

## TRADING POLICIES

<p><b>The purpose of this Guidance Note</b></p>	<ul style="list-style-type: none"> <li>• To assist listed entities to comply with their obligations under Listing Rules 12.9 – 12.12 regarding trading policies</li> </ul>
<p><b>The main points it covers</b></p>	<ul style="list-style-type: none"> <li>• Why listed entities are expected to have a trading policy</li> <li>• Who should be restricted from trading in an entity's securities</li> <li>• When should trading in an entity's securities be restricted</li> <li>• What types of trading should be restricted</li> <li>• Exceptions where trading may be permitted</li> <li>• Procedures to clear trading</li> <li>• Other matters that could be addressed in a trading policy</li> <li>• Disclosure requirements applicable to trading policies</li> <li>• Compliance measures for trading policies</li> </ul>
<p><b>Related materials you should read</b></p>	<ul style="list-style-type: none"> <li>• Governance Institute of Australia, <i>Good Governance Guide: Issues to consider in developing or reviewing the policy on trading in company securities</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 ASX Listing Rules. Nothing in this Guidance Note necessarily binds ASX in the application of the ASX 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.

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### 1. Introduction

This Guidance Note is published by ASX Limited (ASX) to assist listed entities to comply with their obligations under Listing Rules 12.9 – 12.12 regarding trading policies.

Listing Rule 12.9 requires each entity admitted to the Official List in the ASX Listing category<sup>1</sup> to have a trading policy<sup>2</sup> that regulates trading in its securities by its key management personnel (KMP) during certain prohibited periods and to give a copy of that trading policy to ASX for release to the market. The trading policy must comply with the minimum requirements set out in Listing Rule 12.12. This requires the following five matters to be covered in the policy:

- the entity's "closed periods";<sup>3</sup>
- the restrictions on trading that apply to the entity's KMP;
- any trading that is excluded from the entity's trading policy;
- any exceptional circumstances in which the entity's KMP may be permitted to trade during a "prohibited period"<sup>4</sup> with prior written clearance; and
- the procedures for obtaining such clearance.

Entities are free to adopt a trading policy that covers other matters and that suits their individual circumstances, as long as it meets the minimum requirements in Listing Rule 12.12.

The purpose of this Guidance Note is to give guidance on the minimum requirements that a trading policy must address and also on some other issues that it might address. Further guidance on these issues can be found in the Governance Institute of Australia's publication *Good Governance Guide: Issues to consider in developing or reviewing the policy on trading in company securities*.<sup>5</sup>

### 2. The policy objective of Listing Rules 12.9 – 12.12

Most people agree that it is generally beneficial for directors and employees of a listed entity to own securities in the entity. It gives them a bigger stake in the success of the entity and helps to align their interests with the interests of investors.

That said, directors and employees (particularly senior executives) of an entity who trade in its securities need to be mindful that:

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<sup>1</sup> Listing Rules 12.9 – 12.12 do not apply to entities admitted to the Official List in the ASX Debt Listing or ASX Foreign Exempt Listing categories (although it should be noted that ASX does have a discretion in respect of any particular ASX Debt Listing under Listing Rule 1.10.2, or ASX Foreign Exempt Listing under Listing Rule 1.15.2, to specify additional Listing Rules with which the entity must comply and therefore, in an appropriate case, ASX could require an entity admitted to the Official List in the ASX Debt Listing or ASX Foreign Exempt Listing category to comply with Listing Rules 12.9 – 12.12).

Unless the context otherwise requires, therefore, references in this Guidance Note to an "entity" are to entities admitted to the Official List in the ASX Listing category.

<sup>2</sup> The term "trading policy" is defined in Listing Rule 19.12 to mean "an entity's policy relating to trading in [its] securities by [its] key management personnel during prohibited periods." The definition of "key management personnel" is set out in the text accompanying note 17 below. The definition of "prohibited period" is set out in note 4 below.

<sup>3</sup> The term "closed period" is defined in Listing Rule 19.12 to mean "fixed periods specified in the [entity's] trading policy when [its] key management personnel are prohibited from trading in [its] securities."

<sup>4</sup> The term "prohibited period" is defined in Listing Rule 19.12 to mean: "(a) any closed period [see note 3 above]; or (b) any additional periods when an entity's key management personnel are prohibited from trading, which are imposed by the entity from time to time when [it] is considering matters which are subject to Listing Rule 3.1A.

<sup>5</sup> Available online at <https://www.governanceinstitute.com.au/resources/resource-centre/>.

- they will often be, or be perceived to be, in possession of “market sensitive information” or “inside information”<sup>6</sup> concerning the entity that is not generally available to investors;<sup>7</sup>
- they have legal obligations not to engage in insider trading<sup>8</sup> or market manipulation<sup>9</sup> and not to use information acquired as a director or employee to gain an improper advantage for themselves or anyone else;<sup>10</sup>
- if they breach those obligations, very significant legal consequences can follow;<sup>11</sup> and

<sup>6</sup> “Market sensitive information” is the term used by ASX to describe information that is subject to the continuous disclosure regime in Listing Rule 3.1 and section 674 of the Corporations Act – that is, information concerning an entity that a reasonable person would expect to have a material effect on the price or value of the entity’s securities (see generally Guidance Note 8 *Continuous Disclosure: Listing Rules 3.1 – 3.1B*).

“Inside information” refers to information that triggers the insider trading prohibition in section 1043A of the Corporations Act – that is, information that is not generally available and that, if it were generally available, a reasonable person would expect it to have a material effect on the price or value of particular financial products (see the definition of “inside information” in section 1042A).

While there are some subtle differences in the statutory provisions that underpin these regimes and that define what is meant by a material effect on price or value (compare sections 677 and 1042D), the two terms are largely synonymous. In other words, information that is market sensitive information is likely also to be inside information and vice versa.

In this Guidance Note, a reference to the “Corporations Act” means the Corporations Act 2001 (Cth) and, unless otherwise indicated, references to a section of an Act are to a section of that Act.

<sup>7</sup> For example, confidential market sensitive information about an incomplete proposal or negotiation the entity is pursuing that has not been released to the market under Listing Rule 3.1A.

<sup>8</sup> Under Australian law, the obligation not to engage in insider trading can be found in section 1043A of the Corporations Act. Section 1043A applies to conduct involving the securities of entities established in Australia, regardless of where the conduct takes place (sections 1042B(a) and (b)(ii)). It also applies to conduct involving the securities of entities established outside Australia, if the conduct occurs in Australia or the entity carries on business in Australia (sections 1042B(a) and (b)(i)).

Entities that are established, listed or have operations in jurisdictions outside Australia may also be subject to insider trading laws in those jurisdictions.

It should be noted that section 1043A not only prohibits a person from trading in securities while they are in possession of inside information about those securities (section 1043A(1)(c)), it also prohibits them from procuring someone else to trade in those securities (section 1043A(1)(d)) and, if the securities are traded on a licensed market in Australia (such as ASX), from communicating the inside information to another person whom they know or ought reasonably to know will trade or procure someone else to trade in the securities (section 1043A(2)). References in this Guidance Note to insider trading should be read as covering all of these activities.

<sup>9</sup> The obligation not to engage in market manipulation in relation to Australian markets can be found in sections 1041A, 1041B and 1041C of the Corporations Act 2001 (Cth). Persons who engage in market manipulation in relation to markets outside Australia may be subject to similar provisions under the laws applicable in those markets.

<sup>10</sup> The obligation of a director or employee not to use information acquired in that capacity to gain an improper advantage for themselves or someone else can be found, in the case of listed companies established in Australia, in section 183 and, in the case of listed trusts established as managed investment schemes in Australia, in sections 601FD(1)(d) and 601FE((1)(a)), of the Corporations Act. Entities established outside Australia may be subject to similar provisions under the laws applicable in their home jurisdiction.

<sup>11</sup> A breach of section 1043A, 1041A, 1041B or 1041C is a criminal offence. In the case of an individual, it is punishable by 15 years’ jail and/or a fine equal to the greater of: (1) 4,500 penalty units; or (2) if the court can determine the amount of the benefit derived and detriment avoided because of the offence, 3 times that amount. In the case of a body corporate, it is punishable by a fine equal to the greatest of: (1) 45,000 penalty units; (2) if the court can determine the amount of the benefit derived and detriment avoided because of the offence, 3 times that amount; or (3) 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 (sections 1311 – 1311E and schedule 3 of the Corporations Act).

