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EDITORIAL SUMMARY

[1003] BCLB 22: Dr Marcel Fernandes

Robin Bowley and Aidan Douglas discuss the ASX's proposed changes to its continuous disclosure guidance for listed entities. Of particular importance is its explication of Listing Rule 3.1 and the materiality test for disclosure in the Revised Guidance Note 8. The new term "market sensitive" is introduced as a qualifier to refer to information that has a material effect on price or value. Under s 677 of the Corporations Act, "a reasonable person would be taken to expect information to have a material effect on the price or value of ... securities" -- that is, be market sensitive -- "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". The ASX comments that it interprets the phrase "persons who commonly invest" in s 677 as meaning people who commonly buy and hold securities beyond the very short term and according to the inherent value of the security. Usefully, company officers are provided with two questions to ask themselves as a heuristic for market sensitive information: "would this information influence my decision to buy or sell securities in the company at their current market price?" and "would I feel exposed to an action for insider trading if I were to buy or sell securities in the entity at their current market price, knowing this information had not been disclosed to the market?".

In *Elkington v Farsands Solutions Pty Ltd* [2012] NSWCA 334, an application for leave to appeal against an interlocutory order dismissing a statement of claim was dismissed. The applicant argued that a contract creating options for share subscription contained the following implied term: that the respondent company that granted the options would have its business decisions made by individuals who did not have obligations that conflicted with their obligations to the company. This contention arose in relation to the decisions of the respondent company, made by its board of three directors, to sell all of its shares and, later, all of its assets to another company. When the respondent company's directors made the decision to sell all of the company's assets to the same company that had purchased all of the company's shares, all three directors of the respondent company were also directors of the purchasing company and in fact had been appointed as directors of the respondent company by the purchasing company.

The court applied the rule in *Foss v Harbottle* (1843) Hare 461; ; 67 ER 189 , (see also ss 236, 237 (CA) that directors owe duties to the company, not shareholders, so that breaches are actionable at the suit of the company. A shareholder cannot sue a director for his or her wrongful conduct even if it has diminished the value of shares. Since a holder of an option cannot be in a better position than a shareholder, there was therefore no implied term and so no reasonable cause of action. The court also made the orthodox point that a director can have other allegiances or interests without being in a position of conflict due to holding multiple offices, unless the specific factual context gives rise to a conflict. In any event, any holder of options for share subscription necessarily takes the risk that the company will deteriorate in value, or even be liquidated, before the exercise of the options.

ARTICLES

[1004] "ASX consults on proposed changes to continuous disclosure guidance"

Robin Bowley, Lecturer, Faculty of Law, University of Technology, Sydney and Aidan Douglas, Associate, Minter Ellison Lawyers, London

On 17 October 2012, ASX released for public comment proposed significant changes to its continuous disclosure guidance for listed entities. These changes have included major revisions to Guidance Note 8 to ASX Listing Rule 3.1,

amendments to several of the disclosure-related ASX Listing Rules including Listing Rules 3.1, 3.1A and 3.1B, and a new shorter 13 page publication targeted at company directors and officers titled *Continuous Disclosure: An Abridged Guide*.¹ This article provides an overview these proposed changes in light of significant developments relating to market disclosure over recent years.

BACKGROUND TO ASX CONTINUOUS DISCLOSURE REVIEW AND CONSULTATION

In its Public Consultation Paper, ASX notes that since the most recent update to Guidance Note 8 in June 2005,² equity markets around the world have been tested by the fall-out from the global financial crisis, with a number of market disclosure issues emerging. It also notes that courts have ruled on various aspects of Australia's continuous disclosure laws, most recently in the *Fortescue Metals*³ and *James Hardie*⁴ cases, and that ASIC has provided further direction on the operation of these laws through its enforcement activities -- particularly through the 20⁵ continuous disclosure infringement notices it has issued under Corporations Act (2001) Pt 9.4AA⁶ since 2004.⁷ Furthermore, ASX acknowledged the scope for better understanding of, and more detailed guidance on, the continuous disclosure requirements under Listing Rule 3.1. Accordingly, in November 2010 an agreement was reached between ASIC and ASX⁸ to establish a working group to advance better disclosure for investors -- with a particular focus on reviewing Revised Guidance Note 8 to ensure its currency in light of recent market conditions and disclosure practices.⁹ As outlined below, the significantly more comprehensive¹⁰ Revised Guidance Note 8 makes references to several of these continuous disclosure infringement notices, as well as other information sources, to assist listed entities in understanding and complying with their continuous disclosure obligations under ASX Listing Rules 3.1, 3.1A and 3.1B. The most significant changes in Revised Guidance Note 8 are discussed below.

