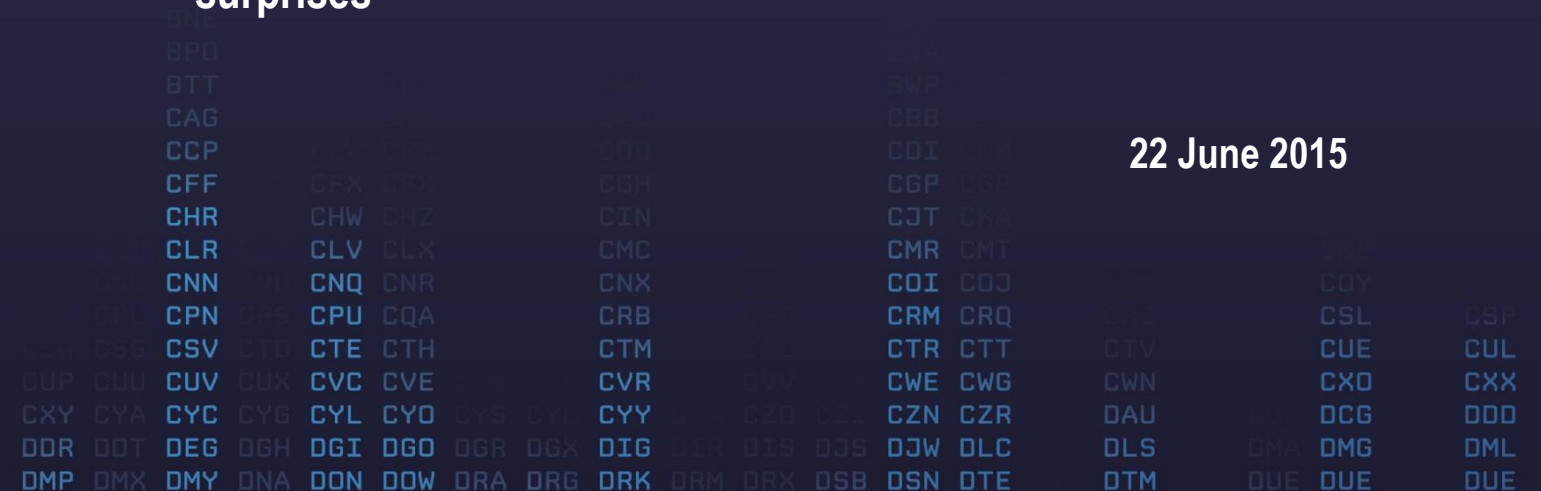


ASX Listing Rules Guidance Note 8 Continuous Disclosure: Listings Rules 3.1 – 3.1B

**Response to consultation feedback on proposed changes to
Guidance Note 8 related to analyst and investor briefings,
analyst forecasts, consensus estimates and earnings
surprises**

22 June 2015



Introduction

1. On 6 March 2015 ASX issued a public consultation paper [Proposed changes to Guidance Note 8 Continuous Disclosure: Listing Rules 3.1-3.1B](#) ('GN 8') proposing expanded guidance on analyst and investor briefings, analyst forecasts, consensus estimates and earnings surprises.

Consultation response

2. ASX received nine written submissions in response to the consultation paper from:

Australasian Investor Relations Association (AIRA)
Australian Institute of Company Directors (AICD)
BHP Billiton Limited (BHP Billiton)
Governance Institute of Australia (GIA)
Group of 100 (G100)
Johnson Winter Slattery (JWS)
Law Council of Australia, Business Law Section, Corporations Committee (LCA)
Telstra Corporation Limited (Telstra)
University of Sydney Business School, Ms Juliette Overland, Senior Lecturer (USBS)

Their submissions can be viewed on the 'Public Consultations' page of the ASX website at: <http://www.asx.com.au/regulation/public-consultations.htm> (next to the entry for 28/04/15).

3. ASX would like to thank each of the above respondents. ASX has found their feedback most helpful in formulating the final version of the changes to GN 8.

General support for changes

4. Generally speaking, the submissions were broadly supportive of the changes proposed by ASX in its consultation paper. Comments in support included:

AICD: We congratulate ASX on what is, in our view, a balanced and clear update to its existing Guidance Note 8. ... Overall, the amendments are useful and the additional guidance and examples provided in the updated draft are very clear.

BHP Billiton: In summary, BHP Billiton is very supportive of the proposed changes to Guidance Note 8 which reflect the guidance by the Australasian Investor Relations Association (AIRA) in relation to the Compilation and Dissemination of Broker Forecasts and Consensus Estimates by Listed Entities. The proposed changes promote transparency and are consistent with BHP Billiton's commitment to maintaining the highest standards of disclosure, ensuring that all investors and potential investors have the same access to high-quality, relevant, accessible and timely information to assist them in making informed decisions.

GIA: Governance Institute supports the proposed amendments to Guidance Note 8, as they are very helpful in clarifying in a formal manner when an earnings surprise ought to be disclosed to the market. They also address helpfully a number of issues related to analyst and investor briefings and the publication of analyst forecasts and consensus estimates.

JWS: In general terms, we support the proposed changes to GN 8. We consider that, for the most part, the changes will be helpful to listed entities and their advisers. In particular, we support proposed clarification to the effect that listed entities are not required to release internal budgets or earnings projections to the market ... and that a distinction is to be drawn, for the purpose of “earnings surprises”, between entities that have issued earning guidance and those that have not.

Telstra: Telstra supports the proposal to provide greater clarity on when an earnings surprise may require disclosure and the distinction in this regard between circumstances where market expectations may be measured by reference to an entity’s published earnings guidance and where they are not. We also broadly support the proposed rewrite of ASX guidance on when it may be appropriate to correct analyst forecasts and consensus estimates.

USBS: 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.

5. A number of submissions took issue with some of ASX’s proposed changes or recommended additions or modifications. A summary of these submissions, and ASX’s response, is set out in the table in the Annexure.

