CONTINUOUS DISCLOSURE: LISTING RULES 3.1 – 3.1B

The purpose of this Guidance Note	• To assist listed entities to understand and comply with their continuous disclosure obligations under Listing Rules 3.1, 3.1A and 3.1B • Listing Rule 3.1 requires a listed entity to disclose "market sensitive" information to ASX immediately • Listing Rule 3.1A sets out the exceptions to that general rule • Listing Rule 3.1B requires information to be disclosed to ASX if ASX asks for it to correct or prevent a false market
The main points it covers	• When is information "market sensitive"? • What does "immediately" mean? • How to use trading halts to manage disclosure obligations • The exceptions to the requirement to disclose immediately • What is a “false market”? • Responding to media/analyst commentary/speculation and market rumours • Earnings guidance and earnings surprises • ASX's enforcement practices (including price queries and aware letters)
Related materials you should read	• Annexure A: Worked examples of the operation of Listing Rule 3.1 • Annexure B: Relevant provisions of the Corporations Act • Annexure C: Guidance on compliance policies • Guidance Note 12 *Significant Changes to Activities* • Guidance Note 14 *ASX Market Announcements Platform* • Guidance Note 16 *Trading Halts and Voluntary Suspensions*

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

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1. Introduction

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

3.1 Once an entity is or becomes aware of any information concerning it that a reasonable person would expect to have a material effect on the price or value of the entity's securities, the entity must immediately tell ASX that information.

3.1A Listing rule 3.1 does not apply to particular information while each of the following requirements is satisfied in relation to the information:

3.1A.1 One or more of the following 5 situations applies:

- *It would be a breach of a law to disclose the information;*
- *The information concerns an incomplete proposal or negotiation;*
- *The information comprises matters of supposition or is insufficiently definite to warrant disclosure;*
- *The information is generated for the internal management purposes of the entity; or*
- *The information is a trade secret; and*

3.1A.2 The information is confidential and ASX has not formed the view that the information has ceased to be confidential; and

3.1A.3 A reasonable person would not expect the information to be disclosed.

3.1B If ASX considers that there is or is likely to be a false market in an entity's securities and asks the entity to give it information to correct or prevent a false market, the entity must immediately give ASX that information.

These rules apply to all entities[1] admitted to the ASX Official List in the ASX Listing category, including entities that are established in countries other than Australia.[2] They also apply to entities in the ASX Debt Listing category, but only in relation to their debt securities.[3] They do not apply to entities in the ASX Foreign Exempt Listing category.[4]

Compliance with Listing Rule 3.1 is critical to the integrity and efficiency of the ASX market and other markets that trade in ASX quoted securities or derivatives of those securities.[5] Reflecting this, Parliament has given the rule statutory force in section 674 of the Corporations Act 2001 (Cth).[6] An entity which breaches Listing Rule 3.1 may also breach that section and this can attract serious legal consequences for the entity and its officers. Those consequences are outlined in greater detail in Annexure B.

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

2 For more detail on the disclosure obligations that apply to foreign entities listed on ASX, see Guidance Note 4 *Foreign Entities Listing on ASX*.

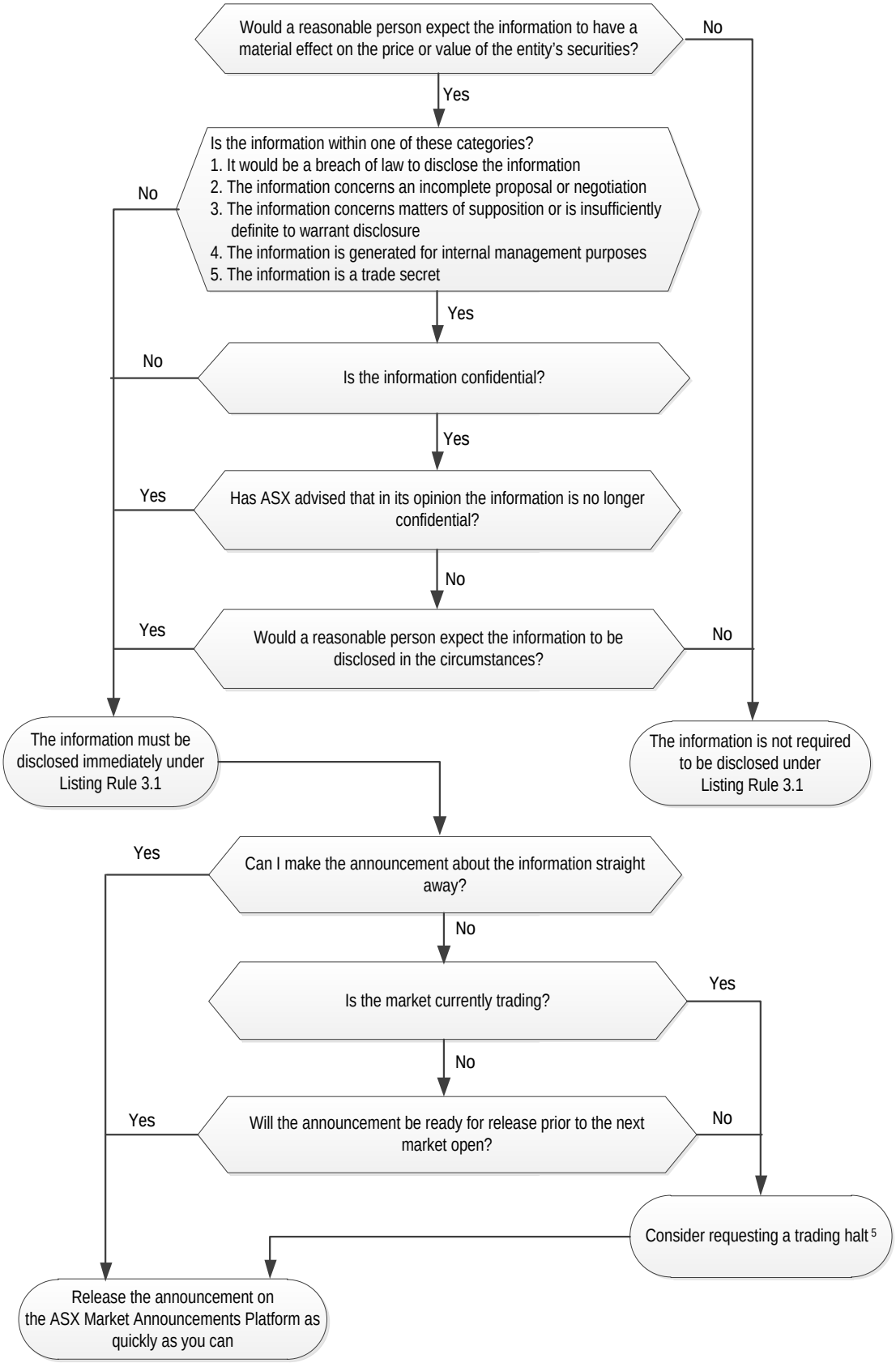
3 Listing Rule 1.10.1.

4 Entities listed in the ASX Foreign Exempt category are generally expected to comply with the disclosure obligations of their overseas home exchange (Listing Rule 1.15.3) and to immediately provide to ASX any information that they provide to their home exchange that is, or is to be, made public (Listing Rule 1.15.2). That said, it should be noted that ASX does have a discretion in respect of any particular 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 Foreign Exempt Listing category to comply with Listing Rules 3.1 – 3.1B

5 See note 10 below and the accompanying text.

6 Referred to in this Guidance Note as the "Corporations Act". Unless otherwise indicated, references in this Guidance Note to sections of an Act are to sections of the Corporations Act.

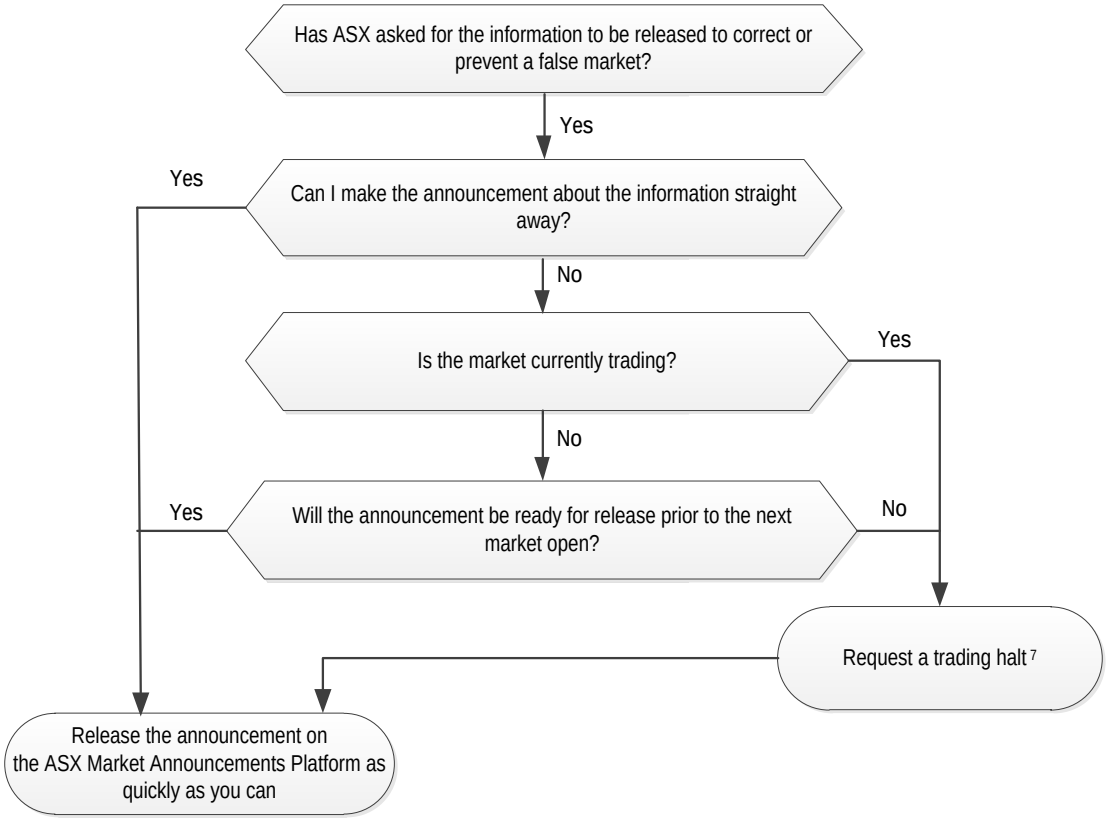
2. An overview of the continuous disclosure decision process



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

The questions in the second to fifth hexagons in the diagram go to whether the information falls within the carve-outs to immediate disclosure in Listing Rule 3.1A. It should be noted that these questions may need to re-appraised from time to time as circumstances change (eg, as a previously incomplete proposal or negotiation approaches completion or if the information has ceased to be confidential).[7]

The diagram below outlines the decision process an entity should generally follow if ASX asks it under Listing Rule 3.1B to disclose information needed to correct or prevent a false market in its securities:



3. The policy objective of the continuous disclosure regime

The policy objective of Australia's continuous disclosure regime has been described judicially as:

> "*to enhance the integrity and efficiency of Australian capital markets by ensuring that the market is fully informed.*[9] *The timely disclosure of market sensitive information is essential to maintaining and increasing*

[7] See generally '5 Listing Rule 3.1A – the exceptions to immediate disclosure' on page 31 and following.

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

[9] ASX generally prefers to use the term "reasonably informed" rather than "fully informed" in recognition of the fact that certain types of information do not have to be disclosed to the market under Listing Rules 3.1 and 3.1A and therefore the market is never really "fully informed".

the confidence of investors in Australian markets, and to improving the accountability of company management. It is also integral to minimising incidences of insider trading and other market distortions."[10]

Listing Rules 3.1, 3.1A and 3.1B form an integrated set of rules intended to strike an appropriate balance between the interests of the market in receiving information that will affect the price or value of, or which is needed to correct or prevent a false market in, an entity's securities at the earliest reasonable time, and the interests of the entity in not having to disclose information prematurely or where it would clearly be inappropriate to do so.

Thus, if there is or may be a false market in an entity's securities, the interests of the market prevail and ASX can require the entity under Listing Rule 3.1B to disclose immediately whatever information ASX considers necessary to correct or prevent that situation. Otherwise, the time at which market sensitive information must be disclosed will be determined by the interplay of Listing Rules 3.1 and 3.1A:

- for information that falls within Listing Rule 3.1A, the requirement to disclose will not arise unless and until that rule ceases to apply; but
- for information that falls outside Listing Rule 3.1A, the requirement to disclose will arise as soon as the entity is aware of the information.

In each case, once the requirement to disclose has been triggered, the information must be disclosed immediately to ASX for release to the market.

Listing Rule 3.1A is the balancing factor here. It seeks to avoid the premature disclosure of information initially by excluding from the requirement for immediate disclosure in Listing Rule 3.1 confidential information that is not yet ripe for disclosure (eg, because it concerns an incomplete proposal or negotiation or is insufficiently definite to warrant disclosure) and then only requiring it to be disclosed if and when it has ripened to an appropriate degree (eg, because the relevant proposal or negotiation has been completed or the matter has become sufficiently definite to warrant disclosure) or it has ceased to be confidential. It also seeks to avoid the inappropriate disclosure of information by excluding from the requirement for immediate disclosure in Listing Rule 3.1 confidential information that is a trade secret, that is generated for internal management purposes or that would give rise to a breach of law if it were disclosed.

4. Listing Rule 3.1 – the obligation to disclose "market sensitive" information immediately

4.1 What type of information has to be disclosed?

Listing Rule 3.1 requires an entity to disclose information[11] "concerning it" that "a reasonable person would expect to have a material effect on the price or value[12] of the entity's securities". This type of information is referred to in this Guidance Note as "market sensitive information".[13]

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[10] Per the NSW Court of Appeal in *James Hardie Industries NV v ASIC* [2010] NSWCA 332, at paragraph 355.

[11] Under Listing Rule 19.12, "information" is defined to include: (1) matters of supposition and other matters that are insufficiently definite to warrant disclosure to the market; and (2) matters relating to the intentions, or likely intentions, of a person. This definition is based on section 1042A.

[12] Where securities are traded on a licensed market, one would generally expect information that will have a material effect on the value of an entity's securities also to have a material effect on their price, through the ordinary forces of supply and demand. There could be circumstances, however, where information has a material effect on the market's assessment of the value of a security without that translating into a material change in the price of the security. This might occur, for example, if security prices in the market generally or in a particular sector are moving materially in one direction and the information causes the market to assess the value of the security differently and to hold its price at or about the current level. In these circumstances, ASX considers that the information is still having a material effect on the price of the security in question, in the sense that it is maintaining the price at a level that would not otherwise be the case, but the reference to "value" in Listing Rule 3.1 puts this issue beyond any doubt. It also caters for the situation where there is no market price for an entity's securities, such as might be the case if its securities are in a trading halt or suspension.

[13] References in this Guidance Note to market sensitive information should be read as including information which causes the market to maintain the price of a security at or about its current level when it would otherwise be expected to move materially in a particular direction, given price movements in the market generally or in the entity's sector – see note 12.

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

- a transaction that will lead to a significant change in the nature or scale of the entity's activities;[14]
- a material mineral or hydrocarbon discovery;[15]
- a material acquisition or disposal;
- the granting or withdrawal of a material licence;
- the entry into, variation or termination of a material agreement;
- becoming a plaintiff or defendant in a material law suit;
- the fact that the entity's earnings will be materially different from market expectations;
- the appointment of a liquidator, administrator or receiver;
- the commission of an event of default under, or other event entitling a financier to terminate, a material financing facility;
- under subscriptions or over subscriptions to an issue of securities (a proposed issue of securities is separately notifiable to ASX under Listing Rule 3.10.3);
- giving or receiving a notice of intention to make a takeover; and
- any rating applied by a rating agency to an entity or its securities and any change to such a rating.

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

For these purposes, "information" extends beyond pure matters of fact and includes matters of opinion and intention.[16] It is not limited to information that is generated by, or sourced from within, the entity. Nor is it limited to information that is financial in character or that is measurable in financial terms. Under Listing Rule 3.1, an entity must disclose all information "concerning it" that it becomes aware of from any source[17] and of any character, if a reasonable person would expect the information to have a material effect on the price or value of its securities.

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

For instance, a gold producer would not generally be expected to disclose publicly available information about daily changes in the gold price on major metals exchanges or about a proposed increase in the taxes that miners generally are required to pay. This type of information will be available to the market at large and the market can be assumed to have absorbed its impact on the price or value of the entity's securities within a relatively short period after it became publicly available. By contrast, if the entity has previously given earnings guidance to the market and the change in the gold price or taxes is likely to cause its earnings to differ from that guidance by a

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

[15] Note that information about a material mineral or hydrocarbon discovery must also comply with the reporting requirements in Chapter 5 of the Listing Rules.

[16] See the definition of "information" in Listing Rule 19.12 quoted in note 11 above. See also McLure JA in *Jubilee Mines NL v Riley* [2009] WASCA 62, at paragraph 161 (quoted in note 110 below), and Perrem J in *Grant-Taylor v Babcock & Brown Limited (In Liquidation)* [2015] FCA 149, at paragraph 156.

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

material amount, that is information "concerning it" which it would be expected to disclose.[18] Likewise, if the change in the gold price or taxes is likely to have a particular effect on the entity over and above a mere change in earnings or tax expense (eg, if it would mean that the entity could no longer economically operate and therefore would have to shut its mines), that is information "concerning it" which it would be expected to disclose.

4.2 When is information market sensitive?

The test for determining whether information is market sensitive and therefore needs to be disclosed under Listing Rule 3.1 is set out in section 677 of the Corporations Act.[19] Under that section, a reasonable person is taken to expect information to have a material effect on the price or value of an entity's securities if the information "would, or would be likely to, influence[20] persons who commonly invest[21] in securities in deciding whether to acquire or dispose of" those securities.

In applying this test for the purposes of the Listing Rules, ASX interprets the reference to persons who commonly "invest in" securities as a reference to persons who commonly buy and hold securities for a period of time, based

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[18] This obligation may arise under Listing Rule 3.1 if a reasonable person would expect information about the difference in earnings to have a material effect on the price or value of the entity's securities, or it may arise under section 1041H because the failure by the entity to updated its published guidance could constitute misleading conduct on its part: see the discussion on earnings guidance under '7.3 Market sensitive earnings surprises' and 'Example F – material difference in earnings compared to earnings guidance' on pages 44 and 72 respectively.

[19] See Listing Rule 19.3, which provides that expressions given a particular meaning in the Corporations Act have the same meaning when used in the Listing Rules, and *Jubilee Mines NL v Riley*, note 16 above, where Martin CJ held (Le Miere AJA agreeing but McLure JA dissenting) that, in light of this rule, the test in the precursor to section 677 should be applied to determine whether a reasonable person would expect information to have a material effect on the price or value of an entity's securities under the Listing Rules.

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

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

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

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

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

[21] The meaning of the phrase "commonly invest in securities" was explored in *Grant-Taylor v Babcock & Brown Limited (In Liquidation)*, note 16 above, There Perrem J opined (at paragraph 70):

> "Section 677 should be interpreted in light of its ordinary language. The subject matter of Chapter 6CA is continuous disclosure by 'listed disclosing entit[ies]': s 674(1). I would therefore read the word 'securities' in s 677 somewhat more narrowly than the extensive definition of securities contained in s 92(3) and would confine it to listed securities because the context appears unavoidably to require this. The section therefore refers to persons who ordinarily or usually invest in listed securities. The plural is significant – what is posited is not a single investor but a class and the attributes which are to be identified are class attributes and not individual ones. I do not think 'commonly' means that the investors must be professionals in the sense that a livelihood must be derived from investing activities but it does denote a degree of sophistication which might be expected from those who have more than a passing or occasional interest in the activities of securities exchanges."

on their view of the inherent value of the security. In ASX's view, it therefore does not include traders who seek to take advantage of very short term (usually intraday) price fluctuations and who trade into and out of securities without reference to their inherent value and without any intention to hold them for any meaningful period of time.[22]

It should be noted that the test in section 677 is an objective one and the fact that an entity's officers may honestly believe that information is not market sensitive and therefore does not need to be disclosed will not avoid a breach of Listing Rule 3.1, if that view is ultimately found to be incorrect.[23]

ASX acknowledges that because of this, the test for determining the materiality of information in section 677 can give rise to some difficulty in practice for entities in assessing whether or not they have an obligation to disclose information under Listing Rule 3.1.They are effectively required to predict how investors will react to particular information when it is disclosed. In some cases this may be fairly obvious but in others not so.[24] However, this difficulty is inescapable. It is the entity, and only the entity, that can and must form a view as to whether the information it knows, and the rest of the market does not, is market sensitive and therefore needs to be disclosed under Listing Rule 3.1.

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

(1) "Would this information influence my decision to buy or sell securities in the entity at their current market price?"[25]

(2) "Would I feel exposed to an action for insider trading if I were to buy or sell securities in the entity at their current market price, knowing this information had not been disclosed to the market?"[26]

If the answer to either question is "yes", then that should be taken to be a cautionary indication that the information may well be market sensitive and, if it does not fall within the carve-outs to immediate disclosure in Listing Rule 3.1A, may need to be disclosed to ASX under Listing Rule 3.1.

Entities may also find the 5/10% parameters mentioned below[27] that ASX uses for determining whether or not to refer a potential breach of Listing Rule 3.1 to ASIC helpful in understanding the order of magnitude of the likely

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22 The exclusion of such traders from the class of "persons who commonly invest in securities" is an important one. These types of traders often make trading decisions on the basis of very small movements in market price and so their inclusion in that class could artificially reduce the level of price movement that might be regarded as "material" under Listing Rule 3.1 and section 674. Also, their trading decisions typically are made without any regard to the underlying fundamentals of the securities in which they trade. They therefore are not the type of person to whom section 677 was addressed, namely, persons who commonly "invest in" securities and whose decision to buy or sell any given security is determined by their assessment of the information available about that security.

23 Per the NSW Court of Appeal in *James Hardie Industries NV v ASIC*, note 10 above, at paragraph 454:

"the statutory obligation to disclose involves an objective test ... Therefore, the views of a company's senior management or its directors cannot determine whether disclosure of any given information is required. That is not to say that the views of those who make the decision as to disclosure may not be relevant. For example, if there was particular information that informed the decision making of management, such information may be relevant to the determination of whether or not, objectively determined, disclosure was required. However, the ultimate decision of management or the directors to the disclosure or not of information is not determinative."

