CHARTERED SECRETARIES
AUSTRALIA

Leaders in governance

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Dear Kevin

Review of ASX Listing Rules Guidance Note 8 Continuous Disclosure: Listing Rules 3.1—3.1B

CSA is the peak body for over 7,000 governance and risk professionals. It is the leading independent authority on best practice in board and organisational governance and risk management. Our accredited and internationally recognised education and training offerings are focused on giving governance and risk practitioners the skills they need to improve their organisations' performance and are 'first-choice' options for those intent on pursuing a C-suite career. CSA has unrivalled depth and expertise as an independent influencer and commentator on governance and risk management thinking and behaviour in Australia.

Company secretaries have primary responsibility in listed companies to deal with the Australian Securities Exchange (ASX) and interpret and implement the listing rules. Our Members deal on a day-to-day basis with ASX and have a thorough working knowledge of the operations of the markets, the needs of investors and the listing rules, as well as compliance with the Corporations Act (the Act).

CSA welcomes the consultation paper *Review of ASX Listing Rules Guidance Note 8 Continuous Disclosure: Listing Rules 3.1—3.1B,* and the revised Guidance Note and Listing Rules which provide greater clarity for listed entities as to how to understand and comply with their disclosure obligations under Listing Rules 3.1—3.1B.

CSA has been seeking for some time greater clarity on issues such as how the term 'immediate' should be interpreted, what standard of materiality listed entities can refer to and how a consistent approach to trading halts can be developed. CSA Members are of the view that the revised Guidance Note 8 (the Guidance Note) provides good clarification of some matters that were previously ambiguous or uncertain as to their interpretation. The Guidance Note is very helpful in the manner in which it crystallises certain assumptions underpinning how listed entities seek to fulfil their disclosure obligations and CSA commends ASX for providing such a substantive revision.

We understand that the policy settings in relation to continuous disclosure are not open to consultation. However, CSA remains of the view that Listing Rule 3.1 requires amendment, given the increasing pressure from regulators and market operators for listed entities to disclose more, even when the entity in question believes information is not material or otherwise exempt from disclosure and the continuing increase in the number of funded class actions in relation to

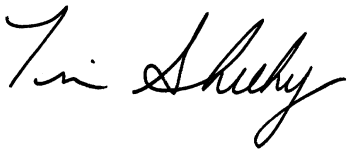
continuous disclosure, many of which are concerned with such issues are ‘immediacy’ and ‘materiality’. For example, CSA is of the view that ‘immediately’ should be interpreted as ‘promptly and as soon as possible’.

CSA is of the view that if a Listing Rule requires 69 pages of guidance, the Listing Rule itself is the cause for concern, rather than the guidance.

Any concerns with the Guidance Note we set out on the following pages stem from the practical insights of those responsible for liaising with boards of directors and the CEO on announcements to the market and acting as the point of contact with ASX on continuous disclosure. They are intended to provide constructive feedback on the draft. We hope our comments are received in the manner in which they are intended.

In preparing this submission, CSA has drawn in particular on the expertise of its internal national policy committee, comprising company secretaries in public listed companies.

Yours sincerely



Tim Sheehy
CHIEF EXECUTIVE

The meaning of 'immediately'

CSA Members appreciate the guidance that 'immediately' does not mean 'instantaneously' but 'promptly and without delay', and recognition that the circumstances and relevant factors on a case-by-case basis will be taken into account by ASX, provided the listed entity is seen to be responding quickly in order to make an announcement of price sensitive information to the market. The market suffers if information issued to the market is misleading or inaccurate and verification processes can be required to be undertaken to avoid this, and CSA is pleased to see that the Guidance Note recognises the importance of verification, consideration and approval processes.

However, this guidance is tempered by further guidance that if the market is, or is going to be, trading before the announcement is released, the entity needs to give careful consideration to requesting a trading halt. It is not clear from the Guidance Note what circumstances would need to exist in order for a trading halt to be appropriate where an entity can release an announcement promptly and without delay. CSA members consider that a trading halt is not appropriate where confidentiality is maintained and an entity can release promptly and without delay.