Final form of Guidance Note

6. The final version of GN 8 reflecting changes to address the feedback ASX received in the consultation process is attached as Attachment A.
7. ASX has consulted with ASIC in relation to the changes it has included in the final form of GN 8 in Annexure B. Those changes reflect input received from ASIC.
8. To help readers to identify the changes, ASX has also attached a mark-up comparing the final version of GN 8 to the draft version of GN 8 issued with ASX’s 6 March consultation paper (Attachment B), as well as a mark-up comparing the final version to the current (pre-consultation) version (Attachment C).
9. In addition, ASX has revised its booklet *Continuous Disclosure: an Abridged Guide* to reflect the changes made to GN 8. A mark-up of the booklet showing the changes is attached as Attachment D. A clean version of the booklet can be downloaded from the ASX Compliance “downloads” page on the ASX website: <http://www.asx.com.au/regulation/compliance/compliance-downloads.htm>
10. ASX intends to publish the final form of GN 8 on 1 July 2015. It will be available from that date on the “Rules, guidance notes and waivers” page on the ASX website: <http://www.asx.com.au/regulation/rules/asx-listing-rules.htm>

Annexure: Specific feedback on proposed changes to GN 8 and ASX's response

Note: The headings in this Annexure referring to sections of GN 8 refer to the section numbers in the final version of GN 8 rather than the consultation version. These differ slightly as a result of the creation of a separate section (section 7.6) dealing with the publication of analyst forecasts or consensus estimates to analysts. Previously this material appeared in section 7.5 of the consultation version of GN 8.

Respondent	Comment	ASX Response
Section 7.3 – market sensitive earnings surprises		
JWS	We support proposed clarification ... that a distinction is to be drawn, for the purpose of “earnings surprises”, between entities that have issued earning guidance and those that have not.	ASX appreciates the support.
LCA	We agree it is worthwhile reiterating that a listed entity which has not given any earnings guidance is not necessarily required to disclose a 5-10% cent difference between internal projections and analyst consensus estimates, and that the s1041H test is only relevant where a representation has been given to the market in the form of earnings guidance. Some listed entities may still be tempted to ‘manoeuvre’ analyst forecasts in a non-public or selective manner to align them with the entities' internal projections, so as to avoid a disclosure obligation, but the pressure to do so should be less if it is clear that the disclosure obligation only arises if the difference between internal projections and analyst forecasts is ‘so significant’ that a reasonable person would expect the difference to have a material effect on price or value.	ASX appreciates the support.
Telstra	We support the proposal to provide greater clarity on when an earnings surprise may require disclosure and the distinction in this regard between circumstances where market expectations may be measured by reference to an entity’s published earnings guidance and where they are not.	ASX appreciates the support.

Respondent	Comment	ASX Response
AIRA G100	<p>[G100] Section 7.3 of Revised GN8 places increasing emphasis on the more stringent accounting materiality threshold for determining whether disclosure is required for an earnings surprise, in the case of entities that have provided earnings guidance. This is in contrast to the general materiality test (which is equated to anticipated share price movement test) for an entity that has not provided earnings guidance.</p> <p>The G100 is concerned that because of this 'two-tiered' approach, listed entities will be decreasingly inclined to provide earnings guidance knowing they are voluntarily holding themselves to what is likely to be a more stringent test should earnings variations arise.</p> <p>[AIRA] The proposed amendments in section 7.3 item 2 emphasise, beyond what is necessary or appropriate, the differences in the ASX's expectations of companies who choose to provide guidance and those who do not. These changes will effectively formalise a two-tier regulatory system – with a clear indication that ASX will regulate the two categories differently.</p> <p>The proposed added emphasis in relation to the different regulatory expectations of the ASX between those companies that do provide guidance and those that don't, will be interpreted by many as a clear statement that ASX considers any guidance to the market to be high risk, warranting tighter regulation by ASX and that companies should move away from providing guidance to the market unless it becomes necessary in order to avoid a market sensitive earnings surprise.</p> <p>The outcome will be that companies (and their Boards) will be very reluctant to provide guidance even where they otherwise believe it to be both appropriate and "safe" (in the sense of having reasonable grounds to do so).</p> <p>We recommend that the final two paragraphs in section 7.3 item 2 are deleted. The law in this area is adequately covered by the existing guidance and the proposed changes will have counter-productive outcomes.</p>	<p>ASX would note that what AIRA and G100 have described as a "two-tier" regulatory approach is not new – it was already a feature of the revised version of GN 8 issued in May 2013. In addressing the issue of earnings surprises, that version of GN 8 drew a distinction between situations where an entity had published earnings guidance and those where it had not. In the former case, ASX suggested that an entity should consider updating its earnings guidance if its actual or projected earnings differed from its guidance by more than 5-10%. In the latter case, ASX declined to provide any percentage guidelines, for the reasons articulated in GN 8.</p> <p>The changes ASX is now making to GN 8 in this area are simply intended to reduce the risk that readers will confuse or conflate the 5-10% variation guideline recommended by ASX as to when a listed entity should consider updating any earnings guidance it has given to the market, with those situations where a listed entity has not given earnings guidance to the market.</p> <p>The reasons for doing this were explained in ASX's 6 March consultation paper. ASX was concerned that some listed entities may have misinterpreted the updated guidance around earnings surprises in the May 2013 rewrite of GN 8 as suggesting they might have to give an earnings update under Listing Rule 3.1 just because their actual or projected earnings happened to differ from consensus forecasts by 5-10%. ASX was concerned that this may have spurred some listed entities to try to "manoeuvre" analyst forecasts in a non-public or selective manner to align them more closely with their own internal projections, so as to reduce the perceived risk that they might otherwise have to give an earnings update to the market.</p> <p>ASX therefore wanted to make it clear that it does not expect entities who have not published earnings guidance to issue an earnings update just because their actual or projected earnings happen to differ from consensus estimates by 5-10%.</p> <p>This is not a case of "tighter regulation" being applied to situations where an entity has published earnings guidance than those where it has not. It</p>

