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30 November 2012

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Dear Ms Tan

Consultation – Review of ASX Listing Rules Guidance Note 8

We refer to the ASX Limited (**ASX**) consultation paper "Review of ASX Listing Rules Guidance Note 8 – Continuous Disclosure: Listing Rules 3.1 – 3.1B" and the accompanying documents (**Proposals**).

We welcome the Proposals and the opportunity to provide comment. They are, in our view, extremely positive and carefully considered measures that will increase clarity and thus promote market confidence.

However, we do have some concerns, and would welcome the opportunity to discuss these matters further, so that the improvements to our continuous disclosure system can be optimised.

1 Earnings guidance and analyst forecasts

Section 6 of the draft Guidance Note 8 sets out a modified regime relating to earnings guidance, and earnings updates and disclosures. Many of the proposed elements of that regime are very worthwhile improvements. For example, the reference to Australian Equivalent of International Financial Reporting Standards (**AIFRS**) guidance regarding materiality will, in our view, contribute to consistency and clarity in financial analysis and reporting.

As a general statement, we are similarly supportive of the increased recognition of the role played by sell side analysts' estimates in the framework of listed companies' continuous disclosure obligations. It is in our view appropriate that a system designed to keep the market informed, should have reference to the information that the market actually uses.

We submit however, that the treatment of analysts' estimates in the draft Guidance Note is somewhat inconsistent and confused. For example:

(a) paragraph 6.2 discourages companies from providing 'de facto guidance' by referring to analysts' forecasts or consensus estimates;

(b) paragraph 6.3 provides however that consensus estimates may set market expectations, and may be the reference point by which disclosure obligations are measured;

(c) paragraph 6.4 suggests that entities covered by sell side analysts should monitor their forecasts;

(d) that same paragraph asserts that there is no obligation to correct analysts' forecasts;

(e) and yet, sometimes it may be worth exploring material differences between analysts' and internal forecasts; and

(f) paragraph 6.4 also clarifies that there should not be selective disclosure to some analysts, and not others.

The elements of confusion are compounded to some degree by the suggestion that for those companies that have not provided earnings guidance, the threshold requiring an earnings update is not the quantitative 5-10% formulation that applies under AIFRS, but rather the qualitative answers to the questions articulated on page 37 of the draft Guidance Note.

We do not disagree with the analysis that distinguishes between the disclosure obligations of entities that have, or have not provided guidance, based on the application of, and interaction between ASX Listing Rule 3 and section 1041H of the *Corporations Act 2001* (Cth) (**Corporations Act**). However, in our view, it would be preferable to have clarity, certainty and consistency, irrespective of whether the circumstance is governed by the Listing Rules, the Corporations Act, or both.

Accordingly, we submit that:

- a single, uniform standard and test for materiality should be applied for all entities, whether or not they have provided guidance. It seems sensible that that single, uniform standard is the AIFRS materiality formulation referencing 5% and 10% (described on page 37 of the draft Guidance Note);

- the benchmark in terms of market expectations should be guidance if guidance has been provided. Or if not, consensus estimates (for larger entities) or previous corresponding period (for entities not covered by sell side analysts). This is already articulated clearly and appropriately in the draft Guidance Note; and

- the draft Guidance Note should however go further. If we are going to allow consensus to represent a benchmark for market expectations (in circumstances where no guidance has been provided) - then it ought to give definition to entities' obligation to

update the market. Accordingly, entities should be required not only to monitor analysts' forecasts, but to correct market information and align analysts' forecasts with internal expectations. That obligation would be measured not by reference to an individual analyst, but by reference to consensus.

Part of our concern arises from the change in focus described in the draft Guidance Note, from changes in earnings themselves, to changes in earnings which have a material effect on the price or value of the entity's securities. This is a subtle shift, but it requires entities to predict market responses, which, in the absence of hindsight, is an inherently uncertain task. We submit that our suggestions (above) would mitigate that uncertainty.