The Guidance Note references two infringement notices issued by the Australian Securities and Investments Commission (ASIC) where market sensitive information was withheld from the market for periods as short as 60 and 90 minutes and a trading halt had not been requested to cater for the delay.

By its nature, an infringement notice reflects the view of a regulator that has been untested in court. The two examples provided in the Guidance Note are well known to the market — they refer to Rio Tinto and Commonwealth Bank. Simply not mentioning either entity by name does not disguise the examples.

Neither listed entity admitted liability. Both listed entities took a pragmatic decision to pay the fine without admitting liability, and yet these two infringement notices now are forming the policy settings for the interpretation of 'immediate disclosure'.

Without knowledge of the full context of the particular circumstances of the alleged breaches in these two instances (the full context has not been made public and is known only to ASIC, ASX and the listed entities involved), CSA is of the view that it is inappropriate to include references to 60 and 90 minutes in the Guidance Note when providing guidance on 'immediate disclosure'. Our reasons are that:

- such inclusion sets 60 and 90 minutes as the default timing for market announcements, imposing an unrealistic expectation on how fast a company can and should turn around price-sensitive announcements to the market
- there is no case law on continuous disclosure, yet the referencing of these two infringement notices establishes them as de facto law
- in turn this is counter to guidance provided elsewhere in the Guidance Note that '...the speed with which a notice can be given under Listing Rule 3.1 will vary, depending on the circumstances'[1] and taking into account factors such as the need in some cases to verify the accuracy of the information or for an announcement to be considered by and approved by the entity's board.

If the reference to the infringement notices is to be retained in the Guidance Note, CSA suggests that ASX should provide further context in relation to why such short delays may have been considered too lengthy by the regulator so that the examples can be considered in light of the particular circumstances.

[1] p 5, Abridged Guide

Trading halts

CSA Members note that the Guidance Note now sets a trading halt as the norm in circumstances where the board needs time to determine if an announcement to the market is required. CSA is of the view that trading halts are not appropriate in all circumstances.

We are not sure that practice at an operational level accords with the direction set out in the Guidance Note. Our Members have experience of trading halts not always being granted when requested by listed entities in circumstances where Members are of the view the information is market sensitive. Listed entities are concerned that they have to spend time trying to convince ASX of the reasons for a trading halt when they need to deal with a whole host of other more important issues, such as the matter triggering the disclosure requirement and attending to the drafting and lodgement of the disclosure.

Notwithstanding the cultural shift to which the Guidance Note points, CSA also recommends that the Guidance Note should recognise that trading halts may not be appropriate in circumstances where the disclosure obligation is still being assessed and the entity is still in the process of determining whether it has market sensitive information. For example, the board may be required to make a decision regarding the materiality of information brought before it, and the board may decide that an announcement is not required. It would be untenable for a board to request a trading halt in advance of its consideration as to whether the information is material when its decision-making resolves that the information does not require disclosure.

Another example arises when the market may be aware that the board of a listed entity will consider a particular project or transaction by a particular point in time, and there is speculation in the market as to the board decision. CSA submits that these circumstances would not give rise to an uninformed market and CSA is of the view that it would not be appropriate to enforce a trading halt at such times.

CSA recommends that the Guidance Note recognise that a trading halt may not be appropriate in all circumstances, and include an additional example of how a listed entity is to fulfil its continuous disclosure obligations where a trading halt may not be appropriate. This differs from the situation where it is beyond doubt that an announcement of some kind is required, but the content of the announcement is to be decided.

ASX is of the view that both market practice and the understanding of the media and analysts need to change to accommodate trading halts as the tool to use to manage continuous disclosure. However, CSA notes that the market can react badly to trading halts and that this cultural change will require further education from ASX, and will need to include analysts, brokers, the media and directors. CSA Members are of the view that this cultural shift will not happen overnight and are concerned that listed entities will suffer negative consequences when calling trading halts to manage their continuous disclosure obligations in the short term.