Respondent	Comment	ASX Response
		<p>is a function of the fact that the market will expect earnings guidance from an entity to be inherently more authoritative and reliable than other measures of expected earnings, such as analyst forecasts or prior period earnings. It is therefore likely to take a comparatively smaller variation between the entity's actual or projected earnings and its published earnings guidance for that to be considered market sensitive than would be the case for a variation against analyst forecasts or prior period earnings.</p> <p>For these reasons, ASX does not agree with AIRA's characterisation of its proposed changes to GN 8 as "beyond what is necessary or appropriate".</p> <p>ASX would add that guidance on earnings surprises, particularly for those entities that have published earnings guidance, is not intended in any way to discourage listed entities or their boards from issuing earnings guidance. It is simply intended to ensure that the market is kept properly informed if an entity's actual or projected earnings differ materially from its guidance. ASX has added a statement to this effect at the end of the commentary on question 2 in section 7.3.</p>
G100	<p>In addition, the G100 feels this 'two tiered' approach penalises guidance entities that have provided guidance with:</p> <ul style="list-style-type: none"> • 'recovering' earnings (ie low earnings compared to their asset base or future potential) given the 5-10% materiality guidance on earnings points to very small variation in earnings; and • cyclical earnings with the 5-10% materiality guidance on earnings being a more challenging level for a non-cyclical entity. <p>At the very least, we consider that the existing drafting in GN 8 should be modified to specifically cite examples of possible exceptions to the accounting materiality test for entities with cyclical or recovering earnings, building on the existing references in the Guidance Note that for some entities a measure closer to 10% may be more appropriate.</p>	<p>GN 8 states:</p> <p><i>ASX would recommend that the entity consider updating its published earnings guidance for the current reporting period if and when it expects there to be a material difference between its actual or projected earnings for the period and the guidance it has given to the market. For these purposes, ASX would suggest that entities apply the guidance on materiality that formerly appeared in the Australian Accounting Standards, that is:</i></p> <ul style="list-style-type: none"> • <i>treat an expected variation in earnings compared to its published guidance equal to or greater than 10% as material and presume that its guidance needs updating; and</i> • <i>treat an expected variation in earnings compared to its published guidance equal to or less than 5% as not being material and</i>

Respondent	Comment	ASX Response
		<p>presume that its guidance therefore does not need updating, <u>unless, in either case, there is evidence or convincing argument to the contrary.</u> Where the expected variation in earnings compared to its published earnings guidance is between 5% and 10%, the entity needs to form a judgment as to whether or not it is material. Smaller entities or those that have relatively variable earnings may consider that a materiality threshold of 10% or close to it is appropriate. Very large entities or those that normally have very stable or predictable earnings may consider that a materiality threshold that is closer to 5% than to 10% is appropriate.</p> <p><u>This recommendation is purely a suggestion to assist entities in determining if and when they should update their published earnings guidance. The mere fact that an entity may expect its actual or projected earnings to differ from its published guidance by more (or less) than a particular percentage will not necessarily mean that its guidance is (or is not) misleading.</u></p> <p>This guidance is sufficiently flexible to allow an entity with very low or cyclical earnings legitimately to take the view, in appropriate circumstances, that a 5-10% variation in its actual or projected earnings compared to guidance at a particular point in time is not material.</p> <p>However, to remove any doubt on this score, ASX has added a footnote (footnote 214) to GN 8 stating that:</p> <p><i>An example of where there might be convincing argument that a 5-10% variation between an entity's actual or projected earnings and its published guidance is not material would be where an entity has particularly low earnings, meaning that a 5-10% variation would be very low in absolute terms and therefore unlikely to have a material effect on the price or value of the entity's securities. Another example would be where an entity has particularly "lumpy" revenue or expenses – the fact that it may be more than 5-10% above or below its published guidance part way through a financial period may not be market sensitive if that situation is expected to correct itself over the</i></p>

Respondent	Comment	ASX Response
		<p><i>course of the financial period as it receives revenue and incurs expenses.</i></p>
G100	<p>Our preferred solution for identification of a possible earnings surprise is to place primary emphasis on the general materiality test for all entities. The 5-10% materiality variation test (against guidance or, against consensus or prior period in the absence of guidance) could then be described as an indicator of possible earnings surprise.</p>	<p>For the reasons state in the May 2013 version of GN 8 and expanded upon in the revised version of GN8 ASX is now issuing, ASX does not believe that it is appropriate to extend the 5-10% materiality guidance it has provided in relation to entities that have issued earnings guidance to entities that have not issued earnings guidance.</p> <p>For an entity that does not issue earnings guidance, the mere fact that its earnings may differ from consensus forecasts or its prior corresponding period's earnings at some point of the earnings cycle by 5-10% will not necessarily be market sensitive and therefore will not necessarily trigger the obligation to make a market announcement under Listing Rule 3.1.</p> <p>ASX is aware that, as a matter of practice, some larger listed entities apply ASX's 5-10% materiality guidelines to consensus forecasts as a potential trigger point for the board to consider whether it should be making an announcement to the market to clarify its earnings. ASX has no issue with listed entities adopting that practice.</p> <p>However, ASX does not believe it is appropriate for it to include a general statement in GN 8 that an entity should consider issuing a market announcement with updated earnings guidance when its actual or projected earnings differ by 5-10% from consensus.</p>
AICD	<p>Directors continue to have concerns with respect to the expectation that companies must disclose differences between their earnings and "the consensus estimate" of sell side analysts. It is often the case that determining a consensus among analysts is difficult because the spread on analysts' views on expected earnings is quite large. The spread of views may be significant even for smaller listed entities that are only covered by two or three analysts.</p>	<p>ASX notes the concern but believes that this issue is already adequately addressed in section 7.3 of GN 8.</p> <p>Section 7.3 highlights that analyst forecasts are only a guide to the market's expectations around earnings. It also notes that there are a number of approaches that an entity may legitimately take in terms of using analyst forecasts as a measure of the market's expectations. For example, some entities may use the "consensus estimate" as a central measure of analyst forecasts. They may obtain this from a market data vendor or they may calculate it for themselves. If they feel that the consensus estimate is being distorted by an obvious outlier that is out of</p>

Respondent	Comment	ASX Response
		<p>line with their own internal forecasts, they might also adjust the consensus estimate to exclude that outlier. Other entities may not use consensus at all, but simply plot the various analyst forecasts and if all or most of them are clustered within a reasonable range, treat that range as representing the market's view of their likely earnings.</p> <p>Section 7.3 further recognises that this can be a difficult area for an entity and its officers. Forecasting its earnings for the current reporting period with an appropriate degree of confidence, endeavouring to work out what the market is expecting its earnings to be and then predicting how the market will react if its earnings significantly differ from those expectations involves many variables and requires considerable judgment. Section 7.3 notes that ASX is mindful of this when it considers whether it should refer a potential breach of Listing Rule 3.1 to ASIC involving a market sensitive earnings surprise. The matters ASX refers to ASIC usually involve an obviously significant difference in earnings compared to the relevant base used to measure the market's expectations of earnings and where the announcement of the entity's results in fact triggers a material change in the market price of its securities.</p>
AICD	<p>In a number of instances, GN 8 refers to changes in earnings relative to the prior corresponding period (for example, in relation to earnings surprises). While this will be appropriate for some companies, it should be recognised in GN 8 that this will not always be a useful comparison for the purpose of determining whether a material change has occurred. For example, where a company is in a growth stage, significant changes may occur between reporting periods that are completely normal and expected.</p>	<p>ASX agrees and has modified the materials answering the question "<i>How does an entity determine what the market is expecting its earnings for the current reporting period to be?</i>" in section 7.3 of GN 8 to address this issue.</p>
<p>Section 7.4 – correcting analyst forecasts and consensus estimates</p>		
Telstra	<p>We broadly support the proposed rewrite of ASX guidance on when it may be appropriate to correct analyst forecasts and consensus estimates.</p>	<p>ASX appreciates the support.</p>

