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**CONSULTATION PAPER: ASX LISTING RULES GUIDANCE NOTE 8 CONTINUOUS DISCLOSURE: LISTING RULES 3.1-3.1B**

Thank you for the opportunity to make a submission on the Consultation Paper relating to proposed updates to Guidance Note 8 Continuous Disclosure: Listing Rules 3.1-3.1B .

I would like to indicate my broad agreement with the nature of proposed updates as they relate to specific issues concerning analyst and investor briefings, analyst forecasts, consensus estimates and forecast surprises.

However, I would like to highlight my particular concern that the continuous disclosure obligations and insider trading laws continue to diverge in application and content, despite sharing a commonality of purpose. I hope that ASX will consider, both within the context of this consultation paper and more broadly, the need for there to be greater consistency between the continuous disclosure regime under the Listing Rules and the insider trading laws under the *Corporations Act 2001* (Cth).

On page 7 of Guidance Note 8, ASX notes the comments of the New South Wales Court of Appeal (comprised of Spigelman CJ, Beazley JA and Giles JA) in *James Hardie Industries NV v ASIC* [2010] NSWCA 332 at [355], that the continuous disclosure regime is '...integral to minimising incidences of insider trading...'. Indeed, the rationale underlying Australia's continuous disclosure regime is almost identical to that underpinning the prohibition of insider trading – investor protection and the maintenance of market integrity.[1]

Despite their common aim, insider trading laws and continuous disclosure obligations continue to differ in two significant respects:

(i) the circumstances in which a corporation or entity is regarded as becoming "aware" of information; and

(ii) the tests for determining when information is "material".

## 1. The circumstances in which a corporation or entity is regarded as becoming "aware" of information

ASX Listing Rule 3.1 requires listed entities to immediately notify ASX:

> once an entity is or becomes aware of any information concerning it that a reasonable person would expect to have a material impact on the price or value of the entity's securities.

In chapter 19 of the Listing Rules, the term "aware" is given the following meaning:

> An entity becomes aware of information if, and as soon as, an officer of the entity... has, or ought reasonably to have, come into possession of the information in the course of the performance of their duties as an officer of that entity.

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[1] In relation to the rationale for continuous disclosure see, for example, Corporations and Markets Advisory Committee (then, the Company and Securities Advisory Committee), *Report on an Enhanced Statutory Disclosure System*, 1991, at 7; ASIC, CP 5, *Heard it on the grapevine: Disclosure of information to investors and compliance with continuous disclosure and insider trading provisions* (1999), at 7; Commonwealth Treasury, *CLERP 9: Corporate Disclosure*, 2002, at 129.
In relation to the rationale for the prohibition of insider trading see, for example, Standing Committee on Legal and Constitutional Affairs, House of Representatives, *Fair Shares for All: Insider Trading in Australia* (1989) at [3.34] to [3.36]; Final Report, The Committee of Inquiry into the Australian Financial System (1981) at 382; Explanatory Memorandum, Corporations Legislation Amendment Bill 1991 (Cth), [307]; the majority of the High Court in *Mansfield and Kizon v R* (2012) 87 ALJR 20.

In relation to the prohibition of insider trading, which is found in section 1043A of the *Corporations Act,* section 1042G(a) sets out the circumstances in which a corporation is taken to possess inside information:

> A body corporate is taken to possess any information which an officer of the body corporate possesses and which came into his or her possession in the course of the performance of duties as such an officer.

ASX states on page 13 of the Guidance Note that the definition of "aware" in chapter 19 of the Listing Rules is based on section 1042G of the *Corporations Act.* There is, however, an important distinction as, under the Listing Rules, an entity is regarded as being aware of information not only where the relevant person has come into possession of the information in the course of performance of their duties but also where they *ought reasonably to have come into possession of the information.* This distinction has resulted in the continuous disclosure obligations being interpreted to as having both subjective and objective elements, so that where a director or an executive officer of a corporation has access to information, even without actual knowledge of the contents, they are deemed to have it in their possession.[2]

However, in relation to the insider trading laws, such a position clearly falls outside the judicial interpretation of the meaning of "possession" of inside information in section 1043A of the *Corporations Act,* which requires an *actual* and not *constructive* "awareness" of information before a person is regarded as possessing that information.[3]

On page 13 of the Guidance Note, ASX offers an explanation for including information that an officer 'ought reasonably to have come into possession of' as information that a corporation is "aware" of, by stating that it is intended to prevent corporations from seeking to avoid their obligations or liability 'by not bringing market sensitive information to the attention of its officers in a timely manner'. However, such an argument could equally be made in relation to the insider trading laws, that corporations would simply attempt to ensure that officers did not come into actual possession of inside information, in order to attempt to avoid liability for insider trading. Additionally, as relevant information can be positive or

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[2] *ASIC v Fortescue Metals Group Ltd* [2011] FCAFC 19 (18 February 2011) [185].

