.</p>	<p>B7Q1 Do you agree with this proposal? If not, please explain why.</p> <p>B7Q2 Would you meet this benchmark? If not, please explain why.</p> <p>B7Q3 Is there a more relevant or useful measure that we should consider to address the impact on the scheme of gearing risk at an individual asset level? If so, please explain.</p> <p>B7Q4 Are there cost, competition or compliance implications associated with the implementation of this proposal? If so, please provide details.</p>
<p>B8 We propose that, in addition to providing the information already outlined under Disclosure Principle 2 of RG 46, a responsible entity should disclose against the following benchmark on an 'if not, why not' basis:</p> <p><b>Benchmark 2: Interest cover policy</b> The responsible maintains and applies a written policy that governs the level of interest cover at an individual asset level.</p>	<p>B8Q1 Do you agree with this proposal? If not, please explain why.</p> <p>B8Q2 Would you meet this benchmark? If not, please explain why.</p> <p>B8Q3 Is there a more relevant or useful measure that we should consider to address the impact on the scheme of risks associated with interest cover at an individual asset level? If so, please explain.</p> <p>B8Q4 Are there cost, competition or compliance implications associated with the implementation of this proposal? If so, please provide details.</p>



Proposal	Your feedback
<p>B9 We propose that, in addition to the information already outlined under Disclosure Principle 2 of RG 46, a responsible entity should disclose against the following benchmark on an 'if not, why not' basis:</p> <p><b>Benchmark 3: Interest capitalisation</b> The interest expense of the scheme is not capitalised.</p>	<p>B9Q1 Do you agree with this proposal? If not, please explain why.</p> <p>B9Q2 Would you meet this benchmark? If not, please explain why.</p> <p>B9Q3 Is there a more relevant or useful measure that we should consider to address the impact on the scheme of risks associated with capitalisation of interest at an individual asset level? If so, please explain.</p> <p>B9Q4 Are there cost, competition or compliance implications associated with the implementation of the proposal? If so, please provide details.</p>
<p>B10 We propose to remove existing RG 46.68 and RG 46.71 under Disclosure Principle 5: Valuation policy, as per the attached draft update to Section C of RG 46, and that, in addition to providing the remaining information outlined under this disclosure principle, a responsible entity should disclose against the following benchmark on an 'if not, why not' basis:</p> <p><b>Benchmark 4: Valuation policy</b> The responsible entity maintains and applies a written valuation policy that requires:</p> <p>(a) a valuer to:</p> <p>(i) be registered or licensed in the relevant state, territory or overseas jurisdiction in which the property is located;</p> <p>(ii) subscribe to a relevant industry code of conduct in the jurisdiction in which the property located; and</p> <p>(iii) to be independent;</p> <p>(b) procedures to be followed for dealing with any conflicts of interest;</p> <p>(c) rotation and diversity of valuers; and</p> <p>(d) for each property, an independent valuation to be obtained:</p> <p>(i) before the property is purchased:</p> <p>(A) for a development property, on an 'as is' and 'as if complete' basis; and</p> <p>(B) for all other property, on an 'as is' basis; and</p> <p>(ii) within two months after the directors form a view that there is a likelihood that a decrease in value of the security property may have caused a material breach of loan covenant.</p>	<p>B10Q1 Do you agree with this proposal? If not, please explain why.</p> <p>B10Q2 Would you meet this benchmark? If not, please explain why.</p> <p>B10Q3 Is there a more appropriate way to address this issue that we should consider? If so, please explain.</p> <p>B10Q4 Are there cost, competition or compliance implications associated with the implementation of this proposal? If so, please provide details.</p> <p>B10Q5 Do you agree with the proposal that a valuer should be registered or licensed in the relevant state, territory or overseas jurisdiction in which the property is located? If not, please explain why. Does this cause issues in some jurisdictions where there may not be an appropriate professional body? If so, please explain.</p>