CSA recommends that ASX bear this reality in mind in the short to medium term while this education process continues.

Reasonable person test

CSA members support the reweighting of Listing Rule 3.1A, which sees the movement of the reasonable person test to the last limb of decision-making, given that, if the first two limbs are met, then only special circumstances would see a movement away from the reasonable person test. It is helpful to understand that this is the approach ASX will take to the interpretation of the decision-making.

Detailed comments

Diagram
The diagram on p 5 of the operation of continuous disclosure will be of use to many listed entities, particularly from the business perspective. However, CSA recommends that the words 'at that time' be inserted in the box 'The information is not required to be disclosed under Listing Rule 3.1' on the right-hand side of the diagram, following the arrow where a decision is taken that a reasonable person would *not* expect the information to be disclosed in the circumstances (that is, where their decision is 'No'). This recognises that this may not be the end of the analysis, if at some point in time the response to one of the exception limbs changes.

What type of information needs to be disclosed?
CSA Members are of the view that the definition of 'information' need not change, as unintended consequences could arise from such a change and the test proposed from insider trading is not the appropriate test for the listing rule disclosure. CSA Members are also of the view that ASX should not make an amendment that changes the meaning of s 674 — if there is a gap in the Corporations Act (and we are not convinced there is), it should go to parliament for resolution and not be addressed through an amendment to the Listing Rules.

Footnote 7 on page 6 sets out the definition of information in Listing Rule 19.12 as including 'matters of supposition and other matters that are insufficiently definite to warrant disclosure to the market' and 'matters relating to the intentions, or likely intentions, of a person'. On p 24, the Guidance Note states that 'embryonic thinking that a listed entity may do about a potential transaction may qualify both as an incomplete proposal and as a matter that is insufficiently definite to warrant disclosure'. Yet on p 26, the Guidance Note recognises that 'in some cases information [that is insufficiently definite to warrant disclosure] may be so uncertain or indefinite that it is not in fact market sensitive and therefore not required to be disclosed ....'. CSA agrees with this last proposition and considers that some of the earlier statements are inconsistent with this point, thereby creating confusion. We suggest that ASX reconsider these statements as a whole when taken together.

An example of information which is embryonic, but which would not generally require disclosure, is where a listed entity may have approached a third party to test if there is any interest in engagement in order to fulfil strategic objectives, but the discussions may never have 'got off the launching pad' or no response may yet have been received. The information remains no more than a 'one-way' discussion. Although this should not fall within Listing Rule 3.1 at all, the statements in the Guidance Note create some uncertainty as to whether it does, but is able to be held back because it is insufficiently definite. If the latter, then if the entity had to lodge a s 708A(6) statement, it would need to disclose the information if material.

CSA Members are of the view that there is insufficient recognition of this concept on pp 24 and 26 of the Guidance Note.

CSA recommends that the word 'industry' be inserted between the words 'particular' and 'sector' in footnote 8 on p 6. The word' sector' can mean many things, and without some contextual clarification, it is open to misinterpretation.

Footnote 8 on p 13 states that there is an obligation under s 1041H to disclose to the market information 'concerning the entity' where earnings reported for a reporting period will materially differ from specific earnings guidance it has given to the market. This is repeated on p 36. This is a new express use of s 1041H, and one that provides a potentially lower test of materiality on the strength of published guidance. CSA queries the legal basis for this interpretation.

The need to assess information in context

Footnote 19 on p 9 references the observations of O'Loughlin. However, this case is not necessarily easy to access, as not all cases are to be found on Austlii, and a listed entity may not have the in-house resources to the same extent as a large law firm library. CSA strongly recommends that all information relevant to the Guidance Note should be able to be found within the Guidance Note or on the ASX website. In an instance such as this, CSA recommends that a hyperlink be provided to a section of the ASX website where the case in question can be found and read.

