SUBMISSION ON PROPOSED AMENDMENTS TO ASX LISTING RULES

Draft Guidance Note 8 Continuous Disclosure: Listing Rules 3.1 – 3.1B

December 2012

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CORRS CHAMBERS WESTGARTH lawyers

Introduction

Corrs Chambers Westgarth (**Corrs**) is pleased to provide this submission (**Submission**) to ASX Limited in respect of the Public Consultation of ASX Listing Rules Guidance Note 8 (**Revised Guidance Note 8**) *Continuous Disclosure: Listing Rules 3.1 – 3.1B* (**Proposed Disclosure Related Amendments**) (together **Continuous Disclosure Revisions**).

This Submission focuses on certain issues relating to Continuous Disclosure Revisions. We have not commented on all the issues in the Continuous Disclosure Revisions.

We welcome the clarification and insight the Continuous Disclosure Revisions provide into both ASX and ASIC's approach to applying and enforcing Australia's continuous disclosure laws.

Please note this Submission does not necessarily reflect the views of any particular Corrs' client or stakeholder. Rather, this Submission is made by Corrs in the spirit of fostering public debate and informed discussion on issues that affect a large number of ASX-listed issuers, investors and their advisers.

Corrs welcomes the opportunity to contribute to any further consultation process in respect of the Continuous Disclosure Revisions.

To discuss any aspects of this Submission or to facilitate further consultation, please contact:

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Executive summary

Continuous disclosure is, in our experience, the area of law which most frequently vexes Australian listed company boards and general counsel.

The Revised Guidance Note 8 is a **timely and welcome acknowledgment** of the proposed approach of both ASX and ASIC to the continuous disclosure framework. In particular, the detail and worked examples included in Revised Guidance Note 8 provide clarification and insight into the "murkier" aspects of the operation of Listing Rule 3.1 and we **welcome the transparency and insight** the revisions provide.

We support the structure of Revised Guidance Note 8, which provides more detailed and systematic guidance on the various elements of Listing Rule 3.1, and will facilitate a better understanding of the practical operation of the continuous disclosure rules.

Recommendations: further clarification

There are some areas in the Revised Guidance Note which Corrs considers could be clarified or improved further, some of which are summarised below.

"Immediately" – Revised Guidance Note 8 be amended to provide further guidance as to the meaning of the term "without delay" in the context of "promptly and without delay". Revised Guidance Note 8 be amended to consistently adopt the phrase "promptly and without delay" (as opposed to "immediate" or "instantaneous") where appropriate. In circumstances where "instantaneous" disclosure is or may be required, Revised Guidance Note 8 should be clarified accordingly.

Analysts' forecasts – Revised Guidance Note 8 be clarified to provide that a company is not required to correct a consensus estimate if that company does not otherwise provide earnings forecasts and to highlight that a consensus estimate is only one factor to be considered by a company in assessing "market expectations".

Earning surprises – Revised Guidance Note 8 be amended to include further guidance by way of worked examples for when ASX considers companies will have a reasonable degree of certainty about expected earnings to make disclosure and the contents of that disclosure.

Prudent and risk averse – That example H1 be amended to remove the words "prudent and risk averse" and replace them with the words "prudent and risk-conscious".

Use of trading halts – Revised Guidance Note 8 be amended to include clear support from both ASX and ASIC that trading halts are in certain circumstances the appropriate means to manage continuous disclosure and further guidance about the circumstances in which the use of a trading halt is appropriate. Revised Guidance Note 8 should take into account the fact that companies require a period of time to assess whether a trading halt is appropriate or warranted in the circumstances.

Market rumours – Revised Guidance Note 8 be amended to include clear guidance on market rumours, namely that a company need only be proactive in relation to a market rumour, if that market rumour will have a material effect on price. Revised Guidance Note 8 be amended to include worked examples on market rumours and expectations on companies to monitor new media proactively.

What does *"immediately"* mean?

1. There have been various views expressed about the interpretation of the word "immediately" in Listing Rule 3.1. Accordingly, we **support** the confirmation provided in Revised Guidance Note 8 that the term *"immediately"*, in the context of Listing Rule 3.1, means *"promptly and without delay"* rather than *"instantaneously".*

2. The meaning of the term "*without delay*" in the context of the phrase "*promptly and without delay*" is unclear to us. It would be helpful to include a description of particular factors that are to be taken into account when determining how quickly an announcement needs to be made. This would provide valuable guidance about the practical application of the obligation to disclose "promptly and without delay".

3. In particular, these factors should explicitly recognise the complexity of the circumstances in which decisions regarding materiality are made and in our view should strike the right balance between

   - the benefits to the market and investors associated with "immediate" disclosure; and
   - the need to ensure that the market is not misinformed or prejudiced as a result of information being disclosed or a trading halt having been sought before the directors have had the chance to assess its veracity and/or materiality.