Respondent	Comment	ASX Response
BHP Billiton	We are supportive of the proposal by the ASX to re-write section 7.4 of GN 8. BHP Billiton agrees with ASX's position that an entity does not have an obligation to correct the earnings forecast of an individual analyst, or the consensus estimate of an individual market vendor, to bring it into line with internal earnings projections; and that there should be no obligation on an entity to publish its internal earnings projections just because they are different from an analyst's forecast or a consensus estimate of analysts' forecasts.	ASX appreciates the support.
GIA	While it is implicit in the commentary that the guidance in section 7.4 addresses the situation where companies have not published earnings guidance, we recommend that for greater clarity the heading of this section should be changed to 'Correcting analyst forecast and consensus estimates <i>where no earnings guidance is published</i> ' [italics show suggested additional words]	ASX considers that the current heading to section 7.4 is appropriate. An entity that has published earnings guidance could still seek to influence or manoeuvre the forecasts of analysts in a non-public or selective way. For example, an entity might find itself in a situation where analysts' forecasts are starting to diverge from its guidance because the analysts are interpreting a particular development in a different way than the entity. To avoid this causing embarrassment or requiring a more public explanation, the entity might be tempted to discuss the development in question with analysts and get them to move their forecasts closer to the entity's guidance. This could lead to the entity conveying to analysts information about the development that has not been conveyed to the market as a whole.
Telstra	We consider it would be helpful for ASX to clarify the proposed application of the rewritten guidance on monitoring analyst forecasts and consensus estimates in cases where an entity has published current earnings guidance.	ASX has amended section 7.4 of GN 8 to recommend that an entity that has published earnings guidance and that is covered by sell-side analysts monitor their forecasts and/or consensus estimates for the useful information they may reveal. For example, if analyst forecasts or consensus estimates are diverging materially from the entity's guidance, that may indicate that the analysts no longer attach any credence to its guidance and that, in turn, may warrant an inquiry as to why that is so.

Respondent	Comment	ASX Response
LCA	It might be useful if the revised guidance could expand a little on the scenario where the market may not have fully appreciated the import of the entity's previous announcements. For example, it may be worthwhile stating that if this has occurred, the way to address it would be to make a further announcement to the market, rather than through contact to the analysts selectively.	ASX agrees and has modified section 7.4 of GN 8 to address this point.
Section 7.5 – publishing analysts' forecasts and consensus information generally		
BHP Billiton	We are supportive of the proposed new section 7.5 in GN 8 in relation to the publication of analyst forecasts or consensus estimates. BHP Billiton agrees with ASX's position that an entity can choose to publish a range of analysts' forecasts and consensus estimates with an appropriate disclaimer on the entity's website.	ASX appreciates the support.
G100	We are supportive of the guidance found in section 7.5 of revised GN 8 concerning the approach to publishing analyst forecast information (that is, provision of a range or all forecasts rather than a point estimate of consensus, and inclusion of a 'no endorsement' disclaimer).	ASX appreciates the support.
GIA	To assist companies to turn their minds actively to considering what approach they take to consensus, and whether they may need to include a reference to their approach in any announcement to the market, GIA recommends that GN 8 contain a reference to the guidance on this matter issued by the Australasian Investor Relations Association (AIRA), <i>Member Update #7 Special edition on Compilation and Dissemination of Broker Forecasts and Consensus Estimates by Listed Entities</i> .	The guidance included in <i>AIRA Member Update #7 Special edition on Compilation and Dissemination of Broker Forecasts and Consensus Estimates by Listed Entities</i> reflected substantial input by ASIC and ASX. The revised version of GN 8 incorporates and expands upon this guidance. GN 8 should therefore be regarded as superseding <i>AIRA Member Update #7</i> and AIRA members should refer to GN 8 for authoritative guidance on these issues rather than <i>Member Update #7</i> .
G100	For clarity we seek inclusion of comments in section 7.5 that indicate that a listed entity can supply analyst forecast information to an enquiring party in the same manner as the section sets out for publishing such information (that is, provision of range or all forecasts and inclusion of a 'no endorsement' disclaimer).	ASX does not agree. Neither ASIC nor ASX would be comfortable with a listed entity disclosing this type of information selectively. ASX has, however, modified section 7.5 of GN 8 to include a comment that: ...

Respondent	Comment	ASX Response
		<p><i>Having published information about analyst forecasts in this format and with this disclaimer [ie in the format and with the disclaimer recommended by ASX] on its website and/or in a market announcement, ASX would have no issue with an entity referring an interested party with an enquiry about analyst forecasts to the relevant web page or market announcement for further information. ASX would not regard that as de facto guidance, provided the entity does not do or say anything that conflicts with the disclaimer.</i></p>
LCA	<p>In circumstances where the listed entity is not giving earnings guidance, we are not sure why section 7.5 lends any support to the entity publishing analyst forecasts on its website, even with the disclaimer, or for that material to then be released on the Markets Announcement Platform. We understand the 'equality of information' argument, but think that if the entity is putting out an announcement, the market will simply ignore the disclaimer and treat the announcement as a form of de facto guidance. Publishing analyst forecasts on the website or Platform also encourages investors to require the entity to comment on those forecasts, significantly increasing the risk of de facto earnings guidance.</p> <p>For these reasons, we do not think that ASX should be seen to be supporting the practice of publishing analyst forecasts, even with all of the explanation around the need for legal disclaimers.</p>	<p>ASX acknowledges the point but it has received a number of submissions over recent years that investors find information about analyst forecasts helpful and relevant and that some listed entities consequently have a strong desire to provide this information to their investors.</p> <p>ASX has carefully considered how this information should be disclosed to reduce the risk of it being seen to be “de facto guidance” and that is reflected in the amendments ASX is proposing to section 7.5 of GN 8.</p> <p>ASX could refuse permission to allow listed entities to publish information about analyst forecasts on the Market Announcements Platform on the basis that it is not market sensitive but this would not prevent listed entities wanting to provide this information to their investors from publishing it on their websites.</p> <p>On balance, ASX believes it is better for entities to have the opportunity to publish this information (in the format and with the disclaimer recommended by ASX) on the Market Announcements Platform – even if it is not required to be disclosed under Listing Rule 3.1 – so that it is readily available to investors searching that Platform.</p>
AIRA BHP Billiton	<p>[AIRA] The proposed additional guidance in section 7.5 in relation to publishing analyst forecasts or consensus estimates does not allow for the exclusion of analyst reports even where they are considered by the company to be manifestly defective.</p> <p>ASX guidance should appropriately emphasise the need to ensure that any dissemination of an entity's view of consensus occurs in a way that</p>	<p>ASX agrees and has modified section 7.5 of GN 8 to address this issue.</p>