The approach ASX takes to requests for disclosure-related trading halts

Proper verification required

On p 14, the Guidance Note refers to ASX exploring whether an interim announcement about an event could be made under Listing Rule 3.1. CSA Members are of the view that ASX expects the listed entity to make an interim announcement before the entity has an understanding of the implications of the information, followed by a second announcement at a later time setting out the implications of the facts.

CSA does not agree with the approach set out in the Guidance Note, as announcing information to the market without an understanding of the impact of the information could lead to the creation of a false market in shares. The information is potentially misleading if only the facts are released without a statement as to the implications of those facts.

CSA notes that not all circumstances are as 'cut and dried' as the example provided in the Guidance Note. For example, a transaction might or might not be material, but the taxation implications need to be understood to clarify if it is. The full effect on profit needs to be understood before it can be confirmed if it is material. The entity could be waiting for advisers to verify the impact of the information and it could be misleading to announce the transaction to the market with no information as to its implications.

CSA is of the view that it could confuse the market to release information without context in some circumstances. While CSA Members accept that in some circumstances it may be straightforward (as in the cyclone example supplied by the Guidance Note), this will not always be the case and CSA recommends that the Guidance Note be amended to recognise this.

Does the board need to approve an announcement under Listing Rule 3.1?

Recognise that entities have different governing structures

The second para on p 14 notes that a matter that falls outside delegations to senior management to release announcements of their own accord may need to be referred to a disclosure committee. CSA Members note that not all listed entities have a disclosure committee, but will have other processes in place. CSA recommends that the words 'or other appropriate process' be inserted after the words 'disclosure committee' to provide certainty that listed entities are free to establish the processes most suitable to their circumstances.

Monitoring social media

On p 15, the Guidance Note encourages a listed entity to monitor 'any investor blogs, chat sites or other social media it is aware of that regularly include postings about the entity'. CSA Members are very concerned with the expectation that entities should monitor a range of social media, particularly given the statement on p 10 that the Guidance Note refers to information that an officer 'ought reasonably have come into possession of'.

Blogs and chat sites spring up constantly. It is practically impossible for an entity to have knowledge of or monitor all social media sites regularly that include postings about the entity. Moreover, there are substantial cost implications, which will have a significant impact on smaller listed entities.

CSA recommends that either this bullet point be deleted or this section be amended to refer to 'well-known' and 'credible' investor blogs or chat sites or other social media. CSA notes that, in an article in the November issue of the magazine *Company Director*[2], the Deputy Chairman of ASIC, Belinda Gibson, referred to the need for listed entities to monitor 'significant social media sites'.

CSA Members note that references to investor blogs also appear on pages 28 and 32.

What other steps can a listed entity take to facilitate compliance with Listing Rule 3.1?
On page 16, the Guidance Note includes a checklist requiring the entity to ensure that the person appointed under Listing Rule 12.6 as responsible for communications with ASX in relation to Listing Rule matters have 'the authority to request a trading halt and to issue an announcement to the market, if that is what is required'.

CSA Members are usually those with the responsibility for communications with ASX under the Listing Rules. However, company secretaries rarely have the authority within a listed entity to request a trading halt, as they are generally not the decision-maker (although they may be one member of a disclosure committee).

CSA recognises that ASX has expressed the view that company secretaries should be granted the authority to request a trading halt, and that if such authority is not granted to company secretaries for those times when the chair and CEO are not available, ASX will put the company into suspension if there is a sudden and significant movement in the market price or trading volumes. CSA recognises that ASX will take verbal instruction rather than requiring written instruction. However, CSA Members are of the view that chairs and CEOs will not delegate this authority to the company secretary.

CSA Members are involved in continuous disclosure announcements regularly, and are aware that consultation on calling trading halts is currently and will continue to be required by chairs and CEOs. CSA members recommend that the Guidance Note reflect the reality that the contact person (the company secretary) will not be the person with authority to request a trading halt.

