

### CONTINUOUS DISCLOSURE: LISTING RULES 3.1 – 3.1B

<p><b>The purpose of this Guidance Note</b></p>	<ul style="list-style-type: none"> <li>• To assist listed entities to understand and comply with their continuous disclosure obligations under Listing Rules 3.1, 3.1A and 3.1B</li> <li>• Listing Rule 3.1 requires a listed entity to disclose "market sensitive" information to ASX immediately</li> <li>• Listing Rule 3.1A sets out the exceptions to that general rule</li> <li>• Listing Rule 3.1B requires information to be disclosed to ASX if ASX asks for it to correct or prevent a false market</li> </ul>
<p><b>The main points it covers</b></p>	<ul style="list-style-type: none"> <li>• When is information "market sensitive"?</li> <li>• What does "immediately" mean?</li> <li>• How to use trading halts to manage disclosure obligations</li> <li>• The exceptions to the requirement to disclose immediately</li> <li>• What is a "false market"?</li> <li>• Responding to media/analyst commentary/speculation and market rumours</li> <li>• Earnings guidance and earnings surprises</li> <li>• ASX's enforcement practices (including price queries and aware letters)</li> </ul>
<p><b>Related materials you should read</b></p>	<ul style="list-style-type: none"> <li>• Annexure A: Worked examples of the operation of Listing Rule 3.1</li> <li>• Annexure B: Relevant provisions of the Corporations Act</li> <li>• Annexure C: Guidance on compliance policies</li> <li>• Guidance Note 12 <i>Significant Changes to Activities</i></li> <li>• Guidance Note 14 <i>ASX Market Announcements Platform</i></li> <li>• Guidance Note 16 <i>Trading Halts and Voluntary Suspensions</i></li> </ul>

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**Important notice:** ASX has published this Guidance Note to assist listed entities to understand and comply with their obligations under the Listing Rules. Nothing in this Guidance Note necessarily binds ASX in the application of the Listing Rules in a particular case. In issuing this Guidance Note, ASX is not providing legal advice and listed entities should obtain their own advice from a qualified professional person in respect of their obligations. ASX may withdraw or replace this Guidance Note at any time without further notice to any person. This Guidance Note expresses ASX's views on how certain provisions of the Corporations Act incorporated by reference into the Listing Rules should be interpreted for the purposes of the Listing Rules. It should be noted that those views are ASX's views only and that a court may ultimately reach a different view on the interpretation of those provisions.

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### 1. Introduction

This Guidance Note is published to assist listed entities to understand and comply with their disclosure obligations under Listing Rules 3.1, 3.1A and 3.1B of ASX Limited (ASX). These rules provide:

- 3.1 *Once an entity is or becomes aware of any information concerning it that a reasonable person would expect to have a material effect on the price or value of the entity's securities, the entity must immediately tell ASX that information.*
- 3.1A *Listing rule 3.1 does not apply to particular information while each of the following requirements is satisfied in relation to the information:*
- 3.1A.1 *One or more of the following 5 situations applies:*
- 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; and*
- 3.1A.2 *The information is confidential and ASX has not formed the view that the information has ceased to be confidential; and*
- 3.1A.3 *A reasonable person would not expect the information to be disclosed.*
- 3.1B *If ASX considers that there is or is likely to be a false market in an entity's securities, and asks the entity to give it information to correct or prevent a false market, the entity must give ASX the information it asks for.*

These rules apply to all entities admitted to the ASX Official List in the ASX Listing category, including entities that are established in countries other than Australia. They also apply to entities in the ASX Debt Listing category, but only in relation to their debt securities.<sup>1</sup> They do not apply to entities in the ASX Foreign Exempt Listing category.<sup>2</sup>

Compliance with Listing Rule 3.1 is critical to the integrity and efficiency of the ASX market and other markets that trade in ASX quoted securities or derivatives of those securities.<sup>3</sup> Reflecting this, Parliament has given the rule statutory force in section 674 of the Corporations Act 2001 (Cth).<sup>4</sup> A listed entity which breaches Listing Rule 3.1 may also breach that section and this can attract serious legal consequences for the entity and its officers. Those consequences are outlined in greater detail in Annexure B.

### 2. An overview of the continuous disclosure decision process

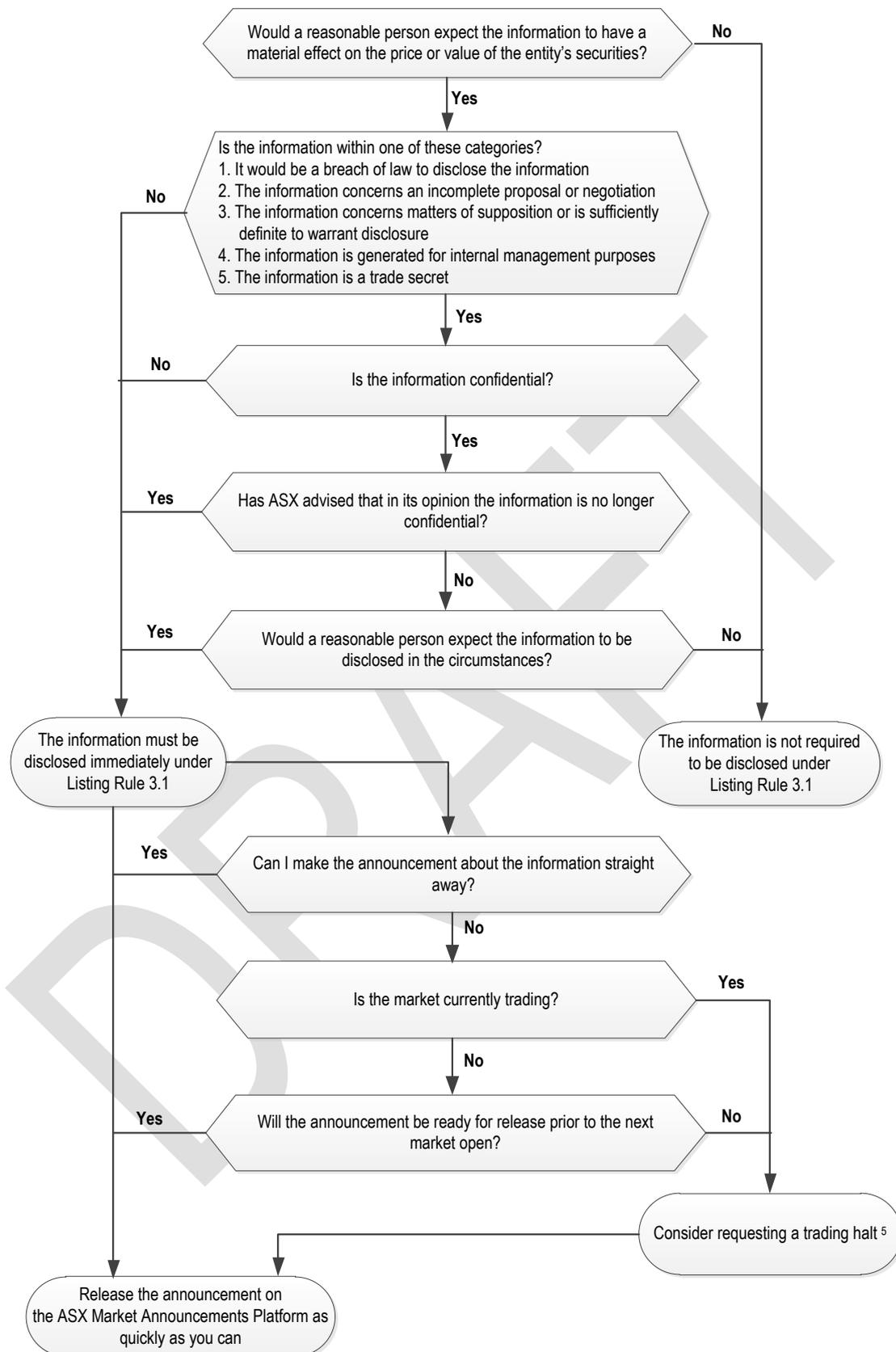
The diagram on the next page outlines the decision making process a listed entity should generally follow, if it becomes aware of information that could have a material effect on the price or value of its securities, to determine whether the information needs to be disclosed under Listing Rules 3.1 and 3.1A and, if it does and the entity is not in a position to issue an announcement straight away, whether it should consider requesting a trading halt:

<sup>1</sup> Listing Rule 1.10.1.

<sup>2</sup> Entities listed in the ASX Foreign Exempt category are generally expected to comply with the disclosure obligations of their overseas home exchange (Listing Rule 1.15.3) and to immediately provide to ASX any information that they provide to their home exchange that is, or is to be, made public (Listing Rule 1.15.2). For more detail on the disclosure obligations that apply to foreign entities listed on ASX, see Guidance Note 4 *Foreign Entities Listing on ASX*.

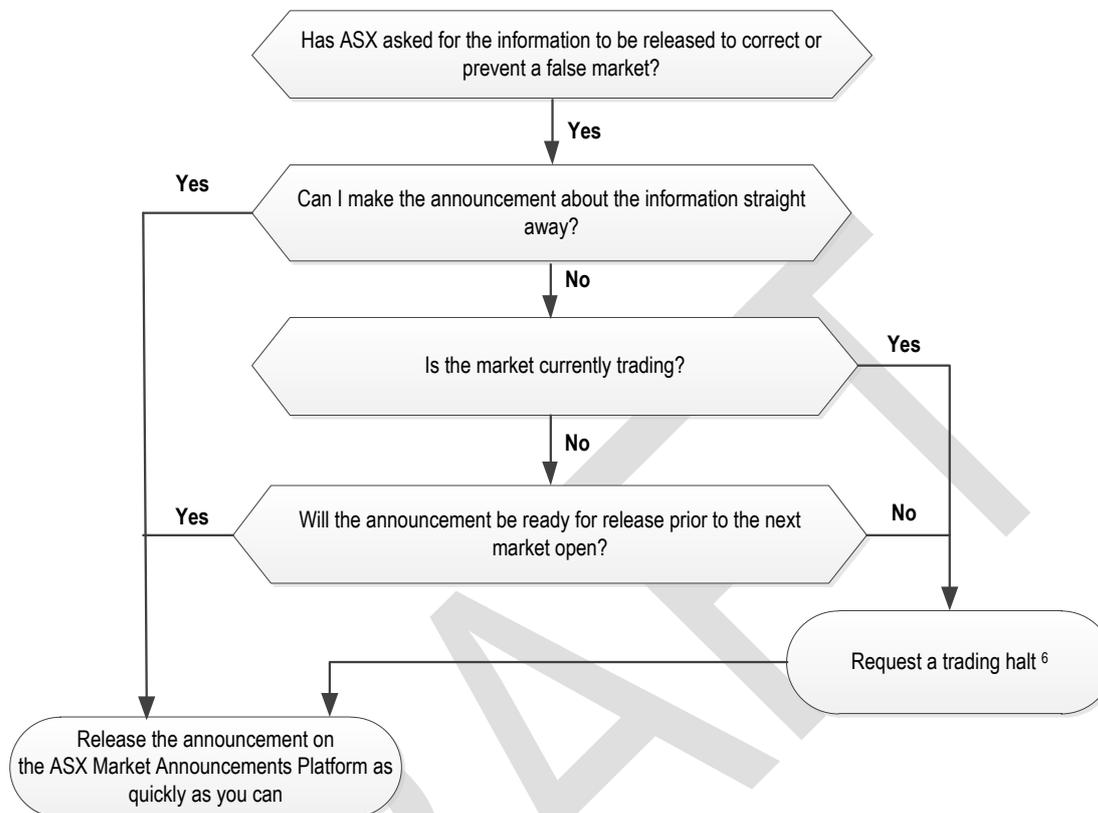
<sup>3</sup> As acknowledged by the NSW Court of Appeal in *James Hardie Industries NV v ASIC* [2010] NSWCA 332, at paragraph 355.

<sup>4</sup> Referred to in this Guidance Note as the "Corporations Act". Unless otherwise indicated, references in this Guidance Note to sections of an Act are to sections of the Corporations Act.



<sup>5</sup> See '3.6 How can trading halts be used to manage a listed entity's obligations under Listing Rule 3.1?', 3.7 The approach ASX takes /cont.

Independent of any disclosure obligation it may have under Listing Rules 3.1 and 3.1A, a listed entity may also have to disclose information under Listing Rule 3.1B if ASX considers it is needed to correct or prevent a false market in the entity's securities. The diagram below outlines the process that should generally be followed in such a case:



### 3. Listing Rule 3.1 – the obligation to disclose “market sensitive” information immediately

#### 3.1 What type of information has to be disclosed?

Listing Rule 3.1 requires a listed entity to disclose information<sup>7</sup> “concerning it” that “a reasonable person would expect to have a material effect on the price or value<sup>8</sup> of the entity’s securities”. This type of information is referred to in this Guidance Note as “market sensitive information”.<sup>9</sup>

to requests for disclosure-related trading halts’ and ‘3.8 Does the board need to approve an announcement under Listing Rule 3.1?’ on pages 12, 13 and 14 respectively.

<sup>6</sup> Note the difference between this diagram and the one above on Listing Rule 3.1 when it comes to trading halts. Where ASX asks an entity to give it information to correct or prevent a false market and the market is or will be trading before the information is released, it will invariably be the case that the entity should request a trading halt.

<sup>7</sup> Under Listing Rule 19.12, “information” is defined to include: (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. This definition is based on section 1042A.

<sup>8</sup> Where securities are traded on a licensed market, one would generally expect information that will have a material effect on the value of an entity’s securities also to have a material effect on their price, through the ordinary forces of supply and demand. There could be circumstances, however, where information has a material effect on the market’s assessment of the value of a security without that translating into a material change in the price of the security. This might occur, for example, if security prices in the market generally or in a particular sector are moving materially in one direction and the information causes the market to assess the value of the security differently and to hold its price at or about the current level. In these circumstances, ASX considers that the information is still having a material effect on the price of the security in question, in the sense that it is maintaining the price at a level that would not otherwise be the case, but the

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The notes to Listing Rule 3.1 give the following examples of the type of information that could be market sensitive:

- a transaction that will lead to a significant change in the nature or scale of the entity's activities;<sup>10</sup>
- a material mineral or hydrocarbon discovery;<sup>11</sup>
- a material acquisition or disposal;
- the granting or withdrawal of a material licence;
- the entry into, variation or termination of a material agreement;
- becoming a plaintiff or defendant in a material law suit;
- the fact that the entity's earnings will be materially different from market expectations;
- the appointment of a liquidator, administrator or receiver;
- the commission of an event of default under, or other event entitling a financier to terminate, a material financing facility;
- 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);
- giving or receiving a notice of intention to make a takeover; and
- any rating applied by a rating agency to an entity or its securities and any change to such a rating.

This list is by no means exhaustive and there are many other examples of information that potentially could be market sensitive.

The obligation to disclose information under Listing Rule 3.1 is not limited to information that is generated by, or sourced from within, the entity. Nor is it limited to information that is financial in character. An entity must disclose information "concerning it" that it becomes aware of from any source<sup>12</sup> and of any character, if the information is likely to have a material effect on the price or value of its securities.

Nevertheless, the qualification that the information must "concern" the listed entity is an important one. Generally speaking, a listed entity would not be expected under Listing Rule 3.1 to disclose publicly available information about external events or circumstances that affect all entities in the market, or in a particular sector, in the same way. All other things being equal, that is not information "concerning it".

For instance, a gold producer would not generally be expected to disclose publicly available information about daily changes in the gold price on major metals exchanges or about a proposed increase in the taxes that miners generally are required to pay. This type of information will be available to the market at large and the market can be assumed to have absorbed its impact on the price or value of the entity's securities within a relatively short

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reference to "value" in Listing Rule 3.1 puts this issue beyond any doubt. It also caters for the situation where there is no market price for an entity's securities, such as might be the case if its securities are in a trading halt or suspension.

<sup>9</sup> References in this Guidance Note to market sensitive information should be read as including information which causes the market to maintain the price of a security at or about its current level when it would otherwise be expected to move materially in a particular direction, given price movements in the market generally or in the entity's sector – see note 8.

<sup>10</sup> See also Listing Rule 11.1 and Guidance Note 12 *Significant Changes to Activities*, which gives guidance as to when a significant transaction is required to be notified to ASX under that rule.

<sup>11</sup> Note that information about a material mineral or hydrocarbon discovery must also comply with the reporting requirements in Chapter 5 of the Listing Rules.

<sup>12</sup> For example, information a listed entity receives from another entity in which the listed entity has a significant investment that materially affects the value of that investment or from a third party that it intends to launch a hostile takeover offer for the listed entity.

period after it became publicly available. By contrast, if the entity has previously given earnings guidance to the market and the change in the gold price or taxes is likely to cause its earnings to differ from that guidance by a material amount, that is information “concerning it” which it would be expected to disclose.<sup>13</sup> Likewise, if the change in the gold price or taxes is likely to have a particular effect on the entity over and above a mere change in earnings or tax expense (eg if it would mean that the entity could no longer economically operate and therefore would have to shut its mines), that is information “concerning it” which it would be expected to disclose.

### 3.2 When is information market sensitive?

The test for determining whether information is market sensitive and therefore needs to be disclosed under Listing Rule 3.1 is set out in section 677 of the Corporations Act.<sup>14</sup> Under that section, 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<sup>15</sup> persons who commonly invest in securities in deciding whether to acquire or dispose of” those securities.

In applying this test for the purposes of the Listing Rules, 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. In ASX’s view, it therefore does not include traders (commonly referred to as high frequency traders) who seek 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.

ASX acknowledges that the test for determining the materiality of information in section 677 gives rise to some difficulty in practice for listed entities in assessing whether or not they have an obligation to disclose information

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<sup>13</sup> This obligation may arise under Listing Rule 3.1 if a reasonable person would expect information about the difference in earnings to have a material effect on the price or value of the entity’s securities, or it may arise under section 1041H because the failure by the entity to update its published guidance could constitute misleading conduct on its part: see the discussion on earnings guidance under ‘6.3 Earnings surprises’ and ‘Example F – material difference in earnings compared to earnings guidance’ on pages 35 and 55 respectively.

<sup>14</sup> See Listing Rule 19.3, which provides that expressions given a particular meaning in the Corporations Act have the same meaning when used in the Listing Rules, and *Jubilee Mines NL v Riley* [2009] WASCA 62, where Martin CJ held (Le Miere AJA agreeing but McLure JA dissenting) that, in light of this rule, the test in the precursor to section 677 should be applied to determine whether a reasonable person would expect information to have a material effect on the price or value of an entity’s securities under the Listing Rules.

ASX notes that Martin CJ also held (Le Miere AJA agreeing) that because section 677 does not include the parenthetical qualification “(but only if)” which appears in the corresponding section in the insider trading provisions of the Corporations Act (section 1042D), it may also be possible to show that a reasonable person would expect information to have a material effect on the price or value of securities in some other manner, without necessarily proving that it would, or would be likely to, influence persons who commonly invest in securities in deciding whether to acquire or dispose of an entity’s securities. However, Martin CJ added (at paragraph 59) that:

“in practical terms, it is very difficult to envisage a circumstance in which a reasonable person would expect information to have a material effect on the price or value of securities if the information would not be likely to influence persons who commonly invest in those securities in deciding whether or not to subscribe for, or buy or sell them. The price of securities quoted on a stock exchange is essentially a function of the interplay of the forces of supply and demand. It is therefore difficult to see how a reasonable person could expect information to have a material effect on price, if it was not likely to influence either supply or demand.”

<sup>15</sup> ASX notes that some commentators have expressed concern about the potential breadth of the “influence” test in section 677 and the fact that it could capture information that is not material in any relevant sense. Those concerns stem from a particular reading of the term “influence” in that section, where it is given its wider meaning of merely “have some effect upon”. ASX does not agree with that reading of the section.

ASX would point out that whether information would or would be likely to influence a decision has been used as a proxy to test the materiality of information in other contexts and in other jurisdictions. For example, in addressing the test for disclosure of information in scheme documents under the precursor to section 411(3)(b) (requiring the disclosure of information material to the making of a decision by a member participating in the scheme on whether or not to agree to the scheme), Brooking J commented in *Phosphate Co-Operative Co of Australia Pty Ltd v Shears* [1989] VR 665 that: “If a fact would tend to influence a sensible member’s decision on whether the scheme is in his interests, then it is “material” for the purposes of [that section].”

Used in the context of section 677, ASX considers that the word “influence” carries its own connotation of materiality. In ASX’s view, to trigger section 677, the information in question must be of a character that would, or would be likely to, influence persons who commonly invest in securities to make a decision to acquire or dispose of an entity’s securities and not merely play some minor and immaterial role in such a decision. Certainly that is how ASX interprets and applies the test in section 677 when it has to make a decision under Listing Rule 3.1 as to whether or not information is market sensitive.

under Listing Rule 3.1. They are effectively required to predict how investors will react to particular information when it is disclosed.<sup>16</sup> However, that difficulty is inescapable. It is the entity, and only the entity, that can and must form a view as to whether the information it knows, and the rest of the market does not, is market sensitive and therefore needs to be disclosed under Listing Rule 3.1.

An officer of an entity who is faced with a decision on whether information needs to be disclosed under Listing Rule 3.1 may find it helpful to ask two questions:

- (1) “Would this information influence my decision to buy or sell securities in the entity at their current market price?”
- (2) “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?”

If the answer to either question is “yes”, then that should be taken to be an indication that the information may be market sensitive and, if it does not fall within the carve-outs from disclosure in Listing Rule 3.1A (see below), should be disclosed to ASX immediately.

Listed entities may also find the 5/10% parameters that ASX uses for determining whether or not to refer a potential breach of Listing Rule 3.1 to ASIC (see ‘7.7 ‘Referrals to ASIC’ on page 43) helpful in understanding the order of magnitude of the likely change in price or value of their securities that ASX considers will trigger a disclosure obligation under Listing Rule 3.1.

Given the potential penalties involved in breaching Listing Rule 3.1 and section 674,<sup>17</sup> ASX recommends that listed entities and their officers err on the side of caution and, if they have any doubts as to whether information is market sensitive or falls within the carve-outs from disclosure in Listing Rule 3.1A, they disclose the information to, rather than withhold it from, the market. ASX also recommends that listed entities carefully weigh up the potential consequences of not disclosing particular information. Example H1 in Annexure A illustrates the point.

If a listed entity decides not to disclose particular information because in its opinion it is not market sensitive and there is a sudden and unexplained movement in the market price or traded volumes of its securities, it may need to revisit its decision about whether the information ought to be disclosed. Such a movement could indicate that the information has leaked and that its initial decision about the market sensitivity of the information was incorrect.<sup>18</sup>

### 3.3 The need to assess information in context

In assessing whether or not information is market sensitive and therefore needs to be disclosed under Listing Rule 3.1, the information needs to be looked at in context, rather than in isolation, against the backdrop of:

- the circumstances affecting the listed entity at the time;<sup>19</sup>
- any external information that is publicly available at the time; and

<sup>16</sup> Assessing how the market will react to particular information is not always easy. For example, information about a material acquisition may be:

- materially price positive, if the market assesses that the acquirer has struck a good bargain or will garner significant synergies from the acquisition;
- materially price negative, if the market assesses that the acquirer has overpaid for the asset; or
- price neutral, if the market assesses that the acquirer has paid what the asset is worth.

See also the discussion in notes 140-142 and the accompanying text about the factors that might affect how the market will react to information that an entity’s earnings for a particular reporting period will be materially different to market expectations.

<sup>17</sup> See Annexure B.

<sup>18</sup> As mentioned below, it may also be evidence that the information is no longer confidential and therefore the carve-out from disclosure in Listing Rule 3.1A no longer applies, or that a false market is developing in its securities and therefore Listing Rule 3.1B applies.

<sup>19</sup> See the observations of O’Loughlin J in *Flavel v Roget* (1990) 1 ACSR 595, at 602-3.

- any previous information the listed entity has provided to the market (eg in a prospectus or PDS, under its continuous or periodic disclosure obligations or by way of earnings guidance).<sup>20</sup>

For example, a small drop in earnings, by itself, may not be considered market sensitive. However, if that small drop in earnings results in the entity breaching a financial covenant and committing an event of default under its banking facilities, the situation is quite different. Conversely, information that an entity has received a formal offer from someone interested in purchasing a major asset at a premium price would usually be considered market sensitive.<sup>21</sup> However, if, at the time it receives the offer, the entity has no intention of selling,<sup>22</sup> or no capacity to sell,<sup>23</sup> the asset, or the prospective purchaser does not have the resources or the wherewithal to proceed with the transaction, the information may not be market sensitive.<sup>24</sup>

The need to assess information in context also means that new information may need to be disclosed because of its impact on information previously disclosed. For example, information that an entity has investigated and decided not to pursue a particular material business opportunity may not be market sensitive, if the market has no knowledge or expectation that the entity is considering the opportunity. However, if the entity has previously announced that it was intending to pursue the opportunity, the fact that it has changed its mind may well be market sensitive and need to be disclosed under Listing Rule 3.1.

### 3.4 When does an entity become aware of information?

Under the Listing Rules, an entity becomes *aware* of information if, and as soon as, an officer of the entity (or, in the case of a trust, an officer of the responsible entity) has, or ought reasonably to have, come into possession of the information in the course of the performance of their duties as an officer of that entity.<sup>25</sup>

The term “officer” has the same meaning as in the Corporations Act<sup>26</sup> and includes a director, secretary or senior manager of a listed entity.<sup>27</sup>

The reference to information that an officer “ought reasonably have come into possession of” is intended to prevent a listed entity from seeking to avoid its continuous disclosure obligations by not having proper processes in place to ensure that market sensitive information is brought to the attention of its officers. It effectively buttresses the obligation that the directors of a listed entity have under the general law to ensure that the entity

<sup>20</sup> See also Example H7 on page 60.