Proposal	Your feedback
<p>B11 We propose that, in addition to providing the information already outlined under Disclosure Principle 6 of RG 46, a responsible entity should disclose against the following benchmark on an 'if not, why not' basis:</p> <p><b>Benchmark 5: Related party transactions</b> The responsible entity maintains and applies written policies on related party transactions, including the assessment and approval processes for such transactions and arrangements to manage conflicts of interest.</p>	<p>B11Q1 Do you agree with this proposal? If not, please explain why.</p> <p>B11Q2 Would you meet this benchmark? If not, please explain why.</p> <p>B11Q3 Is there a more relevant or useful measure that we should consider? If so, please explain.</p> <p>B11Q4 Are there cost, competition or compliance implications associated with the implementation of this proposal? If so, please provide details.</p>
<p>B12 We propose that, in addition to providing the information already outlined under Disclosure Principle 7 of RG 46, a responsible entity should disclose against the following benchmark on an 'if not, why not' basis:</p> <p><b>Benchmark 6: Distribution practices</b> The scheme will only pay distributions from the realised income of the scheme.</p>	<p>B12Q1 Do you agree with this proposal? If not, please explain why.</p> <p>B12Q2 Would you meet this benchmark? If not, please explain why.</p> <p>B12Q3 Is there a more relevant or useful measure that we should consider? If so, please explain.</p> <p>B12Q4 Are there cost, competition or compliance implications associated with the implementation of this proposal? If so, please provide details.</p>
<p>C1 We propose 1 July 2012 as the commencement date for responsible entities to apply the updated disclosure principles in all up-front and ongoing disclosures for new and current PDSs for unlisted property schemes.</p>	<p>C1Q1 Do you agree with the proposed timetable for implementation of the updated disclosure principles for unlisted property schemes?</p> <p>C1Q2 Are there likely to be any practical problems in meeting this timetable? If so, what alternative measure would ensure that investors are adequately informed?</p>
<p>C2 We propose to clarify that:</p> <p>(a) where a responsible entity does not base the gearing ratio and/or 'look through' gearing ratio on the latest financial statements, it should disclose the source(s) of the information, and the date of the information, used to calculate the ratio;</p> <p>(b) when explaining what these ratios mean in practical terms, a responsible entity should ensure that the explanation addresses the risks associated with the level of gearing within the scheme; and</p> <p>(c) where a responsible entity is unable to calculate the gearing ratio and/or 'look through' gearing ratio, this should be disclosed with:</p> <p>(i) the reasons why the ratio(s) cannot be calculated;</p> <p>(ii) an explanation of the risks and impact of being unable to calculate the ratio(s); and</p> <p>(iii) the steps being undertaken by the responsible entity to address these risks.</p>	<p>C2Q1 Do you agree with this proposal? If not, please explain why.</p> <p>C2Q2 Are there other issues relating to this disclosure principle that require clarification? If so, please explain.</p> <p>C2Q3 Are there any cost, competition or compliance implications associated with the implementation of this proposal? If so, please provide details.</p>

Proposal	Your feedback
<p>C3 We propose to clarify that:</p> <ul style="list-style-type: none"> <li>(a) where a responsible entity does not base the interest cover ratio on the latest financial statements, it should disclose the source(s) of the information, and the date of the information, used to calculate the ratio;</li> <li>(b) when explaining what this ratio means in practical terms, a responsible entity should ensure that this explanation addresses the relationship between the income received by the scheme and the amounts required to be paid under the terms of any relevant finance facility, and the ability of the scheme to meet its other financial obligations; and</li> <li>(c) where a responsible entity is unable to calculate the interest cover ratio—for example, in a property development or in circumstances where the interest is capitalised—it should disclose the reasons why and provide an explanation of the arrangements it has entered into to meet the payment obligations related to the borrowed funds and the risks associated with these arrangements.</li> </ul>	<p>C3Q1 Do you agree with this proposal? If not, please explain why.</p> <p>C3Q2 Are there other issues relating to this disclosure principle that require clarification? If so, please explain.</p> <p>C3Q3 Are there any cost, competition or compliance implications associated with the implementation of this proposal? If so, please provide details.</p>
<p>C4 We propose that responsible entities should disclose additional information about their finance facilities, including:</p> <ul style="list-style-type: none"> <li>(a) whether a scheme would breach any covenants in any credit facility if either the operating cash flow or the value of the asset(s) used as security for the facility fell by 10% or more;</li> <li>(b) for each credit facility: <ul style="list-style-type: none"> <li>(i) the aggregate undrawn amount;</li> <li>(ii) the assets to which the facility relates;</li> <li>(iii) the loan-to-valuation and interest cover covenants under the terms of the facility;</li> <li>(iv) the interest rate of the facility; and</li> <li>(v) whether the facility is hedged; and</li> </ul> </li> <li>(c) details of any terms within the facility that may be invoked as a result of investors exercising their rights under the constitution of the scheme.</li> </ul>	<p>C4Q1 Do you agree with this proposal? If not, please explain why.</p> <p>C4Q2 Are there any other issues relating to this disclosure principle that require clarification? If so, please give details.</p> <p>C4Q3 Are there any cost, competition or compliance implications associated with the implementation of this proposal? If so, please provide details.</p>