A person who is convicted of breaching section 1043A, 1041A, 1041B or 1041C is automatically disqualified from being a director of or managing any corporation for 5 years (section 206B).

Sections 1043A, 1041A, 1041B and 1041C are also financial services civil penalty provisions (section 1317E(3)). If an individual is found to have breached these provisions, the court may impose a pecuniary penalty equal to the greater of: (1) 5,000 penalty units; or (2) if the court can determine the amount of the benefit derived and detriment avoided because of the breach, 3 times that amount (section 1317G(3)). If a body corporate is found to have breached these provisions, the court may impose a pecuniary penalty equal to the greatest of: (1) 50,000 penalty units; (2) if the court can determine the amount of the benefit derived and detriment avoided because of the breach, 3 times that amount; or (3) 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 breached, or began breaching, the provision up to a cap equivalent to 2,500,000 penalty units (section 1317G(4)). The court may also make compensation orders in favour of anyone suffering damage as a result of the breach (section 1317HA) and relinquishment orders directing a person who has breached these provisions to pay over the benefit derived or detriment avoided by the breach to the Commonwealth (section 1317GAB).

- any suggestion that they have breached those obligations can have a significant impact on their personal reputation, on the entity's standing with investors and on the broader image of the ASX market.

The market is particularly sensitive to directors and senior executives trading in the lead up to the release of:

- periodic financial reports or other financial data; and
- an announcement of market sensitive information under Listing Rule 3.1,<sup>12</sup> such as a material upgrade or downgrade in forecast earnings, a material trading update or the announcement of a material transaction.

During these times, a director or senior executive is likely to have, or be perceived to have, access to the information in the release ahead of the broader market. If it becomes known that a director or senior executive of an entity has traded in its securities shortly prior to the publication of the release to the market, there is a risk that some will speculate that the trade was motivated by inside knowledge of the impending release. This speculation is likely to increase if the market price of the entity's securities moves in response to the release in a way that favours the trade.<sup>13</sup> This may attract criticism from market commentators (including investors, investment advisers, proxy advisers, research analysts and the financial press), as well as the scrutiny of market regulators.

Good governance therefore demands that an entity has in place a fit-for-purpose trading policy, tailored to its particular circumstances, that regulates when and how its directors and senior executives may trade in its securities. The purpose of such a policy is not only to minimise the risk of insider trading but also to avoid the appearance of insider trading and the significant reputational damage that may cause.

As mentioned previously, an entity must give a copy of its trading policy to ASX for release to the market.<sup>14</sup> This allows the market to judge whether the trading policy is indeed fit-for-purpose and more generally to form a view on the governance standards adhered to by the entity.

### 3. Who should be restricted from trading?

#### 3.1. KMP

The Listing Rules specifically require an entity's trading policy to restrict trading in its securities by its KMP.<sup>15</sup> This reflects the fact that the KMP of an entity are the ones most likely to be in possession of inside information about the entity and therefore the ones most vulnerable to allegations of insider trading.<sup>16</sup> It also reflects the fact that the market is more sensitive to allegations of insider trading by KMP than by more junior staff, given the higher levels of trust and confidence that investors repose in KMP and the correspondingly higher ethical standards that investors expect of them.

The Listing Rules define "key management personnel" to have the same meaning as in Accounting Standard AASB 124 *Related Party Disclosures*,<sup>17</sup> which requires subject entities to disclose the name, position, remuneration and shareholdings of, and any related party transactions involving, its KMP.

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A breach of section 1043A can also give rise to civil liability to disgorge any profit made by insider trading in a financial product to the issuer of the product and/or to the other party to the trade (section 1043L).

Section 183 is a corporation/scheme civil penalty provision, which if breached empowers the court to impose the same civil penalties as set out above for a breach of sections 1043A, 1041A, 1041B and 1041C and to make compensation orders in favour of the relevant corporation or scheme for any damage it suffers as a result of the breach (section 1317H).

<sup>12</sup> See generally Guidance Note 8 *Continuous Disclosure: Listing Rules 3.1 – 3.1B*.

<sup>13</sup> In other words, if the director or senior executive has bought securities and the market price rises following the release or if the director or senior executive has sold securities and the market price falls following the release.

<sup>14</sup> See '9. Disclosure matters' on page 19.

<sup>15</sup> See the definition of "trading policy" in Listing Rule 19.12 (mentioned in note 2 above) and Listing Rule 12.12.2, which requires an entity's trading policy to include the restrictions on trading in its securities that apply to its KMP.

<sup>16</sup> In some cases, KMP may also be vulnerable to allegations of market manipulation: see, for example, *ASIC v Soust* [2010] FCA 68 (KMP found to have manipulated the market price of shares to increase his performance bonus) and *R v Jacobson* [2014] VSC 592 (KMP found to have manipulated the market price of shares to avoid a margin call).

<sup>17</sup> Listing Rule 19.12.

AASB 124, in turn, defines “key management personnel” as “those persons having authority and responsibility for planning, directing and controlling the activities of the entity, directly or indirectly, including any director (whether executive or otherwise) of that entity.”

Hence, an entity’s trading policy must apply to all of its directors and to any senior executive who has authority and responsibility for planning, directing and controlling its activities. Typically, this will include the CEO and other senior executives who report to the CEO and have the authority and responsibility for planning, directing and controlling the activities of the entity.<sup>18</sup>

An entity should be aware of which of its senior executives are KMP, since it has to form a view on that issue for the purposes of preparing its financial statements. If an entity has any queries about whether a particular senior executive is a KMP, it should in the first instance discuss that issue with its external auditor or legal adviser.

It is good practice for an entity to include a requirement in the contractual arrangements it has with its KMP<sup>19</sup> that they must comply with its trading policy.<sup>20</sup> This will put the basis for requiring compliance with the policy by the KMP on a firm legal footing and facilitate the taking of appropriate disciplinary action if the policy is breached.

### 3.2. Family members and entities closely connected to KMP

While the Listing Rules only require a trading policy to cover trading by its KMP, an entity should consider carefully whether it is appropriate to extend its trading policy to cover trading by close family members of a KMP, such as the KMP’s spouse and minor children, and any family company or family trust that the KMP or the KMP’s close family members may control or have an interest in (closely connected persons and entities).

A KMP will often be, or be perceived to be, in a position to control or influence the trading of the KMP’s closely connected persons and entities. Their trading can therefore raise similar insider trading issues and risks as trading by the KMP personally.

If an entity does extend its trading policy to cover trading by a KMP’s closely connected persons and entities, it will need to consider the legal basis on which it does so. Typically this will be done through the contractual arrangements the entity has with its KMP, by including a requirement in those arrangements<sup>21</sup> that the KMP must ensure that his or her closely connected persons are aware of the trading policy and comply with it.

### 3.3. Other employees

While the Listing Rules only require a trading policy to cover trading by its KMP, an entity should consider carefully whether it is appropriate to extend its trading policy to cover trading by a wider group of employees, in addition to its KMP.

For example, depending on their individual circumstances, some entities may consider it appropriate to apply their trading policy to:

- staff who work closely with, or in close proximity to, KMP (including their executive assistants);
- staff who work in the finance area or in a strategic planning group;

<sup>18</sup> Not all senior executives reporting to the CEO will necessarily be KMP. The test is whether they have the authority and responsibility for planning, directing and controlling the activities of the entity.

<sup>19</sup> Typically, this will be a letter of appointment for a non-executive director and a service contract for an executive director or other senior executive. See also the commentary to Recommendation 1.3 of the ASX Corporate Governance Council’s *Corporate Governance Principles and Recommendations*, which recommends that the written agreement between a listed entity and a director or senior executive should set out “the requirement to comply with key corporate policies, including the entity’s code of conduct and its trading policy”.

<sup>20</sup> This could take the form of a specific requirement that its KMP comply with its trading policy or a more general requirement that its KMP comply with all of its policies and procedures.