24 For example, information about a material acquisition may be:

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

See also the discussion in notes 208-210 and the accompanying text about the factors that might affect how the market will react to information that an entity's earnings for a particular reporting period will be materially different to market expectations.

25 This question is particularly pertinent if the officer is someone who commonly invests in securities.

26 This question recognises that the test for whether information is material for the purposes of continuous disclosure laws (section 677) is similar to the test for whether it is material for the purposes of insider trading laws (section 1042D). Hence, any officer who is aware of information concerning an entity that a reasonable person would expect to have a material effect on the price or value of its securities (as that phrase is defined in section 677), and who trades in the entity's securities before that information is generally available to the market, is likely to breach the prohibition against insider trading in section 1043A.

27 See '8.7 Referrals to ASIC' on page 59.

change in price or value of their securities that ASX considers will trigger a disclosure obligation under Listing Rule 3.1.

Given the significant penalties that a breach of Listing Rule 3.1 and section 674 can attract,[28] ASX recommends that entities and their officers exercise appropriate caution in assessing whether information is market sensitive or falls within the carve-outs from disclosure in Listing Rule 3.1A and that they carefully weigh up the potential consequences of not disclosing particular information in any given case.

If an entity decides not to disclose particular information because in its opinion it is not market sensitive and there is a sudden and unexplained movement in the market price or traded volumes of its securities, it may need to revisit its decision about whether the information ought to be disclosed. Such a movement could indicate that the information has leaked and that its initial decision about the market sensitivity of the information was incorrect.[29]

4.3 The need to assess information in context

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

- the circumstances affecting the entity at the time;[30]
- any external information that is publicly available at the time; and
- any previous information the entity has provided to the market (eg, in a prospectus or PDS, under its continuous or periodic disclosure obligations or by way of earnings guidance).[31]

For example, a small drop in earnings, by itself, may not be considered market sensitive. However, if that small drop in earnings results in the entity breaching a financial covenant and committing an event of default under its banking facilities, the situation is quite different. Conversely, information that an entity has received a formal offer from someone interested in purchasing a major asset at a premium price would usually be considered market sensitive.[32] However, if at the time it receives the offer, the entity has no intention of selling,[33] or no capacity to sell,[34] the asset, or the prospective purchaser does not have the wherewithal to complete the transaction, the information may not be market sensitive.[35]

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[28] See Annexure B.

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

[30] See *Jubilee Mines NL v Riley*, note 16 above. See also the following observations of O'Loughlin J in *Flavel v Roget* (1990) 1 ACSR 595, at 602-3 (dealing with the issue of whether a memorandum of confirmation and variation of a contract should have been notified to ASX under a predecessor to Listing Rule 3.1):

> "a close examination must be made of the contents of the memorandum so that its significance or importance can be evaluated. This represents a two-fold task; first, the contents of the memorandum itself must be individually assessed, but, secondly, that assessment must then be made within the framework of the company and its affairs as they existed at the time of the execution of the memorandum. Sometimes this second test may not be necessary; sometimes the nature of the document might speak for itself. Its importance might be of such magnitude that, irrespective of the size of the company, irrespective of the general affairs of the company, irrespective of the state of the economy of the country, its importance achieves such prominence that immediate advice to the Home Exchange is the only course of action to adopt. But there can be many cases where the contents of the document are not susceptible to such an immediate and obvious evaluation. Much will depend upon the identity of the particular company; what one company should advise the Stock Exchange might not have to be advised by a second company; what should be advised by a company at one stage in its career might not have to be advised at another stage of its career because of changed circumstances."

[31] See also Example H5 in Annexure A.

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

[33] 'Example B – control transaction' on page 64 explores a similar theme.

[34] For example, because it is subject to binding pre-emption arrangements or other contractual commitments that preclude a sale on the terms proposed.

[35] The finding of the Court of Appeal in *Jubilee Mines NL v Riley*, note 16 above, also illustrates the point that information about a particular opportunity may not be market sensitive if the entity is not capable of exploiting the opportunity to its advantage.

The need to assess information in context also means that new information may need to be disclosed because of its impact on information previously disclosed. For example, information that an entity has investigated and decided not to pursue a particular material business opportunity may not be market sensitive, if the market has no knowledge or expectation that the entity has been considering the opportunity. However, if the entity has previously announced that it was intending to pursue the opportunity, the fact that it has changed its mind may well be market sensitive and therefore need to be disclosed under Listing Rule 3.1. Example H5 in Annexure A is a further illustration of this point. The fact that the drill cores from holes drilled by a mining exploration entity on part of its tenement have returned negative assay results, by itself, may not be market sensitive if the market has no particular expectation about the results from those holes. However, if the entity has previously announced very positive drill results in that part of its tenement and the latest negative drill results cast real doubts about the size and economic viability of the mineral deposit, then that information may be market sensitive and may need to be disclosed under Listing Rule 3.1.

4.4 When does an entity become aware of information?

Under the Listing Rules, an entity becomes *aware* of information if, and as soon as, an officer of the entity (or, in the case of a trust, an officer of the responsible entity) has, or ought reasonably to have, come into possession of the information in the course of the performance of their duties as an officer of that entity.[36]

The term "officer" has the same meaning as in the Corporations Act[37] and includes a director, secretary or senior manager of an entity.[38]

The extension of an entity's awareness beyond the information its officers in fact know to information that its officers "ought reasonably have come into possession of" effectively deems an entity to be aware of information if it is known by anyone within the entity and it is of such significance that it ought reasonably to have been brought to the attention of an officer of the entity in the normal course of performing their duties as an officer. Without this extension, an entity would be able to avoid or delay its continuous disclosure obligations by the simple expedient of not bringing market sensitive information to the attention of its officers in a timely manner.[39]

In light of this extension, it is important that entities have in place appropriate reporting and escalation processes to ensure that information which is potentially market sensitive is promptly brought to the attention of its officers so that there are no gaps between the information they in fact know and the information they are deemed to know for the purposes of Listing Rule 3.1.[40]

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[36] Listing Rule 19.12. This definition is based on section 1042G, although that section only captures information that an officer actually knows and does not extend to information that an officer ought reasonably to know.

For an explanation of how the definition of "aware" should be applied in relation to an opinion, see *Grant-Taylor v Babcock & Brown Limited (In Liquidation)*, note 16 above, at paragraphs 153-161.

[37] Listing Rule 19.3

[38] See section 9. For these purposes, "senior manager" means a person:

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

The definition of "officer" in section 9 also extends to

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

[39] The extension of an entity's awareness to information that an officer "ought reasonably have come into possession of" effectively buttresses the obligation that the directors of an entity have under the general law to ensure that the entity has appropriate information reporting systems in place: see note 328 and accompanying text.

[40] Annexure C has further guidance on the policies that an entity should implement to comply with its obligations under Listing Rule 3.1.

In applying the definition of "aware", it must be remembered that the information which has to be disclosed under Listing Rule 3.1 is market sensitive information, that is, information that a reasonable person would expect to have a material effect on the price or value of an entity's securities. An entity may receive information about a particular event or circumstance in instalments over time. Sometimes the initial information about the event or circumstance is such that the entity cannot reasonably form a view on whether or not it is market sensitive and the entity may need to await further, more complete, information, or to make further enquiries or obtain expert advice, in order to be able to make that determination.[41] In such a case, the entity will only become aware of information that needs to be disclosed under Listing Rule 3.1 when an officer has, or ought reasonably to have, come into possession of sufficient information about the event or circumstance in order to be able to appreciate its market sensitivity.

It should not be thought, however, that this opens up an avenue for an entity to avoid or delay its disclosure obligations – for example, by forming a convenient view that it needs further information before it can assess market sensitivity[42] or by not making or delaying any further enquiries or request for expert advice needed for that purpose. As noted previously,[43] the test for whether or not information is market sensitive is an objective one and, if the entity in fact has information that is market sensitive, the subjective opinion of its officers that it needs further information before it can assess market sensitivity will not avoid a breach of Listing Rule 3.1. Also, the extension of an entity's awareness to information that an officer ought reasonably have come into possession of will effectively require the entity, when it is on notice of information that potentially could be market sensitive, to make any further enquiries or obtain any expert advice needed to confirm its market sensitivity within a reasonable period.

4.5 The meaning of "immediately"

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

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

> "*The words forthwith and immediately have the same meaning. They are stronger than the expression within a reasonable time, and imply prompt, vigorous action, without any delay, and whether there has been such action is a question of fact, having regard to the circumstances of the particular case.*"[44]

Doing something "promptly and without delay" means doing it as quickly as it can be done in the circumstances (acting promptly) and not deferring, postponing or putting it off to a later time (acting without delay).[45]

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[41] For example, where an entity is served with a writ or summons commencing litigation against it, in some cases, it may be immediately apparent that the matter is market sensitive and needs to be disclosed under Listing Rule 3.1. In other cases, the entity may need to obtain legal advice before it is aware that the matter is market sensitive.

[42] As the director of S may be attempting to do in Example H5 in Annexure A.

[43] See note 23 and accompanying text.

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

[45] The infringement notice the subject of ASIC Media Release 09-199 is an example where a relatively short delay in the release of information was found by ASIC not to meet the standard of immediacy required under Listing Rule 3.1. In that case, ASIC alleged that an entity was aware of information about a material deterioration in its loan impairment expense ratio by no later than 3 pm on a particular day, when the market was still trading. However, the entity did not issue an announcement about that information until 7:14 pm that day, when it was included with an announcement about an institutional placement of shares that had been made after market close.

ASX believes that the issue in that case was not so much the period of time it took for the entity to make an announcement to the market (since the market ceased trading on that day at approximately 4 pm, the information was effectively only withheld from the market for 60 minutes) but more the fact that the entity postponed the announcement to coincide with the announcement about the placement. As noted in the text, postponing something to a later time involves a "delay" and therefore does not meet the required standard of acting promptly and without delay.

ASX understands that the entity had given instructions to the financial institution managing the placement that the information in question needed to be disclosed to participants in the placement before they took up any shares. Postponing the announcement therefore also had the effect of denying those investors buying shares on market between 3pm and 4pm access to the same information.

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

A period of time will necessarily pass between when an entity first becomes obliged to give information to ASX under Listing Rule 3.1[46] and when it is able to give that information to ASX in the form of a market announcement. This passing of time, of itself, does not mean that there has been a "delay" in the provision of the information to ASX. Some announcements may be able to be prepared and given to ASX relatively quickly, while others may take longer to complete. The question is each case is whether the entity is going about this process as quickly as it can in the circumstances and not deferring, postponing or putting it off to a later time.

ASX recognises that how quickly an entity can give an announcement of particular information to ASX will be dictated by the circumstances confronting it at the time. Relevant factors may include:

- where and when the information originated;
- the forewarning (if any) the entity had of the information;
- the amount and complexity of the information concerned;
- the need in some cases to verify the accuracy or bona fides of the information;
- the need for an announcement to be carefully drawn so that it is accurate, complete and not misleading;[47]
- the need in some cases for an announcement to comply with specific legal or Listing Rule requirements, such as the requirement for an announcement that relates to mining or oil and gas activities to comply with Chapter 5 of the Listing Rules;[48] and
- the need in some cases for an announcement to be approved by the entity's board or disclosure committee.[49]

ASX will take these factors into account in assessing whether an entity has complied with its obligation to disclose information under Listing Rule 3.1 promptly and without delay.

ASX will also take into account the state of the market in assessing whether an entity has complied with the spirit, intention and purpose of Listing Rule 3.1[50] and whether it ought to refer a possible breach of the rule to ASIC.[51] In this regard, ASX recognises that the sensitivity of the market to information is at its highest during trading hours on licensed Australian securities markets,[52] which is when and where most trading in ASX-listed securities takes place and when the need to issue information promptly takes on greater significance. Thus, if the obligation to disclose information under Listing Rule 3.1 is triggered during a period that licensed Australian securities markets are not trading (eg, overnight or on a weekend), it will generally be sufficient from ASX's perspective for the entity to give the information to ASX for release to the market before trading next resumes.[53] Conversely, if the obligation to disclose information under Listing Rule 3.1 is triggered while licensed Australian securities markets are trading, the entity will be expected to give the information to ASX as quickly as it can in the circumstances and without delay, or else to request a trading halt.

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46 In the case of market sensitive information that does not fall within the carve-outs to immediate disclosure in Listing Rule 3.1A, this will be when the entity first becomes "aware" of the information or, in the case of information that initially falls within the carve-outs to immediate disclosure in Listing Rule 3.1A, when the carve-outs no longer apply.

47 See '4.15 Guidelines on the contents of announcements under Listing Rule 3.1' on page 24.

48 See 'Example D – material mineral discovery' on page 70. Guidance Note 31 *Reporting on Mining Activities* and Guidance Note 32 *Reporting on Oil & Gas Activities* have further guidance on the reporting obligations relating to mining and oil and gas activities.

49 See '4.8 Does the board need to approve an announcement under Listing Rule 3.1?' on page 19.

50 As entities are required to do under Listing Rule 19.2.

51 See '8.7 Referrals to ASIC' on page 59.

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

53 See also the guidance in note 84 about when an announcement must be received by ASX if it is to be released to the market before the market opens.

ASX will expect an entity to act particularly quickly if ASX asks it to make an announcement under Listing Rule 3.1B because of a sudden and significant movement in the market price or traded volumes of its securities[54] or otherwise to correct or prevent a false market in its securities. In such cases, if the entity is not in a position to issue its announcement to the market straight away, ASX will generally expect it to request a trading halt.[55]

ASX will also expect an entity to act particularly quickly if the information to be announced is especially damaging and likely to cause a significant fall in the market price of the entity's securities (eg, information that the board of the entity has resolved to appoint an administrator or that a lender has declared an event of default and appointed a receiver). Again, in such a case, if the entity is not in a position to issue its announcement to the market straight away, ASX will generally expect the entity to request a trading halt.

Given the requirement in Listing Rule 3.1 for immediate disclosure and the significant legal and financial consequences that can follow from a breach of that rule, it is important that entities have in place appropriate compliance systems to ensure that information which is potentially market sensitive is promptly assessed to determine whether it requires disclosure under that rule and, if it does, that it is promptly given to ASX.[56]

The need to disclose information to ASX immediately can give rise to particular issues for dual listed entities. Those issues are explored in greater detail below.[57]

4.6 The use of trading halts and voluntary suspensions to manage disclosure issues

If the market is or will be trading at any time after an entity first becomes obliged to give market sensitive information to ASX under Listing Rule 3.1 and before it can give an announcement with that information to ASX for release to the market, the entity should consider carefully whether it is appropriate to request a trading halt[58] or, in an exceptional case, a voluntary suspension.[59]

The application of a trading halt or voluntary suspension in an appropriate case can often be beneficial for both the market and the entity. It will ensure that the entity's securities are not trading on ASX and other licensed securities markets in Australia[60] on an uninformed basis. It will also signal to investors that market sensitive information may be about to be released and that they should be wary of trading in, or entering into derivative transactions over, the entity's securities off-market or on other trading venues. Both of these things may help to reduce the exposure of the entity and its officers to the legal and financial consequences that could follow if the entity is ultimately found to have breached its obligation to disclose information in accordance with Listing Rule 3.1.

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54 Indicating that the information in question may have leaked ahead of the entity's announcement.

55 ASX understands that ASIC has a similar expectation: see ASIC Media Release 08-117. In that case, ASIC issued an infringement notice against an entity for taking approximately 70 minutes to request a trading halt, and a further 20 minutes to issue an announcement, responding to an article that had appeared in the Dow Jones newswire service containing fairly specific details of a very material acquisition the entity was close to consummating. ASX had in the meantime contacted the entity and suggested that it needed to put out an announcement straight away or request a trading halt, noting that by that point 3 reasonably specific news items had appeared on the Dow Jones and Reuters newswire services regarding the transaction and that there had been a significant spike in the market price and traded volumes of its securities. Instead of requesting an immediate trading halt, the entity told ASX that it would consider its position and respond. It took a further 38 minutes to do that and to finally request a trading halt.

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

56 Annexure C has further guidance on the policies that an entity should implement to comply with its obligations under Listing Rule 3.1.

57 See '4.19 Dual listed entities' on page 28.

58 An entity can request a trading halt under Listing Rule 17.1.

59 An entity can request a voluntary suspension under Listing Rule 17.2.

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

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

A trading halt or voluntary suspension will not be suitable in every case. In particular, since a trading halt can only last for a maximum of two trading days,[61] a trading halt will not be appropriate or of assistance for those more complex or protracted disclosure issues which are unlikely to be resolved within two trading days (although, in an exceptional case, a voluntary suspension might be).

An entity's primary obligation under Listing Rule 3.1 and section 674 is to give market sensitive information to ASX for release to the market promptly and without delay. ASX would not expect an entity to request a trading halt or voluntary suspension before it has assessed whether particular information is in fact market sensitive and therefore needs to be disclosed under Listing Rule 3.1. Having made that assessment, if the entity is able to give the required announcement to ASX promptly and without delay then, in most cases, it will not need a trading halt or voluntary suspension to manage its disclosure obligations.

A trading halt may, however, be necessary in the following scenarios:

- there are indications that the information may have leaked ahead of the announcement[62] and it is having, or (where the market is not trading) is likely when the market resumes trading to have, a material effect on the market price or traded volumes of the entity's securities;
- the entity has been asked by ASX to provide information to correct or prevent a false market; or
- the information is especially damaging and likely to cause a significant fall in the market price of the entity's securities (eg, information that the board of the entity has resolved to appoint an administrator or that a lender has declared an event of default and appointed a receiver),

and in each such scenario:

- where the market is trading, the entity is not in a position to give an announcement to ASX straight away; or
- where the market is not trading, the entity will not be in a position to give an announcement to ASX before trading next resumes.

As indicated above, these are each scenarios where ASX will expect an entity to act particularly quickly and, if it is not in a position to issue an announcement to the market straight away, to request a trading halt.

A trading halt or voluntary suspension will also be necessary if for any reason there is going to be a delay[63] in the release of an announcement under Listing Rule 3.1 and the market is trading during any part of the delay. Examples include:

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[61] Under the ASX Operating Rule Procedure 3301, the longest a trading halt can last is the commencement of "open session state" on the second trading day after the day the trading halt is imposed or, if the trading halt is imposed after the end of that day's "CSPA session state", the commencement of open session state on the third trading day after the trading halt is imposed.

The "open session state" refers to the state that the ASX market platform operates in during normal trading, where overlapping buy orders and sell orders are matched in accordance with price/time priority. The "CSPA session state" refers to the state the ASX market platform operates in during the closing auction on a trading day.

Thus, the longest a trading halt can last is effectively two full trading days. It may in fact be less than two full trading days if the trading halt is put in place part-way through a trading day. For example, if the trading halt is put in place at any time before the close of trading on ASX on a Monday, the maximum period it can operate will be up to the commencement of trading on the following Wednesday (assuming the Monday, Tuesday and Wednesday are all trading days), regardless of whether it was put in place before trading started, or while trading was under way, on the Monday. If the trading halt is put in place after the close of trading on ASX on the Monday, the maximum period it can operate will be up to the commencement of trading on the following Thursday (assuming the Tuesday, Wednesday and Thursday are all trading days).

[62] See '5.8 Listing Rule 3.1A.2 – the requirement for information to be confidential' on page 35,

[63] As above, the word "delay" here is not intended to capture a mere passing of time between when an entity first becomes obliged to give information to ASX and when it gives an announcement to ASX but rather a deferring, postponing or putting off of the announcement to a later time.

- where the entity considers the announcement to be so significant that it ought to be approved by its board before it is released to the market but, due to the unavailability of directors, the board meeting is not able to be held promptly and without delay;
- where the situation is uncertain or evolving but is likely to resolve itself within a relatively short period (in the case of a trading halt, within two trading days) and the entity considers that it would be better for the announcement to be delayed until there is greater certainty or clarity around the outcome – a case in point would be where the announcement is required because of a leak of information about a transaction under negotiation, where the entity reasonably expects to conclude the negotiations within a short period and it considers that it would be better to delay its announcement until after the negotiations have concluded and it can give a more definitive and informative announcement about the transaction, rather than to make an immediate announcement about the current state of the negotiations; and
- Example H4 in Annexure A.

A voluntary suspension is generally only going to be appropriate where:

- the entity has been in a trading halt but the relevant disclosure issue has not been resolved within the maximum period permitted for a trading halt;
- the situation would warrant the granting of a trading halt but the entity does not believe that the relevant disclosure issue will be resolved within the maximum period permitted for a trading halt; or
- the entity is in serious financial difficulties and it is reasonably of the view that continued trading in its securities is likely to be materially prejudicial to its ability to successfully complete a complex transaction that is, or a series of interdependent transactions that are, critical to its continued financial viability.[64]

ASX would strongly encourage an entity which is unsure about whether it should be requesting a trading halt or voluntary suspension to cover the period required to prepare an announcement, to contact its listings adviser at ASX to discuss the situation.

If the entity decides not to request a trading halt or voluntary suspension to prevent the market trading ahead of an announcement, ASX would also strongly encourage the entity to monitor:

- the market price of its securities;
- major national and local newspapers;
- if it has access to them, major news wire services such as Reuters and Bloomberg;
- any investor blogs, chat-sites or other social media it is aware of that regularly post comments about the entity;[65] and
- enquiries from analysts or journalists,

for signs that the information to be covered in the announcement may have leaked and, if it detects any such signs, to contact ASX immediately to discuss whether it is appropriate to request a trading halt.

[64] See '5.10 Entities in financial difficulties' on page 39.

[65] For example, the "shareholder action" blogs that exist for some entities. An entity which is the subject of such a blog would often be aware of that fact from communications with its shareholders and, in ASX's experience, would generally be monitoring the blog for an insight into what its shareholders are saying about it. Some (generally larger) entities would also be monitoring certain investor blogs, chat-sites and other social media sites through their investor relations function, again for the purposes of understanding what is being said about them on those sites. Where a market sensitive announcement is pending, ASX considers that the entity should also be monitoring these sites for signs that the information in the pending announcement may have leaked.

