



**AIRA**

AUSTRALASIAN  
INVESTOR RELATIONS  
ASSOCIATION

# AIRA Submission – response to ASX Consultation Paper on revisions to GN 8

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## 1 Introduction

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The Australian Investor Relations Association (AIRA), as the peak body representing Investor Relations practitioners in Australia and New Zealand. The Association's 160 corporate members now represent over **A\$1.2 trillion** of market capitalisation, over 80% of the total market capitalisation of companies listed on ASX. AIRA welcomes the opportunity to respond to the consultation paper issued by the ASX on 6 March 2015.

AIRA supports ASX's commitment to ensuring that companies maintain an informed market. AIRA appreciates ASX's intent and commitment in continuing to develop further guidance in this difficult and important area.

As ASX will be aware, AIRA was a supporter of the major rewrite of Guidance Note 8 (published in May 2013) and confirms that in its view the current Guidance Note provides valuable assistance to issuers with regard to market disclosure generally.

We appreciate the intent and the objectives underlying the proposed further amendments proposed in the recent consultation paper. However, AIRA is concerned that some of the more substantive proposals:

- go beyond the level of guidance that is necessary and appropriate from ASX in so far as the "guidance" relates to provisions of the Corporations Law and not the Listing Rules;
- fail to appreciate that what the ASX views as "guidance" will be viewed by many if not most listed entities as tantamount to regulatory requirements; and
- (as a consequence of the preceding two bullet points) will result in a less informed market and greater potential for earnings surprises – contrary to the best interests of both issuers and investors.

The following submission sets out AIRA's particular concerns and where appropriate, proposes recommendations, which we hope will be of assistance and subject to further discussion.

Again AIRA reiterates that it has no question with regard to the good intent and commitment of ASX in preparing the proposals and appreciates the willingness of ASX to consult and consider feedback before proceeding with any further revisions.

## 2 Areas of primary concern

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### **The proposed amendments will discourage listed entities from providing guidance**

#### **Summary**

The proposed amendments in subparagraph 2 of item 7.3 emphasise, beyond what is necessary or appropriate, the differences in the ASX's expectations of companies who choose to provide guidance and those who do not.

These changes will effectively formalise a 2-tier regulatory system - with a clear indication that ASX will regulate the two categories differently.

The outcome will be that companies (and their Boards) will be very reluctant to provide guidance even where they otherwise believe it to be both appropriate and "safe" (in the sense of having reasonable grounds to do so).

#### **Recommendation**

The final two paragraphs in section 2 of item 7.3 should be deleted. The Law in this area is adequately covered by the existing guidance and the proposed changes will have counter-productive outcomes.

#### **Discussion**

AIRA recognises and supports the important clarifications in the first paragraph of section 7.1. However, in its view the extensive proposed additions in section 7.3, particularly in the closing paragraphs of section 2, are unnecessary and will be detrimental to an informed market.

The Law in this area is relatively clear and is adequately covered by the existing Guidance Note. The obligation imposed by Listing Rule 3.1 itself, in so far as it may require pro-active earnings guidance in certain circumstances, is also adequately explained in the existing Guidance Note.

The Rule is and the requirements are, the same – irrespective of whether an entity has previously provided guidance.

ASX should appreciate that most of our members tend to treat ASX's "guidelines" as 'mandatory' rather than 'voluntary'. The proposed added emphasis in relation to the different regulatory expectations of the ASX between those companies that do provide guidance and those that don't, will be interpreted by many as a clear statement that ASX considers any guidance to the market to be high risk, warranting tighter regulation by ASX and that companies should move away from providing guidance to the market unless it becomes necessary in order to avoid a market sensitive earnings surprise.

That may be a very "safe" legal outcome. But in AIRA's view it is not in the best interests of an informed market and will ironically lead to greater potential for market sensitive earnings surprises to occur, which in turn leads to greater regulatory risk and exposure to our members.

Listed entities that do choose to provide guidance are already aware of the legal risks associated with providing that guidance. They have made a decision after balancing those risks with the value of providing such information to the market. AIRA does not consider it necessary or appropriate for ASX to now overlay what will be interpreted as additional

regulatory requirements beyond that which the law prescribes. A two-tier regulatory structure will actively discourage entities from providing guidance.

### **Dissemination of consensus estimates should not be subject to such inflexible requirements**

#### **Summary**

The proposed additional guidance in item 7.5 in relation to publishing analyst forecasts or consensus estimates does not allow for the exclusion of analyst reports even where they are considered by the company to be manifestly defective.

#### **Recommendation**

ASX guidance should appropriately emphasise the need to ensure that any dissemination of an entity's view of consensus occurs in a way that is not misleading and does not amount to selective disclosure or de facto market guidance.

However, ASX should stop short of recommending that entities should only publish consensus if **all** analysts are included – irrespective of whether an entity views particular analyst estimates to be defective (because they are stale or otherwise).

### **Discussion**

AIRA's members are of the view that the market is better informed if the entity's view of market consensus is communicated back to the analysts. AIRA appreciates that this should not occur in a way which results in selective disclosure or de facto earnings guidance. Nor can it be misleading.

Recognising that retail investors are those who are most likely to misunderstand the nature of the consensus estimate when disseminated by the entity itself, AIRA supports the ASX's view that dissemination should not be through the MAP.

However, AIRA does not support the lack of flexibility proposed in the amendments to item 7.5 of Guidance Note 8. In particular the clear statement that if information regarding analyst forecasts is published by the entity, that information should not exclude any other analyst forecasts is, in AIRA's view, inappropriate. While proposed footnote 227 contemplates exclusion of analyst forecasts in certain circumstances, this is not reflected in the substantive text and listed entities will be reluctant to depart from what the guidelines clearly specify.