<sup>21</sup> Although, under Listing Rule 3.1A, the entity may not be required to disclose information about the offer for so long as it remains confidential and negotiations on the transaction are incomplete.

<sup>22</sup> ‘Example B – control transaction’ on page 47 explores a similar theme.

<sup>23</sup> For example, because it is subject to binding pre-emption arrangements or other contractual commitments that preclude a sale on the terms proposed.

<sup>24</sup> The finding of the Court of Appeal in *Jubilee Mines NL v Riley*, note 14 above, also illustrates the point that information about a particular opportunity may not be market sensitive if the entity is not capable of exploiting the opportunity to its advantage.

<sup>25</sup> Listing Rule 19.12. This definition is based on section 1042G.

<sup>26</sup> Listing Rule 19.3.

<sup>27</sup> See section 9. For these purposes, “senior manager” means a person:

- who makes, or participates in making, decisions that affect the whole, or a substantial part, of the business of the entity;
- who has the capacity to affect significantly the corporation’s financial standing; or
- in accordance with whose instructions or wishes the directors of the entity are accustomed to act (excluding advice given by the person in the proper performance of functions attaching to the person’s professional capacity or their business relationship with the directors or the entity).

The definition of “officer” in section 9 also extends to

- a receiver, or receiver and manager, of the property of the entity;
- an administrator of the entity;
- an administrator of a deed of company arrangement executed by the entity;
- a liquidator of the entity; or
- a trustee or other person administering a compromise or arrangement made between the entity and someone else.

has appropriate information reporting systems in place so that they are kept apprised of material developments affecting the entity in a timely manner.<sup>28</sup>

### 3.5 The meaning of “immediately”

Under Listing Rule 3.1, market sensitive information must be disclosed to ASX *immediately* upon the entity becoming aware of the information, unless it falls within the carve-outs from disclosure in Listing Rule 3.1A (see below).

Judicial authority in analogous situations confirms that the word “immediately” should not be read as meaning “instantaneously”, but rather as meaning “promptly and without delay”:

*“The words forthwith and immediately have the same meaning. They are stronger than the expression within a reasonable time, and imply prompt, vigorous action, without any delay, and whether there has been such action is a question of fact, having regard to the circumstances of the particular case.”<sup>29</sup>*

Prompt disclosure of market sensitive information is critical to the integrity and efficiency of the market. The standard of promptness expected by the market and by regulators is justifiably high. ASIC has issued infringement notices for breaches of section 674 where market sensitive information has been withheld from the market for periods as short as 60<sup>30</sup> and 90<sup>31</sup> minutes and a trading halt has not been requested to cater for the delay.

Hence, it is important that listed entities have in place appropriate compliance systems to ensure that information which is potentially market sensitive and which 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 it does, that it is promptly given to ASX or a trading halt is promptly requested.<sup>32</sup>

ASX recognises that the speed with which a notice can be given under Listing Rule 3.1 will vary, depending on the circumstances. Relevant factors may include:

- where and when the information originated;
- the forewarning (if any) the entity had of the information;
- the amount and complexity of the information concerned;

<sup>28</sup> See note 235 and accompanying text.

<sup>29</sup> Per Cockburn CJ in *Queen v Berkshire Justices* (1879) 4 QBD 469, 471. Cited with apparent approval by Isaacs J in *Measures v McFadyen* (1910) 11 CLR 723, at 736 and by Forster CJ in *Dorsman v Nichol* (1978) 20 ALR 231, at 237.

<sup>30</sup> See ASIC Media Release 09-199. In that case, ASIC issued an infringement notice against a listed entity for not releasing until 7:14 pm (to coincide with a placement of securities that the entity was planning to make overnight) information about a material deterioration in its loan impairment expense ratio that it had become aware of at 3 pm that day. Since the market ceased trading on that day at approximately 4 pm, the information was effectively only withheld from the market for 60 minutes.

ASX would note that the fact that a listed entity complies with an infringement notice is not to be taken as an admission of guilt or liability (see section 1317DAF).

<sup>31</sup> See ASIC Media Release 08-117. In that case, ASIC issued an infringement notice against a listed entity for taking approximately 70 minutes to request a trading halt, and a further 20 minutes to issue an announcement, responding to an article that had appeared in the Dow Jones newswire service containing fairly specific details of a very material acquisition the entity was close to consummating. The entity had been contacted by ASX after 3 news items had appeared on the Dow Jones and Reuters newswire services regarding the transaction. Instead of requesting an immediate trading halt, it told ASX that it would consider its position and respond. It took a further 38 minutes to do that and to finally request a trading halt.

The delay in requesting a trading halt was specifically mentioned by ASIC as a factor in its decision to issue the infringement notice (“in view of the speculation about the Offer in the Dow Jones Article and in the absence of an immediate request by [the entity] for a trading halt under ASX Listing Rule 16.4.2 [*sic* 17.1], a reasonable person would have expected the Information to be disclosed to ASX”).

Again, ASX would note that the fact that a listed entity complies with an infringement notice is not to be taken as an admission of guilt or liability (see section 1317DAF).

<sup>32</sup> Annexure C has further guidance on the policies that a listed entity should implement to comply with its obligations under Listing Rule 3.1.

- 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 Chapter 5 of the Listing Rules;<sup>33</sup> and
- the need in some cases for an announcement to be approved by the entity's board or disclosure committee.<sup>34</sup>

ASX will take these factors into account, as well as whether or not the entity has promptly requested a trading halt to minimise the period that the market is trading on an uninformed basis, in assessing whether an entity has complied with its obligation to disclose information in a timely manner under Listing Rule 3.1.

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

The sensitivity of the market to information will be at its highest during trading hours on licensed Australian securities markets,<sup>35</sup> which is when and where most trading in ASX listed securities takes place and when the need to issue information promptly is especially high. Consequently, if an entity becomes aware of market sensitive information that needs to be disclosed under Listing Rule 3.1:

- during trading hours on licensed Australian securities markets and it is not in a position to issue an announcement straight away; or
- outside of trading hours on licensed Australian securities markets and it anticipates that it will not be in a position to issue an announcement before trading next commences,

it needs to give careful consideration to whether it is appropriate to request a trading halt.<sup>36</sup> The application of a trading halt will ensure that its securities are not trading on ASX and other licensed securities markets in Australia<sup>37</sup> on an uninformed basis and that may help to reduce its exposure to the legal consequences that could follow if it is found to have breached its obligation to disclose that information immediately.

This applies whatever the reason may be for the entity not being in a position to issue the announcement straight away or before market opens (as the case may be), including because the amount and complexity of the

<sup>33</sup> See 'Example D – material mineral discovery' on page 53. Guidance Note 31 *Reporting on Mining Activities* and Guidance Note 32 *Reporting on Oil & Gas Activities*, when released, will have further guidance on the reporting obligations relating to mining and oil and gas activities.

<sup>34</sup> See '3.8 Does the board need to approve an announcement under Listing Rule 3.1?' on page 14.

<sup>35</sup> Generally 10.00 am to 4.12 pm Australian Eastern Standard Time, Monday to Friday, excluding certain public holidays. Of course, entities that are dual listed on ASX and an overseas exchange will need to consider their disclosure obligations under the rules of the overseas exchange and their exposure to liability if information is not released in a timely manner during the normal trading hours of the overseas exchange.

<sup>36</sup> An entity can request a trading halt under Listing Rule 17.1. Under the ASX Operating Rules, a trading halt can last for a period not exceeding the commencement of normal trading on the second trading day following the day on which the trading halt is imposed. This means that the maximum period for which a trading halt may be granted is two trading days. It may in fact be less than two full trading days if the trading halt is put in place part-way through a trading day. For example, if the trading halt is put in place on a Monday, the maximum period it can operate will be up to the commencement of trading on the next following Wednesday (assuming Monday, Tuesday and Wednesday are all trading days), regardless of the time it was put in place on the Monday.

<sup>37</sup> As a matter of practice, whenever ASX applies a trading halt to an ASX quoted security, it generally also applies a trading halt to any ASX or ASX 24 exchange traded options and contracts for difference related to that security (although ASX may open a short trading window on the day of expiry of an exchange traded option to allow option holders the opportunity to roll or close out their option position). Also, under Part 6.1 of the ASIC Market Integrity Rules (Competition in Exchange Markets) 2011, whenever ASX places a security into a trading suspension (as defined in those rules), it is required to notify that action to all other licensed market operators in Australia who quote the security and they in turn are required to immediately take corresponding action to place the security into a trading suspension.

Hence, ASX placing securities into a trading halt on its market effectively leads to an equivalent trading halt on other licensed securities and derivatives markets in Australia.

information to be disclosed is such that it needs time to prepare the announcement or the announcement is so significant that the entity considers it appropriate to have the announcement approved by its board of directors.<sup>38</sup>

It should be noted that the Listing Rules, including Listing Rule 3.1, continue to apply while an entity's securities are in a trading halt.<sup>39</sup> Hence, the mere fact that an entity has requested and been granted a trading halt technically does not relieve it of the obligation to announce information under Listing Rule 3.1 promptly and without delay. However, ASX does not apply the Listing Rules in a technical manner but rather in a manner that accords with their spirit, intention and purpose, and in a way that best promotes the principles on which they are based.<sup>40</sup> Whether and how promptly an entity has requested a trading halt so as to prevent trading in its securities happening on an uninformed basis are significant factors that ASX takes into account in assessing whether the entity has complied with the spirit, intention and purpose of Listing Rule 3.1<sup>41</sup> and also whether it ought to refer a possible breach of the rule to ASIC.<sup>42</sup>

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

ASX recognises that, faced with the difficulty of predicting whether information will have a material effect on the price or value of its securities and the serious legal consequences that may flow if information is not disclosed when required, a listed entity may err on the side of caution and seek to disclose information where there may be some doubt as to whether the information is in fact market sensitive. Not all announcements an entity may wish to make will warrant a trading halt. It is for this reason that when an entity requests ASX for a trading halt to allow it the time it needs to prepare an announcement under Listing Rule 3.1, ASX will usually ask the entity to outline the nature of the information in question and assess for itself whether the circumstances warrant the granting of a trading halt.

If ASX considers that the information is of a character that is likely to be market sensitive and that the circumstances warrant the granting of a trading halt, ASX will invariably agree to the request for a trading halt so as to afford the entity the time it needs to prepare and issue an announcement. In that case, provided the entity has requested a trading halt promptly after it became obliged to disclose the information under Listing Rule 3.1 and, after the trading halt has been granted, then acts to issue an announcement as quickly as it can in the circumstances, ASX will regard the entity as having complied with the spirit, intention and purpose of Listing Rule 3.1.<sup>43</sup>

If ASX considers that the information is of a character that is unlikely to be market sensitive or that the circumstances do not warrant the granting of a trading halt, ASX may decline the request for a trading halt and ask the entity to complete and lodge its announcement as quickly as it can.<sup>44</sup> In that case, should the information

<sup>38</sup> See also '3.8 Does the board need to approve an announcement under Listing Rule 3.1?' on page 14.

<sup>39</sup> Listing Rule 18.6. This also applies if trading in its securities is suspended.

<sup>40</sup> Listing Rule 19.2.

<sup>41</sup> As listed entities are required to do under Listing Rule 19.2.

<sup>42</sup> ASX understands that ASIC will also take into account whether or not a listed entity has promptly requested a trading halt in determining whether it will take enforcement action in relation to a possible breach of section 674: see, for example, ASIC Media Release 08-117, referred to above in note 31, and ASIC Media Release 07-69. In the latter case, a listed company received an offer to acquire all of its ordinary shares. At approximately noon the following day, reasonably specific details of the proposal were reported in a Dow Jones Newswire article, indicating that the proposal was no longer confidential. The company did not make an announcement about the proposal until approximately 8.30 am the following morning. ASIC issued an infringement notice and the company elected to comply with the notice. In its media announcement about the matter ASIC specifically commented that "in view of the media speculation in relation to the proposal ... and in the absence of a request by [the entity] for a trading halt under ASX Listing Rule 16.4.2 [sic 17.1], a reasonable person would have expected the Information to be disclosed to ASX".

Again, it should be noted that the fact that a listed entity complies with an infringement notice is not to be taken as an admission of guilt or liability (see section 1317DAF).

<sup>43</sup> It should be noted that the fact that ASX may regard the entity as having complied with the spirit, intention and purpose of Listing Rule 3.1 will not preclude ASIC or a civil litigant from taking a different view and arguing that the entity has failed to comply with its disclosure obligations under Listing Rule 3.1 and section 674.

<sup>44</sup> This would be a fairly rare circumstance. If an entity tells ASX that it needs a trading halt to give it time to make an announcement about information that it considers to be market sensitive, ASX will usually err on the side of caution and grant the trading halt, so as to

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ultimately turn out to be market sensitive,<sup>45</sup> provided the entity approached ASX promptly after it became obliged to disclose the information under Listing Rule 3.1 to discuss its request for a trading halt and, after the request was refused, then acted to issue an announcement as quickly as it could in the circumstances, ASX will regard the entity as having complied with the spirit, intention and purpose of Listing Rule 3.1.<sup>46</sup>

ASX may also explore with an entity whether an interim announcement about a particular event could be made under Listing Rule 3.1 and whether trading could resume after the interim announcement has been made. In such a case, ASX may agree to a short trading halt to afford the entity the time it needs to make an appropriate interim announcement.

ASX would strongly encourage any listed entity which is unsure about whether it should be requesting a trading halt to cover the time it needs to prepare and release an announcement to the market, to contact its listings adviser at ASX to discuss the situation.

ASX Guidance Note 16 *Trading Halts and Voluntary Suspensions* has further guidance on how to apply for a trading halt.

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

The courts have acknowledged that it is appropriate for some particularly significant continuous disclosure announcements to be considered and approved by the board of directors before they are released.<sup>47</sup> They have also made it clear, however, that this is not legally necessary in all cases.<sup>48</sup>

Given the requirement for announcements under Listing Rule 3.1 to be issued immediately, a listed entity should have suitable arrangements in place to enable this to occur. Such arrangements may include giving appropriate delegations<sup>49</sup> to senior management to release some announcements of their own accord<sup>50</sup> and, if the matter falls outside those delegations, having a disclosure committee<sup>51</sup> that can meet by phone or on short notice to consider the announcement.

Where an entity considers an announcement to be so significant that it ought to be approved by its full board before release, it needs to think carefully about how it will manage its disclosure obligations. This will require a close consideration of the nature of the information to be disclosed, the applicability of the exceptions in Listing Rule 3.1A and whether the circumstances warrant requesting a trading halt.

Where it is the decision of the board itself that is the information to be disclosed under Listing Rule 3.1 (such as a decision by the board to declare a special dividend), the obligation to disclose generally will not arise until the board has made that decision. It usually will not be necessary to request a trading halt ahead of that decision (although that could change if there are signs that information about the impending board decision has leaked and this has or could have a material impact on the market price or traded volumes of the entity's securities).

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avoid any suggestion of the market trading on an uninformed basis. ASX will generally only deny such a request where, in its opinion, the information is clearly not market sensitive.

<sup>45</sup> Of course, if the information turns out not to be market sensitive, then it was not technically disclosable under Listing Rule 3.1 in the first place.

<sup>46</sup> Again, it should be noted that the fact that ASX may regard the entity as having complied with the spirit, intention and purpose of Listing Rule 3.1 will not preclude ASIC or a civil litigant from taking a different view and arguing that the entity has failed to comply with its disclosure obligations under Listing Rule 3.1 and section 674.

<sup>47</sup> See *ASIC v Macdonald (No 11)* [2009] NSWSC 287, at paragraph 333, and *ASIC v Hellicar* [2012] HCA 17, at paragraph 56.

<sup>48</sup> See *Morley v ASIC* [2010] NSWCA 331, at paragraph 808.

<sup>49</sup> Those delegations could, for example, be set out in the entity's continuous disclosure policy (see Recommendation 5.1 of the ASX Corporate Governance Council's *Corporate Governance Principles and Recommendations*) or in the document that specifies the functions reserved to the board and those delegated to senior executives (see Recommendation 1.1 of the ASX Corporate Governance Council's *Corporate Governance Principles and Recommendations*).

<sup>50</sup> Where an announcement under Listing Rule 3.1 is issued by senior management under delegated authority, it would be common practice for a copy also to be circulated immediately to directors (usually by email) and for it to be noted at the next board meeting.

<sup>51</sup> Such committees often comprise or include the chairperson of directors, the chief executive officer, the company secretary and the general counsel.

Where the information to be disclosed falls within the exceptions to immediate disclosure in Listing Rule 3.1A but the board determines that it is now appropriate and timely to announce the matter to the market, it will be that decision of the board that is the trigger for the announcement rather than any legal obligation under Listing Rule 3.1.<sup>52</sup> Again, it usually will not be necessary to request a trading halt ahead of that decision (although that could change if there are signs that information about the matter has leaked ahead of the announcement and this has or could have a material impact on the market price or traded volumes of the entity's securities).

Where, however, the information relates to a market sensitive event that has already occurred and that information does not fall within the exceptions to immediate disclosure in Listing Rule 3.1A, the obligation to disclose will typically have arisen at the point when the entity first became aware of the event. To comply with the timing requirements of Listing Rule 3.1, an announcement about that event must be released promptly and without delay. In turn, this means that the requisite board meeting to consider the announcement must be convened and the board must settle and approve the announcement for release promptly and without delay. Consideration of the announcement cannot be deferred to a previously scheduled regular board meeting or to a meeting to be convened at a future date. In addition, if the market will be trading at any time after the entity became aware of the event in question and before the announcement is approved and released to the market, the entity should consider carefully whether it needs to request a trading halt to prevent the market trading on an uninformed basis over that period.

Whether a trading halt is appropriate in this latter case will depend on the circumstances. If the matter to be announced is something that a reasonable person would expect to go to the board for approval (such as a maiden announcement by a junior mining exploration entity of material exploration results) and the board can deal with it promptly and without delay, it may not be necessary to request a trading halt ahead of the announcement (although again that could change if information about the matter leaks ahead of the announcement and this has or could have a material impact on the market price or traded volumes of the entity's securities). If not, it will usually be appropriate to request a trading halt to prevent the market trading on an uninformed basis.

ASX would strongly encourage an entity which is unsure about whether it should be requesting a trading halt to cover the time between becoming aware of information and the board being able to approve an announcement, to contact its listings adviser at ASX to discuss the situation.

ASX would also strongly encourage an entity which is awaiting board approval to a market sensitive announcement and which has not requested a trading halt to prevent the market trading ahead of the announcement to monitor:

- the market price of its securities;
- major national and local newspapers;
- major news wire services, such as Reuters and Bloomberg;
- any investor blogs, chat-sites or other social media it is 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 it detects any such signs.<sup>53</sup>

<sup>52</sup> Note that this situation needs to be distinguished from the situation where market sensitive information ceases to fall within the exceptions to immediate disclosure in Listing Rule 3.1A (for example, previously incomplete and confidential negotiations about a market sensitive transaction are completed) and therefore needs to be disclosed immediately under Listing Rule 3.1. In that case, the obligation to disclose arises at the point Listing Rule 3.1A ceases to apply.

<sup>53</sup> See Example H2 in Annexure A.

### 3.9 What other steps can a listed entity take to facilitate compliance with Listing Rule 3.1?

Steps that a listed entity can take to help manage the requirement to disclose information immediately under Listing Rule 3.1 include:

1. Have a template letter requesting ASX to grant a trading halt ready for use at all times. In this way, if it needs to request an urgent trading halt, it can do so without delay.<sup>54</sup>
2. Anticipate what might happen if information about a confidential transaction being negotiated leaks and have a template announcement ready that can be updated and issued straight away (see Example H2 in Annexure A).
3. Where it has advance notice of an event that is likely to require an announcement under Listing Rule 3.1, prepare a draft announcement ahead of time that can be issued straight away (see Examples H3 and H4 in Annexure A).
4. Where the event that gives rise to the need to make an announcement is within its control, be sensitive to the hours when licensed markets in Australia are trading and, where possible, try to ensure that the event happens and the announcement is made before trading commences or after trading has closed,<sup>55</sup> so that it is not necessary to request a trading halt (see Example H4 in Annexure A).
5. Ensure that the person appointed under Listing Rule 12.6 to be responsible for communications with ASX in relation to Listing Rule matters:
  - has the organisational knowledge to have meaningful discussions on disclosure matters and has the authority to request a trading halt and to issue an announcement to the market, if that is what is required; and
  - is readily contactable by ASX by telephone and available to discuss any pressing disclosure issues that may arise during normal market hours and for at least one hour either side thereof (that is, from 9am to 5pm AEST on each trading day).

This requires that the person has a high degree of familiarity with the listed entity's operations and, if they are not a member of senior management, that they have immediate access to senior management. It also requires them to provide ASX with a mobile phone number to contact them and that they keep their mobile phone switched on at all times from 9am to 5pm AEST on each trading day.<sup>56</sup>

On this last point, the need to resolve a continuous disclosure issue can be extremely time critical. Where such an issue arises, if ASX is not able to contact an entity's nominated representative under Listing Rule 12.6, or the representative does not have the organisational knowledge or authority to address the issue promptly, ASX may be left with little option but to suspend the quotation of the entity's securities until the issue can be properly resolved.

<sup>54</sup> Listing Rule 17.1 provides that ASX may require a request for a trading halt to be in writing. In practice, ASX will act upon a verbal request from an entity for an urgent trading halt but will require that request to be confirmed in writing as soon as practicable thereafter. ASX will release the entity's written request for a trading halt through the ASX Market Announcements Platform.

<sup>55</sup> Entities should note the guidance in Guidance Note 14 *ASX Market Announcements Platform* about the lodgement of notices in peak periods, such as prior to market open and market close. For an announcement that must be released prior to market open at 10:00am AEST, the announcement should be submitted prior to 9:30am AEST. For an announcement that must be released prior to market close at 4:00pm AEST, the announcement should be submitted prior to 3:40pm AEST.

<sup>56</sup> For entities based in Western Australia, this requires the nominated person to be available to take calls from ASX on trading days from as early as 6am in the morning during summer time and, for entities based in New Zealand, until as late as 7pm in the evening. The nominated person must also be available to take calls from ASX on trading days that fall on a public holiday where they live and make suitable arrangements to cover any absences due to illness or while they are on leave.

### 3.10 How does Listing Rule 3.1 interact with other disclosure obligations?

The obligation of a listed entity under Listing Rule 3.1 to notify ASX of information that a reasonable person would expect to have a material effect on the price or value of its securities is separate to, but operates in tandem with, its obligations to notify ASX of:

- the specific matters referred to in Listing Rules 3.4 – 3.21;<sup>57</sup> and
- a significant change to the nature or scale of its activities under Listing Rule 11.1.<sup>58</sup>

Notification of information under any of these rules will satisfy the obligation to notify ASX of that information under Listing Rule 3.1 provided, in each case, the notification is given within the timeframe required under Listing Rule 3.1.

The continuous disclosure obligations in Listing Rule 3.1 also operate in parallel with:

- the periodic disclosure obligations in chapters 4 and 5 of the Listing Rules;
- the half-yearly and annual financial reporting requirements in the Corporations Act; and
- the disclosure obligations in relation to a prospectuses, PDSs, cleansing notices, bidders' statements, targets' statements and scheme documents under the Corporations Act,<sup>59</sup>

(together, "periodic disclosure documents").

Once these periodic disclosure documents have been released to the market, the information in them is regarded by ASX as "generally available" and therefore not something that requires a separate disclosure under Listing Rule 3.1.

All other things being equal, a listed entity is not expected to release the information in a periodic disclosure document ahead of the scheduled release date for that document. Sometimes, however, in the course of preparing a periodic disclosure document, market sensitive information may become apparent that ought to be disclosed immediately under Listing Rule 3.1. Two areas where this issue commonly arises are earnings surprises and post-balance date events.

If, in the course of preparing a periodic disclosure document, it becomes apparent to a listed entity that its reported earnings will differ materially from market expectations to an extent which is market sensitive, the entity must disclose that information to ASX immediately under Listing Rule 3.1.<sup>60</sup> It cannot wait until the periodic disclosure document is released. The same is true for information about a market sensitive post-balance date event.

Entities should also be aware of Listing Rule 4.3D, which requires an entity to tell ASX immediately of any circumstances which are likely to affect the results or other information contained in its preliminary final report and to explain their effect on the entity's current or future financial performance or financial position. This rule reflects the primacy of continuous disclosure obligations over periodic disclosure obligations. If particular information is

<sup>57</sup> This includes notifications of specific information about takeover bids; buy-backs; changes in capital; the release of restricted securities and securities subject to voluntary escrow; changes in the exercise price of, or the entry of underwriting agreements for, the exercise of options; auctions of forfeited shares by NL companies; security holder meetings; changes to the entity's registered and principal administrative offices; changes to the location or the closing of any register of securities; changes in chairperson, directors, chief executive officer, company secretary or auditor; documents sent to security holders; documents given to overseas exchanges; in the case of an entity that is not established in Australia, changes to the law of its home jurisdiction that materially affect the rights or obligations of security holders; ownership limits; directors' interests; record dates; and dividends and distributions.

<sup>58</sup> See generally Guidance Note 12 *Significant Changes to Activities*.

<sup>59</sup> The list of disclosure obligations here that a listed entity may have under the Corporations Act is not intended to be exhaustive.

<sup>60</sup> See '6.3 Earnings surprises', 'Example F – material difference in earnings compared to earnings guidance' and 'Example G – material difference in earnings compared to consensus estimates' on pages 35, 56 and 56 respectively.

market sensitive, it must be disclosed immediately and cannot be withheld until the scheduled release date for a periodic disclosure document.

### 3.11 Who can make an announcement under Listing Rule 3.1?

Announcements can only be given under Listing Rule 3.1 by a listed entity or someone authorised by it to make an announcement on its behalf.