Proposal	Your feedback
<p>C5 We propose that responsible entities should disclose the following additional information about a scheme's portfolio:</p> <ul style="list-style-type: none"> <li>(a) whether the current assets of a scheme conform to the investment strategy of the responsible entity for the scheme, and an explanation of any significant variance from this strategy;</li> <li>(b) the current value of the development and/or construction assets of a scheme as a percentage of the current value of the total assets of the scheme; and</li> <li>(c) in the case of a scheme involved in property development, for each significant development asset: <ul style="list-style-type: none"> <li>(i) the development timetable with key milestones;</li> <li>(ii) a description of the status of the development against the key milestones identified;</li> <li>(iii) a description of the nature of the funding arrangements for the development (including the sources of funding and repayment strategies where borrowing is used to fund the development);</li> <li>(iv) the total amounts of pre-sale and lease pre-commitments, where applicable;</li> <li>(v) whether the loan-to-valuation ratio for the asset(s) under development exceeds 70% of the 'as is' valuation of the asset(s); and</li> <li>(vi) the risks associated with the property development activities being undertaken.</li> </ul> </li> </ul>	<p>C5Q1 Do you agree with this proposal? If not, please explain why.</p> <p>C5Q2 Are there any other issues relating to this disclosure principle that require clarification? If so, please explain.</p> <p>C5Q3 Are there any cost, competition or compliance implications associated with the implementation of this proposal? If so, please provide details.</p>
<p>C6 We propose giving guidance that any scheme that has over 20% of its property assets in development should be clearly identified as a development and/or construction scheme: see the attached draft RG 46.71.</p>	<p>C6Q1 Do you agree with this proposal? If not, please explain why.</p> <p>C6Q2 Are there any cost, competition or compliance implications associated with the implementation of this proposal? If so, please provide details.</p>
<p>C7 We propose to remove existing RG 46.68 and RG 46.71 under Disclosure Principle 5: Valuation policy, as per the attached draft update to Section C of RG 46, if we introduce Benchmark 4, as proposed in B10 above.</p> <p>Note: If we do not include Benchmark 4 in the updated regulatory guide, we will revert back to the existing wording in Disclosure Principle 5.</p>	<p>C7Q1 Do you agree with this proposal? If not, please explain why.</p> <p>C7Q2 Are there any other issues relating to this disclosure principle that require clarification? If so, please explain.</p>

Proposal	Your feedback
<p>C8 We propose to amend Disclosure Principle 6: Related party transactions to state that responsible entities should provide information consistent with Section E of Regulatory Guide 76 <i>Related party transactions</i> (RG 76). The disclosure should address:</p> <ul style="list-style-type: none"> <li>(a) the value of the financial benefit;</li> <li>(b) the nature of the relationship (i.e. the identity of the related party and the nature of the arrangements between the parties, in addition to how the parties are related for the purposes of the Corporations Act or ASX Listing Rules—for group structures, the nature of these relationships should be disclosed for all group entities);</li> <li>(c) whether the arrangement is on arm's length terms, is reasonable remuneration, some other exception applies, or we have granted relief;</li> <li>(d) whether scheme member approval for the transaction has been sought and, if so, when (e.g. where member approval was obtained prior to the issue of interests in the scheme);</li> <li>(e) the risks associated with the related party arrangement; and</li> <li>(f) the policies and procedures that the responsible entity has in place for entering into related party transactions, including how compliance with these policies and procedures is monitored.</li> </ul>	<p>C8Q1 Do you agree with this proposal? If not, please explain why.</p> <p>C8Q2 Are there any other issues relating to this disclosure principle that require clarification? If so, please explain.</p> <p>C8Q3 Are there cost, competition or compliance implications associated with the implementation of this proposal? If so, please provide details.</p>
<p>C9 We propose that responsible entities should disclose the following additional information about their distribution practices:</p> <ul style="list-style-type: none"> <li>(a) whether the current or forecast distributions are sustainable over the next 12 months;</li> <li>(b) if the current or forecast distributions are not solely sourced from realised income, the sources of funding and the reasons for making the distributions from these other sources; and</li> <li>(c) the impact of, and any risks associated with, the payment of distributions from the scheme from sources other than realised income.</li> </ul>	<p>C9Q1 Do you agree with this proposal? If not, please explain why.</p> <p>C9Q2 Are there any other issues relating to this disclosure principle that require clarification? If so, please explain.</p> <p>C9Q3 Are there cost, competition or compliance implications associated with the implementation of this proposal? If so, please provide details.</p>