The Guidance Note also requires the contact person to be 'readily contactable by ASX by telephone and available to discuss any pressing disclosure issues that may arise during normal market hours and for at least one hour either side thereof'. CSA Members note that the contact person can also be unavailable (for example, in flight) and may not always be able to be contacted immediately. Listed entities will have processes in place ensuring there is a back-up person to discuss a matter with ASX, and recommends that the Guidance Note reflect this practice.

How does Listing Rule 3.1 interact with other disclosure obligations?
On p 17, in the sixth para, the Guidance Note states that, 'If, in the course of preparing a periodic disclosure document, it becomes apparent to a listed entity that its reported earnings will differ materially from market expectations to an extent which is market sensitive, the entity must disclose that information to ASX immediately under Listing Rule 3.1'.

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[2] Australian Institute of Company Directors, *Company Director*, Volume 28, Issue 10, November 2012, p 11

CSA Members note that such information may only become apparent after appropriate due diligence verification and that the board may need to consider the information and deliberate as to whether an announcement is required, given directors' duty to independently consider information. That is, it may take a little time to clarify that the information is material. CSA recommends that this is recognised in the explanation in the Guidance Note.

Guidelines on the contents of announcements under Listing Rule 3.1
The Guidance Note suggests on p 19 that listed entities can lodge agreements which can run to 60 pages without lodging a summary of the agreement. CSA Members contend that a summary of an agreement is needed by investors to make sense of it, and that it is confusing to ask investors to digest and understand the whole agreement. CSA Members are of the view that there should always be a covering note in the announcement disclosing the material terms of the agreement.

What steps does ASX take when it receives an announcement under Listing Rule 3.1?
Footnote 78 on p 21 provides a disclaimer in relation to ASX's review of announcements.

CSA is strongly of the view that this disclaimer should appear at the front of the Guidance Note in an obvious place and not be buried in a footnote.

CSA Members also note that defamation is dealt with under the Corporations Act and that ASX should not seek to extend that protection further in Guidance Note 8.

Incomplete proposals or negotiations
The guidance note, on pp 24-26, discusses when disclosure of an agreement is required (as well as unilateral proposals). CSA appreciates the guidance that an agreement is generally not binding while any party is free to decide not to proceed, and also that signing can be deferred to a convenient time before the market opens or after the market closes.

However, at the top of p 25 the guidance refers to 'legally binding agreement or the entity is otherwise committed to proceeding with the transaction being negotiated'; and on p 26 to disclosure being required as soon as the agreement is 'legally binding on a listed entity or it is otherwise committed to proceeding with the transaction in question'. These statements could be read as being inconsistent with the remainder of the text. CSA suggests that this section be clarified.

Listing Rule 3.1A.2 — the requirement for information to be confidential
On page 28, CSA Members recommend that the second set of bullet points setting out where ASX may form the view that information about a matter has ceased to be confidential be rewritten as follows:

> In relation to the second component, ASX may form the view that information about a matter involving a listed entity has ceased to be confidential if there is a sudden and significant movement in the market price or traded volumes of the entity's securities that cannot be explained by other events or circumstances, and there is:
> - a media or analyst report about the matter, or
> - a rumour known to be circulating to the market about the matter.

As this section is currently written, a media or analyst report or a rumour is sufficient for the information to be no longer considered confidential, regardless of whether there is any movement in the market price or traded volumes of the entity's securities. This would mean that an entity would have to respond to every media or analyst report or rumour even if they are mere guesswork designed to 'prod' the share price in order to fulfil an individual agenda. If there is no material impact on the share price or trading volumes, this would indicate that the market

does not regard the report or rumour as credible and therefore disclosure should not be required.