KEY REVISIONS TO GUIDANCE NOTE 8

Test for determining the materiality of information

Revised Guidance Note 8 provides more detailed guidance on ASX's approach to determining the materiality of information under Listing Rule 3.1. The notes to Listing Rule 3.1 refer to s 677¹¹ of the *Corporations Act (2001)* (Cth) (**Corporations Act**), under which a reasonable person is taken to expect information to have a material effect on the price or value of an entity's 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" those securities. Significantly, it utilises the new term "market sensitive" as a shorthand means of referring to such information.

It also explains that ASX interprets the reference to persons who commonly "invest in" securities as a reference to persons who commonly buy and hold securities for a period of time, based on their view of the inherent value of the security - as opposed to high frequency traders seeking to take advantage of very short term price fluctuations and who trade into and out of securities without reference to their inherent value and without any intention to hold them for any meaningful period of time.

Acknowledging the challenges of predicting investor reactions to the disclosure of information, Revised Guidance Note 8 suggests two questions to be considered by an entity's officers in determining whether information ought to be disclosed under Listing Rule 3.1. Firstly, "*Would this information influence my decision to buy or sell securities in the entity at their current market price?*" and secondly "*Would I feel exposed to an action for insider trading if I were to buy or sell securities in the entity at their current market price, knowing this information had not been disclosed to the market?*". It suggests an affirmative answer to either question should indicate the information may be market sensitive and if it does not fall within the carve-outs from disclosure in Listing Rule 3.1A, should be disclosed to ASX immediately¹².

Revised Guidance Note 8 also explains that in determining the material effect of information under s 677 of the Corporations Act where ASX suspects a contravention of the Listing Rules warranting a report to ASIC, ASX will generally apply the materiality guidelines in the Australian Accounting and International Financial Reporting Standards.

It explains that, in cases of delayed disclosure, movements in the market price of the entities' securities in the following ranges in the lead up to and shortly after the announcement will influence ASX's assessment of the market sensitivity of the information:

- o 10% or more will generally be regarded as confirmation the information was market sensitive, and therefore ASX will refer a potential breach of Listing Rule 3.1 and s 674 of the Corporations Act to ASIC;
- o If between 5 and 10 % , ASX will have regard to the circumstances of the case,¹³ to determine whether the information should be regarded as market sensitive; and
- o If 5 % or less, will generally be regarded as confirmation the information was not market sensitive and therefore not refer the matter to ASIC.¹⁴

The meaning of "immediately"

Revised Guidance Note 8 explains, with reference to two ASIC continuous disclosure infringement notices, and also judicial authority, that the word "immediately" in Listing Rule 3.1 should not be read as meaning "instantaneously", but rather as meaning "promptly and without delay".

It also acknowledges the speed with which listed entities can notify market sensitive information to ASX under Listing Rule 3.1 may vary depending on the circumstances. It outlines relevant factors in ASX's determination, such as: whether such information has been disclosed immediately and where and when the information originated; the forewarning (if any) the entity had of the information; the amount and complexity of the information concerned; the need in some cases to verify the accuracy or bona fides of the information; the need in some cases to comply with specific legal or Listing Rule requirements, such as the requirement for an announcement that relates to mining or oil and gas activities to comply with Ch 5 of the Listing Rules; and the need in some cases for an announcement to be approved by the entity's board or disclosure committee¹⁵

It also emphasises the importance of listed entities having appropriate compliance systems in place to ensure that potentially market sensitive information that comes into the possession of its directors, secretaries and senior managers is promptly assessed to determine whether it requires disclosure under Listing Rule 3.1 and, if so, that it is promptly given to ASX or that a trading halt is promptly requested.