Proposal	Your feedback
<p>C10 We propose that responsible entities should disclose the following additional information about their withdrawal arrangements:</p> <p>(a) whether the constitution of the scheme makes provision for investors to withdraw from the scheme and the circumstances in which investors are able to withdraw; and</p> <p>(b) any significant risk factors that may affect the unit price at which a withdrawal will be made.</p>	<p>C10Q1 Do you agree with this proposal? If not, please explain why.</p> <p>C10Q2 Are there any other issues relating to this disclosure principle that require clarification? If so, please explain.</p> <p>C10Q3 Are there any cost, competition or compliance implications associated with the implementation of this proposal? If so, please provide details.</p>
<p>D1 We propose to revise our guidance about 'clear, concise and effective disclosure' to be consistent with our guidance in Consultation Paper 155 <i>Prospectus disclosure: Improving disclosure for retail investors</i> (CP 155)—that is, that a PDS will generally be 'clear, concise and effective' if it helps retail investors make informed decisions because it:</p> <p>(a) highlights key information (e.g. through an investment overview: see proposal D2);</p> <p>(b) uses plain language;</p> <p>(c) is as short as possible;</p> <p>(d) explains complex information, including any technical terms; and</p> <p>(e) is logically organised and easy to navigate.</p> <p>We also propose to refer to the guidance in CP 155 on the use of communication tools that can help responsible entities to word and present the information in a PDS in a 'clear, concise and effective' manner.</p>	<p>D1Q1 Do you agree with this proposal? If not, please explain why.</p> <p>D1Q2 Do you agree with our explanation of the term 'clear, concise and effective'?</p> <p>D1Q3 Is there a better way for us to provide this guidance? If so, please explain.</p>
<p>D2 We propose to give guidance that a PDS should include an investment overview within the first few pages that highlights information that is key to a retail investor's investment decision. The investment overview should include disclosure of the benchmark and disclosure principle information.</p>	<p>D2Q1 Do you agree with this proposal? If not, please explain why.</p> <p>D2Q2 Are there cost, competition or compliance implications associated with the implementation of this proposal? If so, please provide details.</p>
<p>D3 We propose that responsible entities should specify the date on any ongoing disclosure to which RG 46 applies.</p>	<p>D3Q1 Do you agree with this proposal? If not, please explain why.</p> <p>D3Q2 Are there cost, competition or compliance implications associated with the implementation of this proposal? If so, please provide details.</p>

## **Attachment: Draft update to Section C of RG 46 (disclosure principles)**

This attachment sets out our proposed amendments to the disclosure principles as a marked-up version of the existing Section C of Regulatory Guide 46 *Unlisted property schemes—Improving disclosure for retail investors* (RG 46).

## C Disclosure principles for unlisted property schemes

### Key points

Responsible entities of unlisted property schemes should give retail investors information on the following aspects of the scheme:

- gearing ratio (see [RG 46.43–RG 46.51](#)~~RG 46.43–RG 46.49~~);
- interest cover (see [RG 46.52–RG 46.58](#)~~RG 46.50–RG 46.53~~);
- scheme borrowing (see [RG 46.59–RG 46.67](#)~~RG 46.54–RG 46.62~~);
- portfolio diversification (see [RG 46.68–RG 46.74](#)~~RG 46.63–RG 46.67~~);
- valuation policy (see [RG 46.75–RG 46.79](#)~~RG 46.68–RG 46.74~~);
- related party transactions (see [RG 46.80–RG 46.83](#)~~RG 46.75–RG 46.76~~);
- distribution practices (see [RG 46.84–RG 46.85](#)~~RG 46.77–RG 46.78~~);  
and
- withdrawal rights (see [RG 46.86–RG 46.89](#)~~RG 46.79–RG 46.82~~).

This information should be disclosed clearly and prominently in the responsible entity's PDS and ongoing disclosures: see Section D.

### Disclosure principle 1: Gearing ratio

RG 46.43 Responsible entities should disclose a gearing ratio for the scheme calculated using the following formula:

$$\text{Gearing ratio} = \frac{\text{Total interest bearing liabilities}}{\text{Total assets}}$$

Note: If the scheme or a stapled group prepares consolidated financial statements, the gearing ratio should be based on the consolidated figures.

RG 46.44 The liabilities and assets used to calculate the gearing ratio should be based on the scheme's latest financial statements. The latest financial statements would usually be the latest audited or reviewed financial statements, except where the responsible entity is aware of material changes since those statements. [Where the responsible entity does not base the gearing ratio on the latest financial statements, it should disclose the source\(s\) of the information, and the date of the information, used to calculate the ratio.](#)

RG 46.45 If members' contributions (other than borrowings from members) are classified as liabilities in the financial statements, they should be excluded from liabilities in calculating the gearing ratio. If the scheme has material off



balance sheet financing, the responsible entity should disclose the following gearing ratios:

- (a) a ‘look through’ gearing ratio that takes into account such financing; and
- (b) a gearing ratio based on liabilities disclosed in the scheme’s financial statements.

Note: Examples of off-balance sheet financing include borrowings of equity accounted investments and loans taken out by investors to invest in the scheme where those loans are secured over the scheme’s assets on a limited recourse basis.

RG 46.46 Responsible entities should also explain to investors what these ratios means in practical terms and how investors can use the ratios to determine the scheme’s level of risk.

Note: We do not think it is adequate to simply state what the gearing ratio is. We expect that an explanation of the gearing ratio should address the risks that may arise as a result of the gearing within the scheme.

RG 46.47 Where the responsible entity is unable to calculate the gearing ratio and/or the ‘look through’ gearing ratio, this should be disclosed with the reasons why the ratio(s) cannot be calculated, an explanation of the risks and impact of being unable to calculate the ratio(s), and the steps being undertaken by the responsible entity to address these risks.