ASX cannot and will not accept an announcement under Listing Rule 3.1 from a third party, such as a security holder or former office holder.<sup>61</sup>

### 3.12 Can an announcement under Listing Rule 3.1 be embargoed?

Given the need for disclosure to be made immediately under Listing Rule 3.1, ASX cannot accept, and will disregard, any embargo<sup>62</sup> a listed entity attempts to place on an announcement given to ASX under that rule.

### 3.13 What form should an announcement under Listing Rule 3.1 take?

A disclosure under Listing Rule 3.1 must be in the form of a written announcement<sup>63</sup> and given to the ASX Market Announcements office for release to the market.<sup>64</sup>

### 3.14 Guidelines on the headers to announcements under Listing Rule 3.1

The ASX Online announcements lodgement screen includes a “title header” field where a title for the announcement can be inserted. In the case of announcements under Listing Rule 3.1, it is common for a listed entity to insert the heading, or an abridged version<sup>65</sup> of the heading, to the announcement in that field.

Listed entities should take care in the headers that they give to their announcements. ASX will generally use the title header supplied in that field as the name or description of the announcement on the ASX website and in the message about the announcement that gets published on its trading platform and displayed on broker trading terminals. Many brokers and investors will use this name or description to assess whether they ought to read the full announcement.

The header to an announcement should briefly and accurately convey its contents (eg “1:4 rights issue of ordinary shares at \$1” or “Full year profits down by 20%”). Not only will this assist brokers and investors in assessing the significance of the announcement, it will also assist ASX in determining more quickly whether an announcement could be market sensitive and therefore warrants a halt to trading under ASX Operating Rule 3301(a).<sup>66</sup>

The header for an announcement should also convey a fair and balanced impression of what the announcement is about so as not to mislead readers as to its contents or significance. For example, the header to an announcement that contains essentially negative information should not attempt to disguise that fact by picking out a small piece of positive information in the announcement and just mentioning that (sometimes referred to as “putting spin” on the announcement). Likewise, the header to an announcement that contains forward looking information (such as earnings guidance or an exploration or production target) that is speculative or highly qualified should be careful not to overstate or sensationalise the true character of the information it contains.

<sup>61</sup> Where ASX receives information from a third party which they assert should be, or should have been, disclosed by a listed entity under Listing Rule 3.1, ASX will make enquiries of the entity as to the accuracy and materiality of the information. If ASX forms the view that the information is accurate, market sensitive and not within the carve-outs from disclosure in Listing Rule 3.1A, ASX will ask the entity to make an announcement under Listing Rule 3.1: see ‘7.5 Complaints or allegations of non-compliance’ on page 43.

<sup>62</sup> That is, a condition that ASX cannot release the announcement to the market until a certain time.

<sup>63</sup> Listing Rule 19.10.

<sup>64</sup> See Listing Rule 15.2.1 and Guidance Note 14 *ASX Market Announcements Platform*. The announcement must be in final form. ASX cannot and will not accept a draft announcement under Listing Rule 3.1 for comment or pre-vetting, since that would be inconsistent with the need for disclosure to be made immediately under that rule.

<sup>65</sup> This field is limited to 60 characters.

<sup>66</sup> See ‘3.18 What steps does ASX take when it receives an announcement under Listing Rule 3.1?’ on page 21.

ASX has experienced difficulties in the past with announcements that have been given a fairly innocuous header (such as “Chairman’s Address to AGM”) but have had market sensitive material embedded in them. ASX would ask listed entities to ensure that the header to such an announcement clearly identifies the fact that it contains market sensitive information (eg “Chairman’s Address to AGM and Buyback Announcement”) or, better still, that market sensitive announcements are made on a stand-alone basis and not embedded in other announcements that may not be market sensitive.

### 3.15 Guidelines on the contents of announcements under Listing Rule 3.1

Wherever possible,<sup>67</sup> an announcement under Listing Rule 3.1 should contain sufficient detail for investors to understand its ramifications and to assess its impact on the price or value of the entity’s securities.

For example, an announcement about the signing of a contract relating to a significant acquisition or disposal should include:

- details of the assets or businesses proposed to be acquired or disposed of;<sup>68</sup>
- information about the likely effect of the transaction on the entity’s total assets, total equity interests, annual revenue (or, in the case of a mining exploration entity or other entity that is not earning material revenue from operations, annual expenditure) and annual profit before tax and extraordinary items;
- if the entity is proposing to issue securities as part of, or in conjunction with, the transaction, detailed information about the issue, including its effect on the total issued capital of the entity and the purposes for which the funds raised will be used;
- if any changes to the board or senior management are proposed as a consequence of the transaction, details of those changes; and
- the timetable for implementing the transaction.

It is open to a listed entity which signs a market sensitive agreement to lodge a copy of that agreement on the ASX Market Announcements Platform, if it wishes to do so. This may help to reduce the amount of material about the agreement that needs to be included in its announcement and also avoid any issues about whether any material terms of the agreement have been properly disclosed. However, ASX recognises that there are cases where an entity will not wish to do this.<sup>69</sup> In those cases, the announcement about the agreement should contain a fair and balanced summary of the material terms of the agreement and include any other material information that could affect an investor’s assessment of its impact on the price or value of the entity’s securities.

It is also open to a listed entity to include in an announcement references or hyperlinks to other documents where further information can be found. However, if those documents have not been lodged on the ASX Market Announcements Platform, the announcement itself should include sufficient detail about the material contents of those documents for investors to understand and assess their significance and determine whether they need to read them.

An announcement under Listing Rule 3.1 must be accurate, complete and not misleading.<sup>70</sup> Opinions expressed in an announcement should be honestly held and balanced and should be clearly identified as a statement of opinion rather than a statement of fact. Any forward looking statements in an announcement, such as earnings guidance or exploration or production targets, must have a reasonable basis in fact or else by law they will be

<sup>67</sup> This does not apply to an “interim” or “holding” announcement about an uncertain situation. In such a case, the announcement may only be able to outline the current situation and foreshadow that a further announcement will be made when the situation is more certain.

<sup>68</sup> If the asset being acquired is a mining exploration tenement, this should include details of the tenement, where it is located and a summary of previous exploration activity and expenditure on the tenement.

<sup>69</sup> For example, it may contain commercially sensitive information that ought not be disclosed (although see ‘3.20 Commercially sensitive information’ on page 22).

<sup>70</sup> Giving materially false or misleading information to ASX potentially breaches section 1309 of the Corporations Act. See ‘The statutory prohibitions against false or misleading disclosures’ on page 63.

deemed to be misleading.<sup>71</sup> Any material assumptions or qualifications that underpin those statements should also be stated in the announcement.

Listed entities should not use an announcement under Listing Rule 3.1 as a guise to publish material that is really promotional, political or tendentious in nature rather than being information that a reasonable person would expect to have a material effect on the price or value of its securities.

For this reason,<sup>72</sup> an entity generally should not submit a broker research report about it, or any extract from or hyperlink to such a report, for publication on the ASX Market Announcements Platform under Listing Rule 3.1.<sup>73</sup> Any market sensitive fact-based material in such a report should already have been released by the entity under that rule beforehand and so it can reasonably be inferred that the entity is seeking to publish the report for its opinion-based material (such as the broker's buy recommendation or price target). This will raise an issue about whether the report is really being published for promotional rather than informational reasons. It may also raise concerns about whether the entity is effectively endorsing any price target, earnings estimate or other forward looking statement in the report. ASX may require an entity which does happen to publish a broker research report about it, or any extract from or hyperlink to such a report, on the ASX Market Announcements Platform to make a further announcement addressing these concerns.

Finally, an announcement must be couched in language that is appropriate for release to the market. It should be factual, relevant and expressed in a clear and objective manner. Emotive, intemperate or defamatory language should not be used, nor should vague or imprecise language such as "single digit" or "double digit", which does not allow investors to assess the value of the information for the purpose of making an investment decision.

ASX may refuse to accept or publish an announcement from a listed entity that does not meet the standards described above or may require the entity to lodge a corrective announcement.<sup>74</sup>

### 3.16 Announcements must be given to ASX first

Subject to an exception for dual listed entities discussed below, under Listing Rule 15.7, an entity must not release information that is required to be given to ASX under Listing Rule 3.1 to anyone else, unless and until it has been given to ASX and the entity has received an acknowledgement from ASX that the information has been released to the market. This includes releasing the information to the media, even on an embargoed basis.

The reason for this requirement is to make ASX's Market Announcements Platform the central collection and dissemination point for market sensitive information. This ensures that such information is quickly and broadly

<sup>71</sup> See note 234 and accompanying text.

<sup>72</sup> There may be particular circumstances where a broker report is required to be lodged on the ASX Market Announcements Platform, eg where it forms part of, or has been incorporated by reference into, a prospectus or other disclosure document that is required to be lodged on the ASX Market Announcements Platform.

<sup>73</sup> ASX has no objection to a listed entity publishing a broker research report about it on its website. A listed entity which does so, however, needs to be alert to the legal issues that this may raise. For example, in the absence of a suitable disclaimer, the publication of the report may imply that the entity endorses the contents of the report, including any price target, earnings forecast or other statement about the entity's prospects. The broker will most likely have copyright in the report and therefore their consent should be sought to its publication, in the form and context in which it will appear. If the report has been commissioned or paid for by the entity, or there is some other commercial relationship between the broker and the entity (eg if the broker is acting as an underwriter or placement agent for an issue of securities by the entity), then that fact should be disclosed in the report. In addition, such a report should not be described on the website or elsewhere as "independent", since that would plainly be misleading.

<sup>74</sup> ASX notes that in *ASIC v Fortescue Metals Group Ltd* [2011] FCAFC 19, the Full Federal Court held (at paragraph 181) that making a false or misleading announcement under Listing Rule 3.1 will trigger a separate obligation under that Listing Rule and section 674 to make a corrective announcement. In overturning the decision of the Full Federal Court, the High Court was not required to rule on this point (see *Forrest v ASIC* [2012] HCA 39, at paragraph 66).

There may be other reasons, in addition to those suggested by the Full Federal Court, as to why a listed entity which has made a false or misleading announcement under Listing Rule 3.1 may have to make a corrective announcement. In some cases, this may be because the false or misleading announcement may not have satisfied its obligation to disclose the relevant information in the first place and therefore this obligation continues on foot until the relevant information is properly disclosed (see for example ASIC Media Release 05/223, involving an initially misleading announcement about the results of a trial for a cancer treatment drug). In addition, if ASX becomes aware that a listed entity has lodged a false or misleading announcement under Listing Rule 3.1, it may require the lodgement of a corrective announcement under Listing Rules 3.1B and/or 18.8.

disseminated to all sections of the market, enhancing the efficiency and integrity of that process and helping to reduce of risk of informational inequities and insider trading.

ASX acknowledges that the requirement to give information to ASX first can pose practical difficulties for listed entities that have business operations in countries in different time zones to Australia. ASX encourages any entity in this situation which has advance warning that it may need to make an announcement in another country at a time when the ASX Market Announcements office is not open,<sup>75</sup> to contact its ASX home branch to discuss the arrangements that can be made to facilitate that occurring in a manner that does not undermine the policy behind Listing Rule 15.7.

ASX also recognises that sometimes events will occur outside of the hours of operation of the ASX Market Announcements office, whether in Australia or overseas, which require an immediate public announcement (eg a major natural disaster affecting the operations of a listed entity where an announcement may be required for health and safety reasons or for the peace of mind of staff and relatives). If a listed entity has a pressing commercial or legal need to make a market sensitive announcement outside of the hours of operation of the ASX Market Announcements office, provided it gives a copy of the announcement to the ASX Market Announcements office at the same time as it makes the announcement, so that it is queued for processing by the ASX Market Announcements office before licensed markets in Australia next open for trading, ASX will generally not take any action against the entity for infringing Listing Rule 15.7.

### **3.17 What if information is released to someone else before it is given to ASX?**

If a listed entity becomes aware that market sensitive information which has not been given to ASX under Listing Rule 3.1 has been released to a section of the market (eg at an investor or analyst briefing or at a meeting of security holders) or to a section of the public (eg at a media briefing or through its publication on a website or in social media), the entity should immediately give the information to ASX under Listing Rule 3.1 in a form suitable for release to the market.<sup>76</sup>

The fact that information released through other outlets may be, or eventually become, “generally available” for the purposes of sections 674<sup>77</sup> is not an excuse for failing to disclose it to ASX under Listing Rule 3.1.

### **3.18 What steps does ASX take when it receives an announcement under Listing Rule 3.1?**

Information given to ASX under Listing Rule 3.1 is quickly reviewed<sup>78</sup> and then released by ASX to the market.<sup>79</sup> Guidance Note 14 *ASX Market Announcements Platform* has further guidance on how this process occurs.

<sup>75</sup> The ASX Market Announcements office is generally staffed from 7.30 am to 7.30 pm AEST (8.30 pm during daylight saving) on each trading day. ASX usually starts releasing announcements by ASX listed entities with a dual listing in New Zealand at or just before 8.00 am AEST (to coincide with the open of trading on the NZX) and by other entities at 8.30 am AEST. Announcements received by the ASX Market Announcements office after 7:30 pm (8:30 pm during daylight saving) or on a non-trading day are queued for review and release on the morning of the next following trading day.

<sup>76</sup> If the entity has been relying on the carve-outs from disclosure in Listing Rule 3.1A, the release of the information in any of these ways will result in it ceasing to be confidential and therefore Listing Rule 3.1A.2 will no longer be satisfied – see the discussion of the carve-outs from disclosure below.

<sup>77</sup> See in particular section 674(2)(c)(i). Section 676 defines what is meant by information being “generally available”. Under that section, information is generally available if: (a) it consists of readily observable matter; or (b) it has been made known in a manner that would, or would be likely to, bring it to the attention of persons who commonly invest in securities of a kind whose price or value might be affected by the information and, since it was so made known, a reasonable period for it to be disseminated among such persons has elapsed; or (c) it consists of deductions, conclusions or inferences made or drawn from information referred to in (a) or (b).

<sup>78</sup> That review is necessarily quick and cursory and directed primarily to determining: (1) whether the announcement is likely to be market sensitive and therefore warrants the application of a halt to trading under ASX Operating Rule 3301(a); and (2) whether the announcement materially affects a listed entity apart from the lodging party and therefore should be captured in the list of announcements for that entity on the ASX Market Announcements Platform. It is not intended to be, and cannot be, a detailed review of the contents of the announcement, given the need for market sensitive information to be released to the market promptly. ASX therefore cannot accept, and expressly disclaims, any responsibility or legal liability to anyone whatsoever for failing to detect or prevent the release of an announcement that is inaccurate, incomplete, misleading, defamatory or otherwise defective.

<sup>79</sup> If ASX has any queries or concerns about an announcement, it may delay the release of the announcement pending a discussion between the entity and a listings adviser to clear up those queries or concerns.

Where ASX receives an announcement under Listing Rule 3.1 from a listed entity which it considers is likely to be market sensitive, it will halt trading in the entity's securities under ASX Operating Rule 3301(a). If the announcement relates to a takeover offer by or for, or a scheme of arrangement involving, the entity, the halt will last for approximately one hour. In all other cases, the halt will last for approximately 10 minutes. The purpose of the halt is to allow the market to absorb and react to the information in the announcement.

### 3.19 Dual listed entities

An entity with a dual listing on the ASX and an overseas securities exchange must immediately give to ASX a copy of any document it gives to the overseas exchange that is, or is to be, made public.<sup>80</sup> Such documents, if not in English, must be accompanied by an English translation.<sup>81</sup>

A dual listed entity which becomes aware of information outside of the hours of operation of the ASX Market Announcements office<sup>82</sup> and which is required to release that information to an overseas exchange may do so provided that it gives the information to the ASX Market Announcements office at the same time, together with written advice that the information has been released to the overseas exchange.<sup>83</sup>

An entity listed on more than one exchange which requests and is given a trading halt on ASX to manage its disclosure obligations will need to consider carefully whether it should be taking action in relation to the other exchange or exchanges on which it is listed to prevent its securities trading there on an uninformed basis.

If another exchange on which it is listed permits a disclosure-related trading halt and there is a possibility of its securities trading on that exchange while ASX is in a trading halt, it will generally be appropriate for the entity to request that exchange to grant an equivalent trading halt to ASX. It is the responsibility of the entity to co-ordinate the application and lifting of that trading halt with its trading halt on ASX.

Not all exchanges, however, are as accommodating as ASX when it comes to granting disclosure-related trading halts. If an entity's securities will be trading on another exchange while they are in a trading halt on ASX and the entity is not able to obtain an equivalent trading halt on that exchange, it may be appropriate for it to publish a notice to that exchange indicating that an announcement is pending and investors should be wary of buying or selling securities ahead of that announcement.

### 3.20 Commercially sensitive information

Issues can sometimes arise under Listing Rule 3.1 in relation to the disclosure of commercially sensitive matters, such as the pricing given to a major customer or supplier under a material contract. ASX recognises that the disclosure of such information could be used by the entity's competitors or by other customers or suppliers, to the detriment of the entity and investors in the entity.

Some commercially sensitive information may be a trade secret and therefore protected from disclosure under Listing Rule 3.1A.<sup>84</sup> Some commercially sensitive information, however, may be difficult to characterise in that manner.

ASX has no issue with a listed entity structuring an announcement about a particular transaction to avoid disclosing commercially sensitive matters, provided it includes sufficient information in the announcement to enable the market to assess the impact of the transaction on the price or value of the entity's securities. For example, in many cases, it will be sufficient to disclose the expected impact of a material contract on the entity's revenues (in the case of a customer), expenses (in the case of a supplier) or profit (in either case), without having to disclose the unit prices receivable or payable, or the volumes to be delivered or received, under the contract.

<sup>80</sup> Listing Rule 3.17A.

<sup>81</sup> Listing Rule 15.2A. If the preparation of an English translation is likely to take some time, to meet the requirement to disclose information immediately, the entity should lodge the original foreign language version with a short summary in English of the material contents of the document and then lodge the translation as soon as it reasonably can thereafter.

<sup>82</sup> See note 75.

<sup>83</sup> Listing Rule 15.7.1.

<sup>84</sup> See '4.7 Trade secrets' on page 27.

If an announcement is structured in this manner, care must be taken to ensure that it is accurate, includes all material information that would influence investors in deciding whether to buy or sell the entity's securities and is not misleading. If the announcement is not capable of being drafted to meet these requirements without including the commercially sensitive information, then Listing Rule 3.1 will require the commercially sensitive information to be disclosed.

### **3.21 Disclosure must be made even if it is contrary to the short term interests of the entity**

A listed entity must comply with its disclosure obligations under Listing Rule 3.1 and section 674, even if does not appear to be in its short term interests to do so (eg because the information might have a materially negative impact on the price of its securities and perhaps jeopardise a transaction that it is trying to conclude).

As mentioned previously, a breach by a listed entity of Listing Rule 3.1 and section 674 can attract serious legal consequences for the entity and its officers and it is no defence to say that it was in the interests of the entity not to disclose the information in question.

Listed entities concerned about the disclosure of negative information should refer to the guidance under '4.10 Entities in financial difficulties' on page 30.

### **3.22 Disclosure must be made even if it is contrary to contractual commitments**

A listed entity must comply with its disclosure obligations under Listing Rule 3.1 and section 674, even where it is party to a confidentiality or non-disclosure agreement that might otherwise require it to keep information confidential.

Generally speaking, any listed entity entering into a confidentiality or non-disclosure agreement should insist upon an express carve-out for the disclosure of information that is required by law or under the rules of a stock exchange so as not to create a conflict with its disclosure obligations under section 674 and Listing Rule 3.1. However, even if such an express carve-out is not included, it is highly likely that one will be implied in any event, on the basis that a commercial contract cannot require a party to act in a manner contrary to the general law.<sup>85</sup>

It should be noted that the ASX Listing Rules are contractually binding on a listed entity and are enforceable against a listed entity under both the Corporations Act and the general law.<sup>86</sup> A party to a confidentiality or non-disclosure agreement who seeks to enforce it against a listed entity in an attempt to prevent the entity from disclosing information it is required to disclose under Listing Rule 3.1 may have difficulty in doing so, since that would interfere with the contractual relations between the entity and ASX. If the party succeeds in that endeavour, however, it may potentially be liable to civil penalties under section 674(2A) and to pay compensation to anyone who has suffered loss or damage as a consequence of the entity's non-disclosure, as someone who has procured (and therefore been "involved in") a breach of section 674(2) by the entity.<sup>87</sup>

### **3.23 Suspended entities**

Entities whose securities have been suspended from trading continue to be subject to the Listing Rules, including their continuous disclosure obligations under Listing Rule 3.1.<sup>88</sup>

ASX recommends that an entity which is in a long-term suspension (eg as a result of an administration or liquidation) implements a system of periodic disclosures to ensure that the market and its security holders are provided with regular updates as to its status.

<sup>85</sup> See *Smorgon v Australian and New Zealand Banking Group Ltd* (1976) 134 CLR 475, at 488-9 and *Parry-Jones v Law Society* [1969] 1 Ch 1, at 6-7. See also the comments of Santow J in *Cultus Petroleum v OMV Australia* [1999] NSWSC 422, at paragraph 73 (confirming that the statutory obligation to disclose material information in a bidder's statement would override a contractual obligation in a confidentiality agreement to keep that information confidential).

<sup>86</sup> Sections 793B and 793C. See also Part 3 of Appendices 1A and 1B of the Listing Rules.

<sup>87</sup> See notes 224 and 225 and accompanying text.

<sup>88</sup> Listing Rule 18.6.

## 4. Listing Rule 3.1A – the exceptions to immediate disclosure

### 4.1 General

Listing Rule 3.1A sets out exceptions to the requirement to make immediate disclosure of market sensitive information under Listing Rule 3.1. These exceptions seek to balance the legitimate commercial interests of listed entities and their security holders with the legitimate expectations of investors and regulators concerning the timely release of market sensitive information. They also seek to ensure that information is not disclosed prematurely when, rather than inform the market, it could misinform or mislead the market.

Unless the requirements in all three of Listing Rules 3.1A.1, 3.1A.2 and 3.1A.3 are satisfied in respect of particular market sensitive information, Listing Rule 3.1A does not apply and the entity must disclose the information immediately under Listing Rule 3.1.

If the requirements in all three of Listing Rules 3.1A.1, 3.1A.2 and 3.1A.3 are initially satisfied in respect of particular market sensitive information but any one of them ceases to be satisfied thereafter,<sup>89</sup> Listing Rule 3.1A ceases to apply at that point and the entity must then disclose the information immediately under Listing Rule 3.1.

### 4.2 Listing Rule 3.1A.1 – the categories of information excluded

The first requirement for Listing Rule 3.1A to apply is that the information must fall within one of the categories mentioned below:

- 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.

Information may fall within more than one of these categories. For example, embryonic thinking that a listed entity may do about a potential transaction it is interested in pursuing may qualify both as an incomplete proposal and as a matter that is insufficiently definite to warrant disclosure.

### 4.3 Breach of law to disclose

To fall within this category, the disclosure of the relevant information must breach a specific statute, regulation, rule, administrative order or court order binding on the listed entity.

The fact that information may be subject to a confidentiality agreement or to duties of confidentiality under the general law, such that its disclosure might give rise to a legal action for damages or for injunctive or other relief, is not sufficient to attract this category.

### 4.4 Incomplete proposals or negotiations

The word “incomplete” in this rule qualifies both “proposal” and “negotiation”.

A proposal is a course of action put forward for adoption. It may be unilateral (eg a proposal to declare a dividend) or it may be multi-lateral (eg a proposal to or from another party to enter into a transaction). Where it is multi-lateral, it will often lead to negotiations about the proposal with a view to the parties entering into an agreement to give effect to it.

<sup>89</sup> For example, because previously incomplete negotiations (as referred to in the second bullet point of Listing Rule 3.1A.1) are completed or because the information has ceased to be confidential (as referred to in Listing Rule 3.1A.2).

A proposal involving a listed entity is incomplete unless and until the entity has adopted it and is committed to proceeding with it. Negotiations are incomplete unless and until they result in a legally binding agreement or the entity is otherwise committed to proceeding with the transaction being negotiated.

Hence, all other things being equal:

- Where a unilateral proposal requires the approval of the board of directors of a listed entity, and nothing more, for the entity to be committed to it (such as a proposal to declare a dividend<sup>90</sup>), it will be complete when the board formally approves the proposal and resolves to proceed with it, and not beforehand. If the proposal is market sensitive, it will need to be announced immediately after the board resolves to proceed with it.<sup>91</sup>
- Where a unilateral proposal requires additional steps to be taken over and above the approval of the board of directors of a listed entity for the entity to be committed to it (such as a unilateral proposal<sup>92</sup> to make a takeover bid, which requires a bidder's statement and, in the case of an off market bid an offer document, to be lodged with ASIC<sup>93</sup>), it will be complete only when those steps have been taken, and not beforehand. If the proposal is market sensitive, it will need to be announced immediately after those steps have been completed.
- Where a listed entity is negotiating a transaction with another party or parties, those negotiations will be complete only when the parties enter into an agreement to implement or give effect to the transaction, and not beforehand.<sup>94</sup> If the transaction is market sensitive, it will need to be announced immediately after the agreement has been entered into.

Generally speaking, an agreement is not binding until it is signed or formally adopted in some other way. Until that point, any party is free to walk away from the agreement or to re-open negotiations. This fact does afford a degree of flexibility to a listed entity, in terms of when it chooses to sign a market sensitive agreement and to make an announcement about it.

It is perfectly acceptable for a listed entity to arrange the signing of, and an announcement about, a market sensitive agreement at a convenient time before licensed securities markets have opened or after the licensed securities markets have closed. In fact, ASX would encourage listed entities to consider doing this to avoid disrupting the normal course of trading on licensed markets.<sup>95</sup>

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<sup>90</sup> Note that a decision by an entity to declare, or not to declare, a dividend or other distribution must be immediately notified to ASX under Listing Rule 3.21, regardless of whether it will have a material effect on the price or value of its securities.