Use of trading halts to manage disclosure issues

Revised Guidance Note 8 includes more detailed guidance on the use of trading halts by listed entities to manage their continuous disclosure obligations under Listing Rule 3.1 - both within and outside of market trading hours. It notes, with reference to two ASIC continuous disclosure infringement notices, that in determining whether to take enforcement action for a possible breach of s 674 of the Corporations Act, ASIC may also take into account whether a listed entity has requested a trading halt.¹⁶

Guidance on board approval of announcements under Listing Rule 3.1

Revised Guidance Note 8 provides more detailed guidance for listed entities in managing their continuous disclosure obligations when announcements require the approval of the board of directors - including convening such meetings promptly and without delay, and requesting a trading halt if necessary. It also encourages listed entities awaiting board approval of market sensitive announcements (and which have not requested a trading halt to prevent the market trading ahead of the announcement) to monitor the market price of their securities; major national and local newspapers; major news wire services, such as Reuters and Bloomberg; investor blogs, chat-sites or other social media they are aware of that regularly include postings about the entity; and enquiries from analysts or journalists, for signs that the information in the announcement may have leaked and to immediately contact ASX to request a trading halt if they detect any such signs.¹⁷

It also encourages listed entities to have template trading halt requests prepared and ready for use at all times; when the entity has advanced knowledge of events likely to require announcement under Listing Rule 3.1, to have draft announcements prepared for release straight away; and for the person responsible for communications with ASX to be both knowledgeable and contactable at all times.¹⁸

Headings and contents of ASX announcements

Revised Guidance Note 8 provides guidance for listed entities on both the headings¹⁹ and contents²⁰ of announcements under Listing Rule 3.1.

More guidance -- application of the carve-outs to disclosure under ASXLR 3.1A

Revised Guidance Note 8 provides more detailed guidance on the application of the carve-outs to disclosure under Listing Rule 3.1A.²¹

Regarding incomplete proposals or negotiations, it acknowledges that agreements will generally not be binding until signed or formally adopted by the entity. However, it notes that it is not acceptable for a listed entity to commit itself to agreements yet delay signing in an attempt to delay its disclosure.²²

It explains that matters may be "insufficiently definite to warrant disclosure" if the information is so vague, embryonic or imprecise; the veracity of the information is so open to doubt; or the likelihood of the matter occurring, or its impact if it does occur, is so uncertain, that a reasonable person would not expect it to be disclosed to the market.²³

It explains that information will be "confidential" if it is known to only a limited number of people; the people who know the information understand that it is to be treated in confidence and is only to be used for permitted purposes; and those people abide by that understanding.²⁴

Clarification regarding false markets: ASX LR 3.1B

Revised Guidance Note 8 provides further guidance on "false markets", which is when there is material misinformation or materially incomplete information in the market compromising proper price discovery. This may arise, for example, where:

- o a listed entity has made a false or misleading announcement;
- o there is other false or misleading information, including a false rumour, circulating in the market; or
- o a segment of the market is trading on the basis of market sensitive information that is not available to the market as a whole.²⁵

It encourages listed entities to deal proactively with potential false market situations.²⁶

Guidance on specific disclosure issues

Revised Guidance Note 8 provides significantly more guidance for listed entities in dealing with earnings guidance,²⁷ earnings surprises,²⁸ and the correction of analyst forecasts.²⁹ It also briefly addresses disclosure of information regarding exploration and production targets, noting that ASX plans to address this topic in further detail in its proposed new Guidance Note 31 *Reporting on Mining Activities*.³⁰

Explanation of ASX's compliance monitoring and enforcement practices

Revised Guidance Note 8 provides significantly more guidance on ASX's compliance monitoring and enforcement practices; in particular, how ASX utilises "price query letters" and "aware letters".³¹

Revised Guidance Note 8 also includes a flow chart diagram³² to outline the decision-making processes that listed entities should generally follow in determining whether potentially material information should be disclosed to ASX and, if this cannot be done, whether a trading halt ought to be requested. It also includes six worked examples illustrating the operation of Listing Rule 3.1,³³ as well as Guidance in the interaction between Listing Rule 3.1 and relevant provisions of the Corporations Act.³⁴

PROPOSED DISCLOSURE-RELATED AMENDMENTS TO THE ASX LISTING RULES

In conjunction with its revisions to Guidance Note 8, ASX has proposed several amendments to disclosure-related provisions of the ASX Listing Rules.³⁵ The most significant are the proposed amendments to Listing Rules 3.1, 3.1A and 3.1B.³⁶

The proposed amendments to Listing Rule 3.1 include a reference to the new definition of "information" under Listing Rule 19.12, which is based on s 1042A of the Corporations Act and includes: "(1) matters of supposition and other matters that are insufficiently definite to warrant disclosure to the market; and (2) matters relating to the intentions, or likely intentions, of a person".