## Explanation

RG 46.47RG 46.48 The gearing ratio in RG 46.43 indicates the extent to which a scheme’s assets are funded by interest bearing liabilities. It gives an indication of the potential risks the scheme faces in terms of its level of borrowings due to, for example, an increase in interest rates or a reduction in property values.

RG 46.48RG 46.49 Retail investors may not have the skills or information to calculate a scheme’s gearing ratio (especially the ‘look through’ gearing ratio) from the scheme’s financial statements. In contrast, responsible entities should be able to calculate the scheme’s gearing ratio and explain its relevance to investors.

RG 46.49RG 46.50 We consider that a scheme’s gearing ratio is a risk factor that retail investors should weigh up against the scheme’s rate of return. Consistent disclosure of gearing ratios across this sector will enable investors to compare relative risks and returns for unlisted property schemes.

RG 46.51 We consider that responsible entities should explain to investors the risks associated with the level of gearing of the scheme and the implications of the gearing. For example, if there are assets within the scheme that have a gearing ratio that is significantly different to the overall gearing ratio of the scheme, then we consider this type of risk should be highlighted to investors.

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## Disclosure **p**Principle 2: Interest cover

~~RG 46.50~~[RG 46.52](#) Interest cover gives an indication of an unlisted property scheme's ability to meet the interest payments from earnings. Responsible entities should disclose the scheme's interest cover calculated using the following formula based on the latest financial statements:

$$\text{Interest cover} = \frac{\text{EBITDA} - \text{unrealised gains} + \text{unrealised losses}}{\text{Interest expense}}$$

Note: If the scheme or stapled group prepares consolidated financial statements, the interest cover should be calculated based on the consolidated figures. Interest expense calculations should take into account any related hedging arrangements. Unrealised losses and gains include losses and gains relating to revaluations of properties, hedging arrangements and straight lining of rental income.

~~RG 46.51~~[RG 46.53](#) EBITDA (earnings before interest, tax, depreciation and amortisation) and interest expense used to calculate interest cover should be consistent with those disclosed in the scheme's latest financial statements. The latest financial statements would usually be the latest audited or reviewed financial statements, except where the responsible entity is aware of material changes since those statements. [Where the responsible entity does not base the interest cover ratio on the latest financial statements, it should disclose the source\(s\) of the information, and the date of the information, used to calculate this ratio.](#)

[RG 46.54](#) [Where the responsible entity is unable to calculate the interest cover ratio \(e.g. in a property development or where the interest is capitalised\), it should disclose the reasons why it is unable to calculate the ratio and provide an explanation of the arrangements it has entered into to meet the payment obligations related to the borrowed funds and the risks associated with these arrangements.](#)

~~RG 46.52~~[RG 46.55](#) Many retail investors may not understand what interest cover means. Responsible entities should explain how investors can use the interest cover to assess the scheme's ability to meet its interest payments.

[Note: We do not think it is adequate to simply state what the interest cover ratio is. We expect that any explanation of the interest cover ratio should address the relationship between the income received by the scheme and the amounts required to be paid under the terms of any relevant finance facility, and any other financial obligations the scheme has.](#)

### Explanation

~~RG 46.53~~[RG 46.56](#) Interest cover measures the ability of the scheme to service interest on debt from earnings. It is therefore a critical indication of a scheme's financial health and key to analysing the sustainability and risks associated with the scheme's level of borrowing. It is information that many retail investors

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would be unable to calculate. As with the gearing ratio, interest cover is information that responsible entities should be able to provide. Consistent disclosure by this sector will allow investors to compare relative risks and returns across investments in unlisted property schemes.

RG 46.57 Where the responsible entity is unable to calculate the interest cover ratio, this should be disclosed, with the reasons why the ratio cannot be calculated, an explanation of the risks and impact of the responsible entity not being able to calculate the ratio, and the steps being undertaken by the responsible entity to address the risks of not knowing the interest cover ratio.

RG 46.58 We consider that responsible entities should help investors to interpret the interest cover ratio by providing information that will enable investors to understand the ability of the scheme to continue to pay distributions and expenses of the scheme after the payment of interest and whether the income of the scheme is sufficient to cover these costs.

## Disclosure **p**Principle 3: Scheme borrowing

RG 46.54RG 46.59 If a scheme has borrowed funds (whether on or off balance sheet), responsible entities should clearly and prominently disclose:

- (a) for each borrowing that will mature in 5five years or less—the aggregate amount owing and the maturity profile in increments of not more than 12 months;

Note: For borrowings that will mature within 12 months, the responsible entity should exercise judgment to determine whether it would be appropriate to disclose aggregate amounts for time bands within 12 months.