This section needs to align with the guidance on p 32 which refers to 'credible market sensitive information' and reflects the point made above. CSA strongly recommends that the word 'credible' be reinserted, as ASX needs to be careful to discourage unfounded speculation, rumour mongering and competitive mischief.

Moreover, as avenues for rumour mongering expand with the rise of social media, CSA believes that ASX needs to monitor more closely the credibility of sources of speculation and rumour. CSA Members are of the view that penalties should attach to those creating the rumours (if such rumours are created frequently) rather than have all the responsibility of managing the rumours sit with the listed entity.

CSA Members recognise that ASX will not enter into a 'debate with a listed entity as to whether a sudden and significant movement in the market price or traded volumes of its securities can fairly be attributed to information about a particular matter ceasing to be confidential' (p 28), but note that they in turn expect ASX to take into account all factors put forward by the listed entity relevant to the particular circumstances of the information. This process needs to recognise that a listed entity is still generally best placed to make a determination about whether the market is fully informed (as acknowledged in the Guidance Note elsewhere: see section 32, page 9).

Entities in financial difficulties

Footnote 109 on p 30 references class actions against listed entities that allege breaches of Listing Rule 3.1 and s 674. All class actions to date have been settled, and no class actions have gone to court. CSA strongly recommends that the footnote be deleted. The inclusion of the footnote gives credence to class actions when there are no authoritative decisions on any of these alleged breaches.

Earnings surprises

CSA supports the guidance provided on p 37 that states that:

> The fact that an entity's earnings may be materially ahead of or behind market expectations part way through a reporting period does not mean that this situation will prevail at the end of the reporting period. The situation may change due to changes in the many variables that can affect an entity's earnings. It may also change because the entity adjusts its business plans in response.

CSA also supports the guidance provided on p 38 that:

> Where Listing Rule 3.1 applies, information about the difference in earnings compared to market expectations has to be released immediately. As indicated above, this does not mean 'instantaneously' but rather 'promptly and without delay'. In assessing whether an entity has acted immediately under Listing Rule 3.1, ASX will make due allowance for the fact that the preparation of earnings guidance will need to be properly vetted and signed off before it is released.

CSA notes that the Guidance Note deals provides clarity to those entities that have issued earnings guidance for a reporting period and become aware that their earnings will be materially different from market expectations and of the need to consider if the expected variation in earnings compared to published earnings guidance is between five and 10 per cent. However, the Guidance Note does not provide similar clarity for entities that do not provide earnings guidance, but are covered by sell-side analysts. CSA recommends that further guidance is required on how entities are to manage consensus expectations, taking into account the entity's decision not to make a forecast and the attendant legal issues if an entity is forced to make a

forecast (the legal issues are acknowledged in the Guidance Note, for example, Annexure B). Further guidance about consensus (having regard for example to the difficulties identified in the AIRA paper referenced in footnote 133) and what materiality range is applicable would also be useful.

Price query letters
CSA supports the amendment to the price query letters which now state that:

> recent trading in the entity's securities would suggest to ASX that such information may have ceased to be confidential and therefore the entity may no longer be able to rely on Listing Rule 3.1A.

The price query letter previously stated that the listed entity 'is no longer able to rely'. The revision allows each matter to be dealt with on the facts.

Referrals to ASIC
The guidance on p 44 states that:

> Where the price movement is between 5% and 10%, ASX will have regard to the circumstances of the case to determine whether the information should be regarded as market sensitive. This includes the market capitalisation of the entity, the beta of its securities, the bid-offer spread at which its securities normally trade and whether there was a noticeable spike in the volume of its securities traded in the lead up to and shortly after the announcement.

CSA is of the view that this should also apply to price movements over 10 per cent.

Example A — material acquisition
CSA recommends that, on p 47 leading into the list of matters that could be included in an announcement, the word 'should' be amended to 'may'.

If this amendment is not made, it appears as if the announcement is defective if one of the matters listed is not included.