<sup>21</sup> Either directly, by including such a provision in the KMP’s letter of appointment or service contract, or indirectly, by including such a provision in the entity’s trading policy and then including in the KMP’s letter of appointment or service contract a requirement that they must comply with the trading policy.

- the next layer of management below KMP; and/or
- staff (such as IT staff) who may have access to a KMP's email or document folders,

on the basis that they too may come into possession of market sensitive information ahead of the market.

Some entities may also consider it appropriate to include a provision in their trading policy allowing them to designate from time to time individual staff members to whom the trading policy applies, which they can use on an appropriate occasion to impose ad hoc trading restrictions on staff below KMP level working on a particular market-sensitive matter.

Some entities – particularly those in the finance industry that are subject to broader regulatory obligations requiring them to supervise all trading in financial products by directors and employees and not just trading in the entity's securities by KMP<sup>22</sup> – may choose to apply their trading policy to all employees.

If an entity does extend its trading policy to a wider group of employees in addition to its KMP, it would be good practice to include a specific requirement in their employment contracts that they must comply with the entity's trading policy. Again, this will put the basis for requiring compliance with the policy on a firm legal footing and facilitate the taking of appropriate disciplinary action if the policy is breached.

Entities that do extend their trading policy to a wider group of employees in addition to their KMP are technically only required to lodge with ASX the relevant provisions in the trading policy that apply to KMP.<sup>23</sup> ASX will therefore accept in satisfaction of the requirement to lodge a copy of the trading policy with ASX, either a copy of the full trading policy or a verbatim extract of the relevant provisions in the trading policy that apply to KMP. However, ASX prefers an entity to lodge a full copy of its trading policy so that the market has a better appreciation of the governance standards adhered to by the entity.

## 4. When should trading be restricted?

### 4.1. The requirement to have “closed periods”

Listing Rule 12.12.1 requires a trading policy to include information on the entity's closed periods. By necessary implication, this means that an entity's trading policy must have one or more closed periods.

A “closed period” is a fixed period specified by an entity in its trading policy when its KMP are generally prohibited<sup>24</sup> from trading in its securities.<sup>25</sup>

Hence, to comply with Listing Rule 12.12.1, an entity's trading policy must provide for at least one fixed period during which trading in securities by its KMP is generally prohibited. A trading policy that does not specify any such fixed period, or that specifies that there is no such fixed period, does not comply with Listing Rule 12.12.1.

### 4.2. How can an entity define its closed periods?

A trading policy can comply with the requirement to specify closed periods either by:

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<sup>22</sup> For example, entities that are participants (ie, brokers and dealers) in the ASX market have an obligation under rule 5.4.2 of the ASIC Market Integrity Rules (Securities Market) 2017 to have arrangements to supervise all trading on the ASX market by their directors, employees and other “connected persons”, not just trading in the entity's securities by their KMP. Entities involved in the broader securities industry are likely to have arrangements to supervise all trading by directors and employees to manage their insider trading risks and monitor the effectiveness of their “Chinese walls”, while entities involved in the investment management industry are also likely to have arrangements to supervise all trading by their directors and employees to comply with the guidance issued by the Financial Services Council in its Guidance Note 7 *Personal Trading*.

<sup>23</sup> See ‘9. Disclosure matters’ on page 19 and the definition of “trading policy” in Listing Rule 19.12.

<sup>24</sup> We say “generally prohibited” because, under Listing Rule 12.12.3, certain types of trading by KMP may be excluded from the operation of the trading policy. Also, under Listing Rule 12.12.4, prior written clearance may be given to KMP to trade during a closed period where there are exceptional circumstances.

<sup>25</sup> See note 3 above.

- generally prohibiting trading by KMP at all times except during certain specified “trading windows” (in which case, the closed period is the whole of the year apart from the specified trading windows); or
- specifying fixed periods, generally referred to as “black-out periods”, throughout the year where trading by KMP is generally prohibited (in which case, the closed periods are the specified black-out periods).

Many people consider trading windows to be preferable to blackout periods, since they typically lead to shorter periods during which KMP are permitted to trade, making them more effective in reducing the risk of insider trading and easier to administer, but either approach complies with Listing Rule 12.12.1.

### 4.3. What periods should an entity choose as its closed periods?

The Listing Rules do not prescribe the periods an entity must have as its closed periods. Each entity has to choose closed periods that are appropriate to its circumstances and specify those closed periods in its trading policy.

In choosing its closed periods, an entity should consider the spirit, intention and purpose behind Listing Rules 12.9-12.12, as it is required to do under Listing Rule 19.2, and that trading policies are intended not only to minimise the risk of insider trading but also to avoid the appearance of insider trading. In that regard, an entity should be especially mindful of the point mentioned previously about the market’s sensitivity to KMP trading in the lead up to the release of periodic financial reports or other financial data, when they may have, or be perceived to have, access to financial information ahead of other investors.

For this reason, ASX would generally expect entities to include within their closed periods the period from, or just prior to,<sup>26</sup> the close of books at half- and full-year end until a reasonable period<sup>27</sup> after the release of their financial results for the half- and full-year respectively. They can address this in their trading policy:

- if they prescribe trading windows, by excluding those periods from their permitted trading windows; or
- if they prescribe black-out periods, by including those periods within their nominated black-out periods.

Entities that periodically publish other financial information, for example:

- “commitments test” entities required to file quarterly Appendix 4C consolidated cash flow statements under Listing Rule 4.7B;
- mining producing entities required to file quarterly mining activity reports under Listing Rule 5.1;
- oil and gas producing entities required to file quarterly oil and gas activity reports under Listing Rule 5.2;
- mining exploration entities and oil and gas exploration entities required to file quarterly exploration activity reports and Appendix 5B consolidated cash flow statements under Listing Rules 5.3, 5.4 and 5.5;
- listed investment entities required to publish monthly the net tangible asset backing of their securities under Listing Rule 4.12; and
- other entities that voluntarily release periodic (monthly or quarterly) trading updates, sales figures, turnover figures or the like,

should carefully consider the likelihood that these statements or reports might contain, or be perceived to contain, market-sensitive information. Unless the likelihood of that is fairly low, they also may wish to include within their

<sup>26</sup> Generally, it would be considered best practice for the closed period to commence one or two weeks before close of books to align with when KMP may be expected to receive unaudited information about the probable financial position at balance date.

<sup>27</sup> The reference here to a “reasonable period” means a period that will allow the market sufficient time to absorb the results and reflect them in the market price of the entity’s securities, as contemplated in section 1042C(1)(b)(ii) of the Corporations Act. Entities that release their results in the morning well before the commencement of trading may regard that as sufficient time to enable the market to absorb the results and therefore end their closed period, or begin their trading window, at the commencement of trading on the day of release. Other entities may feel it is safer to fix as the end of their blackout period, or the beginning of their trading window, the beginning of trading on the first trading day after the day on which its results are released.



closed periods the period from the month- or quarter-end at which those statements or reports are compiled until a reasonable period<sup>28</sup> after the release of those statements or reports to the market. Again, they can address this in their trading policy:

- if they prescribe trading windows, by excluding those periods from their permitted trading windows; or
- if they prescribe black-out periods, by including those periods within their nominated black-out periods.

#### 4.4. Generally acceptable trading windows

The risk of insider trading in an entity's securities is generally lower during periods immediately following the release of up-to-date financial information about the entity, such as occurs:

- on the release of half- and full-year results;
- for "commitments test" entities, mining exploration entities and oil and gas exploration entities that file quarterly consolidated cash flow statements under Listing Rules 4.7B or 5.5, on the release of those quarterly statements;
- at an annual general meeting, where typically security holders are provided with a trading update and information about material post-balance date events;<sup>29</sup> and
- when a prospectus, product disclosure statement or cleansing notice is issued in connection with an offer of securities.<sup>30</sup>

Entities that use trading windows in preference to black-out periods will therefore typically choose as their permitted trading windows:

- short windows (usually around 4 weeks) commencing in each case a reasonable period<sup>31</sup> after:
  - the release of their half- and full-year results;
  - for "commitments test" entities, mining exploration entities and oil and gas exploration entities that file quarterly consolidated cash flow statements under Listing Rules 4.7B or 5.5, the release of those quarterly statements; and
  - their annual general meeting; and
- the duration of the offer period for an offer of securities made pursuant to a prospectus, product disclosure statement or cleansing notice.

