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Dear Ms Tan

Consultation on proposed changes to Guidance Note 8

This letter is a submission in response to ASX's Consultation Paper on proposed changes to Guidance Note 8 "Continuous Disclosure" (**GN 8**).

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[1], that, for the purpose of "earnings surprises", 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.[2]

However, there are several matters in respect of which we wish to make specific comment.

Paragraph 4.10, Footnote 93

In our submission, 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.

[1] Paragraph 7.1, page 44.

[2] Paragraph 7.3, pages 47, and 48 to 49, and footnote 202 on page 47.

Paragraph 7.3, Footnote 212 (and related text)

This footnote 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"[3] 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.

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.

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. This underscores that unless and until the relevant organ of the entity becomes "aware"[4] 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).

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 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.

In view of the above, in our submission, the footnote should be deleted and the accompanying text should read:

"… they will also need to consider their potential liability under section 1041H."

[3] An "obligation to correct" would arise in the sense that liability might result if no additional disclosure were to be made. It is not suggested that section 1041H *directly* imposes a positive duty to make disclosure.

[4] Having regard to the Listing Rules definition of "aware".

[5] Compare the discussion in the recent case of *Grant-Taylor v Babcock & Brown Limited* [2015] FCA 149 at [203].

Alternatively, either the text or footnote 211 would need to be expanded considerably to tease out some of the nuances mentioned above.

* * *

We would be pleased to expand on the points made in this submission if that would be helpful.

Yours faithfully

Johnson Winter & Slattery