Encouraging listed entities to err on the side of including stale or objectively "out of the park" analyst estimates in the entity's own analysis of "consensus" will:

- increase the risk of entities relying on a defective view of consensus when considering what market expectations are (and therefore whether a market sensitive earnings surprise is likely); and
- if disseminated, is more likely to result in misleading information being released to the market.

Both are outcomes that AIRA would obviously prefer to avoid.

With respect to stale estimates, AIRA considers that there should be two grounds for exclusion. First, where the analyst report has not been updated since a periodic financial report. And second where it has not been updated since a major announcement.

In both cases, the issuer excluding the report could expressly disclose the date and the specific financial report or the announcement referred to when disregarding the stale estimates and in such a way ensure that the disclosure was not misleading by omission.

### **The requirement to send all analyst or investor briefing material to the ASX for publication on the MAP will flood the MAP with immaterial information**

#### **Summary**

Item 7.6 specifies that it would be 'prudent practice' to ensure that any material from analyst or investor briefings are given to ASX for publication on the Market Announcement Platform.

AIRA is concerned that this will result in a high volume of repetitive material being lodged on the Platform 'drowning out' important information and thus reducing the effectiveness and utility of the Platform.

#### **Recommendation**

Issuers should be encouraged to decide whether a particular presentation has material information and therefore should be published on the Platform. If in doubt, it should be lodged on the Platform but it should be noted that it is not necessary or appropriate to lodge briefings that are essentially repeating previously disclosed information.

### **Discussion**

Recommending that entities should ensure that any new presentations to be given, or printed materials to be handed out at, an analyst or investor briefing are published on the ASX MAP risks flooding the MAP with large volumes of immaterial information. Because investor and analyst interactions take place continuously as part of a company's investor relations program, including site visits, informal roadshows and one-on-one meetings with significant shareholders and investors, a default practice of always lodging copies with the ASX will result in many essentially duplicate presentations with minor insignificant changes being published on the Platform, thereby reducing its effectiveness and utility.

The Platform should be seen as an efficient and effective source of meaningful information for investors. Although the intention behind the amendment is clearly to minimise the risk of selective disclosure, AIRA is concerned that this recommendation will have detrimental consequences for the effectiveness of the MAP – particularly as a source of information for retail shareholders.

**AIRA suggests that the guidelines should simply make clear that entities must assess whether each presentation contains new and material information such that it should be lodged on the Platform in advance of the briefing. The guidelines could usefully indicate that a conservative view should be taken – if in doubt as to whether materials should be on the Platform, then they should be lodged as a precaution.**

## 3 Other concerns

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### 3.1 Clarity around communicating with analysts

Where an entity has published its view of consensus on its website, it will be entirely appropriate in communications with analysts, verbally or otherwise, to refer analysts to that webpage.

**Accordingly, AIRA requests that a clear statement is made in Item 7.5 confirming that, having published consensus, an entity will be able to draw the attention of analysts to that information including in response to questions from analysts as to where the analysts' own forecasts sit relative to consensus.**

AIRA also cautions against ASX repeating in detail ASIC guidance (as opposed to drawing the attention of entities to the existence of the guidance) because aspects of ASIC guidance will not always be practical in all circumstances. When ASIC's guidance is given the imprimatur of ASX endorsement, our members are put in the difficult position of being unable to confirm to their Boards that the IR process is fully compliant with all of the ASX GN 8 recommendations.

A particular concern in this respect is the expanded paragraph in Item 7.6 dealing with the post-briefing review of Q&A discussion in analyst and investor briefings to ensure that any inadvertent disclosure of material information is immediately published on the MAP.

AIRA's members recognise the importance of post briefing "reflection". In practice, this is typically achieved through a timely cross-check between the internal attendees to confirm that they were comfortable no inadvertent disclosures occurred during the briefing. Such a process is likely to fall short of the "procedure" ASIC is contemplating, ie a relatively detailed review of Q&A after each briefing. A procedure of that type would be impractical in the context of what are often multiple back to back "one on one" briefings with investors and analysts throughout the day.

### 3.2 Polling analysts for information

Item 7.5 states that 'if an entity intends to poll analysts for information about their forecasts, it needs to be careful how it conducts this process...'. **AIRA considers that this paragraph is not particularly helpful and is unnecessary given that it is now clearly understood that the law prohibits companies from 'hinting' at a forecast.**

It is submitted that the proposed change undermines a listed entity's ability to both:

- Collect information to understand the factors that are driving analysts' forecasts (an important part of the feedback loop to continually improve basis for guidance and information disclosure on business drivers) and
- Have a rational discussion, particularly with less informed analysts, on the framework and factors they are assessing in modelling the businesses.

### 3.3 Providing analysts with a periodic summary of forecasts

Item 7.5 includes a new addition, footnote 218, which refers to providing analysts with a periodic summary of all of their forecasts. It is unclear why the guidance includes this footnote, as it appears contradictory to the tenor of the guidelines.

### 3.4 Other financial forecasts

Item 7.7 discusses ‘other financial forecasts’ and how these can raise similar considerations to earnings guidance. **If ASX persists with its “two-tiered” regulatory approach differentiating between companies that do and don’t provide earnings guidance in terms of the significance of a 5-10% variation, it should be clear that that does not extend to other forms of guidance.** For example, it should not be assumed that a 10% variation in Capex or expected production will, of itself, be market sensitive if prior guidance was provided to the market.

### 3.5 Plain English

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