The appropriate length for a trading window may vary, depending on an entity's individual circumstances. A longer trading window may be more appropriate for a smaller entity whose securities are relatively illiquid (and therefore less easily traded) or for an entity with a relatively stable business that is not frequently considering matters under Listing Rule 3.1A.<sup>32</sup> A shorter trading window may be more appropriate for a larger entity whose securities are highly liquid (and therefore more easily traded) and which has a relatively dynamic business that is frequently considering matters under Listing Rule 3.1A.<sup>33</sup>

<sup>28</sup> See note 27 above.

<sup>29</sup> These matters are typically covered in the chairperson's or CEO's address to the meeting and released to the market ahead of the meeting under Listing Rule 3.13.3.

<sup>30</sup> This would also include any period where a supplementary or replacement prospectus, product disclosure statement or cleansing notice has been released as a result of the original prospectus, product disclosure statement or cleansing notice being found to be defective or because a significant new matter has arisen.

<sup>31</sup> See note 27 above.

<sup>32</sup> That is, potentially market sensitive matters that are not required to be disclosed immediately to the market under Listing Rule 3.1 because of the application of the exceptions in Listing Rule 3.1A.

<sup>33</sup> See note 32 above.

### 4.5. Other periods during which trading should be prohibited

In addition to the restrictions that apply during the fixed closed periods required under Listing Rule 12.12.1, the Listing Rules<sup>34</sup> contemplate that an entity may wish to impose ad hoc restrictions on its KMP from trading in its securities at times when it is considering a matter subject to Listing Rule 3.1A.<sup>35</sup> These ad hoc restrictions may apply to individual KMP (for example, those KMP who are aware of the matter being considered under Listing Rule 3.1A) or to all KMP generally.<sup>36</sup>

ASX would strongly encourage entities to reserve the right to impose such ad hoc trading restrictions in their trading policies and to exercise that right without hesitation in appropriate cases. In this regard, an entity should be especially mindful of the point mentioned previously about the market's sensitivity to KMP trading in the lead up to the announcement of market sensitive information under Listing Rule 3.1, when they may have, or be perceived to have, access to information about the announcement ahead of other investors.

Entities can do this in their trading policy:

- if they prescribe trading windows, by providing that the entity can impose a restriction on trading during any period, including one that would otherwise fall within a permitted trading window under the policy; or
- if they prescribe black-out periods, by providing that the entity can impose a restriction on trading during any period, in addition to the fixed black-out periods provided for in the policy.

Entities need to be careful how they handle the process of imposing ad hoc restrictions on trading by its KMP or other employees covered by its trading policy. If news leaks that the entity has imposed such a restriction, this could lead to conjecture that the reason for the ad hoc restriction is because the entity is about to release market sensitive information or is involved in market sensitive negotiations, which in turn could lead to speculative trading. In a worst case scenario, this could result in the entity having to make an announcement about the matter earlier than might otherwise have been the case, because the matter has ceased to be confidential<sup>37</sup> or to correct or prevent a false market in its securities.<sup>38</sup>

Some entities tackle this issue by requiring KMP and other employees covered by the trading policy to seek a clearance for any trading in the entity's securities, regardless of whether it is happening within a permitted trading window, or outside a black-out period, specified in the entity's trading policy. By doing this, the entity can impose an ad hoc restriction on an individual trade, as and when needed. This eliminates the need to communicate the imposition of an ad hoc restriction more widely to KMP and other employees covered by the trading policy.

Others tackle this issue by ensuring that the communication of an ad hoc restriction is limited to KMP and, if other employees are covered by the policy, those employees who are directly involved in, or have knowledge of, the matter being considered under Listing Rule 3.1A. They will typically warn recipients of the communication that the matter is highly confidential and they must not disclose to anyone not directly involved in the matter that a restriction has been imposed on trading in the entity's securities.

### 4.6. A cautionary note about the application of insider trading laws

It should be noted that the fact a trade occurs during a permitted trading window, or outside a black-out period, under an entity's trading policy does not preclude it from breaching insider trading laws, if it is undertaken or procured by someone in possession of inside information at the time. ASX would therefore recommend that an entity include a warning in its trading policy that a person who possesses inside information about an entity's securities is generally prohibited from trading in those securities under insider trading laws and that this applies

<sup>34</sup> See paragraph (b) of the definition of "prohibited period" in Listing Rule 19.12 mentioned in note 4 above.

<sup>35</sup> Again, see note 32 above.

<sup>36</sup> If the entity extend its trading policy to cover other employees, these ad hoc restrictions might apply to an individual employee, a group of employees or all employees generally.

<sup>37</sup> See '5.8. Listing Rule 3.1A.2 – the requirement for information to be confidential' in Guidance Note 8 *Continuous Disclosure: Listing Rules 3.1 – 3.1B*.

<sup>38</sup> See '6. Listing Rule 3.1B – correcting or preventing false markets' in Guidance Note 8 *Continuous Disclosure: Listing Rules 3.1 – 3.1B*.

even where the trade occurs within a permitted trading window, or outside a black-out period, specified in the policy.<sup>39</sup>

## 5. What types of trading should be restricted?

### 5.1. Trading in securities

Strictly speaking, a trading policy is only required by the Listing Rules to cover trading in an entity's securities.

In the case of a listed company, "securities" include:

- any share in, or debenture of, the company;
- an option over an unissued share in, or debenture of, the company; and
- a renounceable or unrenounceable right to subscribe for a share in, or debenture of, the company.<sup>40</sup>

In the case of a listed trust that is a registered managed investment scheme under the Corporations Act, "securities" include:

- any unit or other interest in the scheme;
- an option over an unissued unit or other interest in the scheme; and
- a renounceable or unrenounceable right to subscribe for a unit or other interest in the scheme.<sup>41</sup>

### 5.2. Trading in derivatives

Many listed entities, particularly larger ones, have derivative products (for example, warrants, exchange-traded and over-the-counter options, and contracts for differences) issued over or in respect of their securities.

Trading by KMP in derivative products issued over or in respect of an entity's securities raises the same issues and poses the same risks as trading by KMP in its securities.<sup>42</sup> Indeed, many would argue that trading in derivatives poses a greater risk as the gearing inherent in these products allows larger insider trading plays for a smaller outlay and the trading may not be as visible as trading in the entity's securities, particularly if it is in over-the-counter products.

For these reasons, while the Listing Rules only require an entity's trading policy to cover trading in its securities, where an entity is aware that there are derivative products issued over or in respect of its securities, ASX would strongly recommend that it extend its trading policy to cover trading in those derivative products as well.

### 5.3. Short-term trading

Short-term trading refers to trading in and out of an entity's securities, or derivatives products issued over or in respect of its securities, over a short period. Views differ as to what is a "short period" for these purposes, but it is not uncommon for entities to specify periods of 1, 2, 3 or 6 months.

Short-term trading has a speculative element to it that raises a number of issues. If it becomes known that a KMP of an entity is trading in and out of its securities over short periods, some may see it as an indication that the KMP's interests are not aligned with the interests of long term investors. Some may also speculate that the KMP is doing so because they are taking advantage of information about the entity that the market is not aware of or has not fully absorbed and therefore is engaging in insider trading.

For these reasons, while it is not a matter required to be dealt with under the Listing Rules, an entity should consider carefully whether its trading policy should specifically prohibit short-term trading in its securities (and, where the

<sup>39</sup> See also '8.2 The primacy of insider trading laws' on page 18.

<sup>40</sup> See the definition of "security" in Listing Rule 19.12 and in section 92 of the Corporations Act.

<sup>41</sup> Again, see the definition of "security" in Listing Rule 19.12 and in section 92 of the Corporations Act.

<sup>42</sup> The prohibition on insider trading in Division 3 of Part 7.10 of the Corporations Act applies to so-called "Division 3 financial products". Paragraph (b) of the definition of "Division 3 financial products" in section 1042A specifically includes derivatives.

entity is aware that there are derivative products issued over or in respect of its securities, also in such derivatives products) by its KMP and any other employees covered by its trading policy.<sup>43</sup>

### 5.4. Short selling

Short selling is a legitimate technique used by traders who believe that the market price of a security is likely to fall. They will borrow the security and sell it in the hope that they will be able to buy the security back at a lower price at some point in the future and close out their short position at a profit.