It should be noted that the Listing Rules, including Listing Rule 3.1, continue to apply while an entity's securities are in a trading halt or voluntary suspension.[66] Hence, the mere fact that an entity has requested and been granted a trading halt or voluntary suspension technically does not relieve it of the obligation to announce information under Listing Rule 3.1 promptly and without delay. However, ASX does not apply the Listing Rules in a technical manner but rather in a manner that accords with their spirit, intention and purpose, and in a way that best promotes the principles on which they are based.[67] Whether and how promptly an entity has requested a trading halt or voluntary suspension so as to prevent trading in its securities happening on an uninformed basis are significant factors that ASX takes into account in assessing whether the entity has complied with the spirit, intention and purpose of Listing Rule 3.1[68] and whether it ought to refer a possible breach of the rule to ASIC.[69]

4.7 The approach ASX takes to requests for disclosure-related trading halts/voluntary suspensions

As stated in ASX Guidance Note 16 *Trading Halts and Voluntary Suspensions*:

> "*The general principle applied by ASX in considering requests for a trading halt or a voluntary suspension is that interruptions to trading should be kept to a minimum and, therefore, a trading halt or a voluntary suspension should only be permitted:*
>
> - *where there is a material risk that trading in a particular security might occur while the market as a whole is not reasonably informed; or*
> - *where it is needed to correct or prevent a false or disorderly market.*"

ASX recognises that, faced with the difficulty of predicting whether information will have a material effect on the price or value of its securities and the serious legal consequences that may follow if information is not disclosed when required, an entity may err on the side of caution and seek to disclose information where there may be some doubt as to whether the information is in fact market sensitive. Not all announcements an entity may wish to make will warrant a trading halt or voluntary suspension. It is for this reason that when an entity requests ASX for a trading halt or voluntary suspension to allow it the time it needs to prepare an announcement under Listing Rule 3.1, ASX will usually ask the entity to outline the nature of the information in question and assess for itself whether the circumstances warrant the granting of a trading halt or voluntary suspension.[70]

If ASX considers that the information is of a character that is likely to be market sensitive and that the circumstances warrant a trading halt or voluntary suspension, ASX will invariably agree to the request so as to afford the entity the time it needs to prepare and issue an announcement. In that case, provided the entity has requested a trading halt or voluntary suspension promptly after it became obliged to disclose the information under Listing Rule 3.1 and, after the trading halt or voluntary suspension has been granted, then acts to issue an announcement as quickly as

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66 Listing Rule 18.6.

67 Listing Rule 19.2.

68 As entities are required to do under Listing Rule 19.2.

69 ASX understands that ASIC will also take into account whether or not an entity has promptly requested a trading halt in determining whether it will take enforcement action in relation to a possible breach of section 674: see, for example, ASIC Media Release 08-117, referred to above in note 55, and ASIC Media Release 07-69. In the latter case, a listed company received an offer to acquire all of its ordinary shares. At approximately noon the following day, reasonably specific details of the proposal were reported in a Dow Jones Newswire article, indicating that the proposal was no longer confidential. The company did not make an announcement about the proposal until approximately 8.30 am the following morning. ASIC issued an infringement notice and the company elected to comply with the notice.

In both ASIC Media Release 08-117 and ASIC Media Release 07-69, the delay in requesting a trading halt was specifically mentioned by ASIC as a factor in its decision to issue the infringement notice.

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

70 An entity is required to tell ASX its reasons for wanting a trading halt or voluntary suspension – see the first bullet point in Listing Rules 17.1 and 17.2.

it can in the circumstances, ASX will regard the entity as having complied with the spirit, intention and purpose of Listing Rule 3.1.[71]

If ASX considers that the information is of a character that is unlikely to be market sensitive or that the circumstances do not warrant the granting of a trading halt or voluntary suspension, ASX may decline the request and ask the entity to complete and lodge its announcement as quickly as it can.[72] In that case, should the information ultimately turn out to be market sensitive,[73] provided the entity approached ASX promptly after it became obliged to disclose the information under Listing Rule 3.1 to discuss its request for a trading halt or voluntary suspension and, after the request was refused, then acted to issue an announcement as quickly as it could in the circumstances, ASX will regard the entity as having complied with the spirit, intention and purpose of Listing Rule 3.1.[74]

When approached by an entity for a trading halt or voluntary suspension, ASX will usually explore with the entity the scope and timing of the announcement that will bring an end to the halt or suspension.[75] In some cases where the situation is uncertain or evolving but is likely to resolve itself within a relatively short period (in the case of a trading halt, within two trading days), ASX may agree that it is appropriate for the announcement to be delayed until there is greater certainty or clarity around the outcome so that a more definitive and informative announcement can be made to the market. In other cases, it may be appropriate for an announcement to be made as soon as possible that simply explains the current situation so that the entity can come out of the halt or suspension at the earliest opportunity.

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

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

The courts have acknowledged that it is appropriate for some particularly significant continuous disclosure announcements to be considered and approved by the board of directors of an entity before they are released.[76] They have also made it clear, however, that this is not legally necessary in all cases.[77]

Given the requirement for announcements under Listing Rule 3.1 to be issued immediately, an entity should have suitable arrangements in place to enable this to occur. Such arrangements may include giving appropriate delegations[78] to senior management to release some announcements of their own accord[79] and, if the matter falls

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

[72] This would be a fairly rare circumstance. If an entity tells ASX that it needs a trading halt to give it time to make an announcement about information that it considers to be market sensitive, ASX will usually err on the side of caution and grant the trading halt, so as to avoid any suggestion of the market trading on an uninformed basis. ASX will generally only deny such a request where, in its opinion, the information is clearly not market sensitive or a trading halt is clearly not appropriate.

[73] Of course, if the information turns out not to be market sensitive, then it was not technically disclosable under Listing Rule 3.1 in the first place.

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

[75] An entity is required to tell ASX the event it expects to happen that will end a trading halt or voluntary suspension – see the third bullet point in Listing Rules 17.1 and 17.2.

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

[77] See *Morley v ASIC* [2010] NSWCA 331, at paragraph 808.

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

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

outside those delegations, having a disclosure committee[80] that can meet by phone or on short notice to consider the announcement.

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

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

Where the information to be disclosed falls within the exceptions to immediate disclosure in Listing Rule 3.1A but the board determines that it is now appropriate and timely to announce the matter to the market, it will be that decision of the board that is the trigger for the announcement rather than any legal obligation under Listing Rule 3.1.[81] Again, it usually will not be necessary to request a trading halt ahead of that decision (although that could change if there are signs that information about the matter has leaked ahead of the announcement and this has had or could have a material impact on the market price or traded volumes of the entity's securities).

Where, however, the information to be disclosed relates to something that has already happened and:

- it does not and never did fall within the exceptions to immediate disclosure in Listing Rule 3.1A, or
- it originally fell within those exceptions but has since ceased to do so,

the obligation to disclose will usually already have arisen before the board comes to consider the matter – in the former case at the point when the entity first became "aware" of the information[82] and in the latter case at the point when Listing Rule 3.1A ceased to apply. To comply with the timing requirements of Listing Rule 3.1, an announcement with that information must be given to ASX promptly and without delay. In turn, this means that the requisite board meeting to consider the announcement must be convened and the board must settle and approve the announcement promptly and without delay. Consideration of the announcement cannot be delayed to a previously scheduled regular board meeting or to a meeting to be convened at a future date.

In addition, if the market will be trading at any time after the entity first became obliged to give market sensitive information to ASX under Listing Rule 3.1 and before the board can approve the giving of an announcement with that information to ASX for release to the market, the entity should consider carefully whether it ought to request a trading halt to prevent the market trading on an uninformed basis over that period, applying the guidance above in '4.6 The use of trading halts and voluntary suspensions to manage disclosure issues'.

Again, ASX would strongly encourage an entity which is unsure about whether it should be requesting a trading halt to cover the time required for the board to approve an announcement, to contact its listings adviser at ASX to discuss the situation.

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[80] Such committees often comprise or include the chairperson of directors, the chief executive officer, the company secretary and the general counsel. Further guidance on disclosure committees can be found in the Governance Institute of Australia publication *Good Governance Guide: Disclosure and communications policy*, available online at: https://www.governanceinstitute.com.au/media/365559/ggg_disclosure_and_comms_policy-v3.pdf.

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

[82] See '4.4 When does an entity become aware of information?' on page 12 above.

4.9 What other steps can an entity take to facilitate compliance with Listing Rule 3.1?

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

1. Have a template letter requesting ASX to grant a trading halt ready for use at all times. In this way, if it needs to request an urgent trading halt, it can do so without delay.[83]

2. Anticipate what might happen if information about a confidential transaction being negotiated leaks and have a template announcement ready that can be updated and issued straight away (see Example H1 in Annexure A).

3. Where it has advance notice of an event that is likely to require an announcement under Listing Rule 3.1, prepare a draft announcement ahead of time that can be issued straight away (see Examples H2 and H3 in Annexure A).

4. Where the event that gives rise to the need to make an announcement is within its control, be sensitive to the hours when licensed markets in Australia are trading and, where possible, try to ensure that the event happens and the announcement is made before trading commences or after trading has closed,[84] to avoid disrupting the normal course of trading on licensed markets (see Example H3 in Annexure A).

5. Ensure that the person (or each of the persons[85]) appointed under Listing Rule 12.6 to be responsible for communications with ASX in relation to Listing Rule matters:

   - has the organisational knowledge to have meaningful discussions on disclosure matters;
   - is able to request a trading halt and/or issue an announcement to the market, if that is what is required,[86]

   and that person (or at least one of those persons) is readily contactable by ASX by telephone, and available to discuss any pressing disclosure issues that may arise, during normal market hours and for at least one hour either side thereof (ie, from 9am to 5pm Sydney time) on each day that ASX is trading.[87]

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

On this last point, ASX acknowledges that the decision to request a trading halt is a serious one and that an entity will often have internal approval processes that need to be followed before a person appointed under Listing Rule 12.6 to be responsible for communications with ASX in relation to Listing Rule matters will have the authority to request a trading halt. For example, many entities typically require such a request to be approved by the

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

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

[85] An entity may appoint more than one person to be responsible for communications with ASX, to cater for one of its contacts being absent or on leave.

[86] Where an entity's nominated representative under Listing Rule 12.6 is not available, ASX will accept a request from any director or other officer of the entity for a trading halt.

[87] This requires the nominated representative to be available to take calls from ASX, if they are based in Western Australia, from as early as 6am (WA time) during summer time and 7am (WA time) at other times and, if they are based in New Zealand, until as late as 7pm (NZ time). They must also be available to take calls from ASX on trading days that fall on a public holiday where they live and make suitable arrangements to cover any absences due to illness or while they are on leave.

chairperson and/or the CEO. If an entity has such approval processes in place, they must be able to be activated and any necessary approvals obtained promptly. They should also include appropriate contingencies for when key approvers are not available.

The need to resolve a continuous disclosure issue can be extremely time critical. If for any reason ASX is not able to resolve such an issue to its satisfaction reasonably promptly,[88] ASX may be left with little option but to suspend the quotation of the entity's securities until the issue can be properly resolved. The entity may also expose itself to regulatory action by ASIC.[89]

4.10 How does Listing Rule 3.1 interact with other disclosure obligations?

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

- the specific matters referred to in Listing Rules 3.4 – 3.21;[90] and
- a significant change to the nature or scale of its activities under Listing Rule 11.1.[91]

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

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

- the periodic disclosure obligations in chapters 4 and 5 of the Listing Rules;
- the half-yearly and annual financial reporting requirements in the Corporations Act; and
- the disclosure obligations in relation to a prospectuses, PDSs, cleansing notices, bidders' statements, targets' statements and scheme documents under the Corporations Act,[92]

(together, "periodic disclosure documents").

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

All other things being equal, an entity is not expected to release the information in a periodic disclosure document ahead of the scheduled release date for that document.[93] Sometimes, however, in the course of preparing a periodic

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[88] For example, because ASX is not able to contact an entity's nominated representative(s) under Listing Rule 12.6, because they do not have the organisational knowledge to have a meaningful discussion on the matter or because they are not able to obtain promptly any necessary internal approvals to issue an announcement or to request a trading halt.

[89] See, for example. ASIC Media Release 08-117, referred to above in note 55.

[90] This includes notifications of specific information about takeover bids; buy-backs; changes in capital; the release of restricted securities and securities subject to voluntary escrow; changes in the exercise price of, or the entry of underwriting agreements for, the exercise of options; auctions of forfeited shares by NL companies; security holder meetings; changes to the entity's registered and principal administrative offices; changes to the location or the closing of any register of securities; changes in chairperson, directors, chief executive officer, company secretary or auditor; the material terms of employment, service or consultancy agreements entered into with the CEO or a director of an entity or their related parties; documents sent to security holders; substantial holdings; requisitions received from security holders; financial documents given to overseas exchanges; in the case of an entity that is not established in Australia, changes to the law of its home jurisdiction that materially affect the rights or obligations of security holders; ownership limits; directors' interests; record dates; and dividends and distributions.

[91] See generally Guidance Note 12 *Significant Changes to Activities*.

[92] The list of disclosure obligations here that an entity may have under the Corporations Act is not intended to be exhaustive.

[93] ASX understands that it is common market practice for the board of an entity to review and approve in principle its half year/annual financial statements, an interim/preliminary final profit announcement and an interim/final dividend ahead of their scheduled release date and then for the board, or a committee of the board, to formally approve the financial statements and profit announcement and to formally resolve to pay the dividend just prior to when the announcement is due to be released to the market (eg, on the morning of the announcement

disclosure document, market sensitive information may become apparent that ought to be disclosed immediately under Listing Rule 3.1. Two areas where this issue commonly arises are market sensitive "earnings surprises"[94] and market sensitive material post-balance date events.

If, in the course of preparing a periodic disclosure document, it becomes apparent to an entity that its reported earnings will differ so significantly from market expectations that a reasonable person would expect information about its reported earnings to have a material effect on the price or value of its securities, the entity must disclose that information to ASX immediately under Listing Rule 3.1.[95] It cannot wait until the periodic disclosure document is released. The same is true for information about a material post-balance date event that a reasonable person would expect to have a material effect on the price or value of its securities.

Entities should also be aware of Listing Rule 4.3D, which requires an entity to tell ASX immediately of any circumstances which are likely to affect the results or other information contained in its preliminary final report and to explain their effect on the entity's current or future financial performance or financial position. This rule reflects the primacy of continuous disclosure obligations over periodic disclosure obligations. If particular information is market sensitive, it must be disclosed immediately and cannot be withheld until the scheduled release date for a periodic disclosure document.

4.11 Who can make an announcement under Listing Rule 3.1?

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

ASX cannot and will not accept an announcement under Listing Rule 3.1 from a third party, such as a security holder or former office holder.[96]

4.12 Can an announcement under Listing Rule 3.1 be embargoed?

Given the need for disclosure to be made immediately under Listing Rule 3.1, ASX cannot accept, and will disregard, any embargo[97] an entity attempts to place on an announcement given to ASX under that rule.[98]

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or in the evening beforehand). Amongst other reasons, this is to ensure that any material post-balance date events are accurately reflected in the financial statements and profit announcement and factored into the dividend decision.

ASX has no issue with that particular practice and would not expect the financial statements to be released, the profit announcement to be made or the dividend decision to be notified to ASX ahead of the due date for release just because they may have been approved in principle by the board beforehand.

[94] ASX prefaces the phrase "earnings surprises" with "market sensitive" to limit it to those situations where an entity's reported earnings differ so significantly from market expectations that a reasonable person would expect information about its reported earnings to have a material effect on the price or value of its securities. This is to differentiate those lesser situations, sometime also referred to as an earnings surprise, where an entity's reported earnings differ from the consensus estimate (often described as "surprising on the upside" if the entity's earnings are higher than the consensus estimate and "surprising on the downside" if the entity's earnings are lower than the consensus estimate) but not necessarily to an extent that a reasonable person would expect information about its reported earnings to have a material effect on the price or value of its securities.

[95] See '7.3 Market sensitive earnings surprises', 'Example F – material difference in earnings compared to earnings guidance' and 'Example G – material difference in earnings compared to consensus estimates' on pages 44, 73 and 74 respectively.

[96] Where ASX receives information from a third party which they assert should be, or should have been, disclosed by an entity under Listing Rule 3.1, ASX will make enquiries of the entity as to the accuracy and materiality of the information. If ASX forms the view that the information is accurate, market sensitive and not within the carve-outs from disclosure in Listing Rule 3.1A, ASX will ask the entity to make an announcement under Listing Rule 3.1: see '8.5 Complaints or allegations of non-compliance' on page 59.

[97] That is, a condition that ASX cannot release the announcement to the market until a certain time.

[98] ASX does not recognise any embargo on a document given to it for public release: see Listing Rule 15.8.

4.13 What form should an announcement under Listing Rule 3.1 take?

A disclosure under Listing Rule 3.1 must be in the form of a written announcement[99] and given to the ASX Market Announcements office for release to the market.[100]

4.14 Guidelines on the headers to announcements under Listing Rule 3.1

The ASX Online announcements lodgement screen includes a "title header" field where a title for the announcement can be inserted. It is common for an entity to insert the heading, or an abridged version[101] of the heading, to the announcement in that field.

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

The header to an announcement should briefly and accurately convey its contents (eg, "1:4 rights issue of ordinary shares at $1" or "Full year profits down by 20%"). Not only will this assist brokers and investors in assessing the significance of the announcement, it will also assist ASX in determining more quickly whether an announcement could be market sensitive and therefore warrants a halt to trading under ASX Operating Rule 3301(a).[102]

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

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

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[99] Listing Rule 19.10.

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

[101] This field is limited to 60 characters.

[102] See '4.18 What steps does ASX take when it receives an announcement under Listing Rule 3.1?' on page 28.

4.15 Guidelines on the contents of announcements under Listing Rule 3.1

Wherever possible,[103] an announcement under Listing Rule 3.1 should contain sufficient detail for investors[104] or their professional advisers[105] to understand its ramifications and to assess its impact on the price or value of the entity's securities.

For example, depending on the circumstances, an announcement about the signing of a contract relating to a significant acquisition or disposal might include information about:

- the parties to the contract;[106]
- the assets or businesses proposed to be acquired or disposed of;[107]
- any material conditions that need to be satisfied before the agreement becomes legally binding or proceeds to completion;
- the likely effect of the transaction on the entity's total assets, total equity interests, annual revenue (or, in the case of a mining exploration entity or other entity that is not earning material revenue from operations, annual expenditure) and annual profit before tax and extraordinary items;
- any issue of securities proposed as part of, or in conjunction with, the transaction, including its effect on the total issued capital of the entity and the purposes for which the funds raised will be used;
- any changes to the board or senior management proposed as a consequence of the transaction; and
- the timetable for implementing the transaction.

It is open to an entity which signs a market sensitive agreement to lodge a copy of the agreement on the ASX Market Announcements Platform, if it wishes to do so. This will help to reduce the amount of material about the agreement that needs to be included in its announcement[108] and also avoid any issues about whether any material terms of the agreement have been properly disclosed. However, ASX recognises that there are cases where an entity will not wish to lodge a copy of an agreement on the ASX Market Announcements Platform.[109] In those cases, the announcement about the agreement should contain a fair and balanced summary of the material terms of the agreement and include any other material information that could affect an investor's assessment of its impact on the price or value of the entity's securities.

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[103] This does not apply to an "interim" or "holding" announcement about an uncertain situation. In such a case, the announcement may only be able to outline the current situation and foreshadow that a further announcement will be made when the situation is more certain.

[104] In *Forrest v ASIC* [2012] HCA 39, the majority of the High Court said (at paragraph 36) that it was sufficient to describe the intended audience of an announcement under Listing Rule 3.1 "as investors (both present and possible future investors) and, perhaps, as some wider section of the commercial or business community." In a concurring judgment, Heydon J (at paragraph 135) described the intended audience with greater specificity as "superannuation funds, other large institutions, other wealthy investors, stock brokers and other financial advisers, specialised financial journalists, as well as smaller investors reliant on advice."

[105] As Heydon J recognised in *Forrest v ASIC*, note 104 above, smaller investors are often reliant on professional advice to understand the ramifications of an announcement under Listing Rule 3.1, particularly if it involves a more complex or technical matter. On these types of matters, ASX considers that the announcement should include sufficient details for professional advisers to be able to understand its ramifications, to assess its impact on the price or value of the entity's securities and to advise their clients accordingly.

[106] If a party to the contract is a subsidiary of, controlled by, or acting as nominee for, another entity, the information to be disclosed might include the details of that entity as well.

[107] If the asset being acquired is a mining exploration tenement, the information to be disclosed might include details of the tenement, where it is located and a summary of previous exploration activity and expenditure on the tenement.

[108] In such a case, it will generally only be necessary for the announcement to include a summary of the key commercial terms of the underlying transaction, a general description of the agreement and a statement that a copy of the agreement is available on the ASX Market Announcements Platform.

[109] For example, it may contain commercially sensitive information that ought not be disclosed (although see '4.20 Commercially sensitive information' on page 29) or it may include a confidentiality clause that would make its full publication on the ASX Market Announcements Platform inappropriate (see notes 283 and 298 below and the accompanying examples in Annexure A).

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

An announcement under Listing Rule 3.1 must be accurate, complete and not misleading.[110] To meet this last requirement, opinions expressed in an announcement should be honestly held and balanced and should be clearly identified as a statement of opinion rather than a statement of fact. Any forward looking statements in an announcement, such as earnings guidance or exploration or production targets, must also have a reasonable basis in fact or else by law they will be deemed to be misleading.[111] Entities should note ASIC's guidance that any material assumptions or qualifications that underpin forward looking statements in an announcement under Listing Rule 3.1 should be stated in the announcement.[112] ASX also encourages the inclusion of material assumptions and qualifications as it provides context and will help the market to understand the basis for the forward looking statements.

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

For this reason, with very few exceptions,[113] an entity should not submit a broker research report about it, or any extract from or hyperlink to such a report, for publication on the ASX Market Announcements Platform under Listing Rule 3.1.[114] Any market sensitive fact-based material in such a report should already have been released by the entity under that rule beforehand and so it can reasonably be inferred that the entity is seeking to publish the report

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[110] Giving materially false or misleading information to ASX potentially breaches sections 1041H and 1309 of the Corporations Act (see 'The statutory prohibitions against false or misleading disclosures' on page 79). Note also the observation of McLure JA in *Jubilee Mines NL v Riley*, note 16 above, at paragraph 161, that:

> "The 'information' [to be disclosed] must also include all matters of fact, opinion and intention that are necessary in order to prevent the disclosing company otherwise engaging in conduct that is misleading or deceptive or is likely to mislead or deceive …"

[111] See note 327 and accompanying text.

[112] See ASIC Information Release IR 01/05 dated 7 February 2001, which refers to ASIC's guidance on prospective financial information, now set out in ASIC Regulatory Guide 170 *Prospective financial information*. From an entity's standpoint, the inclusion of material assumptions and qualifications in an announcement under Listing Rule 3.1 may also help to avoid future legal liability (eg, for misleading or deceptive conduct) if the assumptions prove to be incorrect or the qualifications are triggered.