<sup>91</sup> In applying this guidance, a listed entity needs to differentiate carefully between those situations where board approval is required for the entity to be committed to proceeding with a market sensitive proposal and those situations where an entity is in fact already committed to a market sensitive proposal and is simply having that decision noted by the board. The former will not generally need to be announced until after the board has approved the proposal. The latter will need to be announced when the entity is committed to proceeding with the proposal, since the proposal will no longer be incomplete and the exception to immediate disclosure in Listing Rule 3.1A will cease to apply at that point.

<sup>92</sup> Note that a bilateral proposal to make a friendly takeover bid will generally need to be disclosed as soon as the parties have entered into an agreement to proceed with the takeover bid and this will usually be earlier than the lodgement of the acquirer's bidder's statement with ASIC.

<sup>93</sup> See sections 632 – 635. An entity may also become committed to making a takeover bid by publicly announcing its intention to make the bid (see section 631).

<sup>94</sup> An agreement that is entered into to facilitate a negotiation about a transaction (eg a confidentiality agreement or an exclusivity agreement), rather than to implement or give effect to a transaction, would not be expected to be disclosed, provided the requirements in Listing Rules 3.1A.2 and 3.1A.3 continue to be satisfied.

<sup>95</sup> Albeit with the caveat that the entity remains at risk of the other party or parties walking away or re-opening negotiations unless and until the agreement is signed.

Entities that have reached substantive agreement on the terms of a material transaction but which have not yet signed legally binding documentation should be especially vigilant in monitoring the market and the media for signs that information about the transaction may have leaked and be prepared to make an immediate announcement about the transaction should that occur (see note 100 and accompanying text).

It is not acceptable, however, for a listed entity to commit itself to an agreement (eg by “hand shake” or side letter) but to delay signing in an attempt to delay its disclosure. As soon as an agreement is legally binding on a listed entity or it is otherwise committed to proceeding with the transaction in question, the proposal inherent in that agreement and the negotiations about it are completed and this exception no longer applies.

#### **4.5 Matters of supposition or that are insufficiently definite to warrant disclosure**

This category of information is excluded from disclosure because of its propensity to misinform or mislead the market.

The term “supposition” refers to something which is assumed or believed without knowledge or proof.

Information about a matter will 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. In some cases, information in this category may be so uncertain or indefinite that it is not in fact market sensitive and therefore not required to be disclosed under Listing Rule 3.1, regardless of whether it falls within the carve-outs from disclosure in Listing Rule 3.1A.

The situation identified in the last bullet point above needs to be differentiated from information about a known event or circumstance that can reasonably be expected to have a material effect on the price or value of an entity’s securities but where it may take time for the entity to put a figure or estimate on the financial impact of that event or circumstance. Listing Rule 3.1 will generally require such information to be disclosed immediately and it is not appropriate for the entity to delay announcing the information just because it is not in a position to state the financial impact of the event or circumstance in its announcement.

If a listed entity is not in a position to disclose to the market the financial impact of market sensitive information, the appropriate course is for it to announce whatever information is in its possession immediately but to signal that it will make a further announcement when it has had the opportunity to assess the financial impact of the information. Example G in Annexure A illustrates the point. If the entity is concerned that releasing information without disclosing its financial impact could lead to a false market in its securities, it should raise that concern with ASX and discuss whether it would be appropriate to request a trading halt to afford it the time it needs to assess the financial impact of the information and to make a more complete announcement to the market.

#### **4.6 Information generated for the internal management purposes of the entity**

To fall within this category, the information must have been “generated for the internal management purposes of the entity”. The expression “entity” here is to be read in a commercial rather than a legal sense.<sup>96</sup> It includes not only information generated for the internal management purposes of the listed entity itself, but also for the internal management purposes of any child entity or other entity in which the listed entity may have an economic interest.

Information does not have to be generated internally to fall within this category. Information generated externally (eg by an adviser or consultant) may fall within this category provided it is going to be used for the internal management purposes of the entity (eg to help inform a management decision).

Management documents such as budgets, forecasts, management accounts, business plans, strategic plans, contingency plans, decision papers, minutes of management meetings and the like clearly fall within this category, as do board papers and board minutes. Professional advice (eg from lawyers, accountants and financial advisers) will also usually fall within this category.

<sup>96</sup> See Listing Rule 19.2.

However, for the avoidance of doubt, the mere fact that information may happen to be mentioned in a document generated for internal management purposes does not mean that the information itself falls within this category. Management documents often include information about potentially market sensitive events or circumstances, where those events or circumstances (as distinct from the document that refers to them) could not fairly be described as being information generated for internal management purposes. Information about such events or circumstances is not protected from disclosure by this category. For example, while management accounts or forecasts may fall within this category, market sensitive information they may reveal about a material difference in earnings compared to market expectations does not.<sup>97</sup>

#### 4.7 Trade secrets

The term “trade secret” refers to something which has economic value to a business because it is not generally known or easily discoverable by observation and for which efforts have been made to maintain secrecy. This may include a formula, recipe, device, program, method, technique or process. It may also include a compilation of information, such as a client list or database.

Often trade secrets will be protected by copyright or give rise to rights in equity that are capable of being protected by an action for breach of confidence. In some jurisdictions they may also be protected by statute.

#### 4.8 Listing Rule 3.1A.2 – the requirement for information to be confidential

The second requirement for Listing Rule 3.1A to apply has two components: (1) the information must be confidential; and (2) ASX has not formed the view that the information has ceased to be confidential.

In relation to the first component, 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 only to be used for permitted purposes; and
- those people abide by that understanding.<sup>98</sup>

Whether information has the quality of being confidential is a question of fact, not one of the intention or desire of the listed entity. Accordingly, even though an entity may consider information to be confidential and its disclosure to be a breach of confidence, if it is in fact disclosed by those who know it, then it ceases to be confidential information for the purposes of this rule.

It is therefore incumbent on a listed entity which wishes to rely on the carve-out from disclosure in Listing Rule 3.1A to ensure that it has in place suitable and effective arrangements to preserve confidentiality. Guidance on the steps that can be taken in this regard can be found in the joint publication by Chartered Secretaries Australia and the Australasian Investor Relations Association entitled *Handling confidential, price-sensitive information: Principles of good practice*.<sup>99</sup>

Even with strong confidentiality safeguards, it is important to recognise that the more people who know information, the greater the risk that it will cease to be confidential. So, for example, if a party proposing to acquire a business wants, as part of its due diligence, to make enquiries of employees, customers or suppliers, or a party proposing to undertake an issue of securities wants to take soundings from brokers and potential

<sup>97</sup> See ‘6.3 Earnings surprises’, ‘Example F – material difference in earnings compared to earnings guidance’ and ‘Example G – material difference in earnings compared to consensus estimates’ on pages 35, 56 and 56 respectively.

<sup>98</sup> Hence, information can be disclosed to employees (who have a duty to their employer under the general law to maintain confidences), advisers (who also have a duty to their clients under the general law to maintain confidences) and to regulators (who generally have statutory duties to maintain confidences) without it losing confidentiality, provided in each case the recipient of the information in fact treats it in confidence.

<sup>99</sup> Available online at:

[http://www.csaust.com/AM/Template.cfm?Section=Governance\\_guidelines&Template=/CM/ContentDisplay.cfm&ContentID=19240](http://www.csaust.com/AM/Template.cfm?Section=Governance_guidelines&Template=/CM/ContentDisplay.cfm&ContentID=19240).

investors, it and the other parties involved in the transaction need to be prepared for the chance that information about the transaction will not be kept in confidence.

An entity which is relying on Listing Rule 3.1A not to disclose information about a market sensitive transaction it is negotiating should as a matter of course be monitoring, either itself or through its advisers:

- the market price of its securities and of the securities of any other listed entity involved in the transaction;
- major national and local newspapers;
- major news wire services, such as Reuters and Bloomberg;
- any investor blogs, chat-sites or other social media it is aware of that regularly include postings about the entity; and
- enquiries from analysts or journalists,

for signs that information about the transaction may no longer be confidential and have a draft letter to ASX requesting a trading halt and a draft announcement about the negotiations ready to send to ASX to cater for that eventuality.<sup>100</sup> The closer the transaction gets to being concluded, the higher the risk of leaks and the more diligent that monitoring should be.

In relation to the second component, ASX may form the view that information about a matter involving a listed entity has ceased to be confidential if there is:

- a media or analyst report about the matter;
- a rumour known to be circulating the market about the matter; or
- a sudden and significant movement in the market price or traded volumes of the entity's securities that cannot be explained by other events or circumstances.

Each of these is evidence that the matter is no longer confidential and therefore Listing Rule 3.1A.2 no longer applies.

In the case of the first two points above, the more specific and the more accurate the media or analyst report or market rumour, the more compelling the evidence that confidentiality has been lost.

In relation to the third point above, ASX occasionally finds a listed entity or its advisors wanting to debate whether a sudden and significant movement in the market price or traded volumes of its securities can fairly be attributed to information about a particular matter ceasing to be confidential. ASX considers any such debate to be misplaced.<sup>101</sup> If an entity advises ASX that there is market sensitive information that has not been disclosed in reliance on Listing Rule 3.1A (as it must when it is asked that question by ASX<sup>102</sup>) and it is not able to point to any other event or circumstance which explains the movement in the market price or traded volumes of its securities, ASX has no choice but to assume that the information in question has become known to some in the market, is being traded on and therefore is no longer confidential.<sup>103</sup> Upon the entity being advised by ASX that it is of the

<sup>100</sup> See Example H2 in Annexure A.

<sup>101</sup> In cases where there is a sudden and significant movement in the market price or traded volumes of an entity's securities which cannot be explained by other events or circumstances apart from a possible leakage of market sensitive information, ASX will generally take the view that a reasonable person would expect that information to be disclosed and therefore Listing Rule 3.1A.3 is no longer satisfied. It may also form the view that the movement in the market price or traded volumes of the entity's securities is evidence of a false market in those securities and require the release of that information under Listing Rule 3.1B.

<sup>102</sup> See notes 120 and 159 and accompanying text.

<sup>103</sup> This is in line with the approach taken by regulators and exchanges in other markets. The appropriateness of this approach has been confirmed by European courts: see *Super de Boer*, Utrecht District Court, 30 March 2011, LJN BP9796, holding that substantial increases in trading volumes in the shares in Super de Boer at a time when it was negotiating a takeover bid from Jumbo was sufficient to indicate that information about the takeover bid was no longer confidential and therefore should have been disclosed to the market.

view that the information has ceased to be confidential, Listing Rule 3.1A will no longer apply and the entity will then be obliged to make an immediate announcement about the information under Listing Rule 3.1.<sup>104</sup>

The processes ASX generally follows in these situations are explained under '5.4 Responding to comment or speculation in media or analyst reports', '5.5 Market rumours' and '7.2 The action ASX takes when it detects abnormal trading' below.<sup>105</sup>

#### 4.9 Listing Rule 3.1A.3 – the reasonable person test

The third requirement for Listing Rule 3.1A to apply is that a reasonable person would not expect the information to be disclosed.

This requirement is perhaps the least understood limb of Listing Rule 3.1A. It serves a number of purposes:

- It reinforces the fact that Listing Rule 3.1A does not apply to protect information from disclosure if it has ceased to be confidential. This is because a reasonable person would expect that once information has become known to, and is being traded on by, some in the market (as evidenced, for example, by a sudden and significant movement in the market price or traded volumes of an entity's securities), that information should be disclosed immediately to the market.
- It reinforces the fact that Listing Rule 3.1A does not apply to protect information from disclosure if it is required to correct or prevent a false market. This is because a reasonable person would expect a listed entity, acting responsibly, to immediately disclose any information necessary to correct or prevent a false market in its securities.
- It may require the disclosure of information that otherwise meets the requirements for non-disclosure under Listing Rules 3.1A.1 and 3.1A.2, if a reasonable person would expect the information to be disclosed in the circumstances.

As a general rule, most information that falls within the prescribed categories in Listing Rule 3.1A.1 and that is confidential under Listing Rule 3.1A.2 will also fall within Listing Rule 3.1A.3, since confidential information within those categories will generally be information that a reasonable person would not expect to be disclosed. That general rule can, however, be displaced if there is something in the circumstances that would cause a reasonable person to expect the information to be disclosed. Examples G6, G7 and G8 in Annexure A illustrate the point. These examples highlight the point made earlier that information needs to be assessed in context. The context in which information arises may mean that even though it satisfies the conditions for non-disclosure in Listing Rules 3.1A.1 and 3.1A.2, a reasonable person would nonetheless expect it to be disclosed under Listing Rule 3.1A.3.<sup>106</sup>

The reasonable person test is an objective one. It is to be judged from the perspective of an independent and judicious bystander and not from the perspective of someone whose interests are aligned with the listed entity or with the investment community.<sup>107</sup> It is also to be judged against the backdrop of the policy reasons underpinning

<sup>104</sup> A sudden and significant movement in the market price or traded volumes of an entity's securities may also be evidence of a false market in those securities. In such a case, under Listing Rule 3.1B, ASX may require the entity to release whatever information it asks for the correct or prevent the false market.

Note that one of the unavoidable consequences of information leaking about a confidential market sensitive transaction and causing a sudden and significant movement in the market price or traded volumes of a listed entity's securities is that if the entity happens to be negotiating two confidential market sensitive transactions at the time and it is not able to identify which particular transaction has leaked, it may have to disclose both transactions.

<sup>105</sup> See pages 31, 33 and 40 respectively.

<sup>106</sup> See also *GPG (Australia Trading) Pty Ltd v GIO Australia Holdings Ltd* [2001] FCA 1761 where it was assumed (without deciding) that a heavily qualified actuarial report which predicted that the defendant would make larger than expected reinsurance losses, by itself, was insufficiently definite to warrant disclosure under Listing Rule 3.1. However, when the defendant and its major shareholder announced a scheme a few days later to acquire the shares held by minority shareholders for a cash payment plus a contingent debt instrument tied to the value of the reinsurance business, the report should have been disclosed then.

<sup>107</sup> Listing Rule 3.1A.3 notably uses the term "reasonable person", rather than "reasonable investor", "reasonable security holder" or "reasonable director".

Listing Rule 3.1, namely, that timely disclosure of market sensitive information is critical to the integrity and efficiency of the ASX market and other public markets on which ASX quoted securities trade.

Some specific examples of information that ASX considers a reasonable person would not expect to be disclosed under Listing Rule 3.1A.3 include:

- Confidential information that an entity is planning to make a unilateral takeover bid for another entity. Premature disclosure of that information could jeopardise the transaction, which in turn could prejudice the interests of the entity and investors in both the entity and the target. A reasonable person would not expect this information to be disclosed until the bidding entity formally launches its takeover bid for the target.
- Confidential information that an entity has received an offer from another entity to enter into a control transaction. Again, premature disclosure of that information could jeopardise the transaction, which in turn could prejudice the interests of the entity and investors in the entity. A reasonable person would not expect this information to be disclosed until any negotiations entered into concerning the transaction are successfully concluded.<sup>108</sup>
- Confidential legal advice concerning litigation in which the entity is or could be involved. The disclosure of this information could result in a loss of legal professional privilege in the advice, prejudice the legal position of the entity and, because of that, prejudice both the entity and investors in the entity.

#### 4.10 Entities in financial difficulties

The fact that information may have a materially negative impact on the price or value of an entity's securities does not mean that a reasonable person would not expect the information to be disclosed. Quite the contrary, in many cases, this is precisely the type of information that a reasonable person would expect to be disclosed.<sup>109</sup>

ASX recognises that for a listed entity in financial difficulties, the requirement to disclose materially negative market sensitive information immediately can be an impediment to completing a financial restructure or reorganisation necessary for its survival. However, the proper course for the entity in such a situation is not to disregard its continuous disclosure obligations but instead to approach ASX to discuss the possibility of a trading halt or, if the situation is unlikely to resolve itself within two trading days,<sup>110</sup> a voluntary suspension.

As indicated in ASX Guidance Note 16 *Trading Halts and Voluntary Suspensions*, in certain exceptional circumstances, ASX may agree to suspend quotation of a listed entity's securities (or maintain an existing suspension) notwithstanding that the entity may be in a position to make an announcement about its progress in an incomplete proposal or negotiation that reasonably informs the market as to the current status of the proposal or negotiation. The circumstances in which ASX will consider agreeing to this course of action will generally be limited to situations in which the entity is reasonably of the view, and ASX is satisfied, that continued trading in its securities is likely to be materially prejudicial to the entity's ability to successfully complete a complex transaction that is, or a series of interdependent transactions that are, critical to the entity's continued financial viability.

In such a case, ASX will require the entity to provide the disclosure required under Listing Rule 17.2, including setting out its reasons for the suspension (or continued suspension) and a proposed timetable for reinstatement of trading, and for that information to be released to the market.

ASX is unlikely to agree to such a request if a reasonable timeframe for completion of the proposal or negotiation cannot be reliably estimated.

Entities in this situation should also have regard to the guidance under '3.23 Suspended entities' on page 23.

<sup>108</sup> See also 'Example B – control transaction' on page 47.

<sup>109</sup> Many of the class actions against listed entities alleging a breach of Listing Rule 3.1 and section 674 have involved security holders who purchased securities in the entity when adverse information having a negative effect on the value of its securities was alleged to have been withheld from the market.

<sup>110</sup> Two trading days is the maximum period for which a trading halt may be granted.

## 5. Listing Rule 3.1B – correcting or preventing false markets

### 5.1 What is a “false market”?

The term “false market” refers to a situation where there is material misinformation or materially incomplete information in the market which is compromising proper price discovery. This may arise, for example, where:

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

### 5.2 ASX’s powers to correct or prevent a false market

Under Listing Rule 3.1B, if ASX considers that there is or is likely to be a false market in an entity’s securities, it may require the entity to give ASX any information it asks for to correct or prevent the false market.

To correct or prevent a false market, ASX may require an entity to disclose market sensitive information, even if the entity considers that the information falls within Listing Rule 3.1A and therefore does not require immediate disclosure under Listing Rule 3.1.<sup>111</sup> It may also require an entity to disclose information that of itself is not market sensitive and therefore not required to be disclosed under Listing Rule 3.1 (for example, to correct a false rumour that the entity is about to enter into a market sensitive transaction when it is not).

If ASX has a concern that there is, or may be, a false market in an entity’s securities, it will usually try to contact the person the entity has appointed under Listing Rule 12.6 to be responsible for communications with ASX on Listing Rule matters to discuss the situation and the steps that could be taken to correct or prevent the false market. This may include the entity making an announcement to correct any misinformation in the market. It may also include the entity requesting a trading halt<sup>112</sup> to stop trading in its securities on licensed markets in Australia until the market is properly informed.

If ASX is not able to contact the entity’s nominated representative under Listing Rule 12.6 or the entity does not co-operate with ASX in making an announcement or requesting a trading halt, ASX will generally be left with little option but to suspend trading in its securities to prevent a false market from happening.<sup>113</sup>

### 5.3 What form should a disclosure under Listing Rule 3.1B take?

A disclosure under Listing Rule 3.1B must be in writing<sup>114</sup> and given to the ASX Market Announcements office for release to the market.<sup>115</sup> If the announcement includes market sensitive information, ASX will treat the disclosure in the same manner as an announcement under Listing Rule 3.1.<sup>116</sup>

### 5.4 Responding to comment or speculation in media or analyst reports

Issues often arise under Listing Rule 3.1B in the context of reports in the media (both conventional and social<sup>117</sup>) or from analysts commenting or speculating on a particular matter involving a listed entity (eg that it is about to enter into a material transaction or that it is in material financial difficulties).

<sup>111</sup> Although, in most instances where ASX requires market sensitive information to be disclosed to correct or prevent a false market, ASX will likely have taken the view that the information is no longer confidential and/or that a reasonable person would expect the information to be disclosed in the circumstances, and therefore the information no longer falls within Listing Rule 3.1A,

<sup>112</sup> Under Listing Rule 17.1, a trading halt can only be granted at the request of a listed entity.

<sup>113</sup> ASX may impose a suspension under Listing Rule 17.3.2 to prevent a disorderly or uninformed market. It may also impose a suspension under Listing Rule 17.3.1 for a breach of Listing Rule 3.1B.

<sup>114</sup> Listing Rule 19.10.

<sup>115</sup> Listing Rule 15.2.1.

<sup>116</sup> See ‘3.18 What steps does ASX take when it receives an announcement under Listing Rule 3.1?’ on page 21.

On the one hand, if a media or analyst report appears to contain credible market sensitive information about a listed entity but it is wholly or partially inaccurate, a failure by the entity to correct the report could lead to a false market in its securities. On the other hand, if the report is accurate, a failure by the entity to confirm that fact could contribute to doubt about the report's veracity and that too could lead to a false market in its securities. If the report has not been widely disseminated, it can also raise issues about whether the segment of the market which has received the report is trading on the basis of market sensitive information that is not available to the market as a whole.

ASX does not expect a listed entity to respond to every comment concerning it that appears in a media or analyst report. In particular, where a report:

- appears on its face to be mere supposition or idle speculation; or
- simply confirms a matter that is generally understood by the market (eg because of previous announcements or media or analyst commentary),

and, in either case, it does not appear to be having a material effect on the market price or traded volumes of the entity's securities, then ASX will not generally require the entity to respond to the report.

Where, however, a media or analyst report appears to contain credible market sensitive information (whether that information is accurate or not) and:

- there is a material change in the market price or traded volumes of the entity's securities which appears to be referable to the report (in the sense that it is not readily explicable by any other event or circumstance); or
- if the market is not trading at the time but the report is of a character that when the market does start trading, it is likely to have a material effect on the market price or traded volumes of the entity's securities,<sup>118</sup>

ASX considers that the listed entity has a responsibility to the market to respond to the report in a timely manner. If the entity does not do so voluntarily, ASX will consider exercising its power under Listing Rule 3.1B to require it to do so.<sup>119</sup>

Where ASX has concerns that a media or analyst report has caused, or may cause, a false market in a listed entity's securities, it will usually endeavour to contact the person the entity has appointed under Listing Rule 12.6 to be responsible for communications with ASX on Listing Rule matters to discuss the situation. In those discussions, ASX will usually ask the person to confirm whether the report is accurate. They are expected to answer that question truthfully, even if they consider the matter to be confidential and not something that otherwise requires formal disclosure to ASX under Listing Rule 3.1A. A failure to do so may constitute a criminal offence under section 1309.<sup>120</sup>

Depending on the circumstances, if the entity answers that:

<sup>117</sup> Such as investor chat sites, bulletin boards and blogs.

<sup>118</sup> As evidenced perhaps by orders queued in ASX's central limit order book.

<sup>119</sup> As mentioned above, comment or speculation about a matter in media or analyst reports may also be evidence that it is no longer confidential and therefore the carve-out from disclosure in Listing Rule 3.1A no longer applies.

<sup>120</sup> See 'The statutory prohibitions against false or misleading disclosures' on page 63. A failure to tell ASX this information will also deny ASX the opportunity to advise or assist the entity with its disclosure obligations when that would be beneficial to the entity and to the market.

- the report is wholly accurate, ASX may ask the entity to make a short announcement that confirms the report or it may ask the entity to make a more detailed announcement about the matter under Listing Rule 3.1;<sup>121</sup>
- the report is only partially accurate, ASX may ask the entity to make an announcement that corrects or clarifies the report or, again, it may ask the entity to make a more detailed announcement about the matter under Listing Rule 3.1;
- the report is wholly inaccurate, ASX may ask the entity to make an announcement that denies the report; or
- it doesn't know whether the report is accurate or not (which might be the case, for example, where the report is speculating that the entity is about to be the subject of a hostile takeover bid and the entity has not been approached by the putative bidder), ASX may ask the entity to make an announcement that it has no knowledge of the matter and therefore can neither confirm nor deny the report.<sup>122</sup>

Where the entity advises ASX that it needs time to prepare such an announcement<sup>123</sup> and the market is either currently trading or will commence trading before the announcement is released, ASX will usually suggest that the entity also request a trading halt.

ASX will take all the circumstances of each case into consideration in deciding whether or not a media or analyst report is causing, or is likely to cause, a false market in the entity's securities and, if so, how that should be corrected or prevented. In this regard, ASX is more likely to act under Listing Rule 3.1B where a report appears to contain reasonably specific details about a matter or quotes or is attributed to sources who might be knowledgeable about the matter – suggesting that it is more than just mere supposition or idle speculation – than in cases where that is not so.<sup>124</sup>

### 5.5 Market rumours

Similar issues can arise under Listing Rule 3.1B in respect of rumours known to be circulating the market about a listed entity.<sup>125</sup>

On the one hand, if a market rumour is wholly or partially inaccurate, a failure by the entity to correct the rumour could lead to a false market in its securities. On the other hand, if the rumour is accurate, a failure by the entity to confirm that fact could contribute to doubt about the truth of the rumour and that too could lead to a false market in its securities. Rumours can also raise issues about whether a segment of the market is trading on the basis of market sensitive information that is not available to the market as a whole.<sup>126</sup>

<sup>121</sup> A more detailed announcement may be required, for example, because ASX forms the view that the matter is no longer confidential and therefore Listing Rule 3.1A.2 no longer applies and the entity is consequently obliged to make an announcement about the matter under Listing Rule 3.1. This applies regardless of whether ASX considers that there is, or is likely to be, a false market in the entity's securities as a result of the media piece.

<sup>122</sup> The examples in paragraphs 5 and 7 of 'Example A – material acquisition', paragraph 8A of 'Example B – control transaction', and paragraphs 9A and 9B of Example C – security issue' in annexure A illustrate how ASX generally deals with media comment about market sensitive matters.

<sup>123</sup> For example, because it needs time to verify the accuracy or bona fides of the information in the report.

<sup>124</sup> This applies even where the details, quotes or attributions in the report are inaccurate or have been fabricated. The accuracy or otherwise of a report is largely irrelevant to the application of Listing Rule 3.1B. It is the likely impact of the report on the market for an entity's securities that matters.