If it becomes known that a KMP of an entity has short sold its securities, however, it sends a negative message to the market about the level of confidence that the KMP has in the prospects of the entity. Some may label it an act of disloyalty by the KMP. Some may also speculate that the KMP did so because they were aware of negative information about the entity that the market was not aware of or had not fully absorbed and therefore had engaged in insider trading.

For these reasons, while it is not a matter required to be dealt with under the Listing Rules, an entity should consider carefully whether its trading policy should specifically prohibit the short selling of its securities by KMP and any other employees covered by its trading policy.

### 5.5. Hedging transactions

The Corporations Act<sup>44</sup> prohibits the KMP of an ASX listed company established in Australia and their “closely related parties” from entering into an arrangement that would have the effect of limiting their exposure to risk relating to an element of their remuneration that either has not vested or has vested but remains subject to a holding lock. While it is not a matter required to be dealt with under the Listing Rules, it would be prudent for an entity established in Australia to reiterate that prohibition in its trading policy.<sup>45</sup>

Even though it is not prohibited by the Corporations Act, where an entity’s trading policy extends to employees beyond its KMP and it has an equity-based remuneration scheme that extends to those employees, it should consider carefully whether its trading policy<sup>46</sup> should prohibit those employees from entering into hedging transactions to limit their exposure in respect of any unvested entitlement to securities they receive under the scheme. As noted in the ASX Corporate Governance Council’s *Corporate Governance Principles and Recommendations*:

“Allowing participants in an equity-based remuneration scheme to hedge or otherwise limit the economic risk of participating in the scheme may act counter to the aims of the scheme and blur the relationship between remuneration and performance. A listed entity which has an equity-based remuneration scheme should establish a policy on whether participants can enter into these sorts of transactions and disclose that policy to investors. This applies whether the participants in the scheme are directors, senior executives or other employees.”<sup>47</sup>

More generally, if it becomes known that a KMP of an entity has entered into a hedging transaction to limit his or her exposure to its securities (whether received under an equity-based remuneration scheme or otherwise and whether vested or unvested), this may be interpreted by the market and market commentators as a lack of confidence in the long term prospects of the entity and/or as contributing to a misalignment with the interests of long-term investors. For those reasons, an entity may wish to consider whether its trading policy should also prohibit

<sup>43</sup> An entity that does elect to prohibit short-term trading in its trading policy may also wish to consider how it deals with sales of securities received by KMP and any other employees covered by its trading policy under an equity-based remuneration scheme. Entities commonly exclude that situation from the prohibition on short-term trading in their trading policies. This is to cater for those recipients who need to sell some of their securities to cover their tax liability on the vesting of the securities and also for those recipients who simply wish to cash out their entitlements at the end of the vesting period.

<sup>44</sup> Section 206J.

<sup>45</sup> It is likely that many entities will address this issue with a specific provision in their equity-based remuneration schemes. Nevertheless, repeating the prohibition in the entity’s trading policy will help to reinforce the point.

<sup>46</sup> Again, an entity could address this issue with a specific provision in its equity-based remuneration scheme, but repeating the prohibition in the entity’s trading policy will help to reinforce the point.

<sup>47</sup> See the commentary in the *Principles and Recommendations* in relation to Recommendation 8.3.

its KMP and any other employees covered by its trading policy from entering into any transaction to hedge their exposure to its securities or, at the very least, require such arrangements to be approved by the entity before they are entered into so that the entity can consider their appropriateness on a case-by-case basis.

### 5.6. Margin lending and other secured financing arrangements

Margin lending and other secured financing arrangements entered into by a KMP in relation to an entity's securities can give rise to a number of issues. For example, during the GFC, concerns were raised that short sellers may have been targeting entities whose KMP had substantial margined holdings and attempting to push the market price of their securities to the point where the margin loan would be called and the substantial holding would be sold (thereby causing a further drop in the market price of the entity's securities and increasing the profit on the seller's short position). There were also cases of KMP with substantial margined holdings in an entity's securities manipulating the market price of its securities to avoid a margin call.<sup>48</sup>

It can be embarrassing, both for the entity and the KMP, if there is a default and the lender/financier sells some or all of the securities to cover the default. This is especially so if the sale occurs during a prohibited period when the KMP would otherwise be precluded from selling. However, it can still be embarrassing even if the sale occurs outside of a prohibited period. For example, it may reflect negatively on the business and financial acumen of the KMP in gearing themselves to that extent. If the sale involves a large holding in the entity, it may also overhang or depress the market price of the entity's securities for a period, which will not please investors. These things in turn may reflect negatively on the entity and its board in allowing this situation to occur.

For these reasons, while it is not a matter required to be dealt with under the Listing Rules, an entity should consider carefully whether its trading policy should prohibit KMP and any other employees covered by its trading policy from entering into margin lending or other secured financing arrangements in respect of its securities or, at the very least, require the disclosure of such arrangements so that the board and senior management are not caught unawares if there is a default.

### 5.7. Trading in securities of other entities

The Listing Rules only require an entity's trading policy to cover trading in its securities.

Trading in securities of other entities – for example, trading by an officer or employee of an entity in the securities of another entity with which the entity is in confidential negotiations about a material transaction or trading by officers or employees of a listed investment company or fund in the securities of an entity in which the company or fund is about to undertake a material trade – can also raise insider trading issues. It would be common for an entity's trading policy to acknowledge this fact and to prohibit expressly any form of insider trading as a result of the information acquired through the KMP's (or other employee's) role with the entity, not just insider trading in the entity's securities.

Some entities in the finance industry are subject to broader regulatory obligations requiring them to supervise all trading in financial products by directors and employees, not just in their own securities.<sup>49</sup> They may find it convenient to cover these requirements in their trading policy and to split their policy into two sections – one covering trading in the entity's securities and the other covering trading in any other financial products about which an employee may have inside information.

Entities that do extend their trading policy to cover trading in financial products more generally are technically only required to lodge with ASX the relevant provisions in the trading policy that apply to trading in its securities by KMP.<sup>50</sup> ASX will therefore accept in satisfaction of the requirement to lodge a copy of the trading policy with ASX, either a copy of the full trading policy or a verbatim extract of the relevant provisions in the trading policy that apply to trading in the entity's securities by its KMP. However, ASX prefers an entity to lodge a full copy of its trading policy so that the market has a better appreciation of the governance standards adhered to by the entity.

<sup>48</sup> See, for example, *R v Jacobson* [2014] VSC 592.

<sup>49</sup> See note 22 above.

<sup>50</sup> See '9. Disclosure matters' on page 19 and the definition of "trading policy" in Listing Rule 19.12.

## 6. Exceptions where trading may be permitted

### 6.1. Excluded trading

Listing Rule 12.12.3 requires an entity to disclose any trading that is excluded from the entity's trading policy. This requirement implicitly recognises that an entity may appropriately exclude certain types of trading from the restrictions that would otherwise apply under its trading policy, where the risk of insider trading, or the appearance of insider trading, is low.

Again, the Listing Rules do not prescribe the types of trading an entity may exclude from its trading policy. Each entity has to choose exclusions that are appropriate to its circumstances and specify those exclusions in its trading policy.<sup>51</sup>

Some examples of trading that is commonly excluded from the restrictions in a trading policy are:

- transfers of securities between a KMP and someone closely related to the KMP (such as a spouse, minor child, family company or family trust) or by a KMP to their superannuation fund, in respect of which prior written clearance has been provided in accordance with procedures set out in the trading policy;
- a disposal of securities arising from the acceptance of a takeover offer, scheme of arrangement or equal access buy-back;
- a disposal of rights acquired under a pro rata issue;
- an acquisition of securities under a pro rata issue;
- an acquisition of securities under a security purchase plan or a dividend or distribution reinvestment plan where:
  - the KMP did not commence or amend their participation in the plan during a prohibited period; and
  - the entity's trading policy does not permit the KMP to withdraw from the plan during a prohibited period other than in exceptional circumstances;
- the obtaining by a director of a share qualification;<sup>52</sup>
- an acquisition of securities under an employee incentive scheme;<sup>53</sup>
- where the entity has an employee incentive scheme with a KMP as a trustee of the scheme, an acquisition of securities by the KMP in his or her capacity as a trustee of the scheme;<sup>54</sup>
- an acquisition or disposal of securities under a pre-determined investment or divestment plan for which prior written clearance has been provided in accordance with procedures set out in the trading policy and where:
  - the KMP did not enter into or amend the plan during a prohibited period;
  - the plan does not permit the KMP to exercise any discretion over how, when, or whether to acquire or dispose of securities; and

<sup>51</sup> Again, in doing so, an entity should consider the spirit, intention and purpose behind Listing Rules 12.9-12.12, as it is required to do under Listing Rule 19.2, and that trading policies are intended not only to minimise the risk of insider trading but also to avoid the appearance of insider trading.