4. While we understand and agree with the principle set out in paragraph 3 of section 3.5 of Revised Guidance Note 8 that "the standard of promptness is justifiably high", we consider that it is also important to emphasise in this paragraph that there are many factors which contribute to the meaning of prompt disclosure in any particular circumstance.

   Recommendation: Paragraph 3 of section 3.5 be clarified to emphasise that ASX and ASIC recognise that there are a number of factors which contribute to the meaning of what will constitute prompt disclosure in any particular circumstance.

5. Currently section 3.5 of Revised Guidance Note 8 tends towards an interpretation that "immediate" is still akin to "instantaneous", and the 60 or 90 minute interval referred to in that paragraph could be interpreted as meaning that such a short timeframe is the normal or expected timeframe for disclosure (whereas we assume it was the circumstances of those cases which in ASIC's view warranted particularly urgent disclosure). Clarification and further examples as to particular circumstances which warrant disclosure and the time frames within which disclosure is expected would also be useful.

   Recommendation: Paragraph 3 of section 3.5 be clarified to make clear that the particular circumstances of the cases referred to in this paragraph required almost instantaneous disclosure and should not be regarded as the benchmark for disclosure. An assessment as to the timing for disclosure should be made on a case-by-case basis. Additional examples of specific factors that would warrant disclosure or a trading halt within a short time frame (eg 60 – 90 minutes) would also be welcome.

6. Given the confirmation that the term "*immediately*" means "*promptly and without delay*", we consider that companies would benefit if Revised Guidance Note 8 adopted the phrase *"promptly and without delay"* wherever this is considered to be the appropriate timing.

7. For example, within the second paragraph of section 3.8 of Revised Guidance Note 8, the term immediately could be followed with the phrase *(meaning "promptly and without delay")*. Also, in example G, the term "*immediately*" is used to describe the obligation to make an announcement whereas the phrase "*promptly and without delay*" is used to describe the time at which the review of the event should occur. If these terms have the same meaning, we consider that it would be preferable that only one is used consistently throughout Revised Guidance Note 8.[1]

8. If there are any circumstances in which "immediate" disclosure is or may be required, that should be made clear. For example, in section 3.17 of Revised Guidance Note 8, it is not clear what the expected timeframe for disclosure is where information is released to a section of the market before it is provided to ASX.

Recommendation: Revised Guidance Note 8 is clarified to consistently adopt the phrase "*promptly and without delay*" as appropriate. In circumstances where "instantaneous" disclosure is or may be required, Revised Guidance Note 8 should be clarified accordingly.

Analysts' forecasts

9. Clearly earnings expectations are critical to price. The complexity of managing market expectations in relation to earnings increases exponentially if a company is also required to manage analysts' forecasts.

10. Accordingly, we **support** the guidance provided by the ASX in section 6.4 of Revised Guidance Note 8 which confirms the view that a company is not obliged, under the Listing Rules or otherwise, to correct analysts' forecasts to bring them in line with their own.

11. However, footnote 139 appears to indicate that ASX considers that the "*consensus estimate*" of analysts which cover a company equates to market expectations.

12. This of course gives rise to the difficulty of defining what constitutes a "consensus" estimate in any given case. However, we consider consensus estimates should only be a factor to be considered by the company and that this footnote should be rephrased to align it with the second bullet point under section 6.3 of Revised Guidance Note 8, which provides that "*expectations may have been set by ... forecasts from ... analysts*".

13. The second bullet point under section 6.3 also notes that the "consensus estimate" is "*usually taken as the central measure of the entity's expected earnings*". This statement could be understood as having one of two meanings. First, it could mean that the consensus estimate is the primary or key measure of the market's expectations. Alternatively, the word "central" could be interpreted as indicating ASX's preference as to how the consensus estimate is actually calculated. It would be helpful if this was clarified (in particular, to clearly state ASX's view as to whether the consensus estimate is the average (mean), median or mode of such analysts' estimates).

14. We assume that the first interpretation of the second bullet point under section 6.3 of Revised Guidance Note 8 is what was intended. On that basis, the inclusion of the term "usually" as noted above indicates that ASX considers that the consensus estimate will not always be the central measure. We consider it would be helpful for

[1] We also refer to footnote 52, the first paragraph of section 3.9, the sixth and the final paragraph of section 3.10 and each paragraph of section 4.1 for other examples of the use of *"immediately"* where "*promptly and without delay*" may be more appropriate.

ASX to provide some guidance as to when an analyst's estimate may be given lesser regard by the company in determining whether there is a material difference between its actual or expected earnings and market expectations.

Recommendation: Revised Guidance Note 8 be clarified to provide that a company is not required to correct a consensus estimate if that company does not otherwise provide earnings forecasts and to highlight that a consensus estimate is only one factor to be considered by a company in considering market expectations.