<sup>125</sup> Rumours are often commented upon in media or analyst reports. In addition, they may be evidenced by comments in emails, blogs, bulletin boards, chat sites or other social media.

<sup>126</sup> As mentioned above, a market rumour may also be evidence that the information in question is no longer confidential and therefore the carve-out from disclosure in Listing Rule 3.1A no longer applies.

ASX generally takes the same approach to market rumours as it does in relation to comments and speculation in media or analyst reports (see above).<sup>127</sup>

### 5.6 Dealing proactively with potential false market situations

Where a listed entity becomes aware of a media or analyst report or market rumour that could lead to a false market in its securities, ASX would encourage it to contact its ASX listings adviser immediately to discuss the situation and not wait to receive an enquiry from ASX. In that way, ASX will be able to provide it with guidance on whether there is or could be a false market, the scope of the announcement that it might make to address that situation and whether it is appropriate for it to request a trading halt to prevent trading in its securities in the meantime. It will also assist ASX in determining whether it would be appropriate to institute a halt to trading in the entity's securities under ASX Operating Rule 3301(a) once the announcement is made to allow the market time to absorb and react to the announcement.<sup>128</sup>

Where a listed entity makes an announcement to prevent or correct a false market in its securities, it should make that clear in the announcement so that investors understand the context for the announcement.

## 6. Particular disclosure issues

### 6.1 Earnings guidance

Some entities have a practice of providing periodic earnings guidance to the market on the basis that investors will find this information helpful in assessing the value of their securities.<sup>129</sup> Some entities may also give "one-off" earnings guidance in disclosure documents, such as prospectuses, PDSs, bidders' statements, targets' statements and scheme documents.

Without wishing in any way to discourage this practice, ASX would remind listed entities of the regulatory issues that need to be considered when issuing earnings guidance. As a forward looking statement, earnings guidance must have a reasonable basis in fact or else it will be deemed to be misleading,<sup>130</sup> with all the significant legal consequences that entails.<sup>131</sup> For this reason, appropriate due diligence needs to be applied to the preparation of earnings guidance. The underlying figures and assumptions should be carefully vetted and signed off at a suitably senior level before the guidance is released.

When earnings guidance is provided, any material assumptions on which it is based, or material qualifications to which it is subject, should also be mentioned in the guidance. This will provide context and help the market to understand the basis for the guidance.

### 6.2 De facto earnings guidance

A listed entity which has a policy of not giving earnings guidance needs to be careful in its communications with security holders, analysts and the press that it does not make statements that could be construed as de facto earnings guidance. For example, a comment that the entity:

- is "happy" or "comfortable" with, or expects its earnings to be "in line with", analysts' forecasts or consensus estimates; or
- expects its earnings to be in line with, or a particular percentage range above or below, the corresponding prior period,

<sup>127</sup> The example in paragraph 8B of 'Example B – control transaction' in Annexure A illustrates how ASX generally deals with rumours about market sensitive matters.

<sup>128</sup> See '3.18 What steps does ASX take when it receives an announcement under Listing Rule 3.1?' on page 21.

<sup>129</sup> Despite this, ASX does not consider that Listing Rule 3.1 requires an entity to provide earnings guidance to the market, save in circumstances where its earnings for a reporting period will be materially different to market expectations: see the discussion on 'Earnings surprises' below.

<sup>130</sup> See note 234 and accompanying text. See also ASIC Regulatory Guide 170 *Prospective financial information*.

<sup>131</sup> See 'The statutory prohibitions against false or misleading disclosures' on page 63.

is de facto earnings guidance.

If ASX becomes aware of such a comment being made in a public forum or to an investor, analyst or journalist, it may ask the entity to issue a statement to the market confirming the comment so that the whole market is informed of the guidance it has given.<sup>132</sup> In the case of comments about analysts' forecasts or consensus estimates, ASX may ask the entity to clarify in the statement which particular analysts' forecasts are being commented on, the range of those forecasts and, if the range is relatively wide, where within that range the entity expects its earnings to fall.

### 6.3 Earnings surprises

All other things being equal, a listed entity's earnings for a particular reporting period are not required to be reported to the market until the due date for the release of that information under Chapter 4 of the Listing Rules.

However, for many listed entities, the market's expectations of its earnings over the near term will often be a material driver of the price or value of its securities. Those expectations may have been set by:

- earnings guidance the entity has given to the market;
- in the case of larger entities covered by sell-side analysts, the earnings forecasts of those analysts (with the "consensus estimate" of those analysts usually taken as the central measure of the entity's expected earnings);<sup>133</sup> or
- in the case of smaller entities not covered by sell-side analysts, the earnings results of the entity for the prior corresponding reporting period.<sup>134</sup>

Those expectations may also have been set or modified by "outlook statements" included in a previous period's annual report or results announcement and by other disclosures the entity has made to the market over the reporting period.<sup>135</sup>

If an entity becomes aware that its earnings for a reporting period will materially differ (downwards or upwards) from:

- earnings guidance it has given for the period;
- where the entity is covered by sell-side analysts, the consensus estimate of those analysts for the period; or
- where the entity is not covered by sell-side analysts, its earnings for the prior corresponding period,

it needs to consider carefully whether it has a legal obligation to notify the market of that fact. This obligation may arise under Listing Rule 3.1 and section 674,<sup>136</sup> if the difference is of such magnitude that a reasonable person would expect it to have a material effect on the price or value of the entity's securities.<sup>137</sup> Alternatively, in the case

<sup>132</sup> Using its powers under Listing Rules 3.1B, 18.7 and/or 18.8.

<sup>133</sup> For a discussion of some of the issues involved with consensus forecasts, see Australasian Investor Relations Association *The what, when and where of consensus estimates for listed entities in Australia* (February 2010).

<sup>134</sup> This is because, in the absence of any earnings guidance from the entity itself or analysts' forecasts to help set market expectations, the entity's most recent earnings results are the best guide to its future earnings.

<sup>135</sup> For example, some entities release periodic (monthly or quarterly) production reports, sales reports or other statistics which may give an early signal of a change in earnings. Some also give an update on outlook at their annual general meeting and/or at their half-yearly or annual results announcement.

<sup>136</sup> Note that ASX does not regard information that an entity's earnings will differ materially from market expectations as falling within any of the categories of information protected from immediate disclosure under Listing Rule 3.1A.1.

<sup>137</sup> See ASIC Media Releases 06-124 and 06-443, the former involving an infringement notice against, and the latter an enforceable undertaking by, a listed entity for not informing the market that its reported earnings would be materially lower than a profit forecast it had previously provided to the market. See also ASIC Media Release 10-255AD, involving an infringement notice against, and an enforceable

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of an entity which becomes aware that its earnings for a reporting period will materially differ from specific earnings guidance it has given to the market, it may arise under section 1041H, because failing to inform the market that its published guidance is no longer accurate could constitute misleading conduct on its part.<sup>138</sup>

This raises 4 important issues:

1. What is a material difference for these purposes?

This can be a difficult question to answer. Much will depend on the circumstances involved.

For these purposes, ASX would draw a distinction between a situation:

- where an entity has given earnings guidance to the market, in which case a material difference between its actual or expected earnings and its earnings guidance may raise disclosure issues under both Listing Rule 3.1 and section 1041H; and
- where an entity has not given earnings guidance to the market, in which case a material difference between its actual or expected earnings and market expectations<sup>139</sup> will generally only raise disclosure issues under Listing Rule 3.1.

In either situation, a notification obligation will only arise under Listing Rule 3.1 if the difference in earnings is such that a reasonable person would expect it to have a material effect on the price or value of the entity's securities. Assessing whether or not this is the case will require a consideration of factors such as:

- whether near term earnings is a material driver of the value of the entity's securities;<sup>140</sup>
- whether the difference is attributable to a non-cash item (such as a depreciation, amortisation or impairment charge) that may not impact on underlying cash earnings;
- whether the difference is a permanent one or is simply due to a timing issue (eg a material revenue or expense item that was expected to be booked in one reporting period is to be booked in a different reporting period);
- whether the difference is attributable to one-off or recurring factors;<sup>141</sup> and
- whether the relative outlook for the entity in coming financial periods is positive or negative.<sup>142</sup>

Given the many variables involved, ASX does not consider it appropriate to lay down any general rules on when a difference in earnings compared to market expectations ought to be disclosed under Listing

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undertaking by, a listed entity for not informing the market that its reported earnings for the first half would be materially lower than for the corresponding previous half.

Again, it should be noted that the fact that a listed entity complies with an infringement notice is not to be taken as an admission of guilt or liability (see section 1317DAF).

<sup>138</sup> This will give rise to similar legal exposures as a misleading announcement: see 'The statutory prohibitions against false or misleading disclosures' on page 63.

<sup>139</sup> As evidenced, where the entity is covered by sell-side analysts, by the consensus estimate of those analysts for the relevant period or, where the entity is not covered by sell-side analysts, its earnings for the prior corresponding period.

<sup>140</sup> In some more speculative sectors, near term earnings may not be a material driver of the price or value of an entity's securities.

<sup>141</sup> The market generally prices securities on the basis of forward earnings estimates rather than earnings results for past periods. Hence, if the change in expected earnings is attributable to a one-off event that is unlikely to affect earnings in future periods, it may have very little impact on the market price of the entity's securities.

<sup>142</sup> Again, the market generally prices securities on the basis of forward earnings estimates rather than earnings results for past periods. Hence it is not uncommon for the market price of securities of an entity which announces higher than expected earnings in one period to remain steady, or even go down, if its outlook for future periods is less positive. Similarly, it is not uncommon for the market price of securities of an entity which announces lower than expected earnings in one period to remain steady, or even go up, if its outlook for future periods is more positive.

Rule 3.1. ASX would simply repeat its suggestion previously that an officer of an entity who is faced with a decision on this issue ask two questions:

- (1) “Would this information influence my decision to buy or sell securities in the entity at their current market price?”
- (2) “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?”

If the answer to either question is “yes”, then that should be taken to be an indication that the information may be market sensitive and should be disclosed to ASX immediately.

In a situation where an entity has published specific earnings guidance and it expects its earnings to differ materially from that guidance, however, it needs to be cognisant of its potential exposure under section 1041H for misleading conduct, as well as its responsibilities under Listing Rule 3.1. The threshold for liability under section 1041H is different to, and in some cases could be lower than, the threshold for disclosure under Listing Rule 3.1.<sup>143</sup> Given this, ASX recommends that an entity in this situation apply the guidance on materiality in Australian Accounting and International Financial Reporting Standards that:

- an expected variation in earnings compared to its published earnings guidance equal to or greater than 10% should be presumed to be material and therefore ought to be disclosed; but
- an expected variation in earnings compared to its published earnings guidance equal to or less than 5% should be presumed not to be material and therefore need not be disclosed,

unless, in either case, there is evidence or convincing argument to the contrary.<sup>144</sup> Where the expected variation in earnings compared to its published earnings guidance is between 5% and 10%, the entity needs to form a judgement as to whether or not it is material.

2. When does an entity become aware that its earnings for a reporting period will be materially different from market expectations?

In ASX’s opinion, for a disclosure obligation to arise in relation to an expected difference in earnings compared to market expectations, there needs to be a reasonable degree of certainty that there will be such a difference.<sup>145</sup>

The fact that an entity’s earnings may be materially ahead of or behind market expectations part way through a reporting period does not mean that this situation will prevail at the end of the reporting period. The situation may change due to changes in the many variables that can affect an entity’s earnings.<sup>146</sup> It may also change because the entity adjusts its business plans in response.

Hence, this ultimately comes down to a matter of judgment by the entity. In some cases, it may have sufficient information before the end of the reporting period to have the requisite degree of certainty that its earnings for the period will differ materially from market expectations. In other cases, it may not have the requisite degree of certainty until after the end of the reporting period, when it is preparing its financial statements.<sup>147</sup>

<sup>143</sup> Liability will arise under section 1041H if the failure by the entity to update its published guidance is seen to constitute misleading conduct on its part and someone suffers loss or damage as a consequence.

<sup>144</sup> See paragraph 15 of Accounting Standard AASB 1031 *Materiality*.

<sup>145</sup> Listing Rule 3.1 does not require the disclosure of matters of supposition or matters that are insufficiently definite to warrant disclosure (see the second bullet point under Listing Rule 3.1A.1) provide the requirements in Listing Rules 3.1A.2 and 3.1A.3 are also met.

<sup>146</sup> For example, earnings may be affected by changes in general business conditions, prices of inputs and outputs, interest rates, exchange rates, labour costs, transportation costs and taxes. They may also be affected by breaks in the continuity of operations (eg because of natural disasters, power outages, equipment breakdowns, industrial disputes, etc).

<sup>147</sup> As mentioned in the text accompanying note 60, in such a case, the information must be disclosed immediately and cannot wait until the release of the entity’s financial statements for the period.

### 3. What should be announced?

An announcement which simply stated that an entity expected its earnings for a reporting period to differ materially from market expectations would not be particularly helpful and would not provide sufficient information for the market to assess the impact of the difference on the price or value of the entity's securities. The announcement at least needs to indicate the order of magnitude of the difference. Any identifiable reasons for the difference should also be stated.

Whether or not such an announcement is described in this manner, it will effectively constitute earnings guidance. It should therefore be subject to the same due diligence in its preparation, and to the same vetting and sign-off processes, as any earnings guidance.

### 4. When should it be announced?

Where Listing Rule 3.1 applies, information about the difference in earnings compared to market expectations has to be released immediately. As indicated above, this does not mean "instantaneously" but rather "promptly and without delay".

In assessing whether an entity has acted immediately under Listing Rule 3.1, ASX will make due allowance for the fact that the preparation of earnings guidance will need to be properly vetted and signed off before it is released.

It should be noted that the guidance in points 1 – 4 above relates specifically to the disclosure of updated earnings guidance. Where the trigger for giving updated earnings guidance is a particular event (for example, a natural disaster affecting a particular project, the cancellation of a material contract or the loss of a material licence) that can reasonably be expected to have a material effect on the price or value of an entity's securities, Listing Rule 3.1 will generally require information about that event to be disclosed immediately and it will not be appropriate for the entity to delay announcing the information because it wishes to provide updated earnings guidance in light of that event. In such a case, the entity should announce whatever information is in its possession about that event immediately but signal that it will make a further announcement when it has had the opportunity to prepare updated earnings guidance in light of that event. Example G in Annexure A illustrates the point. If the entity is concerned that releasing information without updated earnings guidance could lead to a false market in its securities, it should raise that concern with ASX and discuss whether it would be appropriate to request a trading halt to afford it the time it needs to prepare that guidance.

## 6.4 Correcting analyst forecasts

Given the potential disclosure obligations discussed in the previous section, a listed entity that is covered by sell-side analysts should be monitoring those forecasts so that it has an understanding of the market's expectations for its earnings.

Analysts' earnings forecasts for a listed entity reflect their professional judgement and acumen, as well as their individual views and assumptions on the many variables that can affect the entity's earnings over a period.<sup>148</sup> It is quite likely that their forecasts will differ from each other and from the entity's internal forecasts. ASX does not believe that a listed entity has any obligation, whether under the Listing Rules or otherwise, to correct analysts' forecasts to bring them into alignment with its own.

Having said this, where an analyst's forecast differs materially from a listed entity's internal forecast, it is in the entity's interests for it to explore with the analyst why that might be so and, if it becomes apparent that the analyst may have made a factual or computational error, to point that out to the analyst. This may help to set market expectations about the entity's earnings at an appropriate level and avoid any later earnings surprises that could raise potential disclosure issues under Listing Rule 3.1.

For the same reason, it is in an entity's interests for all analysts to have access to the same information so that they can prepare their forecasts off the same informational base. To that end, an entity should publish any

<sup>148</sup> See note 146.

materials presented at an analyst briefing on the ASX Market Announcements Platform and on its website, so that it is available to all analysts and investors alike. It should not provide preferential treatment to favoured analysts,<sup>149</sup> nor should it “blacklist” or ban an analyst it may not favour from analyst briefings.

In any discussions with an analyst, a listed entity should pay particular heed to the guidance in principles 8-10 in ASIC Regulatory Guide 62, as set out in Annexure C.<sup>150</sup> Under no circumstances should an analyst be given market sensitive information, unless and until it has first been disclosed to ASX under Listing Rules 3.1 and 15.7.<sup>151</sup>

### 6.5 Explorations and production targets

Exploration and production targets issued by mining or oil and gas entities raise similar considerations to earnings guidance. As a forward looking statement, an exploration or production target must have a reasonable basis in fact or else it will be deemed to be misleading,<sup>152</sup> with all the significant legal consequences that entails.<sup>153</sup> For this reason, appropriate due diligence needs to be applied to the preparation of an exploration or production target. The underlying figures and assumptions should be carefully vetted and signed off at a suitably senior level before the target is released.

If an entity becomes aware that its exploration or production results for a period will differ materially (downwards or upwards) from any target it has published, it may have a legal obligation to notify the market of that fact. This obligation may arise under Listing Rule 3.1 and section 674,<sup>154</sup> if the difference is of such magnitude that a reasonable person would expect it to have a material effect on the price or value of the entity’s securities. It may also arise under section 1041H, because failing to inform the market that its published target is no longer accurate could constitute misleading conduct on its part.

Guidance Note 31 *Reporting on Mining Activities*, when released, will have further guidance on exploration and production targets and financial forecasts based on such targets.

## 7. ASX’s enforcement practices

### 7.1 Monitoring and surveillance

As a licensed market operator, ASX is obliged to have adequate arrangements to monitor and enforce compliance with its Listing Rules.<sup>155</sup> To meet this obligation, ASX conducts various monitoring and surveillance activities to detect possible breaches of Listing Rule 3.1.

The Listings Unit in ASX Compliance assigns each ASX listed entity a listings adviser, who is available to advise it on any questions or concerns it may have, and who will liaise with it on any questions or concerns ASX may have, under the Listing Rules. The listings adviser assigned to a listed entity monitors all of the announcements it makes on the ASX Market Announcements Platform and will follow up with it if an announcement raises any continuous disclosure or other issues under the Listing Rules.

<sup>149</sup> Giving an analyst preferential access to information will raise the question whether any of that information is market sensitive. If it is, not only will that give rise to continuous disclosure issues for the entity (in that the information will cease to be confidential by reason of having been disclosed to the analyst and will therefore have to be disclosed immediately under Listing Rule 3.1), it may also give rise to insider trading issues for both the entity and the analyst under section 1043A(2) (the prohibition against tipping).

<sup>150</sup> See ‘ASIC Regulatory Guide 62’ on page 67.

<sup>151</sup> See *ASIC v Southcorp Limited (No 2)* [2003] FCA 1369.

<sup>152</sup> See note 234 and accompanying text. See also ASIC Regulatory Guide 170 *Prospective financial information*.

<sup>153</sup> See ‘The statutory prohibitions against false or misleading disclosures’ on page 63.

<sup>154</sup> See ASIC Advisory 10-198AD, involving an infringement notice against a listed entity for not informing the market about a material reduction in its gold production compared to a production forecast it had released earlier. Again, it should be noted that the fact that a listed entity complies with an infringement notice is not to be taken as an admission of guilt or liability (see section 1317DAF).

<sup>155</sup> Section 792A(c)(ii).

The Listings Unit reviews all major state and national newspapers before the market opens each trading day to identify any article about an ASX listed entity that may raise continuous disclosure issues. If such an article is identified, it is referred to the relevant listings adviser to follow up with the entity.

The Listings Unit also has a Surveillance Group, which uses sophisticated computer technology to monitor trading in ASX quoted securities on a real time basis across all licensed markets in Australia seeking to identify abnormal trading<sup>156</sup> which could indicate that there has been a leak of market sensitive information yet to be announced under Listing Rule 3.1. The Surveillance Group also reviews various news services, investor forums, chat sites and published broker research looking for similar indications. Again, any concerns that the Surveillance Group may have on this score are referred to the relevant listings adviser to follow up with the entity.<sup>157</sup>

### 7.2 The action ASX takes when it detects abnormal trading

If ASX identifies any abnormal trading in a listed entity's securities which raises a potential continuous disclosure issue, it will endeavour to contact the person the entity has appointed under Listing Rule 12.6 to be responsible for communications with ASX on Listing Rule matters to discuss the situation. In that conversation, ASX will usually ask the person if they are aware of any information concerning the entity which has not been announced to the market and which, if known, could explain the abnormal trading in its securities. When asked this question, they are expected to answer truthfully and, if there is any such information, to tell ASX of the general nature of the information, even if they consider the information to be confidential and not something that otherwise requires formal disclosure to ASX under Listing Rule 3.1A.<sup>158</sup> A failure to do so may constitute a criminal offence under section 1309.<sup>159</sup>

ASX recognises that these discussions can sometimes put listed entities in a difficult position, particularly in relation to hitherto confidential and incomplete negotiations concerning a market sensitive transaction, where premature disclosure could be prejudicial to the entity. Nonetheless, a listed entity is expected to be open and frank in these discussions with ASX and to tell ASX about such a transaction, even if it considers information about the transaction to be confidential.

Typically, these discussions will have one of two conclusions – the entity will tell ASX that:

- it is not aware of any such information – in which case, depending on the circumstances, ASX may issue a price query letter asking the entity to confirm that fact in writing (see below); or
- it is aware of such information – in which case, this will generally lead to a discussion about whether there are any reasons, apart from a possible leakage of that information, which might explain the abnormal trading.

In the latter case, if ASX is satisfied in that discussion that the information remains confidential and is otherwise protected from disclosure by Listing Rule 3.1A, ASX will not release, or require the entity to release, the information to the market.

It will often be the case, however, that the entity is not able to identify any reason to explain the abnormal trading in its securities other than a possible leakage of market sensitive information. As explained above,<sup>160</sup> in such a

<sup>156</sup> Such as a sudden and significant movement in the market price or traded volumes of a listed entity's securities which cannot be explained by announcements the entity has made or by movements in the market or its sector generally.

<sup>157</sup> The processes ASX generally follows when it detects information in a news service, investor forum, chat site or published broker research which could indicate that there has been a leakage of market sensitive information yet to be announced under Listing Rule 3.1 are explained under '5.4 Responding to comment or speculation in media or analyst reports' and '5.5 Market rumours' on pages 31 and 33.

<sup>158</sup> The entity will generally be advised in this conversation that if it has been relying on Listing Rule 3.1A not to announce information which would otherwise require disclosure under Listing Rule 3.1, the recent trading in its securities would suggest that this information has ceased to be confidential and therefore the information is no longer protected from disclosure by Listing Rule 3.1A.

<sup>159</sup> See 'The statutory prohibitions against false or misleading disclosures' on page 63. A failure to tell ASX this information will also deny ASX the opportunity to advise or assist the entity with its disclosure obligations when that would be beneficial to the entity and to the market.

<sup>160</sup> See '4.8 Listing Rule 3.1A.2 – the requirement for information to be confidential' on page 27, .

case, ASX has no choice but to assume that the information in question is no longer confidential and to require an immediate announcement about the information under Listing Rule 3.1 and/or 3.1B.

Where this occurs, ASX will endeavour to work with the entity to achieve an outcome that meets its disclosure obligations under Listing Rule 3.1 and section 674 but, within that constraint, seeks to avoid any undue prejudice to the entity.

For example, where the information relates to an incomplete negotiation that is close to completion, ASX may agree to the entity preparing and releasing a short “holding” announcement explaining that it is currently in negotiations on a market sensitive transaction, coupled with a trading halt or voluntary suspension to allow time for the negotiations to be completed, with a view to a more detailed and meaningful announcement being made when that has occurred.

Where the situation warrants an immediate and more detailed announcement, ASX may also agree to a trading halt to allow the entity the time it needs to prepare such an announcement.

ASX’s aim in these discussions will be to avoid a situation where the market is trading on an uninformed basis. Hence, where these matters arise during normal market trading hours, they will have a high degree of urgency attached. The window for consultation will be limited and, absent a trading halt or suspension, will not accommodate detailed argument or protracted negotiations with the entity or its advisers.

### 7.3 Price query letters

As mentioned above, ASX will generally issue a price query letter when it detects abnormal trading in a listed entity’s securities and, in its discussions with the entity about that matter, the entity tells ASX that it is not aware of any information which has not been announced to the market and which could explain the abnormal trading.<sup>161</sup> Usually a price query letter is issued on the same day as those discussions and requires the entity to provide a prompt response – often before the beginning of trading on the next trading day but sometimes even more promptly.

The purpose of a price query letter is to enable ASX to be satisfied that the entity is in compliance with its continuous disclosure obligations under the Listing Rules.<sup>162</sup> The entity must respond to a price query letter by the time specified by ASX in the letter.<sup>163</sup>

Price query letters tend to follow a standard format. Generally, they will identify the abnormal trading and ask the entity to respond separately to each of the following questions:<sup>164</sup>

1. *Is the entity aware of any information concerning it that has not been announced to the market which, if known by some in the market, could explain the recent trading in its securities?*
2. *If the answer to question 1 is “yes”:*
  - (a) *Is the entity relying on Listing Rule 3.1A not to announce that information under Listing Rule 3.1?*

<sup>161</sup> As noted above, if the entity tells ASX that it is aware of information which has not been announced to the market and which could explain the abnormal trading in its securities and it cannot point to any other reason to explain that abnormal trading, ASX will generally require the entity to make an immediate announcement about the information under either Listing Rule 3.1 or 3.1B. The making of such an announcement avoids the need for a price query letter.

<sup>162</sup> Price query letters are issued under Listing Rule 18.7.

<sup>163</sup> Listing Rule 18.7.

<sup>164</sup> Additional questions may be added to a price query letter if there are other disclosure issues about which ASX wishes to be satisfied. For example, if the price query letter is issued around half year or full year balance date, it may include questions intended to elicit whether the entity is expecting to announce earnings that might come as a surprise to the market.