Note also that Chapter 5 of the Listing Rules requires mining entities to disclose the following assumptions behind certain forward looking statements:

(1) the mining and metallurgical assumptions used when estimating and reporting mineral resources (Table 1 of the JORC Code in Appendix 5A);

(2) the cost and revenue assumptions used when estimating and reporting ore reserves (Table 1 of the JORC Code in Appendix 5A);

(3) the material assumptions from the relevant preliminary feasibility study or feasibility study and the mining and processing assumptions used to support estimates of ore reserves (Listing Rule 5.9.1);

(4) to the extent known, the key assumptions used to prepare historical estimates or foreign estimates of mineralisation in relation to a material mining project (Listing Rule 5.12.5); and

(5) the material assumptions underpinning certain mining production targets or forecast financial information based on such mining production targets (Listing Rules 5.16.1 and 5.17.1).

[113] There may be particular circumstances where a broker report is required to be lodged on the ASX Market Announcements Platform, eg, where it forms part of, or has been incorporated by reference into, a prospectus or product disclosure statement that is required to be lodged with ASX under Listing Rule 3.10.4.

[114] ASX has no objection to an entity publishing a broker research report about it on its website. An entity which does so, however, needs to be alert to the legal issues that this may raise and should take advice on those issues. For example, in the absence of a suitable disclaimer, the publication of the report may imply that the entity endorses the contents of the report, including any price target, earnings forecast or other statement about the entity's prospects. Also, the broker will most likely have copyright in the report and therefore their consent should be sought to its publication, in the form and context in which it will appear.

If a broker research report has been commissioned or paid for by an entity, or there is some other material commercial relationship between the broker and the entity (eg, if the broker is acting as an underwriter or placement agent for an issue of securities by the entity), then that fact should generally be disclosed in the report itself (see ASIC Regulatory Guide 79 *Research report providers: Improving the quality of investment*). In addition, such a report should not be described on the entity's website or elsewhere as "independent", since that would plainly be misleading.

for its opinion-based material (such as the broker's buy recommendation or price target). This will raise an issue about whether the report is really being published for promotional rather than informational reasons. It may also raise concerns about whether the entity is impliedly endorsing any price target, earnings estimate or other forward looking statement in the report.[115] ASX may require an entity which does happen to publish a broker research report about it, or any extract from or hyperlink to such a report, on the ASX Market Announcements Platform to make a further announcement addressing these concerns.

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

ASX may refuse to accept or publish an announcement from an entity that does not meet the standards described above or may require the entity to lodge a corrective announcement.[116]

4.16 Announcements must be given to ASX first

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

The reason for this requirement is to make ASX's Market Announcements Platform the central collection and dissemination point for market sensitive information. This ensures that such information is quickly and broadly disseminated to all sections of the market, enhancing the efficiency and integrity of that process and helping to reduce the risk of informational inequities and insider trading.

ASX acknowledges that the requirement to give information to ASX first can pose practical difficulties for entities that have business operations in countries in different time zones to Australia. ASX encourages any entity in this situation which has advance warning that it may need to make an announcement in another country at a time when the ASX Market Announcements office is not open,[117] to contact its ASX home branch to discuss the arrangements that can be made to facilitate that occurring in a manner that does not undermine the policy behind Listing Rule 15.7.

ASX also recognises that sometimes events will occur outside of the hours of operation of the ASX Market Announcements office, whether in Australia or overseas, which require an immediate public announcement (eg, a major natural disaster affecting the operations of an entity where an announcement may be required for health and safety reasons or for the peace of mind of staff and relatives). If an entity has a pressing commercial or legal need to make a market sensitive announcement outside of the hours of operation of the ASX Market Announcements office, provided it gives a copy of the announcement to the ASX Market Announcements office at the same time as it makes the announcement, so that it is queued for processing by the ASX Market Announcements office before

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[115] See also the discussion in '7.5 Publishing analyst forecasts or consensus estimates' on page 51.

[116] ASX notes that in *ASIC v Fortescue Metals Group Ltd* [2011] FCAFC 19, the Full Federal Court held (at paragraph 181) that making a false or misleading announcement under Listing Rule 3.1 could in certain circumstances (and did in the circumstances of that case) trigger a separate obligation under that Listing Rule and section 674 to make a corrective announcement. In overturning the decision of the Full Federal Court, the High Court was not required to rule on this point (see *Forrest v ASIC*, note 104 above, at paragraph 66).

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

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

licensed markets in Australia next open for trading, ASX will generally not take any action against the entity for infringing Listing Rule 15.7.

4.17 What if information is released to someone else before it is given to ASX?

If an entity becomes aware that market sensitive information which has not been given to ASX under Listing Rule 3.1 has been released to a section of the market (eg, at an investor or analyst briefing or at a meeting of security holders) or to a section of the public (eg, at a media briefing or through its publication on a website or in social media), the entity should immediately give the information to ASX under Listing Rule 3.1 in a form suitable for release to the market.[118]

The fact that information released through other outlets may be, or eventually become, "generally available" for the purposes of sections 674[119] is not an excuse for failing to disclose it to ASX under Listing Rule 3.1.

4.18 What steps does ASX take when it receives an announcement under Listing Rule 3.1?

Information given to ASX under Listing Rule 3.1 is quickly reviewed[120] and then released by ASX to the market.[121] Guidance Note 14 *ASX Market Announcements Platform* has further guidance on how this process occurs.

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

4.19 Dual listed entities

A dual listed entity (ie, an entity listed on ASX and on another exchange or exchanges) which becomes aware of information outside of the hours of operation of the ASX Market Announcements office[122] and which is required to release that information to an overseas exchange may do so provided that it gives the information to the ASX Market Announcements office at the same time, together with written advice that the information has been released to the overseas exchange.[123]

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

If another exchange on which it is listed permits a disclosure-related trading halt or voluntary suspension and there is a possibility of its securities trading on that exchange while ASX is in a trading halt or voluntary suspension, it

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

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

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

[121] If ASX has any queries or concerns about an announcement, it may delay the release of the announcement pending a discussion between the entity and a listings adviser to clear up those queries or concerns.

[122] See note 117.

[123] Listing Rule 15.7.1.

will generally be appropriate for the entity to request that exchange to grant an equivalent halt or suspension to ASX. It is the responsibility of the entity to co-ordinate the application and lifting of that halt or suspension with its halt or suspension on ASX.

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

Likewise, a dual listed entity which requests and is given a trading halt or voluntary suspension on another exchange to manage its disclosure obligations for a period during which ASX is also trading will need to contact ASX to request an equivalent trading halt or voluntary suspension to prevent its securities trading on ASX on an uninformed basis. Again, it is the responsibility of the entity to co-ordinate the application and lifting of the halt or suspension on ASX with its halt or suspension on the other exchange.

It should be noted that in addition to any market sensitive information that it is required to give to ASX under Listing Rule 3.1, an entity with a dual listing on the ASX and an overseas securities exchange must immediately give to ASX a copy of any document it gives to the overseas exchange that meets the following requirements:

- the document is given to the overseas stock exchange by the entity in its capacity as an entity listed on that exchange;
- the document is, or will be, made public by the overseas stock exchange;
- the document includes accounts or other similar financial information; and
- the document is not materially the same as another document that the entity has already given to ASX.[124]

Such documents, if not in English, must be accompanied by an English translation.[125]

4.20 Commercially sensitive information

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

Some commercially sensitive information may be a trade secret and therefore protected from disclosure under Listing Rule 3.1A.[126] Some commercially sensitive information, however, may be difficult to characterise in that manner.

ASX has no issue with an entity structuring an announcement about a particular transaction to avoid disclosing commercially sensitive matters, provided it includes sufficient information in the announcement to enable the market to assess the impact of the transaction on the price or value of the entity's securities.[127] For example, in many cases, it will be sufficient to disclose the expected impact of a material contract on the entity's revenues (in the case of a customer), expenses (in the case of a supplier) or profit (in either case), without having to disclose the unit prices receivable or payable, or the volumes to be delivered or received, under the contract.

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[124] Listing Rule 3.17B.

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

[126] See '5.7 Trade secrets' on page 35.

[127] Guidance Note 31 *Reporting on Mining Activities* and Guidance Note 32 *Reporting on Oil & Gas Activities* have further guidance on the reporting of commercially sensitive information in announcements relating to mining and oil and gas activities.

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

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

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

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

Entities concerned about the disclosure of negative information should also refer to the guidance under '5.10 Entities in financial difficulties' below.

4.22 Disclosure must be made even if it is contrary to contractual commitments

An entity must comply with its disclosure obligations under Listing Rule 3.1 and section 674, even where it is party to a confidentiality or non-disclosure agreement that might otherwise require it to keep information confidential.[128]

Generally speaking, any entity entering into a confidentiality or non-disclosure agreement should insist upon an express carve-out for the disclosure of information that is required by law or under the rules of a stock exchange so as not to create a conflict with its disclosure obligations under section 674 and Listing Rule 3.1. However, even if such an express carve-out is not included, it is highly likely that one will be implied in any event, on the basis that a commercial contract cannot require a party to act in a manner contrary to the general law.[129]

It should be noted that the ASX Listing Rules are contractually binding on, and are enforceable against, an entity under both the Corporations Act and the general law.[130] A party to a confidentiality or non-disclosure agreement who seeks to enforce it against an entity in an attempt to prevent the entity from disclosing information it is required to disclose under Listing Rule 3.1 may have difficulty doing so, since that would interfere with the contractual relations between the entity and ASX. It should also consider its potential liability under section 674(2A) and 1317HA (as someone who has procured, and therefore been "involved in", a breach of section 674(2) by the entity) should it succeed in that endeavour.[131]

4.23 Suspended entities

Entities whose securities have been suspended from trading continue to be subject to the Listing Rules, including their continuous disclosure obligations under Listing Rule 3.1.[132]

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[128] See ASIC Media Release 08-149 (enforceable undertaking accepted from an entity to review its continuous disclosure compliance procedures, among other reasons, because it had delayed an announcement of market sensitive information for 6 days while it sought consent from the counterparty to a confidentiality agreement).

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

[130] Sections 793B and 793C. See also clause 5 of Appendices 1A and 1B of the Listing Rules.

[131] See notes 317 and 318 and accompanying text.

[132] Listing Rule 18.6.

Where an entity has been suspended from quotation under Listing Rule 17.3.1[133] or 17.5[134] for breaching an ASX Listing Rule, ASX will expect the entity to make an immediate announcement to the market to that effect, explaining the reason for the breach and when the entity expects to be in a position to rectify the breach so that trading in its securities can resume.

Where an entity has been suspended from quotation for any other reason, ASX will expect the entity to make an immediate announcement to the market to that effect, explaining the reason for the suspension, the event that is likely to lead to the suspension being lifted and when the entity expects that event to occur so that trading in its securities can resume.

Where an entity is subject to a longer-term suspension (eg, as a result of an administration or liquidation), ASX recommends that it implement a system of periodic (at least quarterly) disclosures to ensure that the market and its security holders are provided with regular updates as to its status and, in particular, the plans it may have for trading in its securities to resume and its progress in implementing those plans.

An entity that fails voluntarily to make such disclosures at least quarterly may be required by ASX to provide such information to ASX for release to the market.[135]

5. Listing Rule 3.1A – the exceptions to immediate disclosure

5.1 General

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

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

If the requirements in all three of Listing Rules 3.1A.1, 3.1A.2 and 3.1A.3 are initially satisfied in respect of particular market sensitive information but any one of them ceases to be satisfied thereafter,[136] Listing Rule 3.1A ceases to apply at that point and the entity must then disclose the information immediately under Listing Rule 3.1.

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

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

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

[133] That is, where the entity is unable or unwilling to comply with, or has broken, a Listing Rule.

[134] That is, where the entity has failed to lodge with ASX a document required by Listing Rules 4.2A, 4.3A, 4.4A, 4.5, 4.7B, 5.1, 5.2, 5.3, 5.4 or 5.5 or the annual report required under Listing Rule 4.7.

[135] Under Listing Rule 18.7 or 18.8.

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

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

5.3 Breach of law to disclose

This category of information is excluded from disclosure because it would clearly be inappropriate and potentially harmful to an entity and its security holders to force it to disclose information if it is subject to a law prohibiting it from doing so.

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

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

5.4 Incomplete proposals or negotiations

This category of information is excluded from disclosure[137] because of the prejudice it could cause to an entity and its security holders if it was effectively required to develop its corporate proposals and conduct its commercial negotiations in public. It is also excluded because of the propensity of markets to overreact in the short term to information that an entity may be contemplating a market sensitive transaction, even where the likelihood of the transaction proceeding is low or unclear.

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

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

A proposal involving an entity is incomplete unless and until the entity has adopted it and is committed to proceeding with it. Negotiations are incomplete unless and until they result in a legally binding agreement or the entity is otherwise committed to proceeding with the transaction being negotiated.[138]

Hence, all other things being equal:

- Where a unilateral proposal requires the approval of the board of directors of an entity, and nothing more, for the entity to be committed to it (such as a proposal to declare a dividend[139]), it will be complete when the board formally approves the proposal and resolves to proceed with it, and not beforehand. If the proposal is market sensitive, it will need to be announced immediately after the board resolves to proceed with it.[140]

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[137] The fact that this type of information may not be required to be disclosed under Listing Rule 3.1A does not prevent an entity from voluntarily disclosing it, should it consider it to be in its interests to do so. However, an entity which chooses to announce such information needs to take care that its announcement is not misleading. The announcement should make it absolutely clear that the relevant proposal is, or negotiations are, incomplete and ensure that readers are not misled as to the likelihood of the proposal coming to fruition or the negotiations being successfully concluded. Further, by voluntarily disclosing the existence of the proposal or negotiations, the entity may come under an obligation to update the market on any material developments as they arise.

[138] The reference to an entity otherwise being committed to proceeding with a transaction is intended to capture those situations where an entity may become legally bound to proceed with a transaction without having signed a legally binding agreement (eg, through the principles of estoppel). It is also intended to capture those situations where an entity enters into an arrangement or understanding committing itself to proceed with a transaction without having signed a legally binding agreement. Once the entity is so committed, the transaction is no longer an incomplete proposal or the subject of incomplete negotiations.

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

[140] In applying this guidance, an entity needs to differentiate carefully between those situations where board approval is required for the entity to be committed to proceeding with a market sensitive proposal and those situations where the entity is in fact already committed to a

- Where a unilateral proposal requires additional steps to be taken over and above the approval of the board of directors of an entity for the entity to be committed to it (such as a unilateral proposal[141] to make a takeover bid, which requires a bidder's statement and, in the case of an off market bid an offer document, to be lodged with ASIC[142]), it will be complete only when those steps have been taken, and not beforehand. If the proposal is market sensitive, it will need to be announced immediately after those steps have been completed.

- Where an entity is negotiating a transaction with another party or parties, those negotiations will be complete only when the parties enter into an agreement to implement or give effect to the transaction,[143] and not beforehand.[144] If the transaction is market sensitive, it will need to be announced immediately after the agreement has been entered into.

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

It is perfectly acceptable for an entity to arrange the signing of, and an announcement about, a market sensitive agreement at a convenient time before licensed securities markets have opened or after the licensed securities markets have closed. In fact, ASX would encourage entities to consider doing this to avoid disrupting the normal course of trading on licensed markets.[145]

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

It should be noted that the fact that an agreement to implement or give effect to a market sensitive transaction may be subject to conditions precedent to it becoming legally binding,[146] or conditions subsequent that must be satisfied before the transaction proceeds to completion, does not alter the fact that it will usually need to be disclosed at the point of signing. At that point, it is no longer an incomplete proposal or negotiation and so this exception will no longer apply.

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market sensitive proposal and is simply having that decision noted by the board. The former will not generally need to be announced until after the board has approved the proposal. The latter will need to be announced when the entity is committed to proceeding with the proposal, since the proposal will no longer be incomplete and the exception to immediate disclosure in Listing Rule 3.1A will cease to apply at that point.

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

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

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

144 This assumes that the entity has not otherwise committed itself to proceeding with the transaction before the agreement is signed: see note 138 above and accompanying text.

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

Entities that have reached substantive agreement on the terms of a material transaction but which have not yet signed legally binding documentation should be especially vigilant in monitoring the market and the media for signs that information about the transaction may have leaked and be prepared to make an immediate announcement about the transaction should that occur (see the text accompanying notes 152and 153).

146 For the avoidance of doubt, this includes, but it not limited to, a condition precedent requiring approval by the board of directors of one or more of the parties to the agreement before it is legally binding.

5.5 Matters of supposition or that are insufficiently definite to warrant disclosure

This category of information is excluded from disclosure[147] because of its propensity to misinform or mislead the market.

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

Information about a matter will be "insufficiently definite to warrant disclosure" if:

- the information is so vague, embryonic or imprecise;
- the veracity of the information is so open to doubt; or
- the likelihood of the matter occurring, or its impact if it does occur, is so uncertain,

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

The situation identified in the last bullet point above needs to be differentiated from the situation where an entity is aware of information about a known event or circumstance and also aware that the event or circumstance will have a material effect on the price or value of its securities, but where it may take time for the entity to put a figure or estimate on the financial impact of the event or circumstance.[148] Listing Rule 3.1 will generally require such information to be disclosed immediately and it is not appropriate for the entity to delay announcing the information just because it is not in a position to state the financial impact of the event or circumstance in its announcement. Example G in Annexure A illustrates the point.

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

5.6 Information generated for the internal management purposes of the entity

This category of information is excluded from disclosure because of the prejudice it could cause to an entity and its security holders, as well as the administrative burden it would create, if it was required to disclose information generated for internal management purposes.

To fall within this category, the information must have been "generated for the internal management purposes of the entity". The expression "entity" here is to be read in a commercial rather than a legal sense.[149] It includes not only information generated for the internal management purposes of the entity itself, but also for the internal management purposes of any child entity or other entity in which the entity may have an economic interest.

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[147] Again, the fact that this type of information may not be required to be disclosed under Listing Rule 3.1A does not prevent an entity from voluntarily disclosing it, should it consider it to be in its interests to do so. However, an entity which chooses to announce such information needs to take care that its announcement is not misleading. The announcement should make it absolutely clear that it is a matter of supposition and/or not definite and ensure that readers are not misled as to the likelihood of that changing.

[148] This latter situation in turn needs to be differentiated from the situation where the initial information an entity receives about an event or circumstance is incomplete and the entity needs to await further, more complete, information, or to make further enquiries or obtain expert advice, in order to be able to reasonably form a view on whether or not it is market sensitive. As indicated above in '4.4 When does an entity become aware of information?' on page 12, in such a case, the entity will only become aware of information that needs to be disclosed under Listing Rule 3.1 when the entity has come into possession of sufficient information about the event or circumstance in order to be able to appreciate its market sensitivity.

[149] See Listing Rule 19.2.

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

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

However, for the avoidance of doubt, the mere fact that information may happen to be mentioned in a document generated for internal management purposes does not mean that the information itself falls within this category. Management documents often include information about potentially market sensitive events or circumstances, where those events or circumstances (as distinct from the document that refers to them) could not fairly be described as being information generated for internal management purposes. Information about such events or circumstances is not protected from disclosure by this category.

5.7 Trade secrets

This category of information is excluded from disclosure because of the proprietary nature of the information in question and the prejudice it could cause to an entity and its security holders if it was required to disclose it. It is also excluded because requiring a trade secret to be disclosed on the basis that it is needed to understand the value of the entity's securities, when the very value of those securities is dependent on the matter remaining secret, would lead to a perverse outcome.

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

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

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

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

The word "confidential" in Listing Rule 3.1A.2 means "secret". Thus, information will be confidential for the purposes of that rule if:

- it is known to only a limited number of people;
- the people who know the information understand that it is to be treated in confidence and only to be used for permitted purposes; and
- those people abide by that understanding.[150]

[150] Information can be disclosed by an entity to its employees (who have a duty to their employer under the general law to maintain confidences), advisers (who have a duty to their clients under the general law to maintain confidences), bankers (who have a duty to their customers under the general law to keep information about their financial affairs confidential), and to regulators (who generally have statutory duties to maintain confidences) without it losing confidentiality, provided in each case the recipient of the information in fact treats it in confidence. It can also be disclosed to someone who has entered into a confidentiality agreement or is subject to a duty of confidence in equity without it losing confidentiality, provided again in each case the recipient of the information in fact treats it in confidence.

Thus, it is permissible for an entity to disclose management accounts and internal budgets and forecasts (being in each case information prepared for internal management purposes) to bankers, insurers or rating agencies on a confidential basis without having to disclose that information to the rest of the market under Listing Rule 3.1.

Whether information has the quality of being confidential is a question of fact, not one of the intention or desire of the entity. Accordingly, even though an entity may consider information to be confidential and its disclosure to be a breach of confidence, if it is in fact disclosed by those who know it, then it is no longer a secret and it ceases to be confidential information for the purposes of this rule.

It is therefore incumbent on an entity which wishes to rely on the carve-out from disclosure in Listing Rule 3.1A to ensure that it has in place suitable and effective arrangements to preserve confidentiality. Guidance on the steps that can be taken in this regard can be found in the joint publication by the Governance Institute of Australia and the Australasian Investor Relations Association entitled *Handling confidential, market-sensitive information: Principles of good practice*.[151]

Even with strong confidentiality safeguards, it is important to recognise that the more people who know information, the greater the risk that it will cease to be confidential. So, for example, if a party proposing to acquire a business wants, as part of its due diligence, to make enquiries of employees, customers or suppliers, or a party proposing to undertake an issue of securities wants to take soundings from brokers and potential investors, it and the other parties involved in the transaction need to be prepared for the chance that information about the transaction will not be kept in confidence.

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

- the market price of its securities and of the securities of any other listed entity involved in the transaction;
- major national and local newspapers;
- if it or its advisers have access to them, major news wire services such as Reuters and Bloomberg;
- any investor blogs, chat-sites or other social media it is aware of that regularly post comments about the entity;[152] and
- enquiries from analysts or journalists,

for signs that information about the transaction may no longer be confidential and have a draft letter to ASX requesting a trading halt and a draft announcement about the negotiations ready to send to ASX to cater for that eventuality.[153] The closer the transaction gets to being concluded, the higher the risk of leaks and the more diligent that monitoring should be.