Example C —security issue
Item 3 on p 51 suggests that the engagement letter creates an underwriting obligation. This is not the case. The underwriting obligation only arises on execution of the formal underwriting agreement.

Example F — material difference in earnings compared to earnings guidance
The draft guidance note on p 56 in clause 1, para 2 is prefaced by reference to 'where the change in earnings is attributable to general trading conditions rather than a particular material event'. CSA Members note that, even if the change were attributable to a particular material event, the following statement should still apply, that is, 'Until the detailed earnings forecast has been prepared and reviewed by the board, and the board in particular has signed off on the forecast earnings for the balance of the year, the information about K's likely higher than expected earnings for the financial year is insufficiently definite to warrant disclosure'.

Cross-references

The Guidance Note includes guidance on the same matters in different sections. CSA recommends that cross-references be included in the Guidance Note so that readers can easily access all the relevant guidance on a particular aspect of continuous disclosure obligations.

For example, references to investor blogs, chat sites and other social media appear on pages 15, 28 and 32 of the Guidance Note, and in footnote 117 on p 32, yet they are not cross-referenced. (Note: Footnote 117 cannot be found in the body of the Guidance Note.)

In another example, guidance is provided on media and analysts reports and market rumours on pages 28, 31, 32 and 33, yet there is no cross reference between these sections.

Listing Rule 3.17A

CSA Members note that the amendment to Listing Rule 3.17A will see listed entities required to lodge with ASX any document provided to a stock exchange that will be made public. Many entities lodge a range of disclosures here and overseas, many of which are administrative in nature and/or apply solely to the foreign market. CSA queries the benefit to shareholders of requiring entities to lodge on ASX's announcements platform all market announcements lodged on overseas exchanges, regardless of materiality or relevance to the Australian investors.

CSA recommends that the proposed Listing Rule should contain a materiality relevance threshold. Furthermore, in relation to dual-listed entities, it would be helpful if the Listing Rule contained either an exception or a clarification that the amended Listing Rule is not intended to apply to the arm of the dual-listed entity that is not listed on ASX, subject of course to any information that is materially price sensitive being immediately disclosed.

Listing Rule 3.17.12

CSA Members note the revisions to Listing Rule 3.17.2 requiring listed entities to immediately give ASX:

> A copy of any notice it receives under ss 249D, 249F, 249N, 252B, 252D or 252L of the Corporations Act or under any equivalent overseas law or equivalent provisions in the entity's constitution from a holder or holders of +securities calling, or requesting the calling of, or proposing to move a resolution at, a general meeting.

CSA Members note that a listed entity may receive an initial approach from a holder or holders of securities in relation to requisitioning a general meeting or proposing to move a resolution at a general meeting, but the initial notice may contain defamatory, factually incorrect or misleading information. After discussion with the individual(s) in question, the notice may be substantially altered or withdrawn. Initial notices under these sections may also contain defects that render them invalid, and companies have in place processes, which may take some time, to determine the validity of such notices. In any case, final valid versions of any notice under these sections of the Corporations Act will be delivered to ASX when they are distributed to members, as per current Listing Rule 13.17.

CSA Members also note that such requisitions are often used as 'ambit claims' to try to force an entity to serve the shareholder's agenda, which may not be appropriate for a number of reasons. Also, publishing such a notice gives greater control to the requisitioner in terms of the information released to the market and it allows manipulation of the entity and misuse of its announcements platform through this rule. Our Members note that they have observed the draft guidance being utilised in some instances to require an ASX entity to release information on the announcements platform rather than relying on the information being circulated in paper form and CSA considers that this will not be appropriate in all circumstances. Our other concern is that, technically, there is no legal means (save seeking a court order) to have a requisition of this nature withdrawn.

Given these factors, CSA is strongly of the view that this proposed new Listing Rule should not proceed in its current form for the reasons stated above. We understand from discussions with

ASX that the new Listing Rule requirement is intended to capture listed entities registered in other countries that are not captured by the Corporations Act, but at present the drafting captures all listed entities.