A price query letter will usually ask for a response to be sent to a nominated listings adviser by email and advise that it should not be sent to the ASX Market Announcements office. It will also contain a statement that ASX reserves the right, under Listing Rule 18.7A, to release the letter and the entity’s response to the market and therefore ask the entity to prepare its response in a form suitable for release to the market.

*Please note that the recent trading in the entity's securities would suggest to ASX that such information may have ceased to be confidential and therefore the entity may no longer be able to rely on Listing Rule 3.1A. Accordingly, if the answer to this question is "yes", you need to contact us immediately to discuss the situation.*

- (b) *Can an announcement be made immediately?*

*Please note, if the answer to this question is "no", you need to contact us immediately to discuss requesting a trading halt.*

- (c) *If an announcement cannot be made immediately, why not and when is it expected that an announcement will be made?*

3. *If the answer to question 1 is "no", is there any other explanation that the entity may have for the recent trading in its securities?*

4. *Please confirm that the entity is in compliance with the Listing Rules and, in particular, Listing Rule 3.1.*

Once the entity's response has been received and reviewed by a listings adviser, both the price query letter and the response will usually be published on the ASX Market Announcements Platform together, so that the market is aware that ASX has made enquiries of the entity about the abnormal trading in its securities and of the entity's response to those enquiries.<sup>165</sup>

#### 7.4 Aware letters

When ASX has concerns about whether a listed entity has disclosed market sensitive information at the time it should have under Listing Rule 3.1, it will typically issue an "aware letter" to the entity.

The purpose of an aware letter is to enable ASX to be satisfied that the entity is in compliance with its continuous disclosure obligations under the Listing Rules.<sup>166</sup> The entity must respond to an aware letter by the time specified by ASX in the letter.<sup>167</sup>

Aware letters tend to follow a standard format. Generally, they will identify the information in question and the relevant date it was announced and ask:<sup>168</sup>

- 1. Does the entity consider the information to be information that a reasonable person would expect to have a material effect on the price or value of its securities?*
- 2. If the answer to question 1 is "no", please advise the basis for that view.*
- 3. If the answer to question 1 is "yes", when did the entity first become aware of the information?*
- 4. If the answer to question 1 is "yes" and the entity first became aware of the information before the relevant date, did the entity make any announcement prior to the relevant date which disclosed the information? If so, please provide details. If not, please explain why this information was not released to the market at an earlier time, commenting specifically on when you believe the entity was obliged to release the information under Listing Rules 3.1 and Listing Rule 3.1A and what steps the entity took to ensure that the information was released promptly and without delay.*

<sup>165</sup> Under a protocol agreed between ASIC and ASX, ASX also notifies the ASIC Market Surveillance team whenever it issues a price query letter so that ASIC is aware, ahead of the publication of the price query letter and the entity's response on the ASX Market Announcements Platform, that ASX is taking action about the abnormal trading.

<sup>166</sup> Aware letters are issued under Listing Rule 18.7.

<sup>167</sup> Listing Rule 18.7.

<sup>168</sup> Again, an aware letter will usually ask for a response to be sent to a nominated listings adviser by email and advise that it should not be sent to the ASX Market Announcements office. It will also contain a statement that ASX reserves the right, under Listing Rule 18.7A, to release the letter and the entity's response to the market and therefore ask the entity to prepare its response in a form suitable for release to the market.

5. Please confirm that the entity is in compliance with the Listing Rules and, in particular, Listing Rule 3.1.

Once the entity's response has been received and reviewed by a listings adviser, both the aware letter and the response will usually be published on the ASX Market Announcement Platform together, so that the market is aware that ASX has made enquiries of the entity about the timeliness of its disclosure and of the entity's response to those enquiries.<sup>169</sup>

### 7.5 Complaints or allegations of non-compliance

If ASX receives a complaint or allegation from a third party asserting that a listed entity has failed to disclose particular information that should have been disclosed under Listing Rule 3.1, ASX will usually make enquiries of the entity as to the accuracy and materiality of the information. If, as a result of those enquiries, ASX forms the view that the information is accurate, market sensitive and not within the carve-outs from disclosure in Listing Rule 3.1A, ASX will ask the entity to make an announcement about the matter under Listing Rule 3.1. If the information should have been disclosed earlier, ASX may also issue an aware letter (see above) and/or refer the matter to ASIC (see below).

### 7.6 Requests for further information

If ASX has concerns that:

- a listed entity may have failed to disclose information that should have been disclosed under Listing Rule 3.1; or
- an announcement under Listing Rule 3.1 or 3.1B may be inaccurate, incomplete or misleading,

ASX may ask the entity to provide it with any information, document or explanation about that matter to enable ASX to be satisfied that the entity is in compliance with its obligations under the Listing Rules. The entity must comply with that request within the time specified by ASX.<sup>170</sup>

Depending on the nature of the information requested, ASX may require that information to be released to the market. ASX's request for the information will make it clear whether ASX is intending to release, or reserves the right to release, the information to the market so that the entity will have the opportunity to respond in a suitable form.<sup>171</sup>

### 7.7 Referrals to ASIC

If ASX suspects that a listed entity has committed a significant contravention of the Listing Rules, or that a listed entity or any other person (such as a director, secretary or other officer of a listed entity) has committed a significant contravention of the Corporations Act,<sup>172</sup> it is required under that Act<sup>173</sup> to give a notice to ASIC with details of the contravention. The purpose of such a notice is so that ASIC can then consider what action, if any, it may wish to take in relation to the suspected contravention.

Given the critical importance of timely disclosure of market sensitive information to the integrity and efficiency of the market, ASX will regard any contravention of Listing Rule 3.1 or of section 674 as a "significant" contravention for these purposes and refer the matter to ASIC under section 792B(2)(c).<sup>174</sup>

<sup>169</sup> Under a protocol agreed between ASIC and ASX, ASX also notifies the ASIC Market Surveillance team whenever it issues an aware letter so that ASIC is aware, ahead of the publication of the aware letter and the entity's response on the ASX Market Announcements Platform, that ASX is taking action in relation to the matter.

<sup>170</sup> Listing Rule 18.7.

<sup>171</sup> Listing Rule 18.7A.

<sup>172</sup> This would include a breach of the various sections referred to in Annexure B.

<sup>173</sup> Section 792B(2)(c).

<sup>174</sup> The same is true of any contravention of Listing Rule 3.1B.

In deciding whether or not to refer a potential contravention of Listing Rule 3.1 and/or section 674 to ASIC, ASX will need to form a view on whether the information in question was market sensitive. As mentioned previously,<sup>175</sup> the test for determining this is set out in section 677 of the Corporations Act. Under that section, 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.

In the absence of any numerical measures in section 677, for these purposes, ASX will generally apply the materiality guidelines in the Australian Accounting and International Financial Reporting Standards<sup>176</sup> as a reasonable proxy for the test in that section. Thus, if information is announced by a listed entity later than when ASX considers that it should have been under Listing Rule 3.1 and trading in the lead up to and shortly after the announcement<sup>177</sup> suggests that it has moved<sup>178</sup> the market price of the entity's securities (relative to other securities in the market or the entity's sector) by:

- 10% or more, ASX will generally<sup>179</sup> regard that as confirmation that the information was market sensitive and therefore refer a potential breach of Listing Rule 3.1 and section 674 to ASIC;

but if the price movement is:

- 5% or less, ASX will generally regard that as confirmation that the information was not market sensitive and therefore not refer the matter to ASIC.

Where the price movement is between 5% and 10%, ASX will have regard to the circumstances of the case to determine whether the information should be regarded as market sensitive. This includes the market capitalisation of the entity,<sup>180</sup> the beta of its securities,<sup>181</sup> the bid-offer spread at which its securities normally trade<sup>182</sup> and whether there was a noticeable spike in the volume of its securities traded in the lead up to and shortly after the announcement.

It should be noted that the fact that ASX takes this approach in assessing whether or not to refer a potential breach of Listing Rule 3.1 and section 674 to ASIC does not displace the test for materiality of information in section 677, nor does it preclude ASIC or a litigant taking a different view to ASX as to the materiality of information. If ASIC institutes criminal or civil penalty proceedings against, or a litigant institutes civil proceedings to recover damages from, a listed entity for breaching section 674, it will have to prove its case using the test for materiality of information in section 677, regardless of any view that ASX may have taken on the issue of materiality.

<sup>175</sup> See '3.2 When is information market sensitive?' on page 8.

<sup>176</sup> Under paragraph 15 of Accounting Standard AASB 1031 *Materiality*, an amount which is equal to or greater than 10% of the applicable base amount is generally presumed to be material, and an amount which is equal to or less than 5% of the applicable base amount is generally presumed not to be material, unless, in either case, there is evidence or convincing argument to the contrary.

<sup>177</sup> This includes any price movements in the lead up to the announcement which may have occurred because of possible leaks of, or rumours about, the information.

<sup>178</sup> References to moving the market price of an entity's securities should be understood as including the maintenance of the market price at or about its current level when it would otherwise be expected to move materially in a particular direction, given price movements in the market generally or in the entity's sector – see notes 8 and 9.

<sup>179</sup> In the case of securities in listed entities with a small market capitalisation and whose market price is less than 10¢, ASX may determine that the indicative threshold for whether a price movement is material should be higher than 10%, having regard to the fact that these securities trade in price steps of 0.1¢ and often have higher percentage bid-offer spreads than securities in listed entities with a larger market capitalisation.

<sup>180</sup> All other things being equal, the higher the market capitalisation of an entity, the lower the threshold is likely to be for ASX to consider a movement in the price of its securities to be material.

<sup>181</sup> Beta measures the sensitivity of an entity's securities to fluctuations in the market (a beta greater than one indicates greater volatility, and a beta of less than one indicates lower volatility, than the market as a whole). All other things being equal, the higher the beta of an entity's securities, the higher the threshold is likely to be for ASX to consider a movement in the price of its securities to be material.

<sup>182</sup> All other things being equal, the higher the bid-offer spread at which an entity's securities normally trade, the higher the threshold is likely to be for ASX to consider a movement in the price of its securities to be material.

Further, the fact that ASX may decide not refer a potential breach of Listing Rule 3.1 and section 674 to ASIC does not prevent ASIC from forming a different view as to whether there has been such a breach and from taking action in relation to that potential breach under its various enforcement powers.

It should also be noted that in determining whether or not to issue a price query letter,<sup>183</sup> ASX may have regard to other factors, in addition to the percentage movement in the market price of an entity's securities, including whether there has been a material change in the traded volumes of those securities. Hence, ASX may issue a price query letter even where the percentage movement in an entity's securities is less than 5%.

### **7.8 Other enforcement action by ASX**

If ASX considers that a listed entity is withholding information from the market that ought to be announced under Listing Rule 3.1 or 3.1B, it may suspend trading in the entity's securities until it releases that information and the market is properly informed.<sup>184</sup> In an extreme case, it may remove the entity from the official list.<sup>185</sup>

Given the critical importance of timely disclosure of market sensitive information to the integrity and efficiency of the market, directors who are repeat offenders of Listing Rule 3.1/section 674(2A), or of equivalent provisions in the listing rules or regulations in overseas markets, are likely to find it difficult to satisfy ASX that they are of "good fame and character" and therefore appropriate persons to be a director of an entity seeking admission to the official list under Listing Rule 1.1 condition 17.

### **7.9 Evidentiary matters**

Listed entities and their officers should be aware that statements they make to ASX listings advisers on disclosure matters may be recorded in written or electronic file notes. Those file notes may be subpoenaed and used as evidence in criminal or civil proceedings.

They should also be aware that their responses to price query letters and aware letters will generally be published on the ASX Market Announcements Platform and, as public documents, may be used as evidence in criminal or civil proceedings. Even in those rare instances where they are not published on the ASX Market Announcements Platform, they may still be subpoenaed and used for that purpose.

<sup>183</sup> See '7.3 Price query letters' on page 41.

<sup>184</sup> Listing Rules 17.3.1 and 17.3.2.

<sup>185</sup> Listing Rule 17.12.

### Annexure A: Worked examples of the operation of Listing Rule 3.1

The following examples illustrate the principles described in Guidance Note 8. For convenience, it is assumed that a reasonable person would regard the transactions or events referred to in each example as likely to have a material effect on the price or value of the entity's securities. It is also assumed that information remains confidential, unless otherwise indicated.

#### Example A – material acquisition

1. Listed entity A wishes to acquire a material business. It contacts the owner of the business, B, with a view to commencing confidential discussions.

*Disclosure would not normally be required. The information clearly concerns an incomplete proposal or negotiation and is insufficiently definite to warrant disclosure.*

2. A submits a confidential non-binding indicative offer to B to purchase the business for a nominated price, which is subject to a number of conditions, including the satisfactory completion of due diligence and the negotiation and signing of legally binding documentation.

*Disclosure would not normally be required. The information clearly concerns an incomplete proposal or negotiation. Even though the offer includes an indicative price, it is also insufficiently definite to warrant disclosure, since the parties have yet to agree the terms of the transaction.*

3. A and B sign a confidentiality agreement with a view to A commencing due diligence.

*Disclosure would not normally be required. The matter is still incomplete and insufficiently definite to warrant disclosure.*

4. A completes its due diligence and indicates to B that it is prepared to purchase the business at the original price stated in its confidential non-binding indicative offer, subject to the negotiation and signing of legally binding documentation with suitable warranties and indemnities. A and B agree to commence negotiations on the legal documentation required for the transaction.

*Disclosure would not normally be required. The matter is still incomplete and insufficiently definite to warrant disclosure.*

5. After a month of negotiations, A and B are close to reaching agreement, but have yet to resolve one outstanding issue. It is expected that this could take another day or two to resolve. That morning, just before the market is due to open, a blog appears on an investor chat site speculating that A is about to announce a significant acquisition, but without giving any further details. When the market opens, there is a material spike in both the market price and traded volumes of A's securities. There are no other circumstances or events that could explain the spike.

*Disclosure would be required. While the transaction is still incomplete, the only inference that can be drawn in the circumstances is that information about the transaction is no longer confidential. Since the completion of negotiations is imminent, it would be appropriate for A:*

- *to make an announcement to the market that it is in discussions with another party about a material acquisition;<sup>186</sup> and*
- *to request a trading halt pending a further announcement about the matter.*

6. A requests a trading halt, which is duly granted by ASX.

<sup>186</sup> Since the party with whom A is negotiating has not been named in the blog, ASX would not generally require A to name B in its announcement. It would be sufficient to state that A is in discussions with another party about a material acquisition.

Alternative A: The negotiations between A and B are successfully concluded within the next two trading days<sup>187</sup> and the parties sign an agreement for A to buy the business from B. The agreement contains a boilerplate clause requiring its terms to be kept confidential.

*Disclosure of the main terms of the agreement<sup>188</sup> would be required immediately after it is signed. The confidentiality clause in the agreement does not override A's disclosure obligations under the Listing Rules.<sup>189</sup> In this instance, the announcement should include:*

- *material details about the business, such as the type of business, location, numbers of employees, length of operation, financial history, etc;*
- *the total consideration to be paid by A for the business;*
- *whether the consideration is to be cash or securities of A;*
- *if the consideration includes cash, whether it will be funded from internal sources or by debt;*
- *if the consideration includes securities, the number of securities to be issued and the price at which they will be issued;*
- *any material conditions to completion under the agreement;*
- *the expected timetable for completion of the transaction; and*
- *the expected impact of the transaction on A's financial position.*

Alternative B: The negotiations between A and B reach a stalemate and the parties decide to terminate their discussions.

*Disclosure would be required. The announcement made when A requested the trading halt would have given rise to an expectation in the market that an agreement was imminent. A should announce that it has not been able to reach an agreement with the other party and that discussions have been terminated.*

7. As a gloss on this example, suppose that a week into the negotiations between A and B (that is, between steps 4 and 5 above) an article appeared in a business column of a major newspaper speculating that A was about to buy B's business.

*Disclosure that the parties are in negotiations would be required. While the matter is still incomplete, it is apparent that the negotiations have not remained confidential. Since B has been named in the article, A would be expected to state in its announcement that it is in discussions with B and to give some indication as to the current state of the negotiations (eg that negotiations are at an early stage and that it is likely to take some time before an agreement is reached, if at all).*

*In these circumstances, where negotiations have some way to go until they are completed, a trading halt will generally only be warranted if the market price of A's securities has moved, or is moving, in response to the speculation and A needs time to have its announcement prepared, approved and published. Given the announcement required in this case is relatively brief, ASX would expect A to be able to do this quite quickly and any trading halt it would grant would be for a relatively short period only.*

### Example B – control transaction

1. An overseas entity C submits a confidential non-binding indicative offer to listed entity D proposing that the two entities merge by way of a scheme of arrangement. Under the proposed terms of the scheme, D's

<sup>187</sup> Two trading days is the maximum permissible period for a trading halt.

<sup>188</sup> It is also open to A to release a full copy of the agreement on the ASX Market Announcements Platform.

<sup>189</sup> See '3.22 Disclosure must be made even if it is contrary to contractual commitments' on page 23.

security holders will transfer their securities in D to C in return for a cash payment equivalent to a 25% premium over their current market price. The offer is expressed to be subject to a number of conditions, including satisfactory completion of due diligence by C, and D's board unanimously recommending the scheme to security holders in the absence of a higher offer. It also contains a boilerplate clause affirming that the offer relates to an incomplete proposal, is subject to further negotiation, is strictly confidential and may be withdrawn if it is disclosed by D.

*Disclosure would not be normally required. The information clearly concerns an incomplete proposal or negotiation. For the avoidance of doubt, ASX does not consider that Listing Rule 3.1A.3 (the reasonable person test) requires the disclosure of such information, provided the information continues to be confidential.<sup>190</sup>*

2. The following day, D's board meets to consider the offer and resolves to reject it on the basis that it undervalues D and is opportunistic. D's advisers write a letter to C confirming D's rejection of the offer.

*Whether disclosure is required will depend on the circumstances. In many cases, the fact that C has made an offer which has been rejected by D's board is only likely to have a material effect on the price or value of D's securities if it gives rise to speculation that C or some other person might make a further offer for D. Often, such speculation would be a matter of supposition and insufficiently definite to warrant disclosure. It could also potentially give rise to a false market in D's securities.*

*Again, for the avoidance of doubt, ASX does not consider that Listing Rule 3.1A.3 (the reasonable person test) requires the disclosure of such information, provided the information continues to be confidential.<sup>191</sup>*

3. A week later C submits a revised confidential non-binding indicative offer to D increasing the consideration payable to D's security holders to a 30% premium over the current market price of D's securities. Again, the offer is expressed to be subject to a number of conditions, including satisfactory completion of due diligence by C, and D's board unanimously recommending the scheme to security holders in the absence of a higher offer.

*Disclosure would not be normally required. The information clearly concerns an incomplete proposal or negotiation.*

4. This time, D's board resolves to enter into negotiations with C about the merger. D's advisers write a letter to C confirming that D's board are prepared to recommend such an offer to D's security holders in the absence of a higher offer, subject to the final transaction terms being satisfactory to D's board.

*Disclosure would not be normally required. The information still concerns an incomplete proposal or negotiation.*

5. C and D sign a confidentiality agreement with a view to C commencing due diligence.

*Disclosure would not normally be required. The information still concerns an incomplete proposal or negotiation.*

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<sup>190</sup> ASX is aware that some listed entities in the past may have disclosed the fact that they have received such a confidential offer because of a view that they or their advisers have taken that a reasonable person would expect such a disclosure under Listing Rule 3.1A.3. ASX does not agree with this interpretation of the reasonable person test.

If Listing Rule 3.1A.3 did require the disclosure of such information, that would make it impossible for entities to have confidential negotiations about a potential control transaction. This in turn would have a seriously adverse impact on the market for corporate control.

For these reasons, absent unusual circumstances (such as thus highlighted in Example H6 below), ASX considers that a reasonable person would not expect D to disclose information about the confidential offer received from C, provided the information continues to be confidential.

<sup>191</sup> In addition to the reasons outlined in note 190, where C's offer has been expressly rejected by D's board, disclosing information about the offer could also cause undue speculation about the likelihood of a follow-up offer by C and potentially give rise to a false market in D's securities.

6. C completes its due diligence and indicates to D that it is prepared to proceed with the transaction at the price indicated in its second confidential non-binding indicative offer, subject to the negotiation and signing of a legally binding merger implementation agreement and various other conditions.

*Disclosure would not normally be required. The information still concerns an incomplete proposal or negotiation.*

7. The parties complete their negotiations and sign a merger implementation agreement.

*Disclosure of the main terms of the agreement<sup>192</sup> would be required immediately after it is signed. In this instance, the announcement should include:*

- *the proposed terms of the scheme including, in particular, the consideration payable to D's security holders under the scheme;*
- *the steps and timetable for completion of the scheme;*
- *confirmation that C has or will have the funds necessary to complete its obligations under the scheme; and*
- *any material conditions to the scheme becoming effective.*

- 8A. As a gloss on this example, suppose that before C approached D about the merger (that is, before step 1 above), an article had appeared in a major newspaper suggesting that the industry was ripe for rationalisation and mentioning that C was looking to expand its operations in Australia and that D might be a potential candidate for takeover. When the market opened on the morning the article was published, there was no noticeable impact on the market price or traded volume of D's securities.

*In these circumstances, where the article has not had any impact on the market price or traded volume of D's securities, ASX would normally not require a response to the article. The comment appears to be speculative and based on generally known circumstances in the industry, rather than any specific information about the intentions of C and/or D.*

*However, if the publication of the article had coincided with a material movement in the market price or traded volume of D's securities, then ASX may contact D to discuss whether it is aware of any information concerning it which has not been announced to the market and which, if known, could explain the abnormal trading in its securities.*

- 8B. As an alternative gloss on this example, suppose that, unbeknownst to D, a rumour starts circulating the market that C is about to make a takeover bid for D. The market price and traded volumes of D's securities increase materially off the back of the rumour and ASX contacts D to discuss whether the rumour is correct and whether it should be making an announcement regarding the rumour under Listing Rule 3.1 or 3.1B. This happens:

- before C has approached D about the merger (that is, before step 1 above). D advises ASX that it has not been approached by C and that it knows of no other reason to explain the trading in its securities.

*ASX would normally require D to make an announcement to the market referring to the rumour and stating that it has not been approached by C and therefore it can neither confirm nor deny the rumour.*

- after the initial offer by C but before the board of D has met to consider the offer (that is, between steps 1 and 2 above). D advises ASX that it has received an offer from C regarding a potential merger but its board has not yet met to consider the offer.

<sup>192</sup> It is also open to D to release a full copy of the agreement on the ASX Market Announcements Platform.

ASX would normally require D to make an announcement to the market referring to the rumour and stating that it has received an offer from C but that its board has not yet had an opportunity to consider the detailed terms of the offer.

Whether ASX would expect the material terms of the offer by C to be announced at this stage would depend on the extent of the leak of information about the offer. If the substance of the rumour was simply that C is about to make a takeover offer for D, ASX would not expect the material terms of the offer to be disclosed. However, if the rumour included more specific information about the offer (including, for example, the offer price), ASX would expect the material terms of the offer to be disclosed.

- after the initial offer by C has been rejected by the board of D but before the second offer has been received from C (that is, between steps 2 and 3 above). D advises ASX that it has been approached by C regarding a potential merger but that it has rejected the approach.

ASX would normally require D to make an announcement to the market referring to the rumour and stating that it had received an offer from C but that D's board has rejected the offer. In these circumstances, ASX would expect the announcement to include the material terms of the offer by C and an explanation as to the reasons why D's board rejected it.

- while the parties are in negotiations over the second offer by C (that is, somewhere between steps 4 and 8 above). D advises ASX that it is in confidential negotiations with C regarding a potential merger.

ASX would normally require D to make an announcement to the market confirming that it is in confidential negotiations with C regarding a merger. ASX would not normally require the terms of the merger to be disclosed at this point, since they are still under negotiation.

If completion of the negotiations between C and D is imminent, it may be appropriate for D to request a trading halt pending a further announcement about the matter once the transaction terms have been agreed.

Note that in each of these cases, if D was in fact aware of the market rumour and the impact it was having on the market price and traded volumes of its securities, it should be contacting its ASX listings adviser immediately to discuss the situation and not wait to receive an enquiry from ASX. In that way, ASX will be able to provide it with guidance on whether there is or could be a false market in its securities, the scope of the announcement that it might make to address that situation and whether it is appropriate for it to request a trading halt to prevent trading in its securities in the meantime.

### Example C – security issue

1. Listed entity E made a major iron ore discovery a few years back and is now proposing to construct a mine and a rail system to transport the ore to the nearest port for export. Its last annual report foreshadowed that it would consider proceeding with the project in the current financial year and that it would require in the order of \$1.5 billion in total funding. E approaches its house broker F in confidence asking it whether it would be prepared to underwrite a \$1 billion capital issue. E intends to approach its bankers to provide a debt facility for the balance of the construction cost.

*Disclosure would not normally be required. The information clearly concerns an incomplete proposal and is insufficiently definite to warrant disclosure.*

2. F suggests to E that for a capital raising of this size a joint lead underwriter would be required. E and F approach G in confidence to act as joint lead underwriter to the issue with F.

*Disclosure would not normally be required. The matter is still incomplete and insufficiently definite to warrant disclosure.*

3. E, F and G enter into an engagement letter under which E appoints F and G as the joint lead underwriters to the proposed issue.

*Disclosure would not normally be required. The matter is still incomplete and insufficiently definite to warrant disclosure.*

4. On F and G's advice, E proposes to proceed with a renounceable accelerated pro rata entitlement offer of new fully paid ordinary shares to raise \$1 billion and to be offered to shareholders in Australia and New Zealand and certain other jurisdictions selected by E in accordance with Listing Rule 7.7.1. In accordance with normal underwriting practice, E, F and G propose to wait until just before the announcement of the capital raising to finalise the ratio of the entitlement offer and the price of the new shares to be issued. E, through its lawyers, approaches ASX for confirmation that the timetable for the proposed capital issue is acceptable to ASX. ASX informs E's lawyers in writing that the proposed timetable is acceptable.