Additionally, the accompanying notes to Listing Rule 3.1 refine the (non-exhaustive³⁷) examples of potentially disclosable information, replacing the current 17 examples with 12 examples³⁸ adding the words "that depending on the circumstances, could" require disclosure "by an entity" under this rule.

ASX proposes to reverse the ordering of Listing Rule 3.1A, adopting ASIC's suggestion to de-emphasise the "reasonable person" test to indicate that this test is a last, rather than first, order requirement for information not to be immediately disclosed by listed entities.

ASX also proposes to amend Listing Rule 3.1B, to remove the scope for entities to argue against providing information to ASX to correct or prevent false markets, noting that ASX is generally better placed to form views on such matters than most listed entities. Both Listing Rules 3.1A and 3.1B are also proposed to be simplified by removing the current accompanying notes, with Revised Guidance Note 8 now covering such matters more comprehensively.

CONCLUSION

ASX has invited comments on these proposed changes from listed entities, their advisors and other stakeholders by 30 November 2012.³⁹ Subject to receiving the necessary Ministerial approval for the proposed amendments to the Listing Rules,⁴⁰ ASX hopes to introduce those Listing Rule amendments and release the final version of Guidance Note 8 and the Continuous Disclosure Abridged Guide in the first quarter of 2013.⁴¹ BCLB will report on the outcomes of this consultation process and the changes once they are finalised in early 2013.

1 ASX Public Consultation *Review of ASX Listing Rules Guidance Note 8 Continuous Disclosure: Listing Rules 3.1-3.1B*, 17 October 2012.

2 Previous versions of Guidance Note 8 were issued by ASX in December 1998, September 2001, March 2002, and January 2003.

3 *Forrest v Australian Securities and Investments Commission; Fortescue Metals Group v ASIC* (2012) 291 ALR 399; [2012] HCA 39; BC201207489.

4 *Australian Securities and Investments Commission (ASIC) v Hellicar* (2012) 286 ALR 501; 88 ACSR 246; [2012] HCA 17; BC201202609

5 As at 5 November 2012.

6 For an overview of ASIC's approach to the infringement notice remedy under Corporations Act 2001 Part 9.4AA, see ASIC Regulatory Guide 73 *Continuous Disclosure: Infringement Notices*, June 2012.

7 For a thorough analysis of ASIC's issuance of Continuous Disclosure infringement notices between 2005 and 2010, see Aakash Desai and Ian Ramsay 'The use of infringement notices by ASIC for alleged continuous disclosure contraventions: Trends and analysis' (2011) 39 *Australian Business Law Review* 260 - 281, particularly Table 4 "Context and duration of non-disclosure" at 270 - which summarises the context of the alleged breaches and the durations of non-disclosure. Since the publication of Desai and Ramsay's article, ASIC has (as at 5 November 2012) issued a further six infringement notices - to BioProspect on 8 March 2012, see ASIC Media Release 12-42AD; BC Iron on 8 March 2012, see ASIC Media Release 12-43AD; 3 notices to Leighton Holdings on 18 March 2012, see ASIC Media Release 12-53MR; and to Navigator Resources on 15 June 2012, see ASIC Media Release 12-130MR .

8 This agreement between ASIC and ASX was noted in ASIC Report REP 222 *Market Assessment Report: ASX Group*, 30 November 2010 at para 19.

9 ASX Public Consultation *Review of ASX Listing Rules Guidance Note 8 Continuous Disclosure: Listing Rules 3.1-3.1B*, 17 October 2012, paras 4-8.