Listing Rule 3.17.3

CSA Members note the revisions to Listing Rule 3.17.2 requiring listed entities to immediately give ASX:

> A copy of any information about substantial holdings of +securities obtained under Part 6C.2 of the Corporations Act or under any overseas law or provisions in the entity's constitution equivalent to Part 6C.1 or 6C.2 of the Corporations Act.
> Note: A person who gives a substantial holding notice to a listed entity under Part 6C.1 of the Corporations Act is required to give a copy of that notice to ASX (section 671B(1)) and therefore the listed entity is not required to give a further copy of that notice to ASX.

CSA Members note that this is a new requirement which places responsibility for policing personal obligations under the Corporations Act on the listed entity. The person who has the obligation under the Corporations Act to lodge a substantial shareholder notice (with both the listed entity and ASX) is the substantial holder. Listed entities are reliant on third parties to provide accurate information in response to beneficial ownership tracing notices. CSA is concerned that listed entities may be required to disclose information which they do not control and which may potentially be incomplete, inaccurate and misleading.

Moreover, CSA is uncertain as to the extent of this new requirement. It is assumed the listed entity would only have to provide information where a shareholder held five per cent or their holding had changed plus or minus one per cent (that is, information consistent with the requirements of the Corporations Act) and this change had not already been provided by the relevant shareholder. However, this is not clear from the current drafting of the Guidance Note.

CSA understands from discussion with ASX that this new requirement is intended to capture substantial shareholders of entities registered in other jurisdictions which are not subject to the Corporations Act, but at present the drafting captures all listed entities.

CSA recommends that this new requirement be revised.

Other Listing Rule changes

Disclosure of material terms of agreement with CEO or a director
CSA Members note that an additional Listing Rule change is to require specific disclosure of the material terms of any employment, service or consultancy agreement a listed entity enters into with its chief executive officer (or equivalent) or a director or any other person or entity who is a related party of the entity, and also of any variation to such an agreement.

The reference to related party of the entity should be changed to related party of the chief executive officer or director — we understand from the commentary that this is what is intended to be captured.

CSA Members note that this proposal does not refer to a materiality threshold. As such, any consultancy agreement, regardless of whether it is material, will need to be disclosed. Also, changes to non-executive director fees (such as an annual/biennial increment, within the shareholder-approved non-executive director fee pool), or indeed the terms of non-executive director engagement, or an annual increment to the chief executive officer's base remuneration, which would currently be reported only after the event, in the corporate governance statement in

the annual report and the remuneration report, will be subject to continuous disclosure requirements.

As a result, this requirement will see the information already disclosed in the remuneration report disclosed again under continuous disclosure requirements, which is a duplication of reporting. In addition, standard agreements such as terms of appointment of non-executive directors will require specific disclosure even if the agreement does not differ from the standard agreement publicly available.

CSA recommends that the amendment to the Listing Rule confirm a materiality threshold in relation to 'any variations' and also clarify whether this is intended to extend to appointments of non-executive directors and annual fee increments for either non-executive directors or the chief executive officer.

Dividends

The new proposed Listing Rule 3.21 requires an entity to disclose to ASX immediately it declares a dividend or distribution. CSA Members note that the current practice of the majority of listed entities is to disclose interim and final dividends in interim and preliminary profit announcements, respectively.

CSA Members recommend that listed entities should be able to continue with the existing practice of disclosing dividends in their half-yearly and full-year profit announcements, provided the information is not otherwise materially price sensitive.

We also note that, in practice, there may be a short delay between approval by the board of interim or preliminary profit announcements and their release to ASX, reflecting the reality that certain matters often need to be finalised after board approval before the documents are ready for lodgement. The continuous disclosure obligation continues to apply to material information.

CSA also recommends that the wording of the Guidance Note should be amended to listed entities 'resolving to pay dividends' rather than 'declaring' dividends, which would reflect the current practice of listed entities.