*Disclosure would not normally be required. The fact that an approach has been made to ASX for confirmation about the timetable for the issue does not affect the confidentiality of the information. The matter is still incomplete and insufficiently definite to warrant disclosure.*

5. Prior to market open on the scheduled date for the announcement of the offer, a board meeting of E is held to approve the final terms of the proposed capital issue and to authorise the execution of the underwriting agreement. E, F and G duly execute an underwriting agreement under which F and G agree to manage and fully underwrite the entitlement offer. The agreement specifies the ratio of the entitlement offer and the price of the new shares to be issued. E applies to ASX for, and is granted, a back-to-back trading halt for four trading days to allow it to complete the institutional component of the offer.

*Disclosure would be required. The details to be disclosed should include:*

- *the amount and purpose of the capital raising;*
- *the key terms of the entitlement offer;*
- *the key dates for the entitlement offer, including details of the trading halt that has been granted to facilitate the institutional component of the offer;*
- *the fact that the offer is underwritten and by whom;*
- *the material terms of the underwriting agreement, including any material conditions precedent or termination events;*
- *an update on its negotiations with its bankers regarding the debt facility for the balance of the construction cost;*
- *the impact of the capital issue, the debt facility and the construction project on E's financial position;*  
*and*
- *any other material information relevant to whether shareholders should take up their entitlement.*

6. Prior to the end of the trading halt, E successfully closes the institutional entitlement component of the capital issue.

*Disclosure would be required. The details to be disclosed should include the dollar amount raised in the institutional component, the number of new shares taken up by institutional shareholders pursuant to their entitlement, the number of new shares sold in the bookbuild for any shortfall and the clearing price for the bookbuild. If the bookbuild has involved the bookrunner entering into:*

- *any concessionary fee or other arrangements which have had the result that the effective issue price paid by some allottees differs materially from the bookbuild price announced by the entity;*

- any arrangements which have had the result that some allottees receive a material benefit for agreeing to participate in the bookbuild at the bookbuild price announced by the entity and which is not received by other allottees; or
- any other arrangements with associates of the entity or the bookrunner to avoid a shortfall, or the appearance of a shortfall, in the bookbuild,

then information about those arrangements should also be disclosed.<sup>193</sup>

7. Approximately 4 weeks later E successfully closes the retail entitlement component of the capital issue.

*Disclosure would be required. The details to be disclosed should include the dollar amount raised in the retail component and the number of new shares taken up by retail shareholders pursuant to their entitlement.*

8. The retail shortfall bookbuild commences after market close and closes overnight.

*Disclosure would be required. The details to be disclosed should include the number of new shares sold in the bookbuild for the retail shortfall and the clearing price for the bookbuild. Again, if the bookbuild has involved the bookrunner entering into:*

- any concessionary fee or other arrangements which have had the result that the effective issue price paid by some allottees differs materially from the bookbuild price announced by the entity;
- any arrangements which have had the result that some allottees receive a material benefit for agreeing to participate in the bookbuild at the bookbuild price announced by the entity and which is not received by other allottees; or
- any other arrangements with associates of the entity or the bookrunner to avoid a shortfall, or the appearance of a shortfall, in the bookbuild,

then information about those arrangements should also be disclosed.<sup>194</sup>

- 9A. As a gloss on this example, suppose that at some time prior to the announcement of the issue (that is, before step 5 above), a short article appeared in a major newspaper commenting that E is rumoured to be looking to raise in excess of a billion dollars to fund its iron ore project. When the market opened on the morning the article was published, there was no noticeable impact on the market price or traded volume of E's securities.

*In these circumstances, where the article has not had any impact on the market price or traded volume of E's securities, ASX normally would not require a response to the article. The comment appears to be repeating information that the market is already aware of from the material in E's annual report.*

*However, if the publication of the article had coincided with a material movement in the market price or traded volume of E's securities, then ASX may contact E to discuss whether it is aware of any information concerning it which has not been announced to the market and which, if known, could explain the abnormal trading in its securities. ASX would expect E to disclose to it the fact that it is about to undertake a major capital raising, which in turn would lead to a discussion on whether an announcement might be required because that the material movement in the market price or traded volumes of its securities might indicate that this information is no longer confidential or that there is, or could be, a false market in its securities.*

<sup>193</sup> See the materials under the heading 'Requirements for additional information' in Guidance Note 30 *Quotation of Additional Securities* and the Annexure to Guidance Note 1 *Applying for Admission – ASX Listings*.

<sup>194</sup> See the materials cited in note 193.

- 9B. As an alternative gloss on this example, suppose that the day before E was due to announce its capital raising (that is, just before step 5 above), an article appeared in a major newspaper stating that E will shortly announce an underwritten billion dollar capital raising via a renounceable accelerated pro rata entitlement offer to its shareholders.

*Disclosure would be required. While the matter is still incomplete, given the specificity of the information in the newspaper article, it has to be assumed that information about the capital raising is no longer confidential. Since the setting of the offer terms and the execution of the underwriting agreement are imminent, it would be appropriate for E to request a trading halt, stating in its written request for the trading halt that the reason for the trading halt is that it is in the final stages of setting the terms for a renounceable accelerated pro rata entitlement offer.<sup>195</sup>*

### Example D – material mineral discovery

1. Listed entity H, a junior mining exploration company, has recently acquired a tenement from another entity. When it announced the acquisition to the market, it highlighted that the previous owner had conducted a VTEM<sup>196</sup> survey which had indicated near surface nickel-copper sulphide mineralisation and that it was proposing to undertake a 5 hole drilling campaign to test the prospectivity of the tenement. The first two holes appeared to contain small traces of copper sulphide mineralisation. When the third hole was completed, however, it was apparent from a visual inspection of the drill core that there was a significant nickel and copper sulphide intercept close to the surface.

*Whether disclosure is required at this stage would depend on the circumstances. In many cases, information derived solely from a visual inspection of a core sample and before an assay has been undertaken, would be a matter of supposition and insufficiently definite to warrant disclosure. In those circumstances, disclosure of the drilling results would not normally be expected until the drill core had been assayed and analysed and a report that complies with the requirements in Chapter 5 and Appendix 5A<sup>197</sup> of the Listing Rules for reporting exploration results had been prepared.*

*There may be cases, however, depending on the style of mineralisation and what is apparent from the visual inspection, where an announcement would be appropriate at this stage. In those cases, the announcement should make it clear that it is based solely on a visual inspection of the core sample and that the sample is yet to be assayed and analysed. It would generally be inappropriate to make any comments about the grade or quality of the mineralisation in the announcement in the absence of an assay.*

2. The core samples for all 3 holes are sent for analysis. The assay results confirm the presence of high grade sulphides in a wide intercept. H's CEO immediately instructs the company secretary to prepare a draft announcement about the drilling results to be reviewed and settled by H's geologist (a 'competent person' under the JORC Code) and approved by H's board of directors. She also instructs the company secretary to keep an eye on the company's share price for any signs that news about the discovery may have leaked. The company secretary and the geologist promptly and diligently work on the announcement, making sure that it complies with the requirements in the JORC Code for reporting exploration results. The company secretary convenes a meeting of H's board on short notice to consider the draft announcement. H's board reviews the draft announcement and approves its release.

*Disclosure would be required immediately after the board has approved the announcement.*

<sup>195</sup> Note that to the extent that this trading halt has had to be applied for earlier than intended, it would utilise part of the maximum period of four trading days that E can apply for by way of a back-to-back trading halt. If E needed a longer period to finalise the institutional component of the offer, it would need to request a voluntary suspension to cover that longer period.

<sup>196</sup> VTEM refers to a Versatile Time Domain Electromagnetic survey.

<sup>197</sup> The Australasian Code for Reporting of Exploration Results, Mineral Resources and Ore Reserves (otherwise known as the JORC Code).

*This example recognises that the board of a junior mining exploration company is likely to want to, and a reasonable person would expect it to, approve any announcement of material exploration results before it is released. In cases such as these, the requirement to disclose information immediately can accommodate the need for a board to review and approve a continuous disclosure announcement, provided it is done promptly and without delay.<sup>198</sup>*

3. H conducts a further drilling program with a view to proving up a mineral resource. As each set of material drill results are received, H follows the process outlined in 2 above and releases information about the results to the market.
4. H's geologist determines that there is now enough drilling information to estimate a mineral resource and begins the work needed to do that. Upon receipt of the geologist's resource estimate, H instructs the company secretary to prepare an announcement that complies with the requirements in Chapter 5 and Appendix 5A of the Listing Rules for reporting a mineral resource. The company secretary convenes a meeting of H's board on short notice to consider the draft announcement. The announcement is tabled and approved at a board meeting.

*Disclosure would be required immediately after the board has approved the announcement.*

- 4A. As a gloss on this example, suppose that at some time after the initial core samples had been inspected but prior to the announcement of the drill results (that is, between steps 1 and 2 above), H notices that there is a sudden spike in the market price and trade volumes of its securities. There are no other reasons to explain the spike in price and volume apart from a suspicion that news about the drill results may have leaked.

*In these circumstances, it is likely that ASX will contact H to ask whether it is aware of any information concerning it which has not been announced to the market and which, if known, could explain the abnormal trading in its securities. In anticipation of this, H should be contacting its listings adviser to request a trading halt so that trading in its securities is not taking place in a false market while it continues the work involved in preparing the announcement of its drill results.*

### Example E – material law suit

1. Listed entity I, a mining exploration company whose principal asset is a particular mining tenement, is served with legal proceedings by a plaintiff J challenging the validity of I's title and asserting a competing claim to the tenement.

*Immediate disclosure would be required. The information does not fall within any of the categories of information excluded from disclosure under Listing Rule 3.1A.1. The details to be disclosed should include:*

- *a summary of the claim against I; and*
- *whether I intends to defend the claim.<sup>199</sup>*

2. I instructs its lawyers to defend the claim. They conduct a detailed investigation into the matter and provide written advice to I about the relative merits of the claim.

Alternative A: I's lawyers advise that J's claim has some chance of success and that it would be prudent for I to attempt to settle the claim at the earliest opportunity.

<sup>198</sup> See '3.8 Does the board need to approve an announcement under Listing Rule 3.1?' on page 14.

<sup>199</sup> It would be imprudent for H to include in the announcement the statement that not infrequently appears in such announcements that the claim has little or no merit and therefore will be vigorously defended, unless H has received considered legal advice to that effect (which is unlikely at this early stage of the matter). If it makes this statement and it transpires that the claim in fact does have some merit, H may leave itself open to an action for misleading or deceptive conduct under section 1041H.

*Disclosure would not normally be required. The advice has been prepared for internal management purposes (the conduct of the litigation). A reasonable person would not expect the advice to be disclosed.<sup>200</sup>*

Alternative B: I's lawyers advise that J's claim has very little merit and almost no chance of success.

*Disclosure would not normally be required. The advice has been prepared for internal management purposes (the conduct of the litigation). A reasonable person would not expect the advice to be disclosed.*

*H, of course, may choose voluntarily to disclose the fact that it has received legal advice that the claim has little merit, even though it is not legally obliged to do so. However, it should be aware that if it does so, that will potentially waive any legal professional privilege it might otherwise be able to assert in the advice.*

3. In due course, I's lawyers commence discussions with J's lawyers with a view to settling the claim.

*Disclosure would not normally be required. The information concerns an incomplete negotiation and is insufficiently indefinite to warrant disclosure.*

4. After some months of negotiation, I and J, through their lawyers, reach an agreement to settle the claim. I and J execute a deed to record and give effect to the settlement. The deed includes a clause requiring the settlement to be kept confidential, save to the extent that disclosure is required by law.

Alternative A: reflecting the fact that that the claim had considerable merit, the settlement provides for J to withdraw its claim in consideration for a "free" issue of ordinary shares in I to J equivalent to 15% of I's issued capital and a cash payment by I to J.

*Disclosure would be required immediately after the deed of settlement is signed. In this instance, the announcement should include:*

- *that the claim has been settled;*
- *the number of ordinary shares to be issued by I to J (this information does not fall within the confidentiality provision in the deed since it is plainly market sensitive and therefore required to be disclosed by law under Listing Rule 3.1 and section 674);<sup>201</sup>*
- *if the information about the cash payment by I to J is market sensitive,<sup>202</sup> the amount of that cash payment (again, if this information is market sensitive, it does not fall within the confidentiality provision in the deed since it is required to be disclosed by law under Listing Rule 3.1 and section 674); and*
- *the impact of the settlement on I's financial position.*

Alternative B: reflecting the fact that that the claim had very little merit, the settlement provides for J to withdraw its claim without any compensation from I and for each party to bear its own legal costs.

*Disclosure would be required immediately after the deed of settlement is signed. In this instance, the announcement should include:*

- *that the claim has been settled; and*

<sup>200</sup> See '4.9 Listing Rule 3.1A.3 – the reasonable person test' on page 29.

<sup>201</sup> It is also separately disclosable to ASX under Listing Rule 3.10.3 and to ASIC under section 254X.

<sup>202</sup> If the information about the cash payment by H to J was not market sensitive (eg it was only a relatively small amount), it would be sufficient for the announcement to state that the settlement also provides for a cash payment by H to J but that the amount is not considered material and is confidential.

- *that the terms of the settlement are confidential but it is not expected that the settlement will have any material impact on I's financial position.*<sup>203</sup>

### Example F – material difference in earnings compared to earnings guidance

1. Listed entity K, a manufacturing company which uses imported components to produce goods for the local market, has published earnings guidance for the current financial year stating that it expects its net profit after tax to be in the region of \$45 million to \$50 million. Ten months into the financial year, it becomes reasonably apparent that K's net profits for the year will be at least \$55 million, and possibly more, due to better than expected trading conditions over the year to date. Since this is materially different to K's earnings guidance, the board of K determines that it ought to publish updated earnings guidance and asks management to prepare a detailed earnings forecast for the financial year and a draft announcement with revised guidance for its review.

*In these circumstances, where the change in earnings is attributable to general trading conditions rather than a particular material event (as is the case in Example G), disclosure would not normally be required at this stage. Until the detailed earnings forecast has been prepared and reviewed by the board, and the board in particular has signed off on the forecast earnings for the balance of the year, the information about K's likely higher than expected earnings for the financial year is insufficiently definite to warrant disclosure.*

*Note that if a reasonable person would expect information about the difference in earnings compared to K's earnings guidance to have a material effect on the price or value of K's securities,<sup>204</sup> Listing Rule 3.1 will require that information to be disclosed immediately (that is, promptly and without delay). This in turn will require the detailed earnings forecast to be prepared and reviewed by the board promptly and without delay.<sup>205</sup>*

2. K's management completes a detailed earnings forecast and a draft announcement as quickly as it reasonably can in the circumstances, having regard to the need to ensure that the forecast is prepared with appropriate care and diligence and is not misleading. The forecast confirms that K's net profits for the financial year are likely to be in the region of \$55 million to \$60 million and this is reflected in the draft announcement. K's secretary convenes a board meeting on short notice to consider the revised forecast and draft announcement. K's board carefully vets the figures in the detailed earnings forecast and the assumptions underpinning it. It also reviews the draft announcement and approves its release.

*Disclosure would be required immediately after the board has approved the detailed earnings forecast and announcement.<sup>206</sup> The announcement should include the revised earnings guidance for the financial year, the reasons why it has been revised upwards, the material assumptions underpinning the revised guidance and any material qualifications to which it is subject.*

### Example G – material difference in earnings compared to consensus estimates

1. Listed entity L is in the business of providing contract engineering and construction services to mining businesses. It has a policy of not providing earnings guidance. It is covered by sell-side analysts. Their estimates for L's net profit after tax for the current financial year range from \$450 million to \$550 million,

<sup>203</sup> This assumes that the legal costs that H has incurred to date, and which H must bear under the terms of the settlement, will not have a material effect on H's financial position.

<sup>204</sup> Note that a variation in earnings of the magnitude in this example may, or may not, be market sensitive, depending on the particular circumstances of K: see the discussion under '6.3 Earnings surprises' on page 35.

<sup>205</sup> Given K's potential exposure under section 1041H for having misleading guidance on foot, it would be wise for the revised earnings guidance to be prepared and reviewed by the Board promptly and without delay in any event, even if there is some doubt as to whether Listing Rule 3.1 applies.

<sup>206</sup> This assumes that a reasonable person would expect information about the revised earnings forecast to have a material effect on the price or value of K's securities and therefore the information has to be disclosed immediately under Listing Rule 3.1. Even if there is some doubt as to whether that is the case, K should disclose the information immediately in order to minimise its exposure under section 1041H for having potentially misleading guidance on foot.

with the consensus estimate being \$500 million. One of L's major projects, which was close to completion and on which it was expecting to make a substantial profit, has just been hit by a severe cyclone. The extent of the damage and its impact on the profitability of the project is unclear in the immediate aftermath of the cyclone. L needs to conduct an on-site assessment of the extent of the damage and review its contractual obligations to repair the damage, its liability to penalties for late delivery and its ability to make an insurance claim, before it can put a figure on any expected loss.

*L should immediately announce the fact that its major project has been hit by the cyclone, that it will be conducting a review to determine the extent of the damage caused by the cyclone and the impact it may have on L's earnings, and that it will provide an update to the market after it has completed that review.<sup>207</sup>*

*To comply with the timing requirements in Listing Rule 3.1, the review should be conducted promptly and without delay. The announcement should indicate the likely timeframe for the review and when an update to the market can be expected.*

2. Having conducted the review, L determines that instead of a profit, it is now likely to make a \$200 million loss on the project due to penalties for late delivery. L has other projects which are performing better than budget and which may help to offset some of that loss. However, it is still reasonably clear that L's net profit after tax for the financial year will be significantly lower than the consensus estimate, to an extent where it is likely to have a material effect on the price or value of L's securities. L recognises that in these circumstances, it would be appropriate to conduct a review of its entire portfolio of projects and give guidance to the market on its likely profit for the year.

*Since the expected loss on the major project is a known and material amount, L should immediately announce the expected \$200 million loss on the major project. The announcement should indicate that L is conducting a review of the profitability of the balance of its portfolio of projects and that it will provide a further update to the market after the review has been completed.*

*Again, to comply with the timing requirements in Listing Rule 3.1, the review should be conducted promptly and without delay. The announcement should indicate the likely timeframe for the review and when a further update to the market can be expected.*

3. L's management completes the review of its portfolio of projects and forecasts that L's net profit for the financial year is likely to be in the range of \$240 million to \$260 million. L's secretary convenes a board meeting on short notice to consider the forecast and a draft announcement to the market about it. L's board carefully vets the figures in the forecast and the assumptions underpinning it. It also reviews the draft announcement and approves its release.

*Disclosure of the earnings forecast would be required immediately after the board has approved the forecast and announcement.<sup>208</sup> The announcement should include L's earnings forecast for the financial year, the reasons why it is lower than the consensus estimate, the material assumptions underpinning the forecast and any material qualifications to which it is subject.*

### Example H – other examples illustrating some of the principles in Guidance Note 8

1. Carefully weigh up the potential consequences of not disclosing particular information:

**Example H1:** *listed entity M is experiencing temporary financial difficulties. Under its main debt facility, its board is required to give a certificate at the end of each quarter confirming M's compliance with certain*

<sup>207</sup> See ASIC Media Release 12-53MR, where ASIC issued 3 infringement notices against a listed entity for failing to disclose immediately losses on two material construction projects and a material write-down of an investment. The entity in that case had delayed the disclosure of the information about the losses and their causes, pending the release of revised earnings guidance to the market.

Again, it should be noted that the fact that a listed entity complies with an infringement notice is not to be taken as an admission of guilt or liability (see section 1317DAF).

<sup>208</sup> This assumes that a reasonable person would expect information about the revised earnings forecast to have a material effect on the price or value of L's securities and therefore the information has to be disclosed immediately under Listing Rule 3.1.

*financial ratios. At quarter end, it becomes apparent that M is in breach of its financial ratios and its board will therefore not be able to give the required certificate. However, M reasonably believes that its financiers will waive the breach without penalty, particularly as the board sees the breach as a one-off event caused by temporary factors.*

*M's board debates whether this information needs to be disclosed under Listing Rule 3.1, given their expectation that the breach will be waived. Being prudent and risk-averse and thinking ahead to what might happen if, contrary to expectations, its financiers do not waive the breach, the board decides that M should make an immediate announcement to the market disclosing the breach, the fact that M will be seeking a waiver and that M believes that because the breach is a one-off event caused by temporary factors, a waiver should be forthcoming.*

*After a month of delicate negotiations, M's financiers formally advise that they will not waive the breach of covenant and that they require at least one half of their debt to be repaid within two months or else they will declare an event of default. M makes an immediate announcement to the market advising it of these developments and requests a trading halt to allow its board the time to consider how it should respond to its financiers' demands. The board meets with M's advisers and determines that M must undertake a significant capital raising at a deep discount to the current market price of M's securities to raise the money needed to pay down its debt. M makes a further announcement to the market promptly after the board meeting outlining the terms of the proposed capital raising. When M's securities resume trading after the trading halt, their market price drops significantly, reflecting the dilution that will result from the proposed capital raising.*

*Compare and contrast this situation to what might have happened if the board of M had decided not to make the initial announcement about the breach because, in its opinion, the information would not influence the price of M's securities, given its expectation that M's financiers would waive the breach. M's subsequent announcement of the financiers' refusal to waive the breach and to demand repayment of half its debt would then have come, as it were, "out of the blue". In this scenario, questions would inevitably arise as to whether the board's decision not to make the initial announcement about the breach was correct.<sup>209</sup> Persons who purchased securities in M between the date of the breach and the time the announcement was made about the demands of its financiers could well be considering whether they have a claim against M under section 674(2) and potentially also against M's directors under section 674(2A).<sup>210</sup>*

2. Anticipate what might happen if information about a confidential transaction leaks and have a "template announcement ready that can be updated and issued straight away:

**Example H2:** *listed entity N is in confidential negotiations with overseas entity O regarding a merger of the two entities. N recognises that, even with careful precautions to preserve the confidentiality of the negotiations, there is always a risk that information about the transaction could leak. N monitors the market price of its securities, newswire services and the press for signs of information leakage. In the final stages of negotiations, a press article appears referring to the transaction. N understands that this means that information about the transaction is no longer confidential and that it is therefore no longer able to rely on the carve-outs from disclosure in Listing Rule 3.1A. It must therefore immediately make an announcement about the transaction under Listing Rule 3.1.*

<sup>209</sup> In this regard, it needs to be remembered that the test for disclosure in Listing Rule 3.1 is an objective one – that is, whether the information would, or would be likely to, influence persons who commonly invest in securities in deciding whether to acquire or dispose of the entity's securities – and not whether the listed entity or its board is of the opinion that it will have this effect. The opinion of M's board in this example will only be relevant in determining whether its directors are entitled to rely on the due diligence defence in section 674(2B). This they will only be able to do if they can show that they took all steps (if any) that were reasonable in the circumstances to ensure that M complied with its continuous disclosure obligations and, after doing so, believed on reasonable grounds that M was complying with those obligations.

<sup>210</sup> See Annexure B.

*N anticipated this possibility when it commenced negotiations with O and had prepared a draft letter to ASX requesting a trading halt and a draft announcement stating that it is in merger discussions with O. It has been keeping the draft announcement updated as the negotiations have progressed. The current version states that N and O are in the final stages of negotiation and expect to be in a position to make a further announcement about a concluded transaction within the next 48 hours.*

*N is therefore able to issue an immediate announcement about the fact that it is in negotiations with O and to request an immediate trading halt to allow it time to finalise those negotiations and to make a more complete announcement about the transaction when the negotiations have concluded.*

3. Where you have advance notice of an event that is likely to require an announcement under Listing Rule 3.1, prepare a draft announcement ahead of time that can be issued straight away:

**Example H3:** *listed company P is proposing a scheme of arrangement to merge with another entity. It has approached the court for orders convening the necessary scheme meetings under section 411(1) of the Corporations Act. The convening of the meetings has been opposed by some security holders. The court is due to hand down its decision on whether or not to convene the meetings at 2.15 pm.*

*Being proactive and anticipating the need to issue an announcement to the market about the court's decision, P's company secretary prepares 2 draft announcements ahead of time – one announcing that the court has granted orders convening the scheme meetings and outlining the timetable for the meetings, and the other announcing that the court has declined those orders and outlining what that means for the company. In this way, P is in a position to release an announcement to the market straight away, regardless of how the court rules on the matter.*

*See also Example H4 below.*

4. Where the event that gives rise to the need to make an announcement is within your control, be sensitive to the hours when licensed markets in Australia are trading and, where possible, try to ensure that the event happens and the announcement is made before trading commences or after trading has closed, so that it is not necessary to request a trading halt:

**Example H4:** *listed entity Q has been negotiating the purchase of a material business. It has not yet made an announcement about the transaction because it has been confidential, incomplete and subject to negotiation. The outstanding commercial points being negotiated are finally agreed late one afternoon and Q's lawyers are instructed to finalise the transaction agreements with the lawyers for the vendor and to have them ready for signing the following morning. Q's financial advisers are instructed to prepare a draft ASX announcement and a draft press release reflecting the final negotiated outcome and to circulate them to all parties for approval overnight.*

*Knowing that the transaction will need to be announced immediately after the transaction agreements are signed, Q arranges for the signing to take place at 9.00 am AEST and for a press conference to take place at 9.30 am. As soon as the transaction agreements are signed, Q transmits the agreed ASX announcement to the ASX Market Announcements office and shortly thereafter receives back a confirmation that it has been released to the market. Q then holds its press conference, as scheduled, at which it releases the agreed press announcement.<sup>211</sup>*

*Since this has all taken place before the market opens, Q has been able to ensure the orderly release of information without having to request a trading halt. Licensed securities markets will have an opportunity to absorb the information and to reflect it appropriately in the price of Q's securities when trading commences later that morning.*

<sup>211</sup> Note that any material information in the press release in this example must also be included in the ASX announcement. Also, if any material information is revealed in response to questions at the press conference that is not contained in the ASX announcement, Q would be obliged to make an immediate announcement to ASX regarding that information.