Respondent	Comment	ASX Response
	<p>is not misleading and does not amount to selective disclosure or de facto market guidance.</p> <p>ASX should stop short of recommending that entities should only publish consensus if all analysts are included – irrespective of whether an entity views particular analyst estimates to be defective (because they are stale or otherwise).</p> <p>Encouraging listed entities to err on the side of including stale or objectively “out of the park” analyst estimates in the entity’s own analysis of “consensus” will:</p> <ul style="list-style-type: none"> • increase the risk of entities relying on a defective view of consensus when considering what market expectations are (and therefore whether a market sensitive earnings surprise is likely); and • if disseminated, is more likely to result in misleading information being released to the market. <p>With respect to stale estimates, AIRA considers that there should be two grounds for exclusion. First, where the analyst report has not been updated since a periodic financial report. And second where it has not been updated since a major announcement.</p> <p>In both cases, the issuer excluding the report could expressly disclose the date and the specific financial report or the announcement referred to when disregarding the stale estimates and in such a way ensure that the disclosure was not misleading by omission.</p> <p>[BHP Billiton] Companies may have objective and rational bases for excluding a particular analyst forecast, and it is our view that the updates to GN 8 should enable them to do so provided they comply with the key underlying principles of no selective disclosure and ensuring no misleading information as well as provide an explanation for exclusion on their website. BHP Billiton recognises that ASX may wish to include examples of the application of these principles, and suggests that ASX clarify that such examples are not prescriptive conditions nor an exhaustive list, but merely illustrative examples.</p>	

Respondent	Comment	ASX Response
	<p>For example, footnote 227 suggests the only circumstance in which companies may exclude publishing certain analyst forecasts or estimates from the consensus figures is when the analyst has left his/her firm <i>and</i> his/her last forecast is now substantially out of date.</p> <p>It is our view that forecasts (disregarding whether an analyst has left his/her firm) which are substantially out of date time-wise or because they have not been updated to reflect a key public announcement by the company (ie "stale information") can distort consensus data and should be excluded, provided that the basis for excluding such forecast is objective, rational and fully disclosed. Further, if an analyst's estimate has not been updated to incorporate a mining and resources company's most recent and publicly available quarterly production and sales volume information, it is our view that this estimate is based on stale information. Excluding this analyst's estimate from the consensus is once again both objective and rational and is <i>less</i> likely to provide a potentially misleading indication to the market. Similarly, there may be other good reasons for excluding certain analyst forecasts particularly in circumstances where the external variables factored into the estimates can be volatile and become substantially out of date quickly (even if a substantial period of time has not passed. ...</p> <p>BHP Billiton's view is that there should be clear guidance from ASX that exclusion is permitted as long as the reason for exclusion is objective, rational and clearly disclosed and does not amount to selective disclosure or misleading information. This approach will lead to companies calculating a more accurate consensus which is useful for their own purposes, in determining market expectations and whether there is likely to be a market sensitive earnings surprise, as well as contributing to a better informed market. An approach that is more restrictive than this risks leading to companies disseminating inaccurate information that is more likely to mislead rather than inform the market.</p>	

Respondent	Comment	ASX Response
BHP Billiton	BHP Billiton suggests that guidance regarding exclusion of analysts (as well as some legitimate reasons for exclusion such as the source, completeness and currency of the information used in the analyst report) should be included in the substantive text of GN 8, rather than in a footnote. Companies will be reluctant to exclude analyst reports on the basis of a footnote in the Guidance Note, even where there are clear and legitimate reasons to do so.	ASX agrees and has moved the relevant footnote into the body of section 7.5 of GN 8.
G100	The last paragraph of section 7.4 addresses how to deal with analyst forecasts that vary widely from others. We agree it is appropriate to correct manifest analyst errors without disclosing any market sensitive information. However, the wording of the section implies that the entity will automatically know the nature of the error underlying an outlying forecast. In order to identify possible corrections to an analyst's work, an entity may need to discuss with the analyst the modelling logic and assumptions on which underlies the 'errant' forecast – that is, the specific error may not be apparent on the face of the analyst's report(s). However, in light of the matter discussed in point made in the preceding section, in ASX's view the entity seems to be at risk of providing a signal to the analyst in seeking to discuss the analyst's assumptions.	<p>ASX acknowledges the point but it is not inclined to make any changes to GN 8 to address it.</p> <p>It would be dangerous for ASX to give a blanket imprimatur to a listed entity having detailed discussions about modelling logic and assumptions with an analyst whose forecast the entity considers to be manifestly wrong. Those discussions could easily lead to selective disclosure of information about earnings, in breach of continuous disclosure requirements.</p> <p>Listed entities that choose to have these types of conversations with analysts need to tread very carefully so as not to breach their continuous disclosure obligations.</p>
G100	<p>We have a concern with the drafting of section 7.5 of Revised GN8 and the statement that <i>'asking analysts to provide information about the assumptions underpinning their forecasts could, in some circumstances, be interpreted as a signal to the analysts that the entity considers their assumptions, and a fortiori their earnings forecasts, to be materially inaccurate'</i>.</p> <p>For many of our members, particularly those exposed to commodity prices and foreign exchange rates, understanding the assumptions analysts are using to reach their earnings estimates is essential to both:</p> <ul style="list-style-type: none"> • continually improve the basis for earnings guidance and information disclosure on business drivers, and • have a rational basis for discussion, particularly with less informed 	ASX has deleted this statement from GN 8. However, it would repeat its cautionary comment above that listed entities that choose to have these types of conversations with analysts need to tread very carefully so as not to breach their continuous disclosure obligations.