2 Market sensitivity and value investors

We would also welcome the opportunity to discuss your draft guidance set out in section 3.2 of draft Guidance Note 8. That paragraph refers to Listing Rule 3.1 and one of the sections of the Corporations Act which it underpins, namely section 677. Reference is made to the language in the Act that defines a material effect on the price or value of an entity's securities in terms of "information which would be likely to influence persons who commonly invest in securities in deciding whether to acquire or dispose of those securities".

The suggestion in the Guidance Note is that that language should be interpreted as a reference to people who buy securities and hold them for a period of time based on their view of the inherent value of the security, and should not be interpreted so as to include traders who seek to take advantage of very short term price fluctuations.

We agree with this interpretation as a matter of market policy. We are supportive of measures that encourage Boards to comply with the law and to use longer term perspectives on value as their reference point, rather than short term market gyrations. However this suggested guidance raises a number of interesting issues that warrant further discussion.

This is an instance where the good work that the ASX has undertaken needs to be enhanced by contemporaneous and consistent measures undertaken by the Australian Securities and Investments Commission (**ASIC**) and/or the legislature. The market needs and deserves certainty as to the interpretations and application of section 677. We are not sure that the plain meaning of the words in the section is as the ASX suggests.

In the period since the Guidance Note regarding continuous disclosure was originally introduced, one of the major changes in this market has been the rising prominence of shareholder class actions in relation to alleged breaches of the continuous disclosure provisions. We think it is important that in discussing guidance on this topic, we have regard to

possible impacts on the shareholder continuous disclosure class action market and practice.

(a) First there is an incongruity between on the one hand, a class action system that measures breach and assesses loss by reference to immediate or short term price impacts, and on the other hand proposed ASX guidance that defines breach and encourages Boards to take a different view. We are of the view that ASX's approach makes sense. However, it is also going to be important to ensure that there is consistency between the ASX guidance, the law and relevant class action jurisprudence and practice.

(b) Similarly, our sense is that if the ASX proposal in relation to the word "immediate" were adopted and enforced by ASIC and the Courts, that would shift the balance of some potential shareholder class action claims. We are not suggesting disagreement with the ASX position. Rather, we submit that, here too, it is important to achieve clarity and consistency between the ASX guidance, the law and relevant jurisprudence.

3 Trading halts and the roles of ASX and ASIC

In draft Guidance Note 8, ASX encourages listed entities to make use of trading halts as a tool to manage their disclosure obligations where they are unable to issue announcements immediately, or prior to the market opening, to ensure the market is not trading in their securities on an uninformed basis.

ASX notes that the Listing Rules continue to apply to an entity while its securities are in a trading halt. ASX also makes reference to ASIC's role, and the independent enforcement decisions that ASIC may make as to whether there has been a breach of section 674 of the Corporations Act.

We appreciate that the Proposals have been shaped by input from ASIC and that ASIC *"is in broad agreement with the thrust and contents of the revised Guidance Note"* and supports the proposed changes to the Listing Rules themselves. However, having two regulatory authorities with overlapping responsibilities, and two subtly different standards and tests - will lead to confusion.

We submit that the Proposals should be progressed contemporaneously with the release of regulatory guidance from ASIC and/or changes to the law. Progress from ASX, accompanied by statements of support and unmodified ASIC discretions will not have the desired or optimal effects in terms of market certainty and confidence.

In terms of the substance of the Proposals, we submit that if trading halts are to be effective as a tool in the continuous disclosure framework, then, once a trading halt has been granted to an entity, it should not be

exposed to breaches of the Listing Rules or section 674, during the actual period where the trading halt applies.

We would welcome the opportunity to further discuss the views expressed in this submission. Further enquiries should be directed to Jonathan Wenig on (03) 9229 9851 and Jeremy Leibler on (03) 9229 9744.

Yours sincerely

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