- (b) for borrowings that mature in more than 5five years—the aggregate amount owing;

- (c) whether the scheme would breach any covenants in any credit facility if either the operating cash flow or the value of the asset(s) used as security for the facility were to fall by 10% or more;

~~(d)~~(d) for each credit facility—:

(i) the aggregate undrawn amount;

(ii) the assets to which the facility relates;

(iii) the loan-to-valuation and interest cover covenants under the terms of the facility;

(iv) the interest rate of the facility; and

(v) whether the facility is hedged;

- (e) details of any terms within the facility that may be invoked as a result of scheme members exercising their rights under the constitution of the

~~scheme; and the maturity profile in increments of no more than 12 months; and~~

~~(d)~~(f) the fact that amounts owing to lenders and other creditors of the scheme rank before an investor's interests in the scheme.

~~RG 46.55~~RG 46.60 If borrowings and credit facilities are to mature within 12 months, the responsible entity should make appropriate disclosure about the prospects of refinancing or possible alternative actions (e.g. sales of assets or further fundraising). If the responsible entity has no reasonable grounds for commenting on the prospect of refinancing or possible alternative actions, then they should state this and explain why to investors: see Regulatory Guide 170 *Prospective financial information* (RG 170) at RG 170.91.

Note: Any forward-looking statements should comply with s769C and RG 170.

~~RG 46.56~~RG 46.61 Responsible entities should explain any risks associated with their borrowing maturity profile, including whether borrowings have been hedged and if so, to what extent.

~~RG 46.57~~RG 46.62 Responsible entities will also need to disclose any information about breaches of loan covenants that is reasonably required by investors. Responsible entities should update investors about the status of any breaches through ongoing disclosure.

Note: Responsible entities should be aware that in certain cases, investors would reasonably require information on likely breaches of loan covenants (e.g. if the responsible entity has approached the lender about a likely breach and has been informed that the loan is likely to be terminated if the breach occurs).

## Explanation

### Borrowing maturity and credit facility expiry profile

~~RG 46.58~~RG 46.63 Borrowing maturity and credit facility expiry profiles are important information where an unlisted property scheme borrows to invest. Credit facilities that are due to expire within a relatively short timeframe can be a significant risk factor, especially in periods where credit is more difficult and expensive to obtain. A failure to renew borrowing or credit facilities can adversely affect a scheme's viability.

~~RG 46.59~~RG 46.64 It is important that disclosure on the expiry of credit facilities is clear and prominent enough for retail investors to easily locate and understand the information.

### Breach of loan covenants

~~RG 46.60~~RG 46.65 Information about breaches of loan covenants reasonably required by investors is key risk information in upfront and ongoing disclosures. Breach of a loan covenant may result in the lender being able to require immediate

repayment of the loan or impose a freeze on further draw-downs on the credit facility.

~~RG 46.61~~ RG 46.66 If the lender exercises such rights, the scheme may be forced to arrange alternative financing or asset sales within a short timeframe. This can be problematic, particularly in periods when access to credit is more constrained and where the scheme has a poor history of meeting loan covenants or when there is a softening of the property market.

#### Ranking of investors

~~RG 46.62~~ RG 46.67 Retail investors should be made aware that they will rank behind the creditors of a scheme.

## Disclosure p Principle 4: Portfolio diversification

~~RG 46.63~~ RG 46.68 A responsible entity should disclose the current composition of the property scheme's direct property investment portfolio, including:

- (a) properties by geographic location by number and value;
- (b) non-development properties by sector (e.g. industrial, commercial, retail, residential) and development projects by number and value;
- (c) for each significant property, the most recent valuation, the date of the valuation, whether the valuation was performed by an independent valuer and, where applicable, the capitalisation rate adopted in the valuation;
- (d) the portfolio lease expiry profile in yearly periods calculated on the basis of lettable area or income and where applicable, the weighted average lease expiry;
- (e) the occupancy rate(s) of the property portfolio; ~~and~~
- (f) for the top five tenants that each constitutes 5% or more by income across the investment portfolio, the name of the tenant and percentage of lettable area or income; and
- (g) the current value of the development and/or construction assets of the scheme as a percentage of the current value of the total assets of the scheme.

~~RG 46.64~~ RG 46.69 Disclosure should cover the responsible entity's investment strategy on these matters, including its strategy on investing in other unlisted property schemes, whether the scheme's current assets conform to the investment strategy and an explanation of any significant variance from this strategy. A responsible entity should also provide a clear description of any significant non-direct property assets of the scheme, including the value of such assets.

~~RG 46.65~~RG 46.70 Responsible entities of unlisted property schemes involved in property development should also disclose for each significant development asset:

- (a) the development project timetable with key milestones;
- (b) a description of the status of the development against the key milestones identified;
- ~~(b)~~(c) a description of the nature of the funding arrangements for the development (including the sources of funding and repayment strategies where borrowing is used to fund the development);
- ~~(c)~~(d) the total amounts of pre-sale and lease pre-commitments, where applicable; and
- (e) whether the loan-to-valuation ratio for the asset(s) under development exceeds 70% of the ‘as is’ valuation of the asset(s); and
- ~~(d)~~(f) the risks associated with the property development activities being undertaken, development status (e.g. percentage of completion).