Respondent	Comment	ASX Response
	<p>analysts, on the framework and factors they are assessing in modelling the business.</p> <p>Overall we feel this updated guidance will have the effect of discouraging necessary and useful interactions between entities and analysts.</p>	
BHP Billiton	<p>BHP Billiton suggests that ASX also consider providing guidance in relation to the content of disclaimers that can be included by an entity when disclosing consensus data. Recognising that each disclaimer should be worded on a case by case basis to ensure a more accurate disclosure that reflects the company's particular situation and reasons for exclusion, it may be appropriate to include guidance that the disclaimer should include such information as the company determines is necessary in the context of the key underlying principles noted above. For example, an appropriate disclaimer clearly made on the company's website could state which analysts are "known analysts" from the company's perspective as well as the reasons for excluding certain forecasts.</p>	ASX has modified section 7.5 of GN 8 to address this issue.
Section 7.6 – publishing analyst forecasts or consensus estimates to analysts (previously part of section 7.5)		
AIRA	<p>Where an entity has published its view of consensus on its website, it will be entirely appropriate in communications with analysts, verbally or otherwise, to refer analysts to that webpage.</p> <p>Accordingly, AIRA requests that a clear statement is made in section 7.5 confirming that, having published consensus, an entity will be able to draw the attention of analysts to that information including in response to questions from analysts as to where the analysts' own forecasts sit relative to consensus.</p>	ASX agrees and has included material in what is now section 7.6 of the final version of GN 8 to address this issue.

Respondent	Comment	ASX Response
AIRA	<p>Section 7.5 states that 'if an entity intends to poll analysts for information about their forecasts, it needs to be careful how it conducts this process...' AIRA considers that this paragraph is not particularly helpful and is unnecessary given that it is now clearly understood that the law prohibits companies from 'hinting' at a forecast.</p> <p>It is submitted that the proposed change undermines a listed entity's ability to both:</p> <ul style="list-style-type: none"> • collect information to understand the factors that are driving analysts' forecasts (an important part of the feedback loop to continually improve basis for guidance and information disclosure on business drivers); and • have a rational discussion, particularly with less informed analysts, on the framework and factors they are assessing in modelling the businesses. 	<p>ASX has deleted this statement from GN 8.</p> <p>However, it would repeat its cautionary comment above that listed entities that choose to have these types of conversations with analysts need to tread very carefully so as not to breach their continuous disclosure obligations.</p>
AIRA	<p>Section 7.5 includes a new addition, footnote 218, which refers to providing analysts with a periodic summary of all of their forecasts. It is unclear why the guidance includes this footnote, as it appears contradictory to the tenor of the guidelines.</p>	<p>ASX has deleted this footnote and moved the contents into the body of GN 8 (see new section 7.6). This should make it clear why this guidance has been included in GN 8.</p>
<p>Section 7.7 – analyst and investor briefings (previously section 7.6)</p>		
<p>AIRA GIA G100 Telstra</p>	<p>[AIRA]: The suggestion to send all analyst or investor briefing material to the ASX for publication on the MAP will flood the MAP with immaterial information. We are concerned that this will result in a high volume of repetitive material being lodged on the Platform 'drowning out' important information and thus reducing the effectiveness and utility of the Platform.</p> <p>[GIA] Section 7.6 recommends as 'prudent practice' that any new presentation provided to an analyst or investor briefing be published on the ASX Markets Announcement Platform.</p> <p>GIA notes that many companies hold numerous presentations each</p>	<p>ASX agrees and has modified what is now section 7.7 of GN 8 to address this point.</p>

Respondent	Comment	ASX Response
	<p>year, and in many instances the presentation is the same information tailored to particular audiences (for example, changes in formatting and some updating of information), but containing no new, material, price-sensitive information. However, each presentation is, as a result of the minor changes outlined above, a new presentation.</p> <p>GIA recommends that GN 8 should clarify that companies should use their judgment and discretion as to which presentations need to be lodged on the ASX Markets Announcements Platform, that is, they should publish only those presentations containing new, market-sensitive information.</p> <p>Too much disclosure of identical information will be obfuscatory rather than helpful, given that the announcements platform could be flooded with multiple presentations, which are in essence the same.</p> <p>[G100] The proposed guidance in section 7.6 of revised GN 8 that an entity should ensure that "any new presentation to be given, or printed materials to be handed out, at an analyst or investor briefing are first given to ASX and published on the ASX Market Announcements platform before the briefing:</p> <ul style="list-style-type: none"> • creates potential market inefficiencies with members of the investment community struggling to identify if a release contains any new material information; the follow-on from this is a risk that members of the investment community overlook the meaningful releases when they are made due to duplication of information, • contradicts the foundational principle of continuous disclosure, and • can be cumbersome for the listed entity, in particular where it is undertaking a series of investor presentations over a period of time. <p>[Telstra] We recognise that it is important for entities to understand the risks of inadvertent disclosure of market sensitive information whenever a new analyst or investor briefing takes place. We are however concerned that the universal description of this risk in the final sentence of the third paragraph in section 7.6 (now section 7.7 of the final version</p>	

Respondent	Comment	ASX Response
	<p>of GN 8), albeit in the context of guidance on prudent practice, may potentially be interpreted as leaving entities without any discretion to determine if disclosure of briefing materials is necessary. This may result in some entities unnecessarily disclosing a large volume of repetitive and non-material information on the Market Announcement Platform (MAP), which may in turn make it more difficult for market participants to distinguish between material and non-material information on the MAP.</p>	
AIRA	<p>AIRA has a particular concern with the expanded paragraph in section 7.6 dealing with the post-briefing review of Q&A discussion in analyst and investor briefings to ensure that any inadvertent disclosure of material information is immediately published on the MAP.</p> <p>AIRA's members recognise the importance of post briefing "reflection". In practice, this is typically achieved through a timely cross-check between the internal attendees to confirm that they were comfortable no inadvertent disclosures occurred during the briefing. Such a process is likely to fall short of the "procedure" ASIC is contemplating, ie a relatively detailed review of Q&A after each briefing. A procedure of that type would be impractical in the context of what are often multiple back to back "one on one" briefings with investors and analysts throughout the day.</p>	<p>ASX has modified what is now section 7.7 in the final version of GN 8 to read:</p> <p><i>An entity should, as a matter of practice, review proceedings at analyst and investor briefings, including responses provided to any questions asked at the briefing, shortly afterwards to verify that no market sensitive information has been inadvertently disclosed and, if it has, the entity should ensure that the information is published immediately on the ASX Market Announcements Platform and thereafter on its website.</i></p> <p>ASX would generally expect a listed entity to document this practice, either in its continuous disclosure policy or in another appropriate policy or procedure. Such a policy or procedure would plainly be a "procedure" within the contemplation of RG 62.</p>
GIA	<p>In the final sentence of the third paragraph in section 7.6, the language 'just too great' potentially elevates guidance on prudent actions to a rule. GIA recommends that the word 'significant' replace 'just too great'.</p>	<p>ASX has modified the language used in what is now section 7.7 of the final version of GN 8 to address this comment.</p>
GIA	<p>Section 7.6 of draft GN 8 currently concentrates on equity presentations. GN 8 should note that any briefing, be it debt, equity or industry, is capable of containing previously undisclosed market-sensitive information. Listed debt is subject to the same continuous disclosure rules as listed companies.</p> <p>GIA recommends that GN 8 clarify that any presentation that includes</p>	<p>ASX agrees and has added a footnote (footnote 236) to this effect.</p> <p>ASX would however note for the record that some briefings to bankers take place on a confidential basis in circumstances where the exclusions in Listing Rule 3.1A are likely to apply.</p>