<sup>52</sup> The obtaining by a director of a share qualification is specifically excluded from the insider trading prohibition in section 1043A(1) by Corporations Regulation 9.12.01(a).

<sup>53</sup> An acquisition of securities under an employee incentive scheme is specifically excluded from the insider trading prohibition in section 1043A(1) by Corporations Regulation 9.12.01(b).

<sup>54</sup> An acquisition of securities by a trustee of an employee incentive scheme is also specifically excluded from the insider trading prohibition in section 1043A(1) by Corporations Regulation 9.12.01(b).

- the entity's trading policy does not allow for the cancellation of the plan during a prohibited period other than in exceptional circumstances;
- indirect and incidental trading that occurs as a consequence of a KMP dealing in securities issued by a managed investment scheme, listed investment company, exchange-traded fund or similar investment vehicle that is managed by a third party and that happens to hold as part of its portfolio securities in the entity; and
- where the entity's trading policy permits KMP to enter into a margin lending or other secured financing arrangement in relation to the entity's securities,<sup>55</sup> an involuntary disposal of securities that results from the margin lender or financier exercising its rights under the arrangement.

It should be noted that a trade that falls within an exclusion in an entity's trading policy may still breach insider trading laws if it is undertaken or procured by someone in possession of inside information at the time. ASX would therefore recommend that an entity include a warning in its trading policy that a person who possesses inside information about an entity's securities is generally prohibited from trading in those securities under insider trading laws and that this applies even where the trading falls within an exclusion in the entity's trading policy.<sup>56</sup>

### 6.2. Trading in exceptional circumstances with prior written clearance

Listing Rule 12.12.4 requires a trading policy to specify any exceptional circumstances in which KMP may be permitted to trade during a prohibited period with prior written clearance.

This requirement implicitly recognises that there may be extraordinary circumstances in which a KMP ought to be granted special dispensation to trade in what would otherwise be a prohibited period, subject to receiving prior written clearance from someone in a position of authority who can provide a safety check that the risk of insider trading, or the appearance of insider trading, is not unacceptable.

Again, the Listing Rules do not prescribe the exceptional circumstances in which an entity may permit its KMP to trade during a prohibited period. Each entity has to choose exceptional circumstances that are appropriate to its circumstances and specify those exceptional circumstances in its trading policy.<sup>57</sup>

One example of an exceptional circumstance that is commonly specified in this regard is where a KMP is facing severe financial hardship and can only meet their financial commitments by selling their securities. It is for an entity that adopts this exception to define clearly what "severe financial hardship" is for these purposes, what evidence it requires to establish that the KMP is facing severe financial hardship and who makes the determination as to whether that evidence is sufficient for the exception to apply.

Another example of an exceptional circumstance that is commonly specified is where a KMP is required by a court order or a court enforceable undertaking (for example, in a bona fide family settlement) or some other overriding legal or regulatory requirement to transfer, or accept a transfer of, securities.

In recognition that exceptional circumstances, by their nature, may not be able to be foreseen, ASX considers it acceptable for a trading policy to include a "catch-all" discretionary power for a senior officer of the entity (for example, the chairperson or the chief executive officer) to determine that there are exceptional circumstances that warrant the granting of approval to a KMP to trade during a prohibited period. ASX would expect this power to be exercised sparingly and with caution.

<sup>55</sup> As mentioned in section 5.6 above, an entity should consider carefully whether its trading policy should prohibit KMP and any other employees covered by its trading policy from entering into margin lending or other secured financing arrangements in respect of its securities.

<sup>56</sup> See also '8.2 The primacy of insider trading laws' on page 18.

<sup>57</sup> Again, in doing so, an entity should consider the spirit, intention and purpose behind Listing Rules 12.9-12.12, as it is required to do under Listing Rule 19.2, and that trading policies are intended not only to minimise the risk of insider trading but also to avoid the appearance of insider trading.

## 7. Procedures to clear trading

### 7.1. The requirement for clearance procedures

Listing Rule 12.12.5 requires a trading policy to set out the procedures for a KMP to obtain prior written clearance to trade during a prohibited period under Listing Rule 12.12.4.

Again, the Listing Rules do not prescribe the procedures an entity should have in this regard. Each entity has to determine procedures that are appropriate to its circumstances and specify those procedures in its trading policy.

Even though it is not strictly required under the Listing Rules, in addition to the special circumstances an entity may specify for the purposes of Listing Rule 12.12.4, some entities require prior written clearance for KMP (and other employees covered by their trading policy) to trade in other circumstances. For example, it is not uncommon for some of the excluded trading an entity specifies under Listing Rule 12.12.3 to require some form of prior approval before the exclusion applies.

Indeed, some entities require a prior clearance for any trading by KMP and other employees covered by the trading policy, even if the trading will take place within a permitted trading window, or outside a black-out period, specified in the entity's trading policy. Some entities involved in the finance industry do this because they are subject to broader regulatory obligations requiring them to supervise all trading in financial products by directors and employees.<sup>58</sup> Some entities do it as a way of facilitating the imposition of an ad hoc restriction without having to communicate the ad hoc restriction more broadly.<sup>59</sup> Others simply do it as an additional safeguard so that someone in a position of authority can determine whether the trading might give rise to an unacceptable risk of insider trading, or the appearance of insider trading, even though it will occur within a permitted trading window, or outside a black-out period, specified in the entity's trading policy.

The guidance in this section 7 covers clearances for a KMP to trade during a prohibited period in exceptional circumstances under Listing Rule 12.12.4 and also any other approval to trade required under an entity's trading policy.

### 7.2. Who should grant a clearance to trade?

The person designated in an entity's trading policy to approve trading in its securities by its KMP should be someone in a position of authority whose decision will be respected by the KMP.

There are different ways of tackling this issue. Some entities require trades by KMP to be cleared by the chairperson – unless the chairperson is not available or it is the chairperson doing the trading, in which case, the trade must be cleared by the chief executive officer or, if the entity has an audit committee with an independent chair<sup>60</sup> or a senior independent director,<sup>61</sup> by the chair of the audit committee or the senior independent director (as the case may be). Others require trades by KMP to be cleared by the chief executive officer – unless it is the chief executive officer doing the trading, in which case, the trade must be cleared by the chairperson.

Entities that extend their trading policy to cover other employees as well as KMP and that require prior clearance for those employees to trade may choose to delegate the decision to grant a clearance to trade to a slightly less senior officer, such as the company secretary or, if the entity has a compliance function, the head of that function.

In all cases, the person given the responsibility to grant a clearance to trade should be someone in a position to know if the entity is:

- about to release a periodic financial report or other financial data that might come as a surprise to the market;

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<sup>58</sup> See note 22 above.

<sup>59</sup> See '4.5 Other periods during which trading should be prohibited' on page 10.

<sup>60</sup> As entities in the S&P / ASX 300 index are required to do under Listing Rule 12.7.

<sup>61</sup> As discussed in the commentary to Recommendations 1.1 and 2.5 of the ASX Corporate Governance Council's *Corporate Governance Principles and Recommendations*.



- about to make an announcement of market sensitive information under Listing Rule 3.1; or
- considering a matter subject to Listing Rule 3.1A,

when it could be unwise or embarrassing for a KMP or other employee covered by the entity's trading policy to be granted a clearance to trade.

It is also important that the person given the responsibility to grant a clearance to trade has a good understanding of the laws governing insider trading or is able to seek advice on that matter.