In relation to the second component of Listing Rule 3.1A.2, ASX may form the view that information about a matter involving an entity has ceased to be confidential if there is:

- a reasonably specific and reasonably accurate[154] media or analyst report about the matter;
- a reasonably specific and reasonably accurate[155] rumour known to be circulating the market about the matter; or
- a sudden and significant movement in the market price or traded volumes of the entity's securities that cannot be explained by other events or circumstances.

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

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151 Available online at: http://www.governanceinstitute.com.au/media/520305/handling_confidential_information_guidance.pdf.

152 See note 65 above.

153 See Example H1 in Annexure A.

154 A media or analyst report that is wholly or partially inaccurate may give rise to a requirement to disclose information under Listing Rule 3.1B: see '6.4 Responding to comment or speculation in media or analyst reports and market rumours' on page 40

155 See note 154 above.

In the case of the first two bullet points immediately above, ASX will have regard to the degree of specificity in the media or analyst report or market rumour in assessing the extent to which there has been a loss of confidentiality. For example, if the report/rumour simply refers to an entity being about to enter into a particular transaction with another party without including any of the transaction details, ASX will generally only require the entity to disclose the fact that it is in negotiations with that party concerning that transaction, without disclosing any of the details under negotiation. If the report/rumour includes some specific and accurate transaction details, ASX will generally expect the entity to confirm those details. If it includes some inaccurate transaction details, the response required will depend on the circumstances – in some cases, it may be appropriate to correct those details, while in others it may be appropriate simply to indicate that they are inaccurate or that they are still under negotiation.

In relation to the third bullet point immediately above, ASX occasionally finds an entity or its advisors wanting to debate whether a sudden and significant movement in the market price or traded volumes of its securities can fairly be attributed to information about a particular matter ceasing to be confidential. ASX considers any such debate to be misplaced.[156] If an entity advises ASX that there is market sensitive information that has not been disclosed in reliance on Listing Rule 3.1A (as it must when it is asked that question by ASX[157]) and it is not able to point to any other event or circumstance which explains the movement in the market price or traded volumes of its securities, ASX has no choice but to assume that the information in question has become known to some of those trading in the market and therefore is no longer confidential.[158] Upon the entity being advised by ASX that it is of the view that the information has ceased to be confidential, Listing Rule 3.1A will no longer apply and the entity will then be obliged to make an immediate announcement about the information under Listing Rule 3.1.[159]

The processes ASX generally follows in these situations are explained under '6.4 Responding to comment or speculation in media or analyst reports and market rumours' and '8.2 The action ASX takes when it detects abnormal trading' below.[160]

5.9 Listing Rule 3.1A.3 – the reasonable person test

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

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

[157] See notes 177 and 251 and accompanying text.

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

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

Note that one of the unavoidable consequences of information leaking about a confidential market sensitive transaction and causing a sudden and significant movement in the market price or traded volumes of an entity's securities is that if the entity happens to be negotiating two (or more) confidential market sensitive transactions at the time and it is not able to identify which particular transaction has leaked, it may have to disclose both (or all) of those transactions. The disclosure that will be required will depend on the circumstances. In some cases, it may be sufficient for the entity to make an announcement that it is negotiating a number of market sensitive transactions and that a further announcement will be made to the market if and when any of those negotiations are successfully concluded. In others, it may be necessary for the entity to make a more detailed announcement about the transactions being negotiated.

[160] See pages 40 and 55 respectively.

The reasonable person test is an objective one. It is to be judged from the perspective of an independent and judicious bystander and not from the perspective of someone whose interests are aligned with the entity or with the investment community.[161]

As a general rule, information that falls within the prescribed categories in Listing Rule 3.1A.1 and that meets the confidentiality requirements in Listing Rule 3.1A.2 will also satisfy the reasonable person test in Listing Rule 3.1A.3. The very reason why the categories in Listing Rule 3.1A.1 are prescribed is because they reflect a value judgment on the part of ASX that a reasonable person would not expect that type of information to be disclosed, at least while it remains confidential.

Consequently, the reasonable person test in Listing Rule 3.1A.3 has a very narrow field of operation. It will only be tripped if there is something in the surrounding circumstances sufficient to displace the general rule described above. Two prime examples would be:

- where an entity has "cherry-picked" its disclosures, disclosing "good" information of a particular type that is likely to have a positive effect on the price or value of its securities but then declining to disclose "bad" information of the same type that is likely to a negative effect on the price or value of its securities, on the pretence[162] that it is not market sensitive or protected from disclosure by Listing Rule 3.1A – Example H5 in Annexure A is an illustration; or

- where the information needs to be disclosed in order to prevent an announcement of other information under Listing Rule 3.1 from being misleading or deceptive.[163]

The reasonable person test also performs two subsidiary purposes: it reinforces the fact that Listing Rule 3.1A does not operate to protect information from disclosure if it has ceased to be confidential or if it is required to correct or prevent a false market. In the former case, this is because a reasonable person would expect that once information has become known to, and is being traded on by, some in the market (as evidenced, for example, by a sudden and significant movement in the market price or traded volumes of an entity's securities), that information should be disclosed immediately to the whole market. In the latter case, this is because a reasonable person would expect an entity, acting responsibly, to immediately disclose any information necessary to correct or prevent a false market in its securities.

ASX is aware that some entities and their advisers have taken the view that the reasonable person test may have a broader operation than ASX has suggested above and require the disclosure of information that is of a particular type or quality.[164] ASX does not agree. The issue of whether information is of a type or quality that is protected from immediate disclosure under Listing Rule 3.1A is answered by whether it falls within or outside the prescribed categories in Listing Rule 3.1A.1. If it falls within those categories, it will only require immediate disclosure if it does not meet the confidentiality requirements in Listing Rule 3.1A.2 or if there is something in the surrounding circumstances sufficient to displace the general rule described above.

For the avoidance of doubt, here are some specific examples of information that ASX considers a reasonable person would <u>not</u> expect to be disclosed under Listing Rule 3.1A.3:

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[161] Listing Rule 3.1A.3 notably uses the term "reasonable person", rather than "reasonable entity" or "reasonable investor". See also McLure JA in *Jubilee Mines NL v Riley*, note 16 above, at paragraph 160: "the hypothetical reasonable person in [the predecessor to Listing Rule 3.1A.3] … in my view is an objective outsider".

[162] The use of the word "pretence" here is quite intentional. In many cases of "cherry-picking", the information in question is market sensitive under Listing Rule 3.1 and falls outside the categories of information protected by Listing Rule 3.1A.1. The information therefore needs to be disclosed immediately, whether or not the "reasonable person" test in Listing Rule 3.1A.3 is satisfied.

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

[164] See notes 284 and 287 below.

- Confidential information that an entity is planning to make a unilateral takeover bid for another entity. Premature disclosure of that information could jeopardise the transaction, which in turn could prejudice the interests of the entity and investors in both the entity and the target. A reasonable person would not expect this information to be disclosed until the bidding entity formally launches its takeover bid for the target.

- Confidential information that an entity has received an offer from another entity to enter into a control transaction. Again, premature disclosure of that information could jeopardise the transaction, which in turn could prejudice the interests of the entity and investors in the entity. A reasonable person would not expect this information to be disclosed until any negotiations entered into concerning the transaction are successfully concluded.[165]

- Confidential legal advice concerning litigation in which the entity is or could be involved. The disclosure of that information could result in a loss of legal professional privilege in the advice, prejudice the legal position of the entity and, because of that, prejudice both the entity and investors in the entity.

5.10 Entities in financial difficulties

The fact that information may have a materially negative impact on the price or value of an entity's securities does not mean that a reasonable person would not expect the information to be disclosed. Quite the contrary, in many cases, this is precisely the type of information that a reasonable person would expect to be disclosed.[166]

ASX recognises that for an entity in financial difficulties, the requirement to disclose materially negative market sensitive information immediately can be an impediment to completing a financial restructure or reorganisation necessary for its survival. However, the proper course for the entity in such a situation is not to disregard its continuous disclosure obligations but instead to approach ASX to discuss the possibility of a trading halt or, if the situation is unlikely to resolve itself within two trading days,[167] a voluntary suspension.

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

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

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

Entities in this situation should also have regard to the guidance above under '4.23 Suspended entities'.

6. Listing Rule 3.1B – correcting or preventing false markets

6.1 What is a "false market"?

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

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165 See also 'Example B – control transaction' on page 64.

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

167 The maximum period for which a trading halt may be granted: see note 61 above.

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

6.2 ASX's powers to correct or prevent a false market

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

To correct or prevent a false market, ASX may require an entity to disclose market sensitive information, even if the entity considers that the information falls within Listing Rule 3.1A and therefore does not require immediate disclosure under Listing Rule 3.1.[168] It may also require an entity to disclose information that of itself is not market sensitive and therefore not required to be disclosed under Listing Rule 3.1 (eg, to correct a false rumour that the entity is about to enter into a market sensitive transaction when it is not).

If ASX has a concern that there is, or is likely to be, a false market in an entity's securities, it will usually try to contact the person the entity has appointed under Listing Rule 12.6 to be responsible for communications with ASX on Listing Rule matters to discuss the situation and the steps that could be taken to correct or prevent the false market. This may include the entity making an announcement to correct any misinformation in the market. It may also include the entity requesting a trading halt[169] to stop trading in its securities on licensed markets in Australia until the market is properly informed.

If ASX is not able to contact the entity's nominated representative under Listing Rule 12.6 or the entity does not co-operate with ASX in making an announcement or requesting a trading halt, ASX will generally be left with little option but to suspend trading in its securities to prevent a false market from happening.[170]

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

A disclosure under Listing Rule 3.1B must be in writing[171] and given to the ASX Market Announcements office for release to the market.[172] If the announcement includes market sensitive information, ASX will treat the disclosure in the same manner as an announcement under Listing Rule 3.1.[173]

6.4 Responding to comment or speculation in media or analyst reports and market rumours

Issues often arise under Listing Rule 3.1B in the context of reports in the media (both conventional and online) or from analysts commenting or speculating on a particular matter involving an entity (eg, that it is about to enter into a material transaction or that it is in material financial difficulties). They can also arise in the context of rumours circulating the market orally or via emails, blogs, bulletin boards, chat sites, FaceBook, Twitter or other social media.[174]

On the one hand, if a report/rumour appears to contain or to be based on credible market sensitive information about an entity but it is wholly or partially inaccurate, a failure by the entity to correct it could lead to a false market in the entity's securities. On the other hand, if the report/rumour is accurate, a failure by the entity to confirm that fact could contribute to doubt about its veracity and that too could lead to a false market in the entity's securities. If

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

[169] Under Listing Rule 17.1, a trading halt can only be granted at the request of an entity.

[170] ASX may impose a suspension under Listing Rule 17.3.2 to prevent a disorderly or uninformed market. It may also impose a suspension under Listing Rule 17.3.1 for a breach of Listing Rule 3.1B.

[171] Listing Rule 19.10.

[172] Listing Rule 15.2.1.

[173] See '4.18 What steps does ASX take when it receives an announcement under Listing Rule 3.1?' on page 28.

[174] Rumours will often also be confirmed or commented upon in, and in some cases fuelled by, media or analyst reports.

the report has not been widely disseminated or the rumour is not widely known, it can also raise issues about whether the segment of the market that is aware of the report/rumour is trading on the basis of market sensitive information that is not available to the market as a whole.

ASX does not expect an entity to respond to every comment concerning it that appears in a media or analyst report or every rumour about it circulating the market. In particular, where a report/rumour:

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

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

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

- there is a material change in the market price or traded volumes of the entity's securities which appears to be referrable to the report/rumour (in the sense that it is not readily explicable by any other event or circumstance); or
- if the market is not trading at the time but the report/rumour is of a character that when the market does start trading, it is likely to have a material effect on the market price or traded volumes of the entity's securities,[175]

ASX considers that the entity has a responsibility to the market to respond to the report in a timely manner. If the entity does not do so voluntarily, ASX will consider exercising its power under Listing Rule 3.1B to require it to do so.[176]

In saying this, ASX understands that many entities have a stated policy position of not commenting on media speculation or market rumours. Absent a false market, that is a perfectly reasonable stance for them to take. However, that policy must give way where there is, or is likely to be, a false market and ASX requires the matter to be commented upon under Listing Rule 3.1B.

Where ASX has concerns that a media or analyst report or market rumour has caused, or is likely to cause, a false market in an entity's securities, it will usually endeavour to contact the person the entity has appointed under Listing Rule 12.6 to be responsible for communications with ASX on Listing Rule matters to discuss the situation. In those discussions, ASX will usually ask the person to confirm whether the report/rumour is accurate. When asked this question, that person is expected to answer it frankly and honestly, even if he or she considers the matter to be confidential and not something that otherwise requires formal disclosure to ASX under Listing Rule 3.1A. A failure to do so will deny ASX the opportunity to assist the entity with its disclosure obligations when that could be of benefit to the entity and to the market. Refusing to answer the question will also constitute a breach of Listing Rules 18.7 and/or 18.8 entitling ASX to suspend trading in the entity's securities under Listing Rule 17.3.1, while answering it dishonestly may constitute a criminal offence under section 1309.[177]

Depending on the circumstances, if ASX is concerned that there is or is likely to be a false market in the entity's securities and the entity advises ASX that:

[175] As evidenced perhaps by orders queued in ASX's central limit order book.

[176] As mentioned above, comment or speculation about a matter in a media or analyst report or market rumour may also be evidence that it is no longer confidential and therefore the carve-out from disclosure in Listing Rule 3.1A no longer applies.

[177] See 'The statutory prohibitions against false or misleading disclosures' on page 79.

- the report/rumour is wholly accurate, ASX may ask the entity to make a short announcement that confirms the report/rumour or it may ask the entity to make a more detailed announcement about the matter under Listing Rule 3.1;[178]
- the report/rumour is only partially accurate, ASX may ask the entity to make an announcement that corrects or clarifies the report/rumour or, again, it may ask the entity to make a more detailed announcement about the matter under Listing Rule 3.1;[179]
- the report/rumour is wholly inaccurate, ASX may ask the entity to make an announcement that denies the report/rumour;[180] or
- it doesn't know whether the report/rumour is accurate or not (which might be the case, for example, where the report/rumour is speculating that the entity is about to be the subject of a hostile takeover bid and the entity has not been approached by the putative bidder), ASX may ask the entity to make an announcement that it has no knowledge of the matter and therefore can neither confirm nor deny the report/rumour.[181]

Where the entity advises ASX that it needs time to prepare such an announcement[182] and the market is either currently trading or will commence trading before the announcement is released, ASX will usually suggest that the entity also request a trading halt.

ASX will take all the circumstances of each case into consideration in deciding whether or not a media or analyst report or market rumour has caused, or is likely to cause, a false market in the entity's securities and, if so, how that should be corrected or prevented. In this regard, ASX is more likely to act under Listing Rule 3.1B where:

- a report/rumour appears to include reasonably specific details about a matter or quotes or is attributed to sources who might be knowledgeable about the matter, suggesting that it is more than just mere supposition or idle speculation; and
- where there has been a material change in the market price or traded volumes of the entity's securities or, if the market is not currently trading, in the opinion of ASX there is likely to be when trading commences,

than in cases where that is not so.[183]

If a report/rumour breaks while the market is not trading and it is unclear whether it is likely to cause a material change in the market price or traded volumes of the entity's securities, ASX may adopt a "wait and see" approach before requiring the entity to respond.

6.5 Dealing proactively with potential false market situations

Where an entity becomes aware of a media or analyst report or market rumour that could lead to a false market in its securities, ASX would encourage it to contact its ASX listings adviser immediately to discuss the situation and

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[178] A more detailed announcement may be required in this case, for example, because the report/rumour is reasonably specific and ASX forms the view that the matter is no longer confidential, in which case, Listing Rule 3.1A.2 no longer applies and the entity is consequently obliged to make an announcement about the matter under Listing Rule 3.1.

[179] A more detailed announcement may be required in this case, for example, because the report/rumour is reasonably specific and, while some of the details are partially inaccurate, overall it is sufficiently accurate for ASX to form the view that the matter is no longer confidential and therefore Listing Rule 3.1A.2 no longer applies.

[180] ASX would note that, in such a case, if the author of the report or the instigator of the rumour was intentionally spreading false or misleading information about the entity, that may well breach any or all of sections 1041E, 1041F, 1041G and 1041H. If ASX has reasonable grounds to suspect such a breach, it will refer the matter to ASIC under section 792B(2)(c).

[181] The examples in paragraph 8A of 'Example B – control transaction', and paragraphs 9A and 9B of Example C – security issue' in Annexure A illustrate how ASX generally deals with media comment about market sensitive matters. The example in paragraph 8B of 'Example B – control transaction' in Annexure A illustrates how ASX generally deals with rumours about market sensitive matters.

[182] For example, because it needs time to verify the accuracy or bona fides of the information in the report.

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

not wait to receive an enquiry from ASX. In that way, ASX will be able to provide it with guidance on whether there is or could be a false market, the scope of the announcement that it might make to address that situation and whether it is appropriate for it to request a trading halt to prevent trading in its securities in the meantime. It will also assist ASX in determining whether it would be appropriate to institute a halt to trading in the entity's securities under ASX Operating Rule 3301(a) once the announcement is made to allow the market time to absorb and react to the announcement.[184]

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

7. Particular disclosure issues

7.1 Earnings guidance

All other things being equal, an entity is not required by Listing Rule 3.1 to release its internal budgets or earnings projections to the market. They are generated for internal management purposes and, provided they remain confidential, clearly fall within the carve-outs to immediate disclosure in Listing Rule 3.1A. Accordingly, subject to the exceptions mentioned below,[185] it is perfectly acceptable for an entity to have a policy of not providing earnings guidance to the market.

Notwithstanding this, some entities do have a practice of providing periodic earnings guidance to the market in order to assist investors in assessing the value of their securities. Some entities also give "one-off" earnings guidance in disclosure documents, such as prospectuses, PDSs, bidders' statements, targets' statements and scheme documents.

Without wishing in any way to discourage this practice, ASX would remind entities of the regulatory issues that need to be considered when issuing earnings guidance.

As a forward looking statement, earnings guidance must have a reasonable basis in fact or else it will be deemed to be misleading,[186] with all the significant legal consequences that entails.[187] For this reason, appropriate due diligence needs to be applied to the preparation of earnings guidance. The underlying figures and assumptions[188] should be carefully vetted and signed off at a suitably senior level before the guidance is released.

Since it is the directors who are ultimately responsible for confirming that an entity's financial statements have been prepared in accordance with applicable accounting standards and give a true and fair view of its financial performance,[189] it will also generally be appropriate for the guidance to be approved by the board before it is released.

7.2 De facto earnings guidance

An entity which has a policy of not giving earnings guidance needs to be careful in its communications with security holders, analysts and the press that it preserves the confidentiality of its internal budgets and projections[190] and, in

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184 See '4.18 What steps does ASX take when it receives an announcement under Listing Rule 3.1?' on page 28.

185 See '7.2 De facto earnings guidance' and '7.3 Market sensitive earnings surprises' below.

186 See note 327 and accompanying text. See also ASIC Regulatory Guide 170 *Prospective financial information* and ASIC Media Release 02-379 (enforceable undertaking accepted from an entity to review its continuous disclosure compliance procedures, amongst other reasons, because the entity had published a potentially misleading revenue forecast for which it did not have a reasonable basis).

187 See 'The statutory prohibitions against false or misleading disclosures' on page 79.

188 Entities should again note ASIC's guidance that any material assumptions or qualifications that underpin forward looking statements (such as an earnings forecast) in an announcement under Listing Rule 3.1 should be stated in the announcement: see note 112 and accompanying text.

189 For entities established in Australia, see sections 295(4)(d) (annual financial reports) and 303(4)(d) (half-yearly financial reports).

190 If an entity's internal budgets or forecasts cease to be confidential, they will lose the protection of Listing Rule 3.1A and, if and to the extent they contain market sensitive information, that information will have to be disclosed immediately to the market under Listing Rule 3.1: see '5.8 Listing Rule 3.1A.2 – the requirement for information to be confidential' on page 35.

particular, does not make statements that could be construed as de facto earnings guidance. For example, a comment that the entity:

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

is de facto earnings guidance.

If ASX becomes aware of such a comment being made in a public forum or to an investor, analyst or journalist, it may ask the entity to issue a statement to the market confirming the comment so that the whole market is informed of the guidance it has given.[191] In the case of comments about analysts' forecasts or consensus estimates, ASX may ask the entity to clarify in the statement which particular analysts' forecasts are being commented on, the range of those forecasts and, if the range is relatively wide, where within that range the entity expects its earnings to fall.

7.3 Market sensitive earnings surprises

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

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

- earnings guidance[192] the entity has given to the market;
- in the case of larger entities covered by sell-side analysts, the earnings forecasts of those analysts; or
- in the case of smaller entities not covered by sell-side analysts, the earnings results of the entity for the prior corresponding reporting period.[193]

Those expectations may also have been set or modified by "outlook statements" included in a previous period's annual report or results announcement and by other disclosures the entity has made to the market over the reporting period.[194]

If an entity becomes aware that its earnings for the current reporting period[195] will differ (downwards or upwards) from market expectations, it needs to consider carefully whether it has a legal obligation to notify the market of that fact. This obligation may arise under Listing Rule 3.1 and section 674,[196] if the difference is of such magnitude that

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[191] Using its powers under Listing Rules 3.1B, 18.7 and/or 18.8.

[192] References to "earnings guidance" should be read broadly as covering any type of guidance that an entity may give in relation to its expected earnings for the current reporting period regardless of the particular measure used (eg, operating revenue, EBITDA, EBIT, underlying profit before tax, underlying profit after tax, statutory profit after tax, or earnings per share).

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

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

[195] ASX uses the term "current reporting period" to mean the financial half year or year in respect of which the entity will next publish financial reports. An entity will not generally publish its financial report until some weeks after the end of the relevant half year or year. During those weeks, references to the current reporting period should be taken to mean the reporting period that has just passed.

The guidance in this section is limited to market sensitive earnings surprises that arise in relation to the current reporting period. If an entity has published a longer term forecast (eg, in a prospectus, PDS, bidder statement, target statement or scheme document), it may also have an obligation to disclose an expected variation in earnings compared to that forecast.