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	new market-sensitive information, including those to debt funders, needs to be disclosed.	
Section 7.8 – other financial forecasts and exploration and production targets (previously section 7.7)		
AICD	Section 7.7 discusses 'other financial forecasts' and how these can raise similar considerations to earnings guidance. If ASX persists with its "two-tiered" regulatory approach differentiating between companies that do and don't provide earnings guidance in terms of the significance of a 5-10% variation, it should be clear that that does not extend to other forms of guidance. For example, it should not be assumed that a 10% variation in capex or expected production will, of itself, be market sensitive if prior guidance was provided to the market.	ASX believes that it is fairly clear that its 5-10% materiality guidelines apply only in relation to earnings surprises and to entities that have published earnings guidance. However, to remove any doubt, ASX has added footnote 216 confirming this.
General comments on the level of detail and length of GN 8		
AICD G100	<p>[AICD]: The increasing volume of GN 8 (now at 82 pages) is of some concern and this may impact on its usefulness as a guide. To address this we ask that consideration be given to including summaries and/or table or making changes to the current format of the Guidance Note to assist users to navigate its content.</p> <p>[G100]: Revised GN 8 represents a further step in the creation of exceptionally detailed and specific guidance in respect of continuous disclosure. We see this as counterproductive as:</p> <ul style="list-style-type: none"> • it brings to bear rules that are not universally relevant to listed entities or which are unduly onerous (examples provided separately); and • we now have an increasingly longer document (85 pages including mark ups) providing guidance on one aspect of a Listing Rule. 	<p>ASX notes the concern. Recognising this, ASX has issued a much shorter guide <i>Continuous Disclosure: An Abridged Guide</i> targeted primarily at directors and senior managers of listed entities, which only runs to 15 pages and which they may find more digestible than GN 8.</p> <p>GN 8 itself is targeted primarily at company secretaries, investor relations professionals and legal advisors. ASX believes that these stakeholders in particular benefit from the comprehensive guidance ASX has included in GN 8.</p> <p>The universal feedback ASX has received is these stakeholders is that they welcomed the more detailed guidance ASX included in GN 8 when it was subject to its major re-write in 2013. Most respondents in the current consultation have also welcomed the further guidance ASX now proposes to include in GN 8.</p> <p>ASX further notes that a number of the respondents in the current consultation (including AICD) have suggested some additional areas where the guidance in GN 8 could be expanded, highlighting the point that most stakeholders seem to want more, rather than less, guidance in</p>

Respondent	Comment	ASX Response
		this area.
G100	There is the risk that class action litigant proponents and activist shareholders may see the specific guidance of the kind contemplated by revised GN 8 as strict standards against which listed entities are to be held to account.	The purpose of GN 8 is to provide comprehensive guidance to listed entities on how to comply with their continuous disclosure obligations and thereby reduce their potential exposure to class action litigation for continuous disclosure breaches.
Other comments		
JWS	We support proposed clarification to the effect that listed entities are not required to release internal budgets or earnings projections to the market.	ASX appreciates the support.
AICD	It may be useful to provide further guidance around what a “material effect on price” would be – although recognising in GN 8 that what will be material will very much depend on particular company’s circumstances (for example, a change in the price or value of an entity’s securities of 5% may be material for some companies but not for others).	This issue is comprehensively addressed in sections 4.2, 4.3 and 8.7 of GN 8.
Telstra	<p>Telstra supports the proposal to include reference to the identity of relevant contracting parties in the list of matters that should be disclosed where a significant acquisition or disposal is announced. However we note in some cases reference merely to the name of the specific contracting parties may result in less meaningful information being provided to the market. For example, where a wholly owned subsidiary or project vehicle is the contracting party, the identity of the contracting party’s controller or associates will often be the matter of material interest to the market.</p> <p>Accordingly, we suggest the wording make it clear that there are circumstances where, in order to provide sufficient detail to enable investors to understand the ramifications and impact of the transaction, it may be appropriate for the parties to identify other persons having a material commercial interest.</p>	ASX agrees and has modified section 4.5 of GN 8 to address this point.

Respondent	Comment	ASX Response
JWS	Footnote 93 should be deleted and replaced with a reference to paragraph 7.3 only. The discussion in the footnote is unlikely to assist users, unlike the more extensive discussion in paragraph 7.3.	<p>The relevant footnote is now footnote 94. It states:</p> <p><i>ASX prefaces the phrase “earnings surprises” with “market sensitive” to limit it to those situations where an entity’s reported earnings differ so significantly from market expectations that a reasonable person would expect information about its reported earnings to have a material effect on the price or value of its securities. This is to differentiate those lesser situations, sometime also referred to as an earnings surprise, where an entity’s reported earnings differ from the consensus estimate (often described as “surprising on the upside” if the entity’s earnings are higher than the consensus estimate and “surprising on the downside” if the entity’s earnings are lower than the consensus estimate) but not necessarily to an extent that a reasonable person would expect information about its reported earnings to have a material effect on the price or value of its securities.</i></p> <p>The footnote simply explains the reason why ASX uses the phrase “market sensitive earnings surprise”. ASX does not see a reason to delete it.</p>
AIRA	AIRA cautions against ASX repeating in detail ASIC guidance (as opposed to drawing the attention of entities to the existence of the guidance) because aspects of ASIC guidance will not always be practical in all circumstances. When ASIC’s guidance is given the imprimatur of ASX endorsement, our members are put in the difficult position of being unable to confirm to their Boards that the IR process is fully compliant with all of the ASX GN 8 recommendations.	<p>The ASIC guidance referred to is ASIC Regulatory Guide 62 (RG 62). As stated in footnote 302 of the current version of GN 8 (now footnote 332 of the final version of GN 8), RG 62 was originally published in August 2000 under the title “<i>Better disclosure for investors</i>”. It was the result of a joint exercise by ASIC and ASX and the views it expresses are joint views of ASIC and ASX.</p> <p>ASX does not agree with the statement that “aspects of ASIC guidance will not always be practical in all circumstances”, especially as it relates to RG 62.</p> <p>ASX considers it entirely appropriate that GN 8 should recommend that listed entities should pay heed to the guidance given in RG 62 and incorporate that guidance in an annexure to GN 8.</p>