### 7.3. What factors should be taken into account when granting a clearance to trade?

The decision to grant a KMP or other employee covered by an entity's trading policy a clearance to trade is one that should be made judiciously, especially if the trade will occur during a prohibited period. Almost by definition, these are periods when the risk of insider trading, or the appearance of insider trading, is high.

The person granting a clearance to trade needs to remember that the underlying purpose of a trading policy is not only to minimise the risk of insider trading but also to avoid the appearance of insider trading and the significant reputational damage that may cause.

For this reason, the person generally should not grant a clearance to trade if they are aware that the entity is likely in the short-term to release a periodic financial report or other financial data that might come as a surprise to the market or make an announcement of market sensitive information under Listing Rule 3.1.

### 7.4. How long should a clearance to trade last?

A trading policy should address the period for which any clearance to trade is valid. Typically, such a clearance would be expressed to expire after a relatively short period (usually one week or less), especially where it is being given to facilitate trading in exceptional circumstances when the KMP or other employee covered by the entity's trading policy would otherwise be precluded from trading.

How long a clearance to trade should be valid may vary, depending on an entity's individual circumstances. A longer period may be appropriate for a smaller entity whose securities are relatively illiquid (and therefore less easily traded). A shorter period may be more appropriate for a larger entity whose securities are highly liquid (and therefore more easily traded).

### 7.5. Other issues around clearances to trade

It would be prudent for a trading policy to state that:

- any clearance to trade can be given or refused by the entity in its discretion, without giving any reasons;
- a clearance to trade can be withdrawn if new information comes to light or there is a change in circumstances;
- the entity's decision to refuse clearance is final and binding on the person seeking the clearance; and
- if clearance to trade is refused, the person seeking the clearance must keep that information confidential and not disclose it to anyone.

On this last point, if news leaks that the entity has refused a clearance to trade, this could lead to conjecture that the reason for the refusal is because the entity is about to release market sensitive information or is involved in market sensitive negotiations, which in turn could lead to speculative trading and the risk identified previously.<sup>62</sup>

It should be noted that a trade that has been granted a clearance under an entity's trading policy may still breach insider trading laws if it is undertaken or procured by someone in possession of inside information at the time. ASX would therefore recommend that an entity include a warning in its trading policy that a person who possesses inside

<sup>62</sup> See notes 37 and 38 and the accompanying text.

information about an entity's securities is generally prohibited from trading in those securities under insider trading laws and that this applies even where the person has been given clearance under the policy to trade (whether in exceptional circumstances or otherwise).<sup>63</sup>

## 8. Other matters that could be addressed in a trading policy

### 8.1. The reason for having a trading policy

While it is not a matter that is required to be included in a trading policy under Listing Rule 12.12, it will generally be helpful for an entity's trading policy to put some context around why the policy has been adopted, by explaining:

- the laws prohibiting insider trading and directors and employees using information acquired in that capacity to gain an improper advantage for themselves or someone else;<sup>64</sup> and
- the ramifications for the entity and its directors and employees if those laws are breached.

It will also be helpful for the policy to state that a breach of the policy will be regarded as serious misconduct which may lead to disciplinary action, up to and including dismissal.

### 8.2. The primacy of insider trading laws

Again, while these are not matters that are required to be included in a trading policy under Listing Rule 12.12, it would be prudent for an entity's trading policy:

- to prohibit expressly any conduct by KMP and any other employees covered by the trading policy in breach of insider trading laws;
- as mentioned previously, to caution that under insider trading laws, a person who possesses inside information about an entity's securities is generally prohibited from trading in those securities and that this applies even where:
  - the trading occurs at a time that would otherwise be within a permitted trading window, or outside a black-out period, specified in the entity's trading policy;
  - the trading falls within an exclusion in the entity's trading policy; or
  - the person has been given clearance under the policy to trade (whether in exceptional circumstances or otherwise);
- to further caution that any clearance to trade under the policy is not an endorsement of the proposed trade and that the person doing the trading is individually responsible for their investment decisions and their compliance with insider trading laws;
- to mention, therefore, that before a KMP (or any other employee covered by the trading policy) trades in the entity's securities, they should consider carefully whether they are in possession of any inside information that might preclude them from trading at that time and, if they have any doubt on that score, they should not trade;
- to require a KMP (or any other employee covered by the trading policy) seeking a clearance to trade in the entity's securities, to certify that they are not in possession of any inside information that might preclude them from trading at that time; and

<sup>63</sup> See also '8.2 The primacy of insider trading laws' below.

<sup>64</sup> See notes 8 and 10 and the accompanying text. This would include explaining that the prohibitions against insider trading extend beyond personal trading and include procuring others to trade and tipping others about inside information in circumstances where the tipper knows or ought reasonably to know that the tippee will trade or procure others to trade.

- to warn that if they do come into possession of inside information after receiving a clearance to trade, they must not trade despite having received the clearance.

### 8.3. Substantial holding notices

An entity established in Australia that has a KMP with relatively significant holdings of securities in the entity may wish to include in its trading policy guidance on the obligation to give a notice to the entity and to ASX if they begin to have, or cease to have, a “substantial holding”<sup>65</sup> in the entity or if they have a substantial holding in the entity and there is a movement of at least 1% in their holding.<sup>66</sup>

## 9. Disclosure matters

### 9.1. Initial disclosure to ASX

Entities that were admitted to the official list as at 1 January 2011, the date on which Listing Rules 12.9 – 12.12 first came into effect, were required to give a copy of their trading policy to ASX at that time.

Entities admitted to the official list after that date have been required under Listing Rule 1.1 condition 19 to give a copy of their trading policy to ASX as part of the admission process.

These trading policies have been released to the market via the ASX Market Announcements Platform.

### 9.2. Disclosure of material changes to ASX

Listing Rule 12.10 requires an entity which makes a material change to its trading policy to give a copy of the amended trading policy to ASX Market Announcements Office for release to the market within five business days of the change taking effect.

For the purposes of Listing Rule 12.10, ASX would consider the following amendments to an entity’s trading policy to constitute a material change:

- changes to the fixed periods specified in the trading policy when the entity’s KMP are prohibited from trading in the entity’s securities;
- changes with respect to the trading that is excluded from the operation of the entity’s trading policy; and
- changes with respect to the exceptional circumstances in which the entity’s KMP may be permitted to trade during a prohibited period.

For the avoidance of doubt, ASX will accept a lodgement of any change to a trading policy under Listing Rule 12.10, even if it might not be considered material.

### 9.3. Disclosure to ASX on request

Listing Rule 12.11 requires an entity to provide a copy of its trading policy to ASX immediately upon request.

In view of the disclosure requirements mentioned in sections 9.1 and 9.2 above, this is not a power that ASX is often called upon to exercise. Generally, ASX will only do so if it has concerns that the version of an entity’s trading policy currently available on the ASX Market Announcements Platform may be materially out-of-date.

### 9.4. Disclosure on an entity’s website

Recommendation 6.1 of the ASX Corporate Governance Council’s *Corporate Governance Principles and Recommendations* states that “[a] listed entity should provide information about itself and its governance to investors via its website.”

<sup>65</sup> As defined in section 9 of the Corporations Act.

<sup>66</sup> Section 671B of the Corporations Act. Entities established outside Australia may be subject to similar provisions under the laws applicable in their home jurisdiction.

The commentary to that recommendation suggests that an entity should include in the corporate governance area of its website a link to its corporate governance policies.

ASX regards an entity's trading policy to be a key corporate governance policy for these purposes and, in keeping with recommendation 6.1, it would strongly encourage entities to publish an up-to-date version of their trading policy on their website.

### 9.5. Appendix 3Y disclosures

The form of notification of a change in a director's interests that must be given to ASX under Listing Rule 3.19A.2 (Appendix 3Y)<sup>67</sup> requires the following information to be included:

- whether the interests the subject of the notification were traded during a closed period where prior written clearance under the trading policy was required;
- if so, whether prior written clearance was obtained; and
- if prior written clearance was obtained, the date on which it was provided.

It should be noted that the obligation to include this information in an Appendix 3Y applies only to trading that occurs during a closed period and not to trading during any additional prohibited period that an entity has imposed on an ad hoc basis because it is considering a matter subject to Listing Rule 3.1A. This is so that an entity does not have to disclose to the market that it has imposed such a prohibition, which would signal the fact that it is considering a potentially market sensitive matter.