10 Revised Guidance Note 8 totals 69 pages, compared to the current June 2005 version which totals 25 pages.

11 Sections 674 and 675 -- "material effect on price or value"

12 Para 3.2 "When is information market sensitive?"

13 Including 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.

14 Para 7.7 "Referrals to ASIC"

15 Para 3.5 "The meaning of 'immediately'"

16 Para 3.6 "How can trading halts be used to manage a listed entity's obligations under Listing Rule 3.1?"

17 Para 3.8 "Does the board need to approve an announcement under Listing Rule 3.1?"

18 Para 3.8 "What other steps can a listed entity take to facilitate compliance with Listing Rule 3.1?"

19 Para 3.14 "Guidelines on the headers to announcements under Listing Rule 3.1"

20 Para 3.15 "Guidelines on the contents of announcements under Listing Rule 3.1"

21 These are: it would be a breach of a law to disclose the information; the information concerns an incomplete proposal or negotiation; the information comprises matters of supposition or is insufficiently definite to warrant disclosure; the information is generated for the internal management purposes of the entity; or the information is a trade secret.

22 Para 4.4 "Incomplete proposals or negotiations."

23 Para 4.5 "Matters of supposition or that are insufficiently definite to warrant disclosure."

24 Para 4.8 "Listing Rule 3.1A.2 -- the requirement for information to be confidential."

25 Para 5.1 "What is a "false market"?"

26 Para 5.6 "Dealing proactively with potential false market situations."

27 Para 6.1 "Earnings Guidance."

28 Para 6.3 "Earnings surprises" - which Incorporates material from Para 3.2 "When is information market sensitive?"

29 Para 6.4 "Correcting analyst forecasts."

30 Para 6 "Particular disclosure issues."

31 Para 7 "ASX's enforcement practices."

32 Para 2 "An overview of the continuous disclosure decision process."

33 "Annexure A: Worked examples of the operation of Listing Rule 3.1."

34 "Annexure B: Relevant provisions of the Corporations Act."

35 "Proposed Disclosure Related Amendments to the ASX Listing Rules" Issued in conjunction with ASX Public Consultation *Review of ASX Listing Rules Guidance Note 8 Continuous Disclosure: Listing Rules 3.1-3.1B*, 17 October 2012.

36 For an overview of these proposed amendments, see ASX Public Consultation *Review of ASX Listing Rules Guidance Note 8 Continuous Disclosure: Listing Rules 3.1-3.1B*, 17 October 2012 at para 18.

37 The proposed amendments add this term.

38 These 12 non-exhaustive examples include: (i) a transaction that will lead to a significant change in the nature or scale of the entity's activities (see also Listing Rule 11.1 and Guidance Note 12 *Significant Changes to Activities*); (ii) a material mineral or hydrocarbon discovery; (iii) a material acquisition or disposal; (iv) the granting or withdrawal of a material licence; (v) the entry into, variation or termination of a material agreement; (vi) becoming a plaintiff or defendant in a material law suit; (vii) the fact that the entity's earnings will be materially different from market expectations; (viii) the appointment of a liquidator, administrator or receiver; (ix) the commission of an event of default under, or other event entitling a financier to terminate, a material financing facility; (x) under subscriptions or over subscriptions to an issue of securities (a proposed issue of securities is separately notifiable to ASX under listing rule 3.10.3); (xi) giving or receiving a notice of intention to make a takeover; and (xii) any rating applied by a rating agency to an entity or its securities and any change to such a rating.

39 ASX Public Consultation *Review of ASX Listing Rules Guidance Note 8 Continuous Disclosure: Listing Rules 3.1-3.1B*, 17 October 2012 at paras 9-11.

40 Under Corporations Act (2001) s 793E "Disallowance of changes to operating rules."

41 ASX Public Consultation *Review of ASX Listing Rules Guidance Note 8 Continuous Disclosure: Listing Rules 3.1-3.1B*, 17 October 2012 at para 15.

RECENT CASES

[1005] Extension of time granted to hold second meeting of creditors

Stuart Dullard

IMO Australian Music Group Holdings Pty Ltd [2012] VSC 474; BC201207891 (14 September 2012, Gardiner AsJ)

[CA ss 436E, 439A, 439B, 440C, 447A]

Court grants extension of time to administrator to hold second meeting of creditors.

Facts

Australian Music Group Holdings Group (AMG) was the parent company of a group of 17 companies that operated 25 music stores. In August 2012, administrators and receivers and managers were appointed to the group. The receivers took control of the businesses and continued to operate the business in order to attempt to sell the group on a going concern basis.

The administrators sought an extension of time for the convening of the second meeting of creditors under ss 439A(6)