Respondent	Comment	ASX Response
JWS	<p>Footnote 212 states that misleading conduct will arise as a result of failing to correct earnings guidance where there has been a change in circumstances. In our submission, this is an over-simplification of the position under section 1041H of the Corporations Act (and analogous provisions). An “obligation to correct” previous earnings guidance may arise under section 1041H in certain circumstances, but the case law on when “silence” will constitute misleading or deceptive conduct is complex, and not susceptible to statements of general principle.</p> <p>The case law on silence amounting to misleading conduct is largely predicated on the maker of the statement being subject to a duty or expectation to make disclosure, coupled with awareness of circumstances triggering a need to break silence. In other words, it is not merely a change in circumstances that gives rise to an “obligation to correct” – what is required is awareness of the change in circumstances, and, in the context of “earnings surprises”, the effect of the change in circumstances on the earnings of the entity.</p> <p>As acknowledged on page 49, the fact there may be a divergence with earnings guidance or market expectations at some point in a reporting period, does not mean that this situation will remain at the end of the reporting period – the entity may take corrective action, for example.</p> <p>This underscores that unless and until the relevant organ of the entity becomes “aware” that the entity’s expected earnings are materially at variance with guidance or market expectation, no obligation to make disclosure will arise under Listing Rule 3.1A.5 Moreover, in our submission, no “obligation to correct” (for the purpose of section 1041H) should be taken arise until the entity becomes aware of the effect on earnings, so it is by no means clear that section 1041H will add anything to Listing Rule 3.1A (or section 674).</p> <p>In addition, the footnote states that a forecast may be rendered misleading by subsequent events. This (implicitly) presupposes that an earnings forecast can be regarded as some form of continuing representation, that is continually repeated once made. While it is</p>	<p>The relevant footnote (now footnote 219 in the final version of GN 8) relates to a passage in the text of GN 8 stating that:</p> <p><i>The reason for drawing a distinction between situations where an entity has published earnings guidance for the current reporting period, and those where it has not, stems from the fact that entities which publish earnings guidance make a positive representation to the market that will serve to set the market’s expectations for their earnings. If they subsequently expect their earnings to differ from their published guidance, not only will they need to consider their potential disclosure obligations under Listing Rule 3.1 and section 674 (ie, whether the difference is market sensitive in all of the circumstances), they also will need to consider their potential liability under section 1041H for having misled the market as to their likely earnings. By contrast, entities which have not published earnings guidance will generally only need to consider their potential disclosure obligations under Listing Rule 3.1 and section 674.</i></p> <p>The relevant footnote simply states:</p> <p><i>A liability could arise under section 1041H and 1041I because the original guidance was misleading. It could also arise where the original guidance was not misleading at the time but where subsequent events have rendered it misleading. In the latter case, the relevant misleading conduct is failing to correct the guidance after it has become misleading. [Emphasis added]</i></p> <p>ASX considers that footnote correctly states the position under ss1041H and 1041I and does not believe that it requires any further embellishment.</p>

Respondent	Comment	ASX Response
	<p>conceivable that this could be so in certain circumstances, the more common, and in our submission, overwhelmingly correct, characterisation would be that an earnings forecast is a statement of opinion or belief given as at the time it is made. Whether it is misleading for the purpose of section 1041H is predominantly a question as to whether it is a genuinely held opinion or belief, and based on reasonable grounds, at the time it was made. To suggest that “subsequent events have rendered it misleading” necessarily means that liability under section 1041H would arise without awareness of the subsequent events, and their effect, or possible effect, on the entity – given that the entity may be able to take corrective action.</p> <p>In view of the above, in our submission, the footnote should be deleted and the accompanying text should read:</p> <p>“... they will also need to consider their potential liability under section 1041H.”</p> <p>Alternatively, either the text or footnote 211 would need to be expanded considerably to tease out some of the nuances mentioned above.</p>	
USBS	<p>I am concerned that the continuous disclosure obligations and insider trading laws continue to diverge in application and content, despite sharing a commonality of purpose. This includes differences between:</p> <ul style="list-style-type: none"> • when a corporation is “aware” of information, with the Listing Rules deeming a listed entity to be aware not only of information that an officer of the entity possesses and that came into their possession in that capacity, but also of information that <i>ought reasonably</i> to have come into the possession of an officer in that capacity; and • the statutory tests for determining whether information is “material”. 	<p>ASX does not share this concern. The reason why the Listing Rules deem an entity to be aware of information if it ought reasonably to have come into the possession of an officer of the entity is explained in section 4.4 of GN 8. ASX considers that to be an appropriate area of divergence between continuous disclosure laws and insider trading laws.</p> <p>ASX acknowledges that there are subtle differences between the statutory tests in the Corporations Act for whether information is material for the purposes of continuous disclosure laws (section 677) and whether it is material for the purposes of insider trading laws (section 1042D). ASX addresses this point in footnote 26 of GN 8. ASX does not consider that these differences create any issue when it comes to the enforcement of Listing Rule 3.1. In any event, correcting these differences is not something that ASX has the power to do. It requires an Act of the Australian Parliament to amend the Corporations Act.</p>

Respondent	Comment	ASX Response
AIRA	AIRA members are keen adherents to “plain English” wherever possible and a number have noted the use of legalese and expressions that would have been better avoided. For example, section 7.5 refers to the Latin term ‘a fortiori’ which will be meaningless (even in the context in which it is used) for many if not most readers.	ASX acknowledges its lapse and has removed the Latin.