RG 46.71 The responsible entity for any scheme that has over 20% of its property assets in development should ensure that the scheme is clearly identified as a development and/or construction scheme.

### Explanation

~~RG 46.66~~RG 46.72 The quality of the properties held by an unlisted property scheme, including the quality of leases entered into over those properties, is a key element in the financial position and performance of the scheme. Generally, the more diversified a portfolio, the lower the risk that an adverse event affecting one property or one lease will put the overall portfolio at risk.

~~RG 46.67~~RG 46.73 It is important that responsible entities disclose in their PDSs and ongoing disclosures their approach to portfolio diversification. Most responsible entities will have a firm policy on the types of properties in which the scheme will invest. This should be disclosed as clearly and prominently as possible to help investors monitor the financial position and performance of the scheme over time.

RG 46.74 It is important that investors who invest in schemes that undertake property development have a good understanding of the nature of the developments and the risks associated with specific developments. Further, responsible entities should ensure that investors are kept informed of the progress of the development on an ongoing basis against the development timetable and key milestones. Any delays (e.g. to development works, including the underlying reason) or changes to financing circumstances are important indicators that a development may be experiencing difficulties (or may fail) and should trigger disclosure about these material matters.

## Disclosure ~~p~~**Principle 5: Valuation policy**

~~RG 46.68~~—Responsible entities should disclose, at a minimum, the following information on valuation of direct property investments:

- ~~(a) how often they obtain valuations for direct investments in real property, including how often they obtain independent valuations;~~
- ~~(b) if independent valuations are not regularly obtained, the reason for this; and~~
- ~~(c) whether valuations are in accordance with relevant industry standards.~~

~~RG 46.69~~**RG 46.75** If a property under development is valued on an ‘as if complete’ basis, the ‘as is’ basis of the valuation should also be disclosed. The responsible entity should also disclose the risks associated with ‘as if complete’ valuations, including the risk that assumptions on which such valuations are based may prove to be inaccurate.

~~RG 46.70~~**RG 46.76** Responsible entities should inform investors if they fail to follow their previously disclosed policy on valuations or if there are any changes to the policy (unless clearly immaterial).

~~RG 46.71~~—We expect responsible entities to only use valuers who:

- ~~(a) where possible, are registered under one of the state or territory valuer registration regimes or a relevant overseas registration regime; and~~
- ~~(b) include a statement in their valuation reports on whether the valuation complies with all relevant industry standards and codes.~~

~~Note: We realise that not all states and territories have a registration or licensing regime for valuers at this time.~~

### Explanation

~~RG 46.72~~**RG 46.77** The value of real property assets can be volatile, particularly when access to credit is constrained and more properties are on the market. A significant fall in valuation will mean an increase in gearing ratio and may trigger a breach of loan covenants.

~~RG 46.73~~**RG 46.78** Investors should be able to understand and compare how responsible entities value their schemes’ real property assets. This will help investors assess the reliability of the valuations.

~~RG 46.74~~**RG 46.79** It is in the interests of responsible entities that the valuations they obtain and use are robust and accurate. Responsible entities are responsible for the financial statements and other documents that rely on the accuracy of these valuations. ~~We expect that, where possible, responsible entities will only use professional valuers who are registered or licensed in the relevant state or territory or overseas jurisdiction, and who subscribe to a relevant industry code of conduct.~~ We also expect that responsible entities will be careful to ensure that their instructions to valuers are comprehensive and contain reasonable terms of reference.

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## Disclosure ~~p~~**Principle 6: Related party transactions**

~~RG 46.75~~**RG 46.80** Responsible entities who enter into transactions with related parties should describe related party arrangements relevant to the investment decision. The description should address: ~~disclose their approach to these transactions, including:~~

- ~~(a) details of investments in and loans, guarantees and fees to any related party;~~
- ~~(b) their policy on related party transactions, including the assessment and approval process and arrangements to manage conflicts of interest; and~~
- ~~(c) how the processes and arrangements are monitored to ensure their policy is followed.~~
- (a) the value of the financial benefit;
- (b) the nature of the relationship (i.e. the identity of the related party and the nature of the arrangements between the parties, in addition to how the parties are related for the purposes of the Corporations Act or ASX Listing Rules—for group structures, the nature of these relationships should be disclosed for all group entities);
- (c) whether the arrangement is on arm’s length terms, is reasonable remuneration, some other exception applies, or we have granted relief;
- (d) whether scheme member approval for the transaction has been sought and, if so, when (e.g. where member approval was obtained prior to the issue of interests in the scheme);
- (e) the risks associated with the related party arrangement; and
- (f) the policies and procedures that the entity has in place for entering into related party transactions, including how compliance with these policies and procedures is monitored.