Earning surprises

15. As we know matters that give rise to profit warnings are not easy and companies often struggle to know when they have robust enough information on which to make a disclosure.

16. We **support** the guidance ASX has provided in section 6.3 of Revised Guidance Note 8 with regard to the obligation of listed companies to provide earnings updates to the market based on variations from market expectations (and not necessarily from historical results).

17. However, while paragraphs 2 and 4 of section 6.3 of Revised Guidance Note 8 note that in ASX's opinion a disclosure obligation may only arise immediately after a company has a "reasonable degree of certainty" of an expected material difference in its earnings from market expectations, paragraph 3 of section 6.3 of Revised Guidance Note 8, indicates that the "announcement needs to indicate the order of magnitude of the difference". Notwithstanding the fact that paragraph 4 of section 6.3 of Revised Guidance Note 8 specifically states that allowance will be made for the proper vetting of earnings guidance, there often remains a "gap" between when a company obtains a "reasonable degree of certainty" in relation to its expected earnings and when it can confidently determine or explain the magnitude of any difference when compared against market expectations.

18. In our experience, company boards would be greatly assisted if ASX were to provide worked examples on this issue to demonstrate at what point ASX considers boards should be making disclosure and the content of that disclosure. Such guidance has the potential to prevent unnecessary disclosures between reporting periods which are a strain on company resources and run the risk of being incomplete and isolated from a broader context.

Recommendation: Revised Guidance Note 8 be amended to include further guidance by way of worked examples for when ASX considers companies will have a reasonable degree of certainty about expected earnings to make disclosure and the contents of that disclosure.

Prudent and risk averse?

19. We **support** the provision of the worked examples in Revised Guidance Note 8 which are a useful and practical tool for companies wishing to understand their disclosure obligations.

20. One concern we would like to raise are the potential implications for the use of the phrase "prudent and risk averse" in Annexure A, example H1. ASX Listing Rule 3.1 provides that, *"once an entity 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 the ASX that information".*

21. In our view, the use of the phrase "prudent and risk averse" connotes a standard of board conduct that is inconsistent with the expectation described under the Listing Rules, namely, that the board act in accordance with the expectations of a "reasonable person".

22. Consistent with case law, we consider continuous disclosure compliance "*does not require a risk averse mentality in the conduct of the company's business, but rather a kind of inbuilt mental checklist as a background to decision making*".[2]

23. An expectation that boards must act in a risk averse manner in relation to continuous disclosure is undesirable for the development and operation of business in Australia. If directors are strictly required to err on each occasion on the side of caution, they may be required to make disclosures contrary to the interests of existing shareholders.

24. Accordingly, we consider that the phrase "prudent and risk averse" should be removed, or replaced with a phrase more consistent with the legal obligations placed on directors, such as "prudent and risk-conscious".

Recommendation: That example H1 be amended to remove the words "prudent and risk averse" and replace them with the words "prudent and risk-conscious".

Use of trading halts

25. Trading halts are a useful tool of good disclosure and we support the guidance provided by the ASX with regard to the use of trading halts in providing greater recognition of the role trading halts perform in managing a company's continuous disclosure obligations.

26. We note that the key priorities behind the enactment of the Listing Rules include the protection of market integrity by ensuring that trading occurs only when the market is fully informed.

27. While it cannot not be said that the market is fully informed during a trading halt, the protection that a trading halt does provide includes:

- the fact that it prevents investment decisions from being made on the ASX while it is in place; and
- the halt itself is an overt signal that the market may not be fully informed.

28. Revised Guidance Note 8 takes this into account by ensuring the rules are applied in a purposive and minimalist fashion such that companies are not exposed to an unnecessary regulatory burden.

29. This purposive and minimalist approach can be seen in section 3.6 of Revised Guidance Note 8 where the ASX describes how trading halts can be used to manage a listed company's continuous disclosure obligations. While noting that technically the obligations under Listing Rule 3.1 apply during a trading halt, Revised Guidance Note 8:

- confirms that the ASX does not apply the Listing Rules in a technical manner but rather in a manner which reflects the spirit, intention and purpose of the Listing Rules; and
- provides that whether and how promptly a company requests a trading halt are significant factors that the ASX takes into account in assessing whether

[2] *ASIC v Chemeq* [2006] FCA 936 at [86]

a company has complied with the spirit, intention and purpose of Listing Rule 3.1.

30. Footnote 42 provides that the ASX understands that ASIC will also take into account whether or not a listed company has promptly requested a trading halt in determining whether it will take enforcement action. However, in the next footnote it is noted that the fact that the ASX may regard a company as having complied with the spirit, intention and purpose of the Listing Rules does not preclude ASIC or a civil litigant from taking a different view and arguing that a company has nonetheless failed to comply with Listing Rule 3.1 and section 674 of the *Corporations Act 2001* (Cth).