[196] Note that ASX does not regard market sensitive information that an entity's earnings will differ from market expectations as falling within any of the categories of information protected from immediate disclosure under Listing Rule 3.1A.1. The information that is required to be disclosed in such a case is not the entity's internal budgets or earnings, which as mentioned above are generated for internal management

a reasonable person would expect it to have a material effect on the price or value of the entity's securities – referred to below as a "market sensitive earnings surprise".[197] Alternatively, in the case of an entity which becomes aware that its earnings for a reporting period will differ from earnings guidance it has published to the market, it may arise under section 1041H, because failing to inform the market that its published guidance is no longer accurate could constitute misleading conduct on its part.[198]

This raises 5 important issues:

1. *How does an entity determine what the market is expecting its earnings for the current reporting period to be?*

   ASX considers that the best and most appropriate base guide to use for these purposes is:

   - if an entity has published earnings guidance[199] for the current period, that guidance;[200]
   - if an entity has not published earnings guidance for the current reporting period and it is covered by sell-side analysts, the earnings forecasts of those analysts; and
   - if an entity has not published earnings guidance for the current reporting period and it is not covered by sell-side analysts, its earnings for the prior corresponding period.[201]

   Each of these measures is only a guide to what the market is expecting. As mentioned previously, market expectations can be set or modified by the disclosures the entity makes to the market over the reporting period. They can also be set or modified by known external events affecting an entity. For example, if an entity has included a negative outlook statement in its last annual report or is known to be affected by a negative external event (eg, in the case of a mining entity, a material fall in mineral prices), the fact that its earnings for the current period turn out to be lower than its earnings for the prior corresponding period, of itself, is unlikely to surprise the market.[202] Similarly, if an entity announces a sudden and unexpected event which will obviously have a material impact on its earnings, then the market is likely to infer that any earnings

purposes and, provided they remain confidential, clearly fall within the carve-outs to immediate disclosure in Listing Rule 3.1A. Rather it is the fact that the entity's earnings will differ so significantly from market expectations that a reasonable person would expect information about that difference to have a material effect on the price or value of its securities.

[197] See ASIC Media Releases 06-124, 01-027 and 06-443, the first involving an infringement notice against, and the latter two an enforceable undertaking by, an entity for not informing the market of market sensitive information that its reported earnings would be significantly lower than a profit forecast it had previously provided to the market. See also ASIC Media Release 10-255AD, involving an infringement notice against, and an enforceable undertaking by, an entity for not informing the market of market sensitive information that its reported earnings for the first half would be significantly lower than for the corresponding previous half.

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

[198] This will give rise to similar legal exposures as a misleading announcement: see 'The statutory prohibitions against false or misleading disclosures' on page 79.

[199] This includes earnings guidance the entity may have given in order to avoid or correct a potential "earnings surprise".

[200] This applies even where the entity is covered by sell-side analysts and their earnings forecasts differ from the entity's published guidance. This is because the published guidance comes from, and is endorsed by, the source that can reasonably be expected to have the best information about the entity's likely earnings for the current reporting period – the entity itself. Hence, ASX would only expect an entity that has published earnings guidance to make an announcement to the market about an earnings surprise if its earnings were going to be different from its published guidance and, in all of the circumstances, that information was market sensitive. It would not expect an entity which has published earnings guidance which is still current to make an announcement about an earnings surprise just because analysts were forecasting a different result.

[201] See note 193 above.

[202] Likewise, if an entity has included a positive outlook statement in its last annual report or is known to be going through an expansionary phase where its earnings are expected grow, the fact that its earnings for the current period turn out to be higher than its earnings for the prior corresponding period, of itself, is unlikely to surprise the market.

guidance it has previously given, and any earnings forecasts analysts have previously published, are now out of date and will need to be updated in due course.[203]

In terms of using analyst forecasts for the current reporting period[204] to measure market expectations, there are a number of approaches that an entity may legitimately use. Some entities may use the "consensus estimate"[205] as a central measure of analyst forecasts. They may obtain this from a market data vendor or they may calculate it for themselves. If they feel that the consensus estimate is being distorted by an obvious outlier that is out of line with their own internal forecasts and other analyst forecasts, they might also adjust the consensus estimate to exclude that outlier.[206] Other entities may not use consensus at all, but simply plot the various analyst forecasts and if all or most of them are clustered within a reasonable range, treat that range as representing the market's view of their likely earnings.

2. *What is a market sensitive difference for these purposes?*

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

An earnings surprise will only need to be notified to the market under Listing Rule 3.1 if it is market sensitive – that is, it of such a magnitude that a reasonable person would expect it to have a material effect on the price or value of the entity's securities. Assessing whether or not this is the case will require a consideration of factors such as:

- the extent of the earnings surprise;
- whether the earnings surprise relates to earnings guidance published by the entity or to some other measure of expected earnings (such as the earnings forecasts of analysts covering the entity's securities or the entity's earnings for the prior corresponding period);[207]
- whether near term earnings is a material driver of the value of the entity's securities;[208]
- whether the difference is attributable to a non-cash item (such as a depreciation, amortisation or impairment charge) that may not impact on underlying cash earnings;
- whether the difference is a permanent one or is simply due to a timing issue (eg, a material revenue or expense item that was expected to be booked in one reporting period is to be booked in a different reporting period);

[203] In such a case, it would be good practice for the entity to mention in the announcement about the event that it will affect the entity's published earnings guidance and that the entity will provide updated guidance to the market in due course.

[204] For the avoidance of doubt, while ASX considers that an entity which has not published earnings guidance for the current reporting period and which is covered by sell-side analysts may have an obligation to notify the market if its earnings for the current period will differ significantly from the market expectations reflected in those forecasts, ASX does not take a similar view in relation to longer term analyst forecasts (eg, 2, 3 or 5 year forecasts). Such longer term forecasts are inherently uncertain.

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

[206] Note that while it is acceptable to exclude an analyst forecast that the entity regards as an obvious outlier when working out market expectations for its earnings and testing whether it has a disclosure obligation in relation to a potential earnings surprise, the same is not true if the entity decides to publish analyst forecasts or consensus estimates, As mentioned in the text accompanying note 234, an entity should not exclude an analyst's forecast from the information it publishes in this regard just because it considers the forecast to be an "outlier", as this substantially increases the risk that the published information could be regarded as de facto earnings guidance.

[207] The market will expect earnings guidance from an entity to be inherently more authoritative and reliable than the other measures of expected earnings mentioned in the text. It is therefore likely to take a comparatively smaller variation between the entity's actual or projected earnings and its published earnings guidance for that to be considered market sensitive than would be the case for the other measures of expected earnings mentioned in the text.

[208] In some more speculative sectors, near term earnings may not be a material driver of the price or value of an entity's securities.

- whether the difference is attributable to one-off or recurring factors;[209] and
- whether the relative outlook for the entity in coming financial periods is positive or negative.[210]

Given the many variables involved, for those cases where an entity has not published earnings guidance for the current reporting period,[211] ASX does not consider it appropriate to lay down any general rule of thumb or percentage guidelines on when a difference in actual or projected earnings compared to market expectations ought to be considered to be market sensitive and therefore disclosed under Listing Rule 3.1. ASX would simply repeat its suggestion previously that an officer of an entity who is faced with a decision on this issue ask two questions:

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

(2) "Would I feel exposed to an action for insider trading if I were to buy or sell securities in the entity at their current market price, knowing this information had not been disclosed to the market?"

If the answer to either question is "yes", then that should be taken to be a cautionary indication that the information may well be market sensitive and may therefore need to be disclosed to ASX under Listing Rule 3.1.

However, for those cases where an entity has published earnings guidance for the current reporting period,[212] ASX would recommend that the entity consider updating its published earnings guidance for the current reporting period if and when it expects there to be a material difference between its actual or projected earnings for the period and the guidance it has given to the market. For these purposes, ASX would suggest that entities apply the guidance on materiality that formerly appeared in the Australian Accounting Standards, [213] that is:

- treat an expected variation in earnings compared to its published guidance equal to or greater than 10% as material and presume that its guidance needs updating; and
- treat an expected variation in earnings compared to its published guidance equal to or less than 5% as not being material and presume that its guidance therefore does not need updating,

unless, in either case, there is evidence or convincing argument to the contrary.[214] Where the expected variation in earnings compared to its published earnings guidance is between 5% and 10%, the entity needs

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

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

[211] Again, this includes earnings guidance the entity may have given to avoid or correct a potential "earnings surprise".

[212] Again, this includes earnings guidance the entity may have given to avoid or correct a potential "earnings surprise".

[213] See paragraph 15 of Accounting Standard AASB 1031 *Materiality* (July 2004). Under that Standard, an amount equal to or greater than 10% of the applicable base amount was generally presumed to be material, and an amount equal to or less than 5% of the applicable base amount was generally presumed not to be material, unless, in either case, there was evidence or convincing argument to the contrary. AASB 1031 was effectively withdrawn on 1 January 2014 as being "unnecessary local guidance on matters covered by IFRSs", although the Australian Accounting Standards Board did expressly note that "it would not expect the withdrawal to change practice regarding the application of materiality in financial reporting" (see Interim Accounting Standard AASB 1031 *Materiality* (December 2013)).

[214] An example of where there might be convincing argument that a 5-10% variation between an entity's actual or projected earnings and its published guidance is not material would be where an entity has particularly low earnings, meaning that a 5-10% variation would be very low in absolute terms and therefore unlikely to have a material effect on the price or value of the entity's securities. Another example would be where an entity has particularly "lumpy" revenue or expenses – the fact that it may be more than 5-10% above or below its published

to form a judgment as to whether or not it is material. Smaller entities or those that have relatively variable earnings may consider that a materiality threshold of 10% or close to it is appropriate.[215] Very large entities or those that normally have very stable or predictable earnings may consider that a materiality threshold that is closer to 5% than to 10% is appropriate.

This recommendation is purely a suggestion to assist entities in determining if and when they should update their published earnings guidance. The mere fact that an entity may expect its actual or projected earnings to differ from its published guidance by more (or less) than a particular percentage will not necessarily mean that its guidance is (or is not) misleading.

To be clear, this recommendation also does not apply to entities that have not published guidance for the current reporting period.[216] The fact that their actual or projected earnings at a point in time may differ, if they are covered by sell-side analysts, by 5 to 10% from analyst forecasts or, if they are not covered by sell-side analysts, by 5 to 10% from their earnings for the prior corresponding period, will not necessarily be market sensitive and therefore will not necessarily require disclosure to the market under Listing Rule 3.1.

The reason for drawing a distinction between situations where an entity has published earnings guidance for the current reporting period, and those where it has not, stems from the fact that entities which publish earnings guidance make a positive representation to the market that will serve to set the market's expectations for their earnings.[217] If they subsequently expect their earnings to differ from their published guidance, not only will they need to consider their potential disclosure obligations under Listing Rule 3.1 and section 674 (ie, whether the difference is market sensitive in all of the circumstances), they also will need to consider their potential liability under section 1041H[218] for having misled the market as to their likely earnings.[219] By contrast, entities which have not published earnings guidance will generally only need to consider their potential disclosure obligations under Listing Rule 3.1 and section 674.

ASX hastens to add that the guidance above on earnings surprises, particularly for those entities that have published earnings guidance, is not intended in any way to discourage listed entities or their boards from issuing earnings guidance. It is simply intended to ensure that the market is kept properly informed if an entity's actual or projected earnings differ materially from its guidance.

3. When does an entity become aware that its earnings for the current reporting period will be different from market expectations for these purposes?

In ASX's opinion, for an entity to have to disclose under Listing Rule 3.1 market sensitive information about an expected difference in its earnings for the current reporting period compared to market expectations, there needs to be a reasonable degree of certainty that there will be such a difference.[220]

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guidance part way through a financial period may not be market sensitive if that situation is expected to correct itself over the course of the financial period as it receives revenue and incurs expenses.

[215] For similar reasons to why, for smaller entities, ASX generally adopts a materiality threshold that is 10% or close to it when considering whether or not to refer a potential breach of Listing Rule 3.1 and section 674 to ASIC: see notes 272-278 and accompanying text.

[216] To avoid any doubt, this recommendation also does not apply to guidance that an entity may give on the other financial measures referred to in section 7.8 on page 54 below, such as operational and capital expenditure and exploration and production targets. The fact that an entity's actual or projected results at a point in time may differ by 5 to 10% from published guidance on operational or capital expenditure or a published exploration or production target will not necessarily be market sensitive and therefore will not necessarily require disclosure to the market under Listing Rule 3.1. Similarly, the fact that difference has arisen may not necessarily render the published guidance misleading, depending on the circumstances.

[217] See note 207 above.

[218] An entity which contravenes section 1041H may be liable to pay compensation to anyone who suffers loss or damage as a consequence of the misleading conduct (see section 1041I).

[219] A liability could arise under section 1041H and 1041I because the original guidance was misleading. It could also arise where the original guidance was not misleading at the time but where subsequent events have rendered it misleading. In the latter case, the relevant misleading conduct is failing to correct the guidance after it has become misleading.

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

The fact that an entity's earnings may be comparatively ahead of or behind market expectations part way through a reporting period does not mean that this situation will prevail at the end of the reporting period. Its earnings may change due to changes in the many variables that can affect an entity's earnings over a reporting period.[221] They may also change because the entity adjusts its business plans in response.

The market's expectations also may change over the course of a reporting period as it factors in changes in general economic conditions and absorbs the various disclosures the entity has made over that period.

Consequently, disclosure issues about market sensitive earnings surprises are generally more likely to arise towards the end of the reporting period than at the beginning, when there will be comparatively greater certainty as to whether the entity's earnings for the period are going to differ from market expectations

Whether and when an entity is aware of a market sensitive earnings surprise ultimately requires an exercise of judgment by the entity and its officers. In some cases, it may have sufficient information before the end of the reporting period to have the requisite degree of certainty that it is facing a market sensitive earnings surprise. In other cases, it may not have the requisite degree of certainty until after the end of the reporting period, when it is in the course of preparing its financial statements for the period.[222]

4. What should be announced?

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

Whether or not such an announcement is described in this manner, it will effectively constitute earnings guidance. It should therefore be subject to the same due diligence in its preparation, and to the same vetting and sign-off processes at a senior level, as any earnings guidance.[223]

Again, since it is the directors who are ultimately responsible for confirming that an entity's financial statements have been prepared in accordance with applicable accounting standards and give a true and fair view of its financial performance, it will also generally be appropriate for the announcement to be approved by the board before it is released.

5. When should it be announced?

Where Listing Rule 3.1 applies, information about a market sensitive earnings surprise has to be released immediately. As indicated above, this does not mean "instantaneously" but rather "promptly and without delay".

In assessing whether an entity has acted immediately under Listing Rule 3.1, ASX will make due allowance for the fact that the preparation of earnings guidance will take time and will need to be properly vetted and signed off at a senior level and most likely approved by the board before it is released.

ASX acknowledges that the issues addressed in points 1, 2 and 3 above can be difficult ones for an entity and its officers. Forecasting its earnings for the current reporting period with an appropriate degree of confidence, endeavouring to work out what the market is expecting its earnings to be and then predicting how the market will react if its earnings significantly differ from those expectations involves many variables and requires considerable judgment. ASX is mindful of this when it considers whether it should refer a potential breach of Listing Rule 3.1 to ASIC involving a market sensitive earnings surprise. The matters ASX refers to ASIC usually involve an obviously significant difference in earnings compared to the relevant base used to measure market expectations mentioned

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

[222] As mentioned in the text accompanying note 95, in such a case, the information must be disclosed immediately and cannot wait until the release of the entity's financial statements for the period.

[223] See '7.1 Earnings guidance' on page 43.

in point 1 above and where the announcement of the entity's results in fact triggers a material change in the market price of its securities.

Finally, it should be noted that the guidance in points 1 – 5 above relates specifically to the disclosure of updated earnings guidance. Where the trigger for giving updated earnings guidance is a particular event (eg, a natural disaster affecting a particular project, the cancellation of a material contract or the loss of a material licence) that can reasonably be expected to have a material effect on the price or value of an entity's securities, Listing Rule 3.1 will generally require information about that event to be disclosed immediately and it will not be appropriate for the entity to delay announcing the information because it wishes to provide updated earnings guidance in light of that event. In such a case, the entity should announce whatever information is in its possession about that event immediately but signal that it will make a further announcement when it has had the opportunity to prepare updated earnings guidance in light of that event. Example G in Annexure A illustrates the point. If the entity is concerned that releasing information without updated earnings guidance could lead to a false market in its securities, it should raise that concern with ASX and discuss whether it would be appropriate to request a trading halt or, in an exceptional case, a voluntary suspension to afford it the time it needs to prepare that guidance.

7.4 Correcting analyst forecasts and consensus estimates

Subject to the comments above and below in relation to market sensitive earnings surprises, ASX does not believe that an entity has any obligation, whether under the Listing Rules or otherwise, to correct the earnings forecast of any individual analyst, or the consensus estimate of any individual market data vendor, to bring it into line with the entity's internal earnings projections. Nor does ASX believe that an entity has any obligation, whether under the Listing Rules or otherwise, to publish its internal earnings projections just because they happen to differ from an analyst's forecast or a consensus estimate of analysts' forecasts.

In this regard, an analyst's earnings forecast for an entity is prepared at a point in time and reflects the analyst's professional judgment and acumen, as well as the analyst's individual views and assumptions at that time on the many variables that can affect the entity's earnings over a period.[224] It will typically be based on a data set that is less complete and less up-to-date than the one available to the entity. Consensus estimates published by market data vendors are affected by the same factors that affect the underlying earnings forecasts they incorporate and can also be affected by the different processes employed by those vendors for gathering and normalising data. The fact that an entity's actual or projected earnings may differ from the forecast prepared by a particular analyst, or from the consensus estimate of a group of analysts, of itself, is not surprising and does not concern ASX.

As indicated above, however, in those cases where an entity has not published earnings guidance to the market, analyst forecasts and consensus estimates can be relevant indicators of market expectations and an entity will have an obligation under the Listing Rules to make an appropriate announcement if it becomes aware that its earnings for the current reporting period are likely to differ so significantly from market expectations that information about that difference is market sensitive.

Given that obligation, ASX would generally expect an entity that has not published earnings guidance to the market and that is covered by sell-side analysts to be monitoring analyst forecasts and/or consensus estimates so that it has an understanding of the market's expectations for its earnings and is alive to any potential market sensitive earnings surprise that may be emerging.

If a significant difference does emerge between the entity's internal earnings projections on the one hand and the earnings forecasts of a significant proportion of analysts and/or consensus estimates on the other, then it behoves the entity to ask why that might be so. It could be because the entity's forecast incorporates information that, legitimately, has not been disclosed to the market under Listing Rule 3.1A and therefore is not available to analysts. It could also be because the entity's forecast is based on materially different assumptions, is more up-to-date, or reflects a more complete and accurate data set, than the analysts' forecasts. Alternatively, it could indicate that the market is not necessarily aware of all of the material information it needs to estimate the entity's earnings, and through that, the price or value of the entity's securities. This in turn may warrant careful consideration by the entity as to whether there is any information, not protected by the carve-outs from disclosure in Listing Rule 3.1A, that

[224] See note 221.

should have been, but has not been, disclosed under Listing Rule 3.1. It could also indicate that the market has not fully appreciated the import of the entity's previous announcements under Listing Rule 3.1, which may warrant careful consideration by the entity as to whether it needs to publish a further announcement with more information.

If an individual analyst's forecast differs significantly from other analysts' forecasts, then again it may be appropriate for the entity to ask why that is so. It may be that the analyst has made a factual or computational error or has missed a particular announcement the entity has made to ASX. In such a case, there is nothing wrong in the entity pointing that error out to the analyst, provided it does not disclose to the analyst any market sensitive information that has not previously been released to the market or say anything that could be construed as de facto earnings guidance.

Having said this, ASX would caution that listed entities that choose to have conversations with analysts about their earnings forecasts need to tread very carefully so as not to breach their continuous disclosure obligations.

Where an entity has published earnings guidance to the market, analyst forecasts are largely irrelevant when it comes to setting market expectations around earnings. However, ASX would still recommend that an entity that has published earnings guidance and that is covered by sell-side analysts monitor their forecasts and/or consensus estimates for the useful information they may reveal. For example, if analyst forecasts or consensus estimates are diverging materially from the entity's guidance, that may indicate that the analysts no longer attach any credence to its guidance and that, in turn, may warrant an inquiry as to why that is so.

It goes without saying that in any case where an entity's analysis of analyst forecasts or consensus estimates leads it to the conclusion that further information needs to be disclosed, the way to address this is to make an announcement to the market and not by selectively divulging the information to analysts.

7.5 Publishing analyst forecasts or consensus estimates generally

From time to time, ASX is asked for its view on whether an entity should publish information about analyst forecasts or consensus estimates so that investors have better access to that information and a better understanding of the market's expectations for its earnings.

In ASX's view, with very few exceptions,[225] a single analyst's forecast or a single consensus estimate is not information that is required to be, or that should be, published on the ASX Market Announcements Platform under Listing Rule 3.1.[226] Publishing this information on the ASX Market Announcements Platform implies that the entity considers it to be market sensitive. It could only be market sensitive if it reflects or approximates the entity's own view of its likely earnings. Hence, the very act of publishing an analyst's forecast or consensus estimate on the ASX Market Announcements Platform constitutes an implied endorsement of the forecast or estimate.[227] It therefore amounts to de facto earnings guidance, with the potential consequences described in '7.2 De facto earnings guidance' above.

For these reasons, ASX will not generally allow an entity to publish a single analyst's forecast or a single consensus estimate on the ASX Market Announcements Platform without a detailed and acceptable explanation as to why the entity considers this information to be market sensitive.

[225] There may be particular circumstances where an analyst's forecast or consensus estimate is required to be lodged on the ASX Market Announcements Platform, eg, where it forms part of, or has been incorporated by reference into, a prospectus or product disclosure statement that is required to be lodged with ASX under Listing Rule 3.10.4.

[226] This is essentially for the same reasons as mentioned previously as to why an entity should not submit a broker research report about it, or any extract from or hyperlink to such a report, for publication on the ASX Market Announcements Platform under Listing Rule 3.1: see the text accompanying notes 113 and 114.

[227] This applies even where the entity publishes a disclaimer stating that it does not endorse, confirm, or express a view as to the accuracy of, the forecast or estimate.

ASX has no objection to an entity publishing information about analyst forecasts or consensus estimates on its website. An entity which does so, however, needs to be alert to the legal issues that this may raise and should take advice on those issues.[228]

An entity that publishes a single analyst's forecast or a single consensus estimate, in particular, should be aware of the risk that this will be seen by many readers as a tacit representation by the entity that its results will be somewhere close to that forecast or estimate and therefore interpreted as de facto earnings guidance. This tacit representation arises because most readers will know that the entity is obliged to disclose a market sensitive earnings surprise. They are therefore likely to infer that if an entity has published an analyst's forecast or consensus estimate on its website and not made any announcement about an earnings surprise, the entity expects its results to be somewhere near the published forecast or estimate.[229]

The risk that publishing a consensus estimate, in particular, will be seen as de facto earnings guidance increases further if the entity has selective discussions with analysts or investors referring to the estimate. For example, a comment:

- to an analyst noting that their forecast differs materially from the published consensus estimate, hinting or implying that they should amend their forecast to be closer to the consensus estimate, or
- to an investor in response to a query about the entity's earnings referring them to the published consensus estimate,

could be seen as an endorsement of the consensus estimate and therefore de facto earnings guidance.