5. If a market sensitive announcement has to be delayed for any reason and the market will be trading during any part of the delay, request a trading halt to avoid having the market trade on an uninformed basis:

**Example H5:** listed entity R has been negotiating a major contract with the Australian government. The contract is to be signed at 9am on a trading day and the relevant Minister has scheduled a major press conference for midday on that day to announce the contract. Protocol dictates that the contract should be announced by the government and R therefore considers it appropriate to delay issuing its announcement to the market until immediately after the Minister has held the press conference.

R should request a trading halt before the commencement of trading on the morning the contract is signed, recognising that the obligation to announce the signing of the contract would have arisen at the time it was signed. The request for the trading halt should indicate that it is being requested so that the entity can announce the signing of a major contract later that day.

6. Examples of situations where a reasonable person would expect information to be disclosed under Listing Rule 3.1A.3 even though it may fall within the conditions for non-disclosure under Listing Rules 3.1A.1 and 3.1A.2:

**Example H6:** listed company S is the subject of a hostile takeover offer from company T. Information about the takeover offer is public. S receives an indicative non-binding confidential offer from another company U interested in pursuing a friendly acquisition at a higher price per share than the offer from T. The offer is expressed to be subject to a number of conditions, including satisfactory completion of due diligence, and includes a statement that it may be withdrawn if it is disclosed by S. S's board is prepared to entertain the offer and resolves to commence negotiations with U.

Absent the takeover offer from T, S would ordinarily be entitled to treat the approach from U as falling within Listing Rule 3.1A while it remains confidential and until the negotiations with U have been completed. However, in these circumstances, where shareholders need to make a decision whether or not to accept the takeover offer from T, a reasonable person would expect S to disclose the fact that it has received a potentially higher offer from, and has resolved to commence negotiations with, U.

The fact that U has tried to pre-empt disclosure by saying that the offer may be withdrawn if it is disclosed does not override S's legal obligation to make disclosure under Listing Rule 3.1 and section 674.<sup>212</sup>

**Example H7:** listed exploration company V has been conducting an infill drilling program. The assay results for the first five completed drill holes were very positive. When they were announced to the market, its share price increased by 15% and there was a significant uptick in the traded volume of its shares.

V has just completed drilling on the next five holes, which are in close proximity to the first five. While awaiting the assay results, V becomes aware that two of the drill holes have returned negative assay results which, if correct, would adversely affect the potential mineralisation of the entire deposit. V considers that the negative result may have arisen due to analytical errors and requests that the two drill cores be retested.

One of V's directors asserts that the information about the negative assay results should be considered confidential and incomplete, until the drill cores have been re-tested.

Even if this assertion was correct,<sup>213</sup> V would be expected to make an immediate announcement regarding the negative assay results and the proposed retesting of those results. In these circumstances, given the significant impact that the original positive assay results had on the market price of its shares, a reasonable person would expect V to make such a disclosure.

<sup>212</sup> See the authorities cited at note 85.

<sup>213</sup> ASX would not agree with this assertion. Information about the assay results from a drill core would not generally fall within any of the categories of information excluded from disclosure under Listing Rule 3.1A.1.

**Example H8:** *a listed entity is not ordinarily required to disclose its earnings forecasts, on the basis that these are prepared for internal management purposes and are usually confidential. However, if it becomes apparent that its earnings for a particular reporting period will differ materially from market expectations, that information may be required to be disclosed to the market under Listing Rule 3.1.<sup>214</sup> In such a case, a reasonable person would expect the entity to disclose the order of magnitude by which its earnings will differ from market expectations, effectively requiring it to disclose an estimated range for its earnings.*

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<sup>214</sup> See '6.3 Earnings surprises', 'Example F – material difference in earnings compared to earnings guidance' and 'Example G – material difference in earnings compared to consensus estimates' on pages 35, 56 and 56 respectively.

### Annexure B: Relevant provisions of the Corporations Act

This annexure has been included to give listed entities and their officers guidance on the interaction of Listing Rule 3.1 with some key provisions in the Corporations Act. It is not intended to be an exhaustive analysis of the disclosure obligations of a listed entity under the Corporations Act.

#### The statutory requirement for timely disclosure

The importance of Listing Rule 3.1 is recognised and reinforced by section 674(2) of the Corporations Act. This section provides, in effect, that where:

- (a) an ASX listed entity has information about specified events or matters that the provisions of the Listing Rules require the entity to notify to ASX as they arise for the purpose of ASX making that information available to participants in the market; and
- (b) that information is not generally available and is information that a reasonable person would expect, if it were generally available, to have a material effect on the price or value of ED securities<sup>215</sup> of the entity;

the entity must notify ASX of that information in accordance with those provisions.

#### The consequences for a listed entity in failing to make timely disclosure

The consequences for a listed entity in breaching section 674(2) are potentially serious. It is both a criminal offence and a financial services civil penalty provision, punishable in the former case by a fine of up to 1,000 penalty units<sup>216</sup> and in the latter case by a civil penalty of up to \$1,000,000.<sup>217</sup> Alternatively, if ASIC has reasonable grounds to suspect such a breach it may, by administrative action, issue an infringement notice imposing a penalty of up to \$100,000.<sup>218</sup>

Persons who suffer loss or damage as a result of a listed entity's breach of section 674(2)<sup>219</sup> may recover that amount from the entity under section 1317HA.<sup>220</sup> ASIC may bring representative proceedings on behalf of such persons<sup>221</sup> and has used its power to enter into enforceable undertakings<sup>222</sup> to require a listed entity to establish a compensation fund to meet prospective claims under section 1317HA.<sup>223</sup>

<sup>215</sup> "ED securities" stands for "enhanced disclosure securities". The term is defined in section 111AD and the following sections. For an ASX listed entity, it includes any class of securities to which the ASX Listing Rules apply. For an entity admitted to the official list in the ASX Listing category, this will inevitably include its ordinary shares (in the case of a company) and ordinary units (in the case of a trust). It will also include any other class of the entity's securities that are quoted on ASX.

<sup>216</sup> Sections 1311 and 1312. At the time of writing, a penalty unit was equivalent to \$110.

<sup>217</sup> See sections 1317DA, 1317E(1)(ja), 1317G(1A) and 1317G(1B)(b).

<sup>218</sup> See generally ASIC Regulatory Guide 73 *Continuous disclosure obligations: infringement notices*. The size of the penalty that can be imposed varies, based on the market capitalisation of the listed entity (section 1317DAE). If a listed entity satisfies the infringement notice by paying the specified penalty and disclosing to the market any specific information referred to in the notice within the required timeframe, ASIC is then precluded from taking civil or criminal proceedings against the entity for the alleged breach specified in the infringement notice (section 1317DAF(5)). Compliance with the infringement notice does not, however, preclude ASIC from taking civil penalty proceedings under section 674(2A) of the Corporations Act against people involved in the alleged breach, nor does it affect the right of third parties who may have been adversely affected by the entity's conduct, to bring compensation proceedings against the entity in relation to the alleged breach (section 1317DAF(6)).

<sup>219</sup> For example, someone who has purchased or sold securities in the entity while the information was withheld from the market.

<sup>220</sup> There have been a number of high profile class actions against listed entities under sections 674 and 1317HA, predominantly involving security holders who purchased securities in an entity when adverse information having a negative effect on the value of its securities was alleged to have been withheld from the market.

<sup>221</sup> Section 1317J(1).

<sup>222</sup> Section 93AA of the Australian Securities and Investments Commission Act 2001 (Cth) (referred to in this Guidance Note as the "ASIC Act").

<sup>223</sup> See ASIC Media Release 06-443.

### The consequences for directors, secretaries and other officers in failing to make timely disclosure

A director, secretary or other officer of a listed entity who is “involved in”<sup>224</sup> a listed entity’s contravention of section 674(2) may breach section 674(2A). This is also a financial services civil penalty provision punishable by a penalty of up to \$200,000.<sup>225</sup> Again, persons who suffer loss or damage as a result of an officer’s breach of section 674(2A) may recover that amount from the officer in question under section 1317HA.

There is a due diligence defence in section 674(2B), which protect officers of a listed entity from civil penalties and civil claims for damages if they can prove that they:

- took all steps (if any) that were reasonable in the circumstances to ensure that the entity complied with its continuous disclosure obligations; and
- after doing so, believed on reasonable grounds that the entity was complying with those obligations.

Hence, it is important that a listed entity has in place appropriate policies and procedures to comply with its disclosure obligations under Listing Rule 3.1.<sup>226</sup> The absence of such policies and procedures may make it difficult for an officer of a listed entity to rely on the due diligence defence in section 674(2B).

Finally, it should be noted that an officer of a listed entity who is involved in a breach of Listing Rule 3.1 may also breach his or her statutory duties of care and diligence to the entity under section 180(1) (in the case of a listed company) or section 601FD(1)(b) (in the case of a listed trust).<sup>227</sup> Both of these sections are corporation/scheme civil penalty provisions. Breaching them can lead to the imposition of a civil penalty of up to \$200,000, a liability to compensate the listed entity for any loss or damage it suffers and the person being disqualified from managing a corporation.<sup>228</sup>

### The statutory prohibitions against false or misleading disclosures

Not only must the disclosure of information that may have a material effect on the price or value of a listed entity’s securities be timely, it must also be accurate and not misleading.

A misleading or deceptive announcement under Listing Rule 3.1 breaches section 1041H of the Corporations Act and section 12DA of the ASIC Act. While this does not attract criminal or civil penalties, it will empower the court to grant an injunction to cure the breach or to order the disclosure of corrective information.<sup>229</sup> In addition, any person who has suffered loss or damage as a result of the breach may recover that amount from the entity, as well as from any other person (such as a director, secretary or other officer) who was “involved in”<sup>230</sup> the entity’s breach.<sup>231</sup>

<sup>224</sup> Section 79 defines what it means to be “involved in” a breach of the Corporations Act. It includes aiding, abetting, counselling or procuring the breach or being in any way, by act or omission, directly or indirectly, knowingly concerned in the breach.

<sup>225</sup> See sections 1317DA, 1317E(1)(ja), 1317G(1A) and 1317G(1B)(a). Note that while the directors, secretaries and other officers of a listed entity are the class most likely to attract liability under section 674(2A), that section is not confined to such officers and extends to any person who is involved in a listed entity’s contravention of section 674(2). The maximum civil penalty for breaching section 674(2A) is \$200,000 in the case of an individual and \$1,000,000 in the case of a body corporate.

<sup>226</sup> For further guidance on continuous disclosure compliance policies, see Annexure C.

<sup>227</sup> See *ASIC v Macdonald (No 11)*, note 47, where the court found that the non-executive directors, CEO, CFO and company secretary/general counsel of a listed company all breached their duties to the company under section 180(1) as a result of their involvement in a failure by the company to announce certain information in breach of Listing Rule 3.1 and section 674 and in the company making a misleading announcement about other information in breach of section 1041H. The decision against the non-executive directors and the company secretary/general counsel was ultimately affirmed on appeal by the High Court in *ASIC v Hellicar*, note 47, and *Shafron v ASIC* [2012] HCA 18 respectively. The decision against the CFO was affirmed on appeal by the NSW Court of Appeal in *Morley v ASIC*, note 48). The CEO did not appeal the decision at first instance.

<sup>228</sup> See sections 1317E(1)(a) and (g), 1317G(1), 1317H and 206C.

<sup>229</sup> Sections 1324 and 1324B.

<sup>230</sup> See note 224.

<sup>231</sup> Section 1041I of the Corporations Act and section 12GF of the ASIC Act.

An officer or employee of a listed entity who gives, or authorises or permits the giving of, materially false or misleading<sup>232</sup> information to ASX under Listing Rule 3.1:

- knowingly, breaches section 1309(1) of the Corporations Act, which is a criminal offence punishable by a fine of up to 200 penalty units and/or imprisonment for up to 5 years; or
- without taking reasonable steps to ensure that the information was not false or misleading, breaches section 1309(2) of the Corporations Act, which is a criminal offence punishable by a fine of up to 100 penalty units and/or imprisonment for up to 2 years.

Depending on the circumstances, the making of a false or misleading announcement to ASX may also breach section 1041E (knowingly or carelessly making a false or misleading statement that is likely to induce persons to acquire or dispose of financial products or to have the effect of increasing, reducing, maintaining or stabilising the price for trading in financial products on a financial market) or 1041F (inducing another person to deal in financial products by knowingly or recklessly making a statement that is false or misleading). These are very serious criminal offences, punishable:

- in the case of an individual, by up to 10 years' jail and/or a fine of up to the greater of: (a) 4,500 penalty units; or (b) if the court can determine the total value of the benefits that have been obtained by one or more persons and are reasonably attributable to the commission of the offence, 3 times that total value; and
- in the case of a body corporate, a fine of up to the greatest of: (a) 45,000 penalty units; or (b) if the court can determine the total value of the benefits that have been obtained by one or more persons and are reasonably attributable to the commission of the offence, 3 times that total value; or (c) if the court cannot determine the total value of those benefits, 10% of the body corporate's annual turnover during the 12 month period ending at the end of the month in which the body corporate committed, or began committing, the offence.<sup>233</sup>

Listed entities and their officers should note, in particular, the legal issues that may arise when making forward looking announcements (eg announcements containing earnings guidance or exploration or production targets). Under both the Corporations Act and the ASIC Act, when a person makes a representation with respect to any future matter and the person does not have reasonable grounds for making the representation, the representation is taken to be misleading.<sup>234</sup>

### **The statutory duty to implement proper information reporting systems**

As a matter of general law, the directors of a listed entity have a duty to ensure that the entity has appropriate information reporting systems in place so that they are kept apprised of material developments affecting the entity in a timely manner.<sup>235</sup> Failure to do so is likely to breach their statutory duties of care and diligence to the entity

<sup>232</sup> This includes omitting material which renders the information given to ASX misleading in a material respect.

<sup>233</sup> Section 1311.

<sup>234</sup> See section 769C of the Corporations Act and section 12BB(1) of the ASIC Act. Note that under the ASIC Act, a person making a representation as to the future is taken not to have had reasonable grounds for making the representation unless they adduce evidence to the contrary: section 12BB(2) of the ASIC Act.

Where a forward looking announcement is predicated on material assumptions or subject to material qualifications, those assumptions and qualifications should be set out in the announcement and due diligence applied to ensure that they are objectively reasonable. A failure to do so could render the announcement misleading.

See also ASIC Regulatory Guide 170 *Prospective financial information* and *ASC v MacLeod* [2000] WASCA 101 (reversed on jurisdictional grounds in *MacLeod v ASIC* [2002] HCA 37).

<sup>235</sup> See *Re Caremark International Inc. Derivative Litigation* (1996) 698 A.2d 959, where the Delaware Court of Chancery held that the directors of a corporation have an obligation to be reasonably informed concerning the corporation and that includes an obligation to assure themselves that information and reporting systems exist in the corporation that are reasonably designed to provide to senior management and to the board itself timely, accurate information sufficient to allow management and the board, each within its scope, to reach informed judgments concerning both the corporation's compliance with law and its business performance. See also *ASIC v Adler* [2002] NSWSC 171, where Santow J held that directors are required to take reasonable steps to place themselves in a position to guide

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under section 180(1) (in the case of a listed company) or section 601FD(1)(b) (in the case of a listed trust). As mentioned above, such a breach may lead to the imposition of a civil penalty of up to \$200,000, a liability to compensate the listed entity for any loss or damage it suffers and the person being disqualified from managing a corporation.

Hence, it is important that a listed entity has in place appropriate policies and procedures to ensure that information which may be market sensitive and which may require disclosure under Listing Rule 3.1 is brought to the attention of its directors, secretaries and senior managers in a timely manner.

Annexure C has further guidance on the policies and procedures that a listed entity should implement to comply with its obligations under Listing Rule 3.1.

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and monitor the management of the company, including becoming familiar with the fundamentals of the business in which the company is engaged and “a continuing obligation to keep informed about the activities of the corporation”.

### Annexure C: Guidance on compliance policies

Every listed entity should have an effective<sup>236</sup> written policy on continuous disclosure aimed at ensuring that information which may be market sensitive and which may require disclosure under Listing Rule 3.1:

- is brought to the attention of its directors, secretaries and senior managers in a timely manner;
- is promptly assessed to determine whether it requires disclosure under Listing Rule 3.1; and
- if it does, is promptly given to ASX.

Not only will this aid the entity in complying with its obligations under Listing Rule 3.1, in the event that the entity does happen to breach those obligations, the fact that it has such a policy may well be taken into account by a court as a mitigating factor in assessing the level of penalty that should be imposed in relation to that breach.<sup>237</sup> It may also assist the directors, secretaries and other officers of the entity in being able to assert the due diligence defence in section 674(2B).<sup>238</sup>

#### The recommendations of the ASX Corporate Governance Council

In designing their disclosure policies, listed entities should have regard to the commentary accompanying Recommendation 5.1 of the ASX Corporate Governance Council's *Corporate Governance Principles and Recommendations*.<sup>239</sup> This recommends that entities have a written compliance policy that includes vetting and authorisation processes designed to ensure that:

- all investors have equal and timely access to material information concerning the entity – including its financial position, performance, ownership and governance; and

<sup>236</sup> The case law on compliance systems suggests that to be effective, a compliance system should:

- be actively implemented (*ACCC v Australian Safeway Stores Pty Ltd* [1997] ATPR ¶41-562, especially at page 43,815);
- be communicated to all affected staff (*Evans v Lee and Commonwealth Bank of Australia* (1996) EOC 92-822 and *Hopper v Mount Isa Mines Ltd* [1997] QADT 3). In this regard, it is not sufficient just to provide manuals or place material on the intranet – all relevant staff must be informed about the system and properly trained (*Coyne v P & O Ports* [2000] VCAT 657);
- include proper escalation procedures so that actual or potential breaches are brought to the attention of senior managers (*EPA v Great Southern Energy* [1999] NSWLEC 192);
- be properly supervised or policed to make sure it is applied (*Videon v Barry Burroughs Pty Ltd* (1981) 53 FLR 425 and *Ali v Hartley Poynton Ltd* [2002] VSC 113);
- be monitored or audited for effectiveness (*Hopper v Mount Isa Mines Ltd* [1997] QADT 3); and
- be kept under review and updated when necessary (*TPC v CSR Ltd* [1991] ATPR ¶41-076).

<sup>237</sup> See *ASIC v Chemeq Ltd* [2006] FCA 936, especially at paragraphs 84-99, and cf *ACCC v Rural Press Ltd* [2001] ATPR ¶41-833, at page 43,291.

<sup>238</sup> See Annexure B.

<sup>239</sup> Recommendation 5.1 states that listed entities: "should establish written policies designed to ensure compliance with ASX Listing Rule disclosure requirements and to ensure accountability at a senior executive level for that compliance and disclose those policies or a summary of those policies." This recommendation supports Principle 5, namely, that listed entities should promote timely and balanced disclosure of all material matters concerning them.

The *Corporate Governance Principles and Recommendations* are underpinned by Listing Rule 4.10.3, which requires a listed entity to include in its annual report a statement disclosing the extent to which it has followed those recommendations during the reporting period. If the entity has not followed all of the recommendations, the entity must identify those recommendations that have not been followed and give reasons for not following them. If a recommendation has been followed for only part of the period, the entity must state the period during which it has been followed.

The *Corporate Governance Principles and Recommendations* are available online at:

[http://www.asx.com.au/documents/about/cg\\_principles\\_recommendations\\_with\\_2010\\_amendments.pdf](http://www.asx.com.au/documents/about/cg_principles_recommendations_with_2010_amendments.pdf).

- announcements by the entity are factual, balanced<sup>240</sup> and expressed in a clear and objective manner that allows investors to assess the impact of the information when making investment decisions.

It also recommends that a listed entity's disclosure policy should address:

- the roles and responsibilities of directors, officers and employees of the entity in the disclosure context; in particular, who has primary responsibility for ensuring that the entity complies with its disclosure obligations and who is primarily responsible for deciding what information will be disclosed;
- measures for seeking to avoid the emergence of a false market in the entity's securities;
- safeguarding confidentiality of corporate information to avoid premature disclosure;
- media contact and comment; and
- external communications such as analyst briefings and responses to security holder questions.

### ASIC Regulatory Guide 62

In designing their disclosure policies, listed entities should also have regard to the 10 principles set out in ASIC Regulatory Guide 62 *Better disclosure for investors*. Those principles are:<sup>241</sup>

1. Establish written policies and procedures on information disclosure. Focus on continuous disclosure and improving access to information for all investors.
2. Use current technology to give investors better access to your information. In particular, post price sensitive information on your company's website as soon as it is disclosed to the market.
3. Nominate a senior officer to have responsibility for:
  - making sure that your company complies with continuous disclosure requirements;
  - overseeing and co-ordinating disclosure of information to the stock exchange, analysts, brokers, shareholders, the media and the public; and
  - educating directors and staff on the company's disclosure policies and procedures and raising awareness of the principles underlying continuous disclosure.<sup>242</sup>

In smaller companies, this person is likely to be the company secretary.

4. Keep to a minimum the number of directors and staff authorised to speak on your company's behalf. Make sure that these persons know they can clarify information that the company has released publicly through the stock exchange, but they should avoid commenting on price sensitive matters. The senior officer responsible for disclosure should outline the company's disclosure history to these persons before they

<sup>240</sup> In the sense of disclosing both positive and negative information.

<sup>241</sup> This Regulatory Guide was originally published in August 2000 under the title "*Better disclosure for investors*". It was the result of a joint exercise by ASIC and ASX.

The introduction to ASIC Regulatory Guide 62 notes that the measures in the Guide:

"should be implemented flexibly and sensibly to fit the situation of individual companies. Each listed company needs to exercise its own judgement and develop a disclosure regime that meets legal requirements and its own needs and circumstances."

A footnote to the Guide also notes that references in the Guide to listed companies are to be read as including other listed entities.

<sup>242</sup> As to who would be a suitable person to have this responsibility, note point 5 under '3.9 What other steps can a listed entity take to facilitate compliance with Listing Rule 3.1?' on page 16.

brief anyone outside the company. This will safeguard against inadvertent disclosure of price sensitive information.<sup>243</sup>

5. The senior officer responsible for disclosure should be aware of information disclosures in advance, including information to be presented at private briefings. This will minimise the risk of breaching the continuous disclosure requirements.
6. Price sensitive information must be publicly released through the stock exchange before disclosing it to analysts or others outside the company. Further dissemination to investors is desirable following release through the stock exchange. Posting information on your company's website immediately after the stock exchange confirms an announcement has been made is one method of making it accessible to the widest audience. Investor information should be posted in a separate area of your website from promotional material about the company or its products.
7. Develop procedures for responding to market rumours, leaks and inadvertent disclosures. Even if leaked or inadvertently disclosed information is not price sensitive, give investors equal access by posting it on the company website.
8. Have a procedure for reviewing briefings and discussions with analysts afterward to check whether any price sensitive information has been inadvertently disclosed. If so, give investors access to it by announcing it immediately through the stock exchange, then posting it on the company website. Slides and presentations used in briefings should be given to the stock exchange for immediate release to the market and posted on the company website.
9. Be particularly careful when dealing with analysts' questions that raise issues outside the intended scope of discussion. Some useful ground rules are:
  - only discuss information that has been publicly released through the stock exchange;
  - if a question can only be answered by disclosing price sensitive information, decline to answer or take it on notice. Then announce the information through the stock exchange before responding.
10. Confine your comments on market analysts' financial projections to errors in factual information and underlying assumptions. Seek to avoid any response which may suggest that the company's or the market's current projections are incorrect. The way to manage earnings expectations is by using the continuous disclosure regime to establish a range within which earnings are likely to fall. Publicly announce any change in expectations before commenting to anyone outside the company.

Additional guidance on these last three principles can also be found in the Chartered Secretaries Australia publication *Good Governance Guide No 5.1: Communication with analysts and shareholders*.<sup>244</sup>

### **Additional guidance**

In addition to the guidance in the *Corporate Governance Principles and Recommendations* and ASIC Regulatory Guide 62, ASX would suggest that a listed entity's disclosure policy should also:

- address how and when to use trading halts to manage continuous disclosure issues;
- provide a clear delineation between those announcements that require prior board approval and those that management can make; and

<sup>243</sup> As noted under '4.8 Listing Rule 3.1A.2 – the requirement for information to be confidential' on page 27, it is incumbent on a listed entity which wishes to rely on the carve-out from disclosure in Listing Rule 3.1A to ensure that it has in place suitable and effective arrangements to preserve confidentiality.

<sup>244</sup> Available online at:

[http://www.csaust.com/AM/Template.cfm?Section=Disclosure\\_ASX\\_guidelines\\_&Template=/CM/ContentDisplay.cfm&ContentID=1678](http://www.csaust.com/AM/Template.cfm?Section=Disclosure_ASX_guidelines_&Template=/CM/ContentDisplay.cfm&ContentID=1678).

- ensure that continuous disclosure announcements are copied to board members and senior managers by email immediately after they have been released to ASX.

Additional guidance on the contents of a disclosure policy can also be found in the Chartered Secretaries Australia publication *Good Governance Guide No 5.2: Disclosure policies and procedures*.<sup>245</sup>

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<sup>245</sup> Available online at:

[http://www.csaust.com/AM/Template.cfm?Section=Disclosure\\_ASX\\_guidelines\\_&Template=/CM/ContentDisplay.cfm&ContentID=1679](http://www.csaust.com/AM/Template.cfm?Section=Disclosure_ASX_guidelines_&Template=/CM/ContentDisplay.cfm&ContentID=1679).