31. Clear support from ASX and ASIC about the use of trading halts would better serve the market.

32. We remain concerned that ASX's and ASIC's expectation is that companies go into trading halt "immediately" if it is not in a position to make disclosure of non public price sensitive information. In our experience, the decision to seek a trading halt is one that companies take extremely seriously, as an ill-conceived request for a trading halt has the potential to adversely affect the company and its shareholders. The materiality of the information in question, the consideration of the "event" that will eventually bring a company out of the trading halt and the likelihood that the "event" will occur are all part of the deliberation of whether to seek a trading halt in the first place. These deliberations take time and do not occur "immediately" or "instantaneously". We submit that better use of trading halts as a mechanism to manage continuous disclosure obligations will result if the period of time necessary to consider these issues is recognised in Revised Guidance Note 8.

Recommendation: Given general market concern that trading halts may indicate "bad news", that Revised Guidance Note 8 should include clear support from both ASX and ASIC that trading halts are an in certain circumstances the appropriate means to manage continuous disclosure and further guidance about the circumstances in which the use of a trading halt is appropriate. Revised Guidance Note 8 should also take into account the fact that companies require a period of time to assess whether a trading halt is appropriate or warranted in the circumstances.

Exploration programs

33. Knowing when to make disclosures during exploration is a problem frequently faced by Australian boards. While not directly within the scope of Revised Guidance Note 8, any clarification of ASX expectations in relation to the reporting requirements associated with both oil and gas and mining-related exploration would be of assistance to the market.

34. In our view, the best method of providing such guidance would be to provide worked examples that deal in detail with scenarios involving exploration programs.

35. A worked example that deals in detail with the following scenario and questions would be of assistance to company boards with an oil and gas focus:

> *"Junior exploration entity has announced an exploration programme targeting specific plays. No contingent or prospective resources have been booked as exploration is still early stage. Exploration well results come in and over the course of the program; technical results are such that it becomes more and more unlikely that the play will be commercially viable. However, final analysis of cores and chip samples will not be available for some months and it is possible, although arguably unlikely, that these results will differ from the preliminary technical conclusions. Internal management reports indicate that it*

is unlikely the play will be viable, but the directors want an independent third party report to confirm this view, taking into account the technical data yet to come.

We would be grateful if in this worked example, ASX could provide guidance on the following:

- At what stage should disclosure be made?
- The board is of the view that until the final analysis and third party report are available, the matter is still insufficiently definite to warrant disclosure. Would ASX agree?"

36. A similar example with a mining focus would also be of assistance.

Recommendation: Revised Guidance Note 8 should include worked examples for both oil and gas and mining junior companies about when exploration results are sufficiently definite (ie on final analysis and when a third party report is available) to warrant disclosure and the factors a company should consider for the making any such disclosure.

Market Rumours

37. With an increasingly fragmented and varied media (consider non authoritative sources such as Facebook, blogs, twitter etc), rumours can be difficult for companies to identify and effectively monitor.

38. Additionally, unlike traditional media comment or speculation, it is difficult for boards to determine the likely impact of rumours broadcast through new media as it may be difficult to determine the number of followers or people with access to that media and whether those with access to that story will attach credibility to it, having due regard to the source and the extent to which the facts of that story have been thoroughly researched and checked. This matter is further complicated if mainstream media inadvertently give credibility to otherwise non-credible social media stories in republication of those stories.

39. A lack of guidance in this area may result in unnecessary disclosures which are a strain on company resources and run the risk of being incomplete and isolated from a broader context.

40. Accordingly, we consider that it would be helpful if the ASX could provide further guidance in relation to the level of expected response and the timing of that response required for market rumours under Section 5.5 of Revised Guidance Note 8.

Recommendation: Revised Guidance Note 8 should include further guidance in relation to the level of response and the timing of that response to market rumours as contemplated under Section 5.5 of Revised Guidance Note 8.

41. We note that the key priorities behind the enactment of the Listing Rules include the protection of market integrity by ensuring that trading occurs only when the market is fully informed.

42. At present, boards run the risk of partially addressing a rumour due to a misunderstanding or partial understanding of its content and this has the potential to lead to further inaccurate speculation by the market.

43. It would be of assistance to boards if ASX could provide clear guidance on their approach to market rumours indicating whether or not a company need only be

proactive in relation to a market rumour where there will be a material effect on market price.

44. We consider that company boards would be assisted if ASX were to provide worked examples on this issue that deal with how (if at all) the ASX expects companies to monitor the new media proactively.

Recommendation: Revised Guidance Note 8 should include clear guidance on market rumours, namely that a company need only be proactive in relation to a market rumour, if that market rumour will have a material effect on price. Revised Guidance Note 8 include worked examples on market rumours and expectations on companies to monitor new media proactively.

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