If an entity wants to publish information about analyst forecasts then, to reduce the risk of this being seen as de facto earnings guidance, ASX would recommend that, in preference to publishing a single analyst's forecast or a single consensus estimate, the entity publish either:

- a list of the individual earnings forecasts of the analysts known to be covering its stock; or
- a range showing the low, average (or consensus)[230] and high earnings forecasts of the analysts known to be covering its stock,

along with a disclaimer making it clear that it does not endorse, confirm, or express a view as to the accuracy of, the forecasts nor does it make any representation that its earnings will fall within the range of forecasts provided.

To facilitate equality of access to information, ASX will allow an entity to publish such a list or range with a disclaimer to this effect on the Market Announcements Platform.

Having published information about analyst forecasts in this format and with this disclaimer on its website and/or in a market announcement, ASX would have no issue with an entity referring an interested party with an enquiry about analyst forecasts to the relevant web page or market announcement for further information. ASX would not regard that as de facto guidance, provided the entity does not do or say anything that conflicts with the disclaimer.

A listed entity should take its own legal advice about the form and content of the disclaimer. It should reflect the entity's particular circumstances and the key underlying principles set out in this Guidance Note.

[228] Again, this applies even where the entity publishes a disclaimer stating that it does not endorse, confirm, or express a view as to the accuracy of, the consensus estimate.

[229] For example, this may well raise copyright issues requiring the consent of an analyst before the entity publishes the analyst's forecast or the consent of, or a licence from, a market data provider before the entity publishes a consensus estimate prepared by the provider.

[230] If it wishes, it could also include a median of the forecasts.

An entity that does publish information about analyst forecasts or consensus estimates on its website or in a market announcement should also take particular care not to mislead[231] readers and, to that end, should disclose the source,[232] completeness and currency[233] of the information in question.

Generally it is best if an entity publishing information about analyst forecasts includes all analysts known by the entity to cover its securities. If the entity has excluded a particular analyst, there should be a clear disclosure of that fact and a reasonable explanation as to why (eg, because the analyst's last forecast does not reflect a material announcement or the most recent financial statements published by the entity and is therefore materially out of date, or because the analyst's forecast contains a manifest error).

An entity should not exclude an analyst's forecast from the information it publishes just because it considers the forecast to be an "outlier",[234] as this substantially increases the risk that the published information could be regarded as de facto earnings guidance.

7.6 Publishing analyst forecasts or consensus estimates to analysts

ASX is aware that some entities provide to the analysts covering their securities a periodic summary of all of their forecasts so that each analyst has an understanding of where its forecast sits vis-à-vis its peers and consensus. The reason generally given for doing this is so that analysts have more accurate and up-to-date information about consensus than may be available from market data providers and so that their comments about consensus, or the entity's performance vis-à-vis consensus, are more likely to be correct.

Entities that do this need to be alive to the appearance it creates of selective disclosure and to the risk that it will be interpreted as de facto earnings guidance. If an entity wants to provide analysts with this information, it will generally be safer for it to make the information available to the market at large by publishing it on its website or in a market announcement in the form and with the disclaimer recommended in section 7.5 above.

Having published information about analyst forecasts in this form and with this disclaimer on its website and/or in a market announcement, ASX would have no issue with an entity referring an analyst to the relevant web page or market announcement for further information.[235] ASX would not regard that as de facto guidance, provided the entity does not do or say anything that conflicts with the disclaimer. An example of doing something that would conflict with the disclaimer would be an entity referring an "outlier" analyst to the relevant webpage or announcement and hinting that the analyst should amend its forecast to be closer to the average of its peers.

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231 See 'The statutory prohibitions against false or misleading disclosures' on page 79.

232 For example, if contrary to ASX's recommendation above, an entity chooses to publish a single consensus estimate and it has compiled the estimate itself, it should disclose that fact and the methodology it has used to do so. If it has obtained the estimate from a third party (such as a market data provider), it should disclose the third party and where information can be obtained as to how the third party has compiled the estimate. If it publishes a list or range of individual analyst forecasts, it should explain how it has compiled the list or range.

233 Analysts' forecasts and consensus estimates are prepared at a point in time and are likely to be updated from time to time. Readers therefore need to know the date at which a forecast or estimate was prepared in order to assess how up-to-date it is.

In a similar vein, an entity should consider how frequently it will update any information it has published about analyst forecasts or consensus estimates so as to avoid its published figures becoming misleading because they are no longer current.

234 An entity excluding an analyst's forecast from a published table of analysts' forecasts or from its published calculation of consensus simply because it considers the forecast to be an "outlier" presents the following difficulty. To avoid misleading readers, the entity will need to disclose that it has excluded the outlier. However, by disclosing that it has excluded the outlier, the entity is effectively indicating that the excluded forecast is a significant distance from, and by necessary implication that the forecasts not excluded are much closer to, its own internal earnings projections. This then runs the risk of being seen as de facto guidance.

235 Although ASX would repeat its caution above that listed entities that choose to have conversations with analysts about their earnings forecasts need to tread very carefully so as not to breach their continuous disclosure obligations.

7.7 Analyst and investor briefings[236]

Analyst and investor briefings[237] are an important contributor to an informed market but require particular care to avoid the selective disclosure of market sensitive information.

An entity should not be disclosing at an analyst or investor briefing any market sensitive information, unless and until it has first been disclosed to ASX under Listing Rules 3.1 and 15.7.[238]

It is prudent practice for an entity to ensure that any new presentation to be given, or printed materials to be handed out at, an analyst or investor briefing are first given to ASX and published on the ASX Market Announcements Platform before the briefing, and thereafter are published on its website. This ensures both that the entity complies with its obligations under the Listing Rules and also that the materials are available to all analysts and investors alike, including those not invited to, or not able to attend, the briefing. If the materials presented or given at such a briefing contain different or more up-to-date information than has previously been given to the market, the entity runs the risk that someone might assert that the materials are market sensitive and therefore should have been disclosed under Listing Rule 3.1.[239]

ASX recognises that entities may give a series of presentations to analysts and investors over a short period that contain materially the same information but have been tailored for each presentation. ASX would not regard any the second and subsequent presentations in such a series as "new" presentations for these purposes and, provided they do not contain any new market sensitive information, would not expect them to be published on the ASX Market Announcements Platform.

Entities should also be alive to the risk that market-sensitive information may inadvertently be discussed at an analyst or investor briefing that is not included in the presentation pack or written materials handed out at the briefing (eg, in response to a question asked at the briefing).

In this regard, an entity should pay particular heed to the guidance in principles 8 and 9 in ASIC Regulatory Guide 62, as set out in Annexure C.[240] An entity should, as a matter of practice, review proceedings at analyst and investor briefings, including responses provided to any questions asked at the briefing, shortly afterwards to verify that no market sensitive information has been inadvertently disclosed and, if it has, the entity should ensure that the information is published immediately on the ASX Market Announcements Platform and thereafter on its website.

It is in an entity's interests for all analysts and investors to have access to the same information so that they can prepare their forecasts off the same fact base. To that end, an entity should not provide preferential treatment to favoured analysts,[241] nor should it "blacklist" or ban an analyst it may not favour from analyst briefings.

7.8 Other financial forecasts and exploration and production targets

Other financial forecasts (such as forecast operational or capital expenditure[242]) published by entities and exploration and production targets published by mining or oil and gas entities can raise similar considerations to earnings guidance. As forward looking statements, these must have a reasonable basis in fact or else they will be

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236 While this section focuses on analyst and investor briefings, other briefings, such as industry briefings or lender briefings, can also raise similar continuous disclosure issues to the ones discussed in this section.

237 For example, at 'one-on-one' briefings with major investors or 'invitation only' investor events organised by brokers or analysts.

238 See *ASIC v Southcorp Limited (No 2)* [2003] FCA 1369.

239 *ASIC v Newcrest Mining Limited* [2014] FCA 698 is a case in point demonstrating this particular risk.

240 See 'ASIC Regulatory Guide 62' on page 83.

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

242 *ASIC v Newcrest Mining Limited*, note 239 above, is a case in point showing the dangers of not correcting information about forecast capital expenditure once it is no longer accurate.

deemed to be misleading,[243] with all the significant legal consequences that entails.[244] For this reason, appropriate due diligence needs to be applied to their preparation and the underlying figures and assumptions[245] should be carefully vetted and signed off at a suitably senior level before they are released.

If an entity becomes aware that its financial results will differ significantly (downwards or upwards) from any financial forecast it has published, or that its exploration or production results for a period will differ significantly (downwards or upwards) from any target it has published, it may have a legal obligation to notify the market of that fact. This obligation may arise under Listing Rule 3.1 and section 674,[246] if the difference is of such magnitude that a reasonable person would expect it to have a material effect on the price or value of the entity's securities. It may also arise under section 1041H, because failing to inform the market that its published forecast or target is no longer accurate could constitute misleading conduct on its part.

Guidance Note 31 *Reporting on Mining Activities* has further guidance on exploration and production targets and financial forecasts based on such targets.

8. ASX's enforcement practices

8.1 Monitoring and surveillance

As a licensed market operator, ASX is obliged to have adequate arrangements to monitor and enforce compliance with its Listing Rules.[247] To meet this obligation, ASX conducts various monitoring and surveillance activities to detect possible breaches of Listing Rule 3.1.

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

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

ASX also has a Surveillance Group, which uses sophisticated computer technology to monitor trading in ASX quoted securities on a real time basis across all licensed markets in Australia seeking to identify abnormal trading[248] which could indicate that there has been a leak of market sensitive information yet to be announced under Listing Rule 3.1. It also reviews various news services, investor forums, chat sites and published broker research looking for similar indications. Again, any concerns that the Surveillance Group may have on this score are referred to the relevant listings adviser to follow up with the entity.[249]

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[243] See note 327 and accompanying text. See also ASIC Regulatory Guide 170 *Prospective financial information*.

[244] See 'The statutory prohibitions against false or misleading disclosures' on page 79.

[245] Entities should again note ASIC's guidance that any material assumptions or qualifications that underpin forward looking statements (such as an exploration or production target) in an announcement under Listing Rule 3.1 should be stated in the announcement: see note 112 and accompanying text.

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

[247] Section 792A(c)(ii).

[248] Such as a sudden and significant movement in the market price or traded volumes of an entity's securities which cannot be explained by announcements the entity has made or by movements in the market or its sector generally.

[249] The processes ASX generally follows when it detects information in a news service, investor forum, chat site or published broker research which could indicate that there has been a leakage of market sensitive information yet to be announced under Listing Rule 3.1 are explained under '6.4 Responding to comment or speculation in media or analyst reports and market rumours' on page 40.

8.2 The action ASX takes when it detects abnormal trading

If ASX identifies any abnormal trading in an entity's securities which raises a potential continuous disclosure issue, it will endeavour to contact the person the entity has appointed under Listing Rule 12.6 to be responsible for communications with ASX on Listing Rule matters to discuss the situation. In that conversation, ASX will usually ask the person if they are aware of any information concerning the entity which has not been announced to the market and which, if known, could explain the abnormal trading in its securities. When asked this question, that person is expected to answer it frankly and honestly and, if there is any such information, to tell ASX of the general nature of the information, even if he or she considers the information to be confidential and not something that otherwise requires formal disclosure to ASX under Listing Rule 3.1A.[250] A failure to do so will deny ASX the opportunity to assist the entity with its disclosure obligations when that could be of benefit to the entity and to the market. Refusing to answer the question will also constitute a breach of Listing Rules 18.7 and/or 18.8 entitling ASX to suspend trading in the entity's securities under Listing Rule 17.3.1, while answering it dishonestly may constitute a criminal offence under section 1309.[251]

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

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

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

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

It will often be the case, however, that the entity is not able to identify any reason to explain the abnormal trading in its securities other than a possible leakage of market sensitive information. As explained above,[252] in such a case, ASX has no choice but to assume that the information in question is no longer confidential and to require an immediate announcement about the information under Listing Rule 3.1 and/or 3.1B.

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

For example, where the information relates to an incomplete negotiation that is very close to completion, at the entity's request, ASX may grant the entity a trading halt to allow it the time needed to conclude the negotiations and to make a more definitive and informative announcement to the market. This may be preferable from the entity's perspective than having to put out an immediate announcement about the current state of the negotiations. It may also avoid the market overreacting to the prospect of a transaction that has yet to be successfully concluded.

ASX's aim in these discussions will be to avoid a situation where the market is trading on an uninformed basis. Hence, where these matters arise during normal market trading hours, they will have a high degree of urgency

[250] ASX will generally advise the entity in this conversation that if it has been relying on Listing Rule 3.1A not to announce information which would otherwise require disclosure under Listing Rule 3.1, the recent trading in its securities would suggest that this information has ceased to be confidential and therefore the information is no longer protected from disclosure by Listing Rule 3.1A.

[251] See 'The statutory prohibitions against false or misleading disclosures' on page 79.

[252] See '5.8 Listing Rule 3.1A.2 – the requirement for information to be confidential' on page 35.

attached. The window for consultation will be limited and, absent a trading halt or suspension, will not accommodate detailed argument or protracted negotiations with the entity or its advisers.

8.3 Price query letters

As mentioned above, ASX will generally issue a price query letter when it detects abnormal trading in an entity's securities and, in its discussions with the entity about that matter, the entity tells ASX that it is not aware of any information which has not been announced to the market and which could explain the abnormal trading.[253] Usually a price query letter is issued on the same day as those discussions and requires the entity to provide a prompt response – often before the beginning of trading on the next trading day but sometimes even more promptly.

The purpose of a price query letter is to enable ASX to be satisfied that the entity is in compliance with its continuous disclosure obligations under the Listing Rules.[254] The entity must respond to a price query letter by the time specified by ASX in the letter.[255]

Price query letters tend to follow a standard format. Generally, they will identify the abnormal trading and ask the entity to respond separately to each of the following questions and requests for information:[256]

1. *Is the entity aware of any information concerning it that has not been announced to the market which, if known by some in the market, could explain the recent trading in its securities?*

2. *If the answer to question 1 is "yes":*

   (a) *Is the entity relying on Listing Rule 3.1A not to announce that information under Listing Rule 3.1?*

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

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

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

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

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

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

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

[254] Price query letters are issued under Listing Rule 18.7.

[255] Listing Rule 18.7.

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

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

5. *Please confirm that the entity's responses to the questions above have been authorised and approved in accordance with its published continuous disclosure policy or otherwise by its board or an officer of the entity with delegated authority from the board to respond to ASX on disclosure matters.*[257]

Once the entity's response has been received and reviewed by a listings adviser, both the price query letter and the response will usually be published on the ASX Market Announcements Platform together, so that the market is aware that ASX has made enquiries of the entity about the abnormal trading in its securities and of the entity's response to those enquiries.[258]

8.4 Aware letters

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

The purpose of an aware letter is to enable ASX to be satisfied that the entity is in compliance with its continuous disclosure obligations under the Listing Rules.[259] The entity must respond to an aware letter by the time specified by ASX in the letter.[260]

Aware letters tend to follow a standard format. Generally, they will identify the information in question and the relevant date it was announced and ask the entity to respond separately to each of the following questions and requests for information:[261]

1. *Does the entity consider the information to be information that a reasonable person would expect to have a material effect on the price or value of its securities?*

2. *If the answer to question 1 is "no", please advise the basis for that view.*

3. *If the answer to question 1 is "yes", when did the entity first became aware of the information?*

4. *If the answer to question 1 is "yes" and the entity first became aware of the information before the relevant date, did the entity make any announcement prior to the relevant date which disclosed the information? If so, please provide details. If not, please explain why this information was not released to the market at an earlier time, commenting specifically on when you believe the entity was obliged to release the information under Listing Rules 3.1 and Listing Rule 3.1A and what steps the entity took to ensure that the information was released promptly and without delay.*

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

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[257] The reference here to the entity's response having been authorised and approved by the entity's board is intended to cater for situations where that has occurred and should not be interpreted as suggesting that the response needs to be authorised and approved by the board in any particular case (cf '4.8 Does the board need to approve an announcement under Listing Rule 3.1?' on page 19). In most cases, ASX would expect an entity to have a continuous disclosure policy (see Annexure C 'Guidance on Compliance Policies' on page 82) and its response to have been authorised and approved in accordance with that policy. If the entity does not have such a policy, or in the circumstances is not able to apply it, ASX would expect the entity's response either to have been authorised and approved by the board or by an officer of the entity with delegated authority from the board to respond to ASX on disclosure matters.

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

[259] Aware letters are issued under Listing Rule 18.7.

[260] Listing Rule 18.7.

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

6. *Please confirm that the entity's responses to the questions above have been authorised and approved in accordance with its published continuous disclosure policy or otherwise by its board or an officer of the entity with delegated authority from the board to respond to ASX on disclosure matters.*[262]

Once the entity's response has been received and reviewed by a listings adviser, both the aware letter and the response will usually be published on the ASX Market Announcement Platform together, so that the market is aware that ASX has made enquiries of the entity about the timeliness of its disclosure and of the entity's response to those enquiries.[263]

8.5 Complaints or allegations of non-compliance

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

8.6 Requests for further information

If ASX has concerns that:

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

ASX may ask the entity to provide it with any information, document or explanation about that matter to enable ASX to be satisfied that the entity is in compliance with its obligations under the Listing Rules. The entity must comply with that request within the time specified by ASX.[264]

Depending on the nature of the information requested, ASX may require that information to be released to the market. ASX's request for the information will make it clear whether ASX is intending to release, or reserves the right to release, the information to the market so that the entity will have the opportunity to respond in a suitable form.[265]

8.7 Referrals to ASIC

If ASX suspects that an entity has committed a significant contravention of the Listing Rules, or that an entity or any other person (such as a director, secretary or other officer of the entity) has committed a significant contravention of the Corporations Act,[266] it is required under that Act[267] to give a notice to ASIC with details of the contravention. The purpose of such a notice is so that ASIC can then consider what action, if any, it may wish to take in relation to the suspected contravention.

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[262] Again, the reference here to the entity's response having been authorised and approved by the entity's board is intended to cater for situations where that has occurred and should not be interpreted as suggesting that the response needs to be authorised and approved by the board in any particular case (cf '4.8 Does the board need to approve an announcement under Listing Rule 3.1?' on page 19). In most cases, ASX would expect an entity to have a continuous disclosure policy (see Annexure C 'Guidance on Compliance Policies' on page 82) and its response to have been authorised and approved in accordance with that policy. If the entity does not have such a policy, or in the circumstances is not able to apply it, ASX would expect the entity's response either to have been authorised and approved by the board or by an officer of the entity with delegated authority from the board to respond to ASX on disclosure matters.

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

[264] Listing Rule 18.7.

[265] Listing Rule 18.7A.

[266] This would include a breach of the various sections referred to in Annexure B.

[267] Section 792B(2)(c).

Given the critical importance of timely disclosure of market sensitive information to the integrity and efficiency of the market, ASX will regard any contravention of Listing Rule 3.1 or of section 674 as a "significant" contravention for these purposes and refer the matter to ASIC.[268]

In deciding whether or not to refer a potential contravention of Listing Rule 3.1 and/or section 674 to ASIC, ASX will need to form a view on whether the information in question was market sensitive. As mentioned previously,[269] the test for determining this is set out in section 677 of the Corporations Act. Under that section, a reasonable person is taken to expect information to have a material effect on the price or value of an entity's securities if the information "would, or would be likely to, influence persons who commonly invest in securities in deciding whether to acquire or dispose of" those securities. Applying this test literally would require ASX to put itself into the shoes of persons who commonly invest in securities at the time the information was required to be disclosed under Listing Rules 3.1 and 3.1A and hypothetically form a view on whether the information would have influenced their decision to acquire or dispose of the entity's securities at that time.

Instead of undertaking that hypothetical task, ASX will generally look to the actual effect that the information had on the market price of the entity's securities[270] when it was finally announced to the market[271] and assess for itself whether or not the information in fact had a material effect on the market price. For these purposes, ASX will generally apply the materiality guidelines that formerly appeared in the Australian Accounting Standards[272] as a reasonable measure of materiality. Thus, if the information appears to ASX to have moved[273] the market price of the entity's securities (relative to prices in the market generally or in the entity's sector) by roughly:[274]

- 10% or more, ASX will generally[275] regard that as confirmation that the information was market sensitive and therefore refer a potential breach of Listing Rule 3.1 and section 674 to ASIC;
- 5% or less, ASX will generally regard that as confirmation that the information was not market sensitive and therefore not refer the matter to ASIC.

Where the price movement is between 5% and 10%, ASX will have regard to a number of factors to determine whether the information should be regarded as market sensitive. This includes the nature and significance of the information, the market capitalisation of the entity,[276] the beta of its securities,[277] the bid-offer spread at which its

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[268] The same is true of any contravention of Listing Rule 3.1B.

[269] See '4.2 When is information market sensitive?' on page 9.

[270] Case law confirms that it is acceptable for a court (and, *a fortiori*, ASX or ASIC) to look at the actual effect that information had on the market price of an entity's securities as a cross-check on whether it would have influenced the decision of persons who commonly invest in securities to acquire or dispose of the entity's securities: see *Rivkin Financial Services Ltd v Sofcom Ltd* [2004] FCA 1538, at paragraphs 113-6; *ASIC v Fortescue Metals Group* (No 5) [2009] FCA 1586, at paragraphs 474-7; *ASIC v Macdonald (No 11)*, note 76 above, at paragraphs 1063-7; and *James Hardie Industries NV v ASIC*, note 10 above, at paragraph 537.

[271] This includes any movements in the market price of the entity's securities (relative to prices in the market generally or in the entity's sector) in the lead up to the announcement which may have occurred because of a possible leak of, or rumour about, the information.

[272] Paragraph 15 of Accounting Standard AASB 1031 *Materiality* (July 2004), discussed in further detail in note 214 above.

[273] References to moving the market price of an entity's securities should be understood as including the maintenance of the market price at or about its current level when it would otherwise be expected to move materially in a particular direction, given price movements in the market generally or in the entity's sector – see notes 12 and 13.