## 10. Compliance matters

### 10.1. Compliance measures generally

Implicit in the requirement for an entity to have a trading policy is that it should also have appropriate measures to ensure that its KMP are aware of, and understand, their obligations under the policy and to monitor and enforce compliance with the policy. For it not to do so would be a failure to comply with its obligation under Listing Rule 19.2 to honour the spirit, intention and purpose of the Listing Rules.

It is up to an entity to determine what those measures should be, having regard to its individual circumstances.

At a minimum, an entity's compliance measures should include appropriate record keeping procedures to capture details of all applications by KMP for clearance to trade under the policy and its decisions on such applications.<sup>68</sup>

### 10.2. Awareness and understanding<sup>69</sup>

Measures an entity could take to ensure that its KMP are aware of, and understand, their obligations under its trading policy include:

- incorporating a requirement in the contractual arrangements it has with its KMP that they must comply with the trading policy;<sup>70</sup>
- including a copy of the trading policy in the "new starter" packs for KMP;

<sup>67</sup> Under ASIC Class Order 01/1519, Appendix 3Y disclosures are also taken to satisfy the obligation of a director to notify ASX of their "notifiable interests" under section 205G of the Corporations Act: see generally Guidance Note 22 *Disclosure of Notifiable Interests of Directors*.

<sup>68</sup> In particular, the entity should have appropriate record keeping procedures in place to capture details of written clearances given under Listing Rule 12.12.4 to directors to trade during closed periods, given the obligation to disclose those details in an Appendix 3Y (see '9.5 Appendix 3Y disclosures' above).

<sup>69</sup> The guidance in this section 10.2 relates specifically to KMP. However, an entity that applies its trading policy to a wider group of employees in addition to its KMP could also apply the same measures in relation to those employees.

<sup>70</sup> As mentioned in the text accompanying note 19 above, it will also put the basis for requiring compliance with the policy on a firm legal footing and facilitate the taking of appropriate disciplinary action if the policy is breached.

- placing a copy of the trading policy on the entity's intranet;
- conducting training programs for KMP in relation to the trading policy;
- circulating reminders to KMP (eg by email) of the start and finish dates for a trading window or black-out period as they are about to occur; and
- requiring periodic (eg annual) sign-offs by KMP that they are aware of, and understand, the trading policy and are in compliance with it.

### 10.3. Monitoring compliance<sup>71</sup>

Measures an entity could take to monitor compliance with its trading policy include:

- requiring KMP to notify the entity of any acquisition or disposal of the entity's securities (and, if the entity's policy covers trading in derivatives, of any derivatives issued over, or in respect of, its securities) within a nominated time period;
- requiring KMP to notify the entity of the HINs or SRNs of their holdings (and, if the entity's policy covers trading by closely connected persons or entities, of the holdings of closely connected persons and entities) and putting in place an alert service with the entity's share registry for it to be notified of any changes in those holdings;
- ensuring that the board is notified of any trading by a KMP (and, if the entity's policy covers trading by closely connected persons or entities, by a closely connected person or entity) so that it is not caught unawares if the trading attracts criticism by market commentators or scrutiny by market regulators; and
- requiring KMP to keep a register of their trading in the entity's securities (and, if the entity's policy covers trading in derivatives, in any derivatives issued over, or in respect of, its securities) and to make a copy of that register available to the entity upon request.

Some entities involved in the finance industry are subject to broader regulatory obligations requiring them to supervise all trading in financial products by directors and employees, not just trading in their own securities by KMP.<sup>72</sup> They are likely to have more comprehensive measures to monitor compliance with their trading policies, such as:

- having a staff trading policy that requires staff to obtain a clearance for any trade in relevant financial products, regardless of when it occurs;
- where the entity is, or has a subsidiary that is, a participant in the ASX market, requiring all trading on that market by staff to be undertaken through that participant, so that the trading can be monitored internally;<sup>73</sup>
- if the entity allows staff to trade through an external broker, requiring copies of confirmations to be sent by the external broker to the entity's compliance group; and
- maintaining watch lists and restricted lists<sup>74</sup> to monitor staff trading in financial products about which the entity may have market sensitive information.

<sup>71</sup> Again, the guidance in this section 10.3 relates specifically to KMP. However, an entity that applies its trading policy to a wider group of employees in addition to its KMP could also apply the same measures in relation to those employees.

<sup>72</sup> See note 22 above.

<sup>73</sup> And, in the case of acquisitions of securities able to be traded on the ASX market by employees involved in its business of dealing in financial products, so as to comply with section 991F(3) of the Corporations Act.

<sup>74</sup> Sometimes referred to as grey lists and black lists.

### 10.4. Enforcing compliance<sup>75</sup>

To meet the standards of good governance expected of listed entities, an entity should regard a breach of its trading policy by a KMP as a serious matter that warrants an investigation as to the circumstances of the breach and, depending on the circumstances, appropriate disciplinary or remedial action.

It is up to each entity to determine the appropriate disciplinary or remedial action for a breach of its trading policy, having regard to the circumstances of the breach and relevant legal and commercial considerations.

Without wishing to limit in any way the types of disciplinary or remedial action an entity may consider imposing for a breach of its trading policy, one remedial measure an entity could consider in relation to a KMP who has:

- disposed of securities in breach of its trading policy, is to have the KMP donate any profit derived from the disposal to charity; or
- acquired securities in breach of its trading policy, is to have the KMP sell the securities at the earliest opportunity they are able to under insider trading laws and donate any profit derived from the sale to charity.

If ASX has concerns that an entity may not be taking appropriate measures to enforce compliance with its trading policy, ASX may require the entity to give any information, document or explanation that ASX asks for to enable it to be satisfied that the entity is, and has been, complying with the Listing Rules.<sup>76</sup> ASX can also impose a requirement with which the entity must comply in order to ensure compliance with the Listing Rules.<sup>77</sup>

### 10.5. Directors trading in closed periods without prior clearance

Where a director of an entity breaches its trading policy by trading in securities during a closed period without prior written clearance, that breach will generally be a matter of public record because of the disclosures in the Appendix 3Y (Change of Director's Interest Notice) required to be lodged with ASX in relation to that trading.<sup>78</sup> In this situation, to meet the standards of good governance expected of listed entities and their directors, an entity should give careful consideration to whether it ought to make an announcement to the market explaining the circumstances of the breach and what (if any) disciplinary or remedial action the entity has taken, or proposes to take, in relation to the breach.

If an Appendix 3Y is lodged with ASX that discloses a breach of its trading policy by a director of an entity and the entity has not made an announcement of the type referred to in the previous paragraph, ASX will give careful consideration to whether it should exercise its powers<sup>79</sup> to require the entity to explain the circumstances of the breach and what (if any) disciplinary or remedial action the entity has taken, or proposes to take, in relation to the breach and to publish its correspondence with the entity to the market.

### 10.6. Referrals to ASIC

Finally, it should be noted that if ASX has reason to suspect that a person has committed a significant contravention of the Corporations Act, it is required under section 792B(2)(c) of the Corporations Act 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 under its various enforcement powers.

If ASX comes into possession of information which gives it cause to suspect that a KMP or other officer or employee of an entity has engaged in insider trading or market manipulation in breach of the Corporations Act, it will invariably regard that as a "significant contravention" and refer the matter to ASIC under section 792B(2)(c).

<sup>75</sup> Again, the guidance in this section 10.4 relates specifically to KMP. However, an entity that applies its trading policy to a wider group of employees in addition to its KMP could also apply the same measures in relation to those employees.

<sup>76</sup> Listing Rule 18.7 requires an entity to give ASX any information or explanation that ASX asks for to enable it to be satisfied that the entity is, and has been, complying with the Listing Rules. Under Listing Rule 18.7A, ASX may publish any correspondence between it and an entity if ASX has reserved the right to do so and considers that it is necessary for an informed market.

<sup>77</sup> Listing Rule 18.8.

<sup>78</sup> See '9.5 Appendix 3Y disclosures' on page 20.

<sup>79</sup> Under Listing Rules 18.7 and 18.7A (see note 76 above).