Note: The term ‘related party’ is defined in s228 (as modified by Pt 5C.7 for registered schemes) and includes the responsible entity. The term ‘related party’ should be interpreted broadly, taking into consideration the definitions of ‘related party’ in s228 (as applied to the scheme by Part 5C.7). Responsible entities should refer to our guidance in Regulatory Guide 76 *Related party transactions* (RG 76) including, among other things, the content requirements for prospectuses, PDSs and other disclosure documents.

### Explanation

~~RG 46.76~~**RG 46.81** Related party transactions carry a risk that they could be assessed and monitored less rigorously than ‘arm’s length’ third party transactions. Investors should therefore be able to assess whether responsible entities take an appropriate approach to related party transactions. A significant number and value of such transactions may mean that investors should consider the financial position of the related group as a whole and the risk of potential conflicts of interest.



RG 46.82 Related party transactions may include employment contracts with key directors as well as commercial contracts for the supply of goods or services with persons that are related parties. They may also comprise larger transactions, such as asset acquisitions or disposals.

RG 46.83 Responsible entities should disclose information about existing related party transactions in disclosure documents except to the extent that:

- (a) such disclosure may confuse investors by dealing with inconsequential matters; or
- (b) investors already have adequate information about the related party transactions as a result of past disclosures so it is not reasonable for the information to be repeated in full.

Note: Responsible entities are Australian financial services (AFS) licensees and have duties to adequately manage conflicts of interest: s912A(1)(aa). If applicable, responsible entities may need to obtain investor approval for related party transactions under Part 5C.7. For further guidance on disclosing related party transactions in a PDS, see Section E of Regulatory Guide 76 Related party transactions (RG 76).

## Disclosure **p**Principle 7: Distribution practices

~~RG 46.77~~RG 46.84 If a scheme is making or forecasts making distributions to members, the responsible entity should disclose:

- (a) the source of the current distribution (e.g. from realised income, capital, unrealised revaluation gains);
- (b) the source of any forecast distribution;

(c) whether the current or forecast distributions are sustainable over the next 12 months;

~~(d)~~(d) if the current or forecast distribution is not solely sourced from realised income, the sources of funding and the reasons for making the distribution from these other sources; ~~and~~

~~(e)~~(e) if the current ~~distribution~~ or forecast distribution is sourced other than from realised income, whether this is sustainable over the next 12 months; and

(f) the impact of, and any risks associated with, the payment of distributions from the scheme from sources other than realised income.

Note: Any forward-looking statements should comply with s769C and RG 170. If a responsible entity does not have reasonable grounds for disclosing whether current or forecast distributions sourced other than from realised income are sustainable, it should explain this to investors: see RG 170.91.

### Explanation

~~RG 46.78~~RG 46.85 Some unlisted property schemes make distributions to members from capital and/or unrealised gains where cash is available from either within the

fund or from borrowings. If this is the case, the responsible entity should clearly and prominently disclose whether these distributions are sustainable.

## Disclosure ~~p~~**Principle 8: Withdrawal arrangements**

~~RG 46.79~~RG 46.86 If investors are given the right to withdraw from a scheme, the responsible entity should clearly disclose:

- (a) whether the constitution of the scheme makes provision for investors to withdraw from the scheme and a description of the circumstances in which investors can withdraw;
- ~~(a)~~(b) the maximum withdrawal period allowed under the constitution for the scheme (this disclosure should be at least as prominent as any shorter withdrawal period promoted to investors);
- ~~(b)~~(c) any significant risk factors or limitations that may affect the ability of investors to withdraw from the scheme or the unit price at which any withdrawal will be made (including risk factors that may affect the ability of the responsible entity to meet a promoted withdrawal period);
- ~~(c)~~(d) a clear explanation of how investors can exercise their withdrawal rights, including any conditions on exercise (e.g. specified withdrawal periods and scheme liquidity requirements); and
- ~~(d)~~(e) if withdrawals from the scheme are to be funded from an external liquidity facility, the material terms of this facility including any rights the provider has to suspend or cancel the facility.

~~RG 46.80~~RG 46.87 The responsible entity should ensure that investors are updated on any material changes to withdrawal rights through ongoing disclosure. For example, investors should be informed if the responsible entity knows that withdrawal requests will be suspended during an upcoming withdrawal period for whatever reason.

~~RG 46.81~~RG 46.88 Responsible entities should also clearly disclose if investors have no withdrawal rights.

### Explanation

~~RG 46.82~~RG 46.89 It is important for responsible entities to make investors aware of withdrawal arrangements so that investors form realistic expectations about their ability to withdraw from the scheme.

Note 1: Members will only have a limited ability to withdraw if a scheme is not 'liquid' for the purposes of ~~Part~~ 5C.6.

Note 2: If a responsible entity makes representations about likely future withdrawal periods, it must have reasonable grounds for those representations: s769C.