[3] See, in particular the comments of Spigelman CJ in *R v Hannes* (2000) 158 FLR 359 at 398, and the judgment of the New South Wales Court of Criminal Appeal in *Fysh v R* [2013] NSWCCA 284 (20 November 2013). For commentary, please refer to Lyon and du Plessis, *The Law of Insider Trading in Australia* (Federation Press, 2005), 23.

negative in nature, it is somewhat difficult to accept such a position, particularly as it would also give rise to breaches of other legal obligations and duties.

I would suggest that the continuous disclosure obligations could be more effective in this respect if they more closely aligned with the insider trading laws so that the concept of "awareness" of information under the Listing Rules was limited to a concept of *actual* awareness (rather than constructive awareness where an officer *ought reasonably to have been aware*). If desired, the category of persons to whom the concept of awareness was to be applied could be extended beyond officers of the corporation, thereby including more junior employees with an obligation to report the relevant information to their superiors. While section 1042G(a) of the *Corporations Act* does refer only to officers having possession of information, an extension of the category of persons is merely an additional application, whereas a distinction in the nature of awareness between actual and constructive awareness is a fundamental difference in concept between these two sets of complementary regulation.

## 2. The tests for determining when information is "material"

The obligation under Listing Rule 3.1 is for an entity to disclose information 'that a reasonable person would expect to have a material effect on the price or value of the entity's securities.' Section 677 of the *Corporations Act* provides that:

> a reasonable person would be taken to expect information to have a material effect on the price or value of [the] securities ... if the information would, or would be likely to, influence persons who commonly invest in securities in deciding whether to acquire or dispose of the ... securities.

This test is similar, but not identical, to the test contained in section 1042D of the *Corporations Act,* used to determine if information is 'material' in order that it could be considered to be inside information. Section 1042D provides:

> a reasonable person would be taken to expect information to have a material effect on the price or value of ... financial products if (and only if) the information would, or would be likely to, influence persons who commonly acquire ... financial products in deciding whether or not to acquire or dispose of the first-mentioned financial products.

A important distinction here is that, under the continuous disclosure obligations, there is no requirement that an entity know, or ought reasonably to know, that the information is material, whereas there will only be a breach of the prohibition of insider trading if, as set out in section 1043A(1)(b) of the *Corporations Act*, the alleged insider:

> ... knows or ought reasonably to know, that the matters specified in paragraphs (a) and (b) of the definition of inside information in s1042A are satisfied in relation to the information.

Paragraph (b) in section 1042A relates to the concept of materiality. Accordingly, there is no liability for insider trading unless the alleged insider knows, or ought reasonably to know, that the information would be material. That is, unless the alleged insider knows, or ought reasonably to know, that a reasonable person would expect that the information would, or would be likely to, influence persons who commonly acquire ... financial products in deciding whether or not to acquire or dispose of the first-mentioned financial products.

Unfortunately, both sets of tests are somewhat convoluted. The primary difficulty here is that the insider trading laws require some subjective knowledge, either actual or constructive, that the information is material, whereas the continuous disclosure obligations impose only an objective test requiring disclosure where information is material, regardless of whether the relevant entity has knowledge that it is material or not. ASX acknowledges in the Guidance Note that the position under the continuous disclosure obligations 'can give rise to some difficulty in practice' but suggests that the difficulty is 'inescapable'.

I would suggest that this difficulty could be addressed by incorporated the concept of "knowledge" of materiality into the continuous disclosure obligations. While it is understood that ASX does not wish for liability to avoided merely because an entity could potentially argue that neither it nor its officers "knew" that the information was material, this position could be remedied by providing, in a similar manner to the insider trading laws, that the obligation is to disclose information "that the entity knows, or ought reasonably to know" that a reasonable person would expect to have a material effect on the price or value of the entity's securities. If desired, a separate provision could be inserted to provide that an entity is taken to know, or ought reasonably to know, that a reasonable person would have such an expectation, if an officer or the entity (or other personnel) had such knowledge, or ought reasonably to have such knowledge.

**Concluding remarks**

Accepting that it is highly undesirable that two sets of laws and obligations dealing with similar issues and with the same underlying rationale should differ significantly in two important respects, I have chosen to offer suggestions to ASX as to how those issues might be addressed, in the context of the review of the guidance note concerning the continuous disclosure obligations. While they may be of broader operation and consideration that those originally contemplated when preparing the consultation paper, ASX may have a future opportunity to consider the precise operation of the continuous disclosure obligations in this context, which may be informed by these suggestions.

I appreciate the opportunity to make a submission on these topics. Please feel free to contact me if I can be of any further assistance.

Yours sincerely

**Juliette Overland**