[274] Note that ASX does not apply the 5%/10% materiality guidelines in a mathematically precise manner. Isolating the price effect of particular information from the other factors that may have affected the market price of an entity's securities and then adjusting for price movements in the market generally and in the entity's sector is not an exercise that can be done with mathematical precision.

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

[276] All other things being equal, the higher the market capitalisation of an entity, the lower the threshold is likely to be for ASX to consider a movement in the price of its securities to be material.

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

securities normally trade,[278] and whether there was a noticeable spike in the volume of its securities traded in the lead up to and shortly after the announcement. For smaller entities, ASX would generally expect the application of these factors to result in it applying a materiality threshold that is 10% or close to it. For very large entities, ASX would generally expect the application of these factors to result in it applying a materiality threshold that is closer to 5% than to 10%.

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

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

It should also be noted that in determining whether or not to issue a price query letter,[279] ASX may have regard to other factors, in addition to the percentage movement in the market price of an entity's securities, including whether there has been a material change in the traded volumes of those securities. Hence, ASX may issue a price query letter even where the percentage movement in an entity's securities is less than 5%.

8.8 Other enforcement action by ASX

If ASX considers that an entity is withholding information from the market that ought to be announced under Listing Rule 3.1 or 3.1B, it may suspend trading in the entity's securities until it releases that information and the market is properly informed.[280] In an extreme case, it may remove the entity from the Official List.[281]

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

8.9 Evidentiary matters

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

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

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

[279] See '8.3 Price query letters' on page 56.

[280] Listing Rules 17.3.1 and 17.3.2.

[281] Listing Rule 17.12.

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

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

Example A – material acquisition

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

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

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

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

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

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

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

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

5. After a month of negotiations, A and B are close to reaching agreement, but have yet to resolve one outstanding issue. It is expected that this could take another day or two to resolve. That morning, as the market opens, there is a very material spike in both the market price and traded volumes of A's securities. A price alert is triggered in ASX's surveillance system and ASX contacts A to discuss whether it is aware of any information concerning it which has not been announced to the market and which, if known, could explain the abnormal trading in its securities. A tells ASX that it is in the final stages of negotiating a material business acquisition. A is not able to point to any other circumstance or event that could explain the abnormal trading in its securities.

   ASX advises A that in its opinion the matter is no longer confidential and therefore an announcement must be made immediately under Listing Rule 3.1. ASX also advises A that in view of the abnormal trading in its securities, unless it can release an announcement straight away, it ought to request a trading halt to stop the market trading on an uninformed basis.

   Disclosure would be required. While the transaction is still incomplete, in light of the abnormal trading in A's securities, ASX has to infer that information about the transaction is no longer confidential and/or that there is now potentially a false market in A's securities.

   In this scenario, ASX will invariably suggest to an entity that if it cannot release an announcement to the market straight away, it ought to request a trading halt to quell the uninformed trading in its securities. If the

entity does not agree to do so, ASX will generally be left with little choice but to impose a suspension to prevent the market trading on an uninformed basis.

6. A indicates to ASX that it is agreeable to requesting a trading halt. A and ASX discuss the scope and timing of the announcement that will bring an end to the trading halt. A indicates that since it is very close to concluding the transaction negotiations, rather than put out an announcement now advising the market about the current state of the negotiations with B, it would prefer for the announcement to be delayed to allow the negotiations to be completed, so that a more definitive and informative announcement can be made to the market. A formally requests a trading halt, indicating in its request simply that it is in negotiations about a material acquisition and that it expects to be able to make a further announcement about the transaction shortly. The trading halt is duly granted by ASX.

Alternative A: The negotiations between A and B are successfully concluded within the next two trading days[282] and the parties sign an agreement for A to buy the business from B. The agreement contains a boilerplate clause requiring its terms to be kept confidential.

A would be expected to disclose the key commercial terms of the acquisition and the material terms of the agreement immediately after it is signed. The confidentiality clause in the agreement does not override or displace A's disclosure obligations under the Listing Rules.[283]

A's announcement should include sufficient information about the agreement for investors to understand its ramifications and to assess its impact on the price or value of A's securities. Depending on the circumstances, that information might include:

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

The publication of the announcement will result in the trading halt being lifted.

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

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

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[282] Two trading days is the maximum permissible period for a trading halt.

[283] See '4.22 Disclosure must be made even if it is contrary to contractual commitments' on page 30. Note that in this case, given the confidentiality clause in the agreement, it would generally not be appropriate to lodge a copy of the agreement on the ASX Market Announcements Platform. While the confidentiality clause cannot prevent the disclosure of information required to be disclosed under Listing Rule 3.1, the agreement may well contain other information that is not be required to be disclosed under Listing Rule 3.1 and the publication of that information on the ASX Market Announcements Platform could give rise to a breach of the confidentiality clause.

Example B – control transaction

1. An overseas entity C submits a confidential non-binding indicative offer to listed entity D proposing that the two entities merge by way of a scheme of arrangement. Under the proposed terms of the scheme, D's security holders will transfer their securities in D to C in return for a cash payment equivalent to a 25% premium over their current market price. The offer is expressed to be subject to a number of conditions, including satisfactory completion of due diligence by C, and D's board unanimously recommending the scheme to security holders in the absence of a higher offer. It also contains a boilerplate clause affirming that the offer relates to an incomplete proposal, is subject to further negotiation, is strictly confidential and may be withdrawn if it is disclosed by D.

   Disclosure would not be normally required. The information clearly concerns an incomplete proposal or negotiation and is confidential. For the avoidance of doubt, ASX does not consider that Listing Rule 3.1A.3 (the reasonable person test) requires the disclosure of such information, provided the information continues to be confidential.[284]

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

   Disclosure would not be normally required.[285] *The fact that D has received and its board has rejected a confidential offer from C is only likely to have a material effect on the price or value of D's securities if it gives rise to speculation that D is now "in play" and that C or some other person might make a further offer for D in the near term at a price materially above its current market price. If C does make a further offer, then the matter is still an incomplete proposal or negotiation. If C does not, then the prospect of some other person making an offer would generally be pure speculation and therefore a matter of supposition and/or insufficiently definite to warrant disclosure.*[286] *The information falls within Listing Rule 3.1A.1, and provided it continues to be confidential, does not require disclosure under Listing Rule 3.1.*

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

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

For these reasons, ASX considers that a reasonable person would not expect D to disclose information about the confidential offer received from C, provided the information continues to be confidential.

[285] Even though disclosure would not normally be required under Listing Rule 3.1, there would be nothing to stop D from voluntarily disclosing information about the offer and its rejection for its own corporate purposes (eg, because it wanted to put itself "in play" and initiate an auction for control). C's unilateral stipulation that the offer would be withdrawn if disclosed would no longer have any relevance once the offer had been rejected.

[286] It has been suggested to ASX that the relevant information to be disclosed in this case is simply that D has rejected C's offer to enter into a control transaction and that this is a known and definite fact and therefore not a matter of supposition, nor a matter insufficiently definite to warrant disclosure. Accordingly, it is not protected from disclosure by Listing Rule 3.1A and, if it is market sensitive (as it may well be), it must be disclosed immediately under Listing Rule 3.1. ASX does not agree. In ASX's view, this suggestion suffers from the same flaw as that highlighted by McLure JA in *Jubilee Mines NL v Riley*, note 16 above, at paragraph 161:

> "The respondent would narrowly confine the 'information' by taking it out of its broader factual and commercial/corporate context then gauge whether that information has the deemed material effect on the price of the companies securities by reference to the common investor who assesses the information in the context of publicly available information. That in my view is inconsistent with the purpose of the disclosure regime which is a fully informed market. … The disclosure regime does not countenance disclosure of incomplete information just because that information alone would influence persons who commonly invest to buy or sell shares."

Martin CJ (Le Miere AJA agreeing) similarly observed at paragraphs 87 and 90 that:

> "the legislative objective is to ensure that all participants in the market for listed securities have equal access to all information which is relevant to, or more accurately, likely to, influence decisions to buy or sell those securities. It would be entirely contrary to that evident purpose to construe either the listing rule or the statutory provisions as countenancing the disclosure of incomplete or misleading information. … Jubilee's obligations of disclosure must be assessed having regard to the totality of relevant information."

Viewed in its totality and in its broader commercial/corporate context, in ASX's opinion, confidential information that D has received and rejected C's confidential offer is not something that requires disclosure under Listing Rule 3.1, for the reasons given in the text.

Note also that speculation about a further offer (whether from C or someone else) could also potentially give rise to a false market in D's securities.

If another offer does emerge (whether from C or someone else), it should be disclosed at the appropriate point then (eg, when it is no longer confidential or it reaches the stage of no longer being an incomplete proposal or negotiation).

Again, for the avoidance of doubt, ASX does not consider that Listing Rule 3.1A.3 (the reasonable person test) requires the disclosure of information that D has received and its board has rejected the confidential offer from C, provided the information continues to be confidential.[287]

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

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

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

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

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

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

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

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

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

   D would be expected to disclose the material terms of the merger implementation agreement immediately after it is signed.

   D could make this disclosure by lodging a copy of the agreement on the ASX Market Announcements Platform with a relatively short announcement containing a summary of the key commercial terms of the merger, a general description of the agreement and a statement that a copy of the agreement is available on the ASX Market Announcements Platform. Alternatively, D could make this disclosure without lodging a

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[287] Again, ASX is aware that some entities in the past may have disclosed the fact that they have rejected such a confidential offer because of a view that they or their advisers have taken that a reasonable person would expect such a disclosure under Listing Rule 3.1A.3. ASX does not agree with this interpretation of the reasonable person test.

These transactions often involve multiple offers and counteroffers. If Listing Rule 3.1A.3 did require the disclosure of each rejection of an offer, that would make it impossible for entities to have confidential negotiations about a potential control transaction. This in turn could have a chilling effect on the market for corporate control.

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

For these reasons, ASX considers that a reasonable person would not expect D to disclose confidential information that it had rejected the confidential offer from C.

copy of the agreement on the ASX Market Announcements Platform by making a more detailed announcement that includes a summary of the material terms of the agreement. In the latter case, the announcement should include sufficient information about the agreement for investors to understand its ramifications and to assess its impact on the price or value of the entity's securities.

Depending on the circumstances, D's announcement might include:

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

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

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

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

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

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

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

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

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

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

(including, for example, the offer price), ASX would expect the material terms of the offer to be disclosed.

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

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

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

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

  If completion of the negotiations between C and D is imminent, D may prefer to request a trading halt so that it can delay its announcement until after the transaction terms have been agreed and it can make a more definitive and informative announcement to the market.

Note that in each of these cases, ASX would generally advise D that in view of the abnormal trading in its securities, unless it can release an announcement straight away responding to the rumour, it ought to request a trading halt to stop the market trading on an uninformed basis.

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

Example C – security issue

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

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

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

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

3. E, F and G enter into an engagement letter under which E appoints F and G as the joint lead managers and underwriters to the proposed issue. The engagement letter foreshadows that the parties will enter an underwriting agreement in relation to the issue, on terms to be agreed.

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

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

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

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

   E would be expected to disclose the material terms of the offer immediately after the underwriting agreement has been signed. The announcement should include sufficient information about the offer for investors to understand its ramifications and to assess its impact on the price or value of A's securities. Depending on the circumstances, that information might include:

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

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

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

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

- *any other arrangements with associates of the entity or the bookrunner to avoid a shortfall, or the appearance of a shortfall, in the bookbuild,*

then information about those arrangements should also be disclosed.[288]

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

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

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

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

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

then information about those arrangements should also be disclosed.[289]

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

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

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

9B. As an alternative gloss on this example, suppose that the day before E was due to announce its capital raising (ie, just before step 5 above), an article appeared in a major newspaper stating that E will shortly announce an underwritten billion dollar rights issue.

Disclosure would be required. While the matter is still incomplete, given the specificity and accuracy of the information in the newspaper article, it has to be assumed that information about the capital raising is no longer confidential. Since the setting of the offer terms and the execution of the underwriting agreement are imminent, E may prefer to request a trading halt so that it can delay its announcement until after the

[288] See the materials under the heading 'Requirements for additional information' in Guidance Note 30 *Quotation of Additional Securities* and the Annexure to Guidance Note 1 *Applying for Admission – ASX Listings*.

[289] See the materials cited in note 288.

underwriting terms have been agreed and it can make a more definitive and informative announcement to the market. In its request for a trading halt, E would state that the reason for the trading halt is that it is in the final stages of setting the terms for a renounceable accelerated pro rata entitlement offer of securities.[290]

Example D – material mineral discovery

1. Listed entity H, a junior mining exploration company, has recently acquired a tenement from another entity. When it announced the acquisition to the market, it highlighted that the previous owner had conducted a VTEM[291] survey which had indicated near surface nickel-copper sulphide mineralisation and that it was proposing to undertake a 5 hole drilling campaign to test the prospectivity of the tenement. The first two holes appeared to contain small traces of copper sulphide mineralisation. When the third hole was completed, however, it was apparent from a visual inspection of the drill core that there was a significant nickel and copper sulphide intercept close to the surface.

   Whether disclosure is required at this stage would depend on the circumstances. In many cases, information derived solely from a visual inspection of a core sample and before an assay has been undertaken, would be a matter of supposition and insufficiently definite to warrant disclosure. In those circumstances, disclosure of the drilling results would not normally be expected until the drill core had been assayed and analysed and a report that complies with the requirements in Chapter 5 and Appendix 5A[292] *of the Listing Rules for reporting exploration results had been prepared.*

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

2. The core samples for all 3 holes are sent for analysis. The assay results confirm the presence of high grade sulphides in a wide intercept. H's CEO immediately instructs the company secretary to prepare a draft announcement about the drilling results to be reviewed and settled by H's geologist (a 'competent person' under the JORC Code) and approved by H's board of directors. She also instructs the company secretary to keep an eye on the company's share price for any signs that news about the discovery may have leaked. The company secretary and the geologist promptly and diligently work on the announcement, making sure that it complies with the requirements in Chapter 5 and Appendix 5A of the Listing Rules for reporting exploration results. The company secretary convenes a meeting of H's board on short notice to consider the draft announcement. H's board reviews the draft announcement and approves its release.

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

   This example recognises that the board of a junior mining exploration company is likely to want to, and a reasonable person would expect it to, approve any announcement of material exploration results before it is released. In a case such as this, the requirement to disclose information immediately can accommodate the need for a board to review and approve a continuous disclosure announcement, provided it is done promptly and without delay.[293]

3. H conducts a further drilling program with a view to proving up a mineral resource. As each set of material drill results are received, H follows the process outlined in 2 above and releases information about the results to the market.

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

[291] VTEM refers to a Versatile Time Domain Electromagnetic survey.

[292] The Australasian Code for Reporting of Exploration Results, Mineral Resources and Ore Reserves (otherwise known as the JORC Code).

[293] See '4.8 Does the board need to approve an announcement under Listing Rule 3.1?' on page 19.

4. H's geologist determines that there is now enough drilling information to estimate a mineral resource and begins the work needed to do that. Upon receipt of the geologist's resource estimate, H instructs the company secretary to prepare an announcement that complies with the requirements in Chapter 5 and Appendix 5A of the Listing Rules for reporting a mineral resource. The company secretary convenes a meeting of H's board on short notice to consider the draft announcement. The announcement is tabled and approved at a board meeting.

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

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

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

Example E – material law suit

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

   Disclosure would be required. The information does not fall within any of the categories of information excluded from disclosure under Listing Rule 3.1A.1. The point at which disclosure would be required would depend on the circumstances. If J has sufficient facts at hand to assess that information about the legal proceedings is market sensitive (noting that the proceedings on their face appear to be highly significant as they threaten J's principal asset), the disclosure would be required immediately after the service of the legal proceedings. If J doesn't have sufficient facts at hand to make that assessment (which might be the case, for example, if the proceedings have "come out of the blue" and J needs legal advice to assess whether K's claim has any merit or is totally frivolous), the disclosure would be required immediately J has, or ought reasonably to have, collected sufficient facts to be able to make that assessment.[294]

   The details to be disclosed would also depend on the circumstances but might include:

   - *a summary of the matters raised and the relief being sought by K in the legal proceedings; and*
   - *whether J intends to defend the proceedings.*[295]

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

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

   Disclosure would not normally be required. The advice has been prepared for internal management purposes (the conduct of the litigation). A reasonable person would not expect the advice to be disclosed.[296]

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[294] See '4.4 When does an entity become aware of information?' on page 12 and, in particular, the example given in note 41.

[295] It would be imprudent for H to include in the announcement the statement that not infrequently appears in such announcements that the claim has little or no merit and therefore will be vigorously defended, unless H has received considered legal advice to that effect. If it makes this statement and it transpires that the claim in fact does have some merit, H may leave itself open to an action for misleading or deceptive conduct under section 1041H.

[296] See '5.9 Listing Rule 3.1A.3 – the reasonable person test' on page 37.

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

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

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

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

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

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

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

Disclosure of the material terms of the settlement would be required immediately after the deed of settlement is signed.[297] *Depending on the circumstances, this might include:*

- *the fact that the claim has been settled;*
- *the number of ordinary shares to be issued by J to K (this information does not fall within the confidentiality provision in the deed since it is plainly market sensitive and therefore required to be disclosed by law under Listing Rule 3.1 and section 674);*[298]
- *if the information about the cash payment by J to K is market sensitive,*[299] *the amount of that cash payment (again, if this information is market sensitive, it does not fall within the confidentiality provision in the deed since it is required to be disclosed by law under Listing Rule 3.1 and section 674); and*
- *the impact of the settlement on J's financial position.*

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

Disclosure of the material terms of the settlement would be required immediately after the deed of settlement is signed. Depending on the circumstances, this might include:

- *the fact that the claim has been settled; and*

[297] In this case, given the confidentiality clause in the deed of settlement, it would generally not be appropriate to lodge a copy of the deed on the ASX Market Announcements Platform. While the confidentiality clause cannot prevent the disclosure of information required to be disclosed under Listing Rule 3.1, the deed may well contain other information that is not be required to be disclosed under Listing Rule 3.1 and the publication of that information on the ASX Market Announcements Platform could give rise to a breach of the confidentiality clause.

[298] It is also separately disclosable to ASX under Listing Rule 3.10.3 and to ASIC under section 254X.

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

- *that the terms of the settlement are confidential but it is not expected that the settlement will have any material impact on J's financial position.*[300]

Example F – material difference in earnings compared to earnings guidance

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

   The information in this case that L's earnings are likely to exceed its published earnings guidance by around 10% will only have to be announced under Listing Rule 3.1 if that information is market sensitive (ie, if a reasonable person would expect the information to have a material effect on the price or value of L's securities). A variation in earnings of this magnitude may, or may not, be market sensitive, depending on the circumstances.[301] *For example, if the market regards this as a "one-off" and that trading conditions and exchange rates are likely not to be as favourable in future years, then the better than expected result this year may not have any material effect at all on the price or value of L's securities.*

   If Listing Rule 3.1 does apply, it will require the information to be disclosed immediately (ie, promptly and without delay) upon L becoming aware of it. This in turn will require the detailed earnings forecast to be prepared and reviewed and approved by the board promptly and without delay.

   If Listing Rule 3.1 does not apply, L may still have disclosure issues under section 1041H. To address those issues, it would be prudent for L to adopt the same approach (ie, to prepare the detailed earnings forecast and have it reviewed and approved by the board promptly and without delay).

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

   Disclosure would be required immediately after the board has approved the detailed earnings forecast and announcement.[302] *The announcement should include the revised earnings guidance for the financial year. It might usefully include an explanation of the reasons why it has been revised upwards.*

   Entities should again note ASIC's guidance that any material assumptions or qualifications that underpin forward looking statements (such as an earnings forecast) in an announcement under Listing Rule 3.1 should be stated in the announcement.[303]

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[300] This assumes that the legal costs that J has incurred to date, and which J must bear under the terms of the settlement, will not have a material impact on J's financial position.

[301] See the discussion under '7.3 Market sensitive earnings surprises' on page 44.

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

[303] See note 112 and accompanying text.

Example G – material difference in earnings compared to consensus estimates

1. Listed entity M is in the business of providing contract engineering and construction services to mining businesses. It has a policy of not providing earnings guidance. It is covered by sell-side analysts. Their estimates for M's net profit after tax for the current financial year range from $450 million to $550 million, with the consensus estimate being $500 million. One of M's major projects, which was close to completion and on which it was expecting to make a substantial profit, has just been hit by a severe cyclone. The damage is considerable and it is reasonably apparent that it will have a significant impact on the profitability of the project and, because of that, is likely to have a material effect on the price or value of M's securities. However, M needs to conduct an on-site assessment of the extent of the damage and review its contractual obligations to repair the damage, its liability to penalties for late delivery and its ability to make an insurance claim, before it can put a figure on the financial impact of the cyclone.

   M is aware of market sensitive information (the fact that its major project has suffered considerable damage caused by a severe cyclone and that this is likely to have a material effect on the price or value of its securities). M therefore should immediately give that information to ASX under Listing Rule 3.1.

   Since M doesn't yet know the impact of the cyclone on the profitability of the project, its announcement need not say anything on that issue at this point beyond saying that it will be conducting a review to determine the extent of the damage caused by the cyclone and the impact it may have on its earnings, and that it will provide an update to the market after it has completed that review.[304] *The announcement might also usefully mention the likely timeframe for the review and when an update to the market can be expected.*

   Note that to comply with the timing requirements that underpin Listing Rule 3.1, the review should be conducted and the results announced promptly and without delay.

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

   M is aware of market sensitive information (the fact that it now expects to make a $200 million loss on the major project and that this is likely to have a material effect on the price or value of its securities). M therefore should immediately give that information to ASX under Listing Rule 3.1.

   M's announcement could mention that it is conducting a review of the profitability of the balance of its portfolio of projects and that it will provide a further update to the market after the review has been completed. It might also usefully mention the likely timeframe for the review and when a further update to the market can be expected.

   Again, to comply with the timing requirements that underpin Listing Rule 3.1, the review of the balance of its portfolio of projects should be conducted and the results announced promptly and without delay.

3. M's management completes the review of its portfolio of projects and forecasts that M's net profit for the financial year is likely to be in the range of $240 million to $260 million. M's secretary convenes a board meeting on short notice to consider the forecast and a draft announcement to the market about it. M's board

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

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

carefully vets the figures in the forecast and the assumptions underpinning it. It also reviews the draft announcement and approves its release.

Disclosure of the earnings forecast would be required immediately after the board has approved the forecast and announcement.[305] *The announcement should include M's earnings forecast for the financial year. It might usefully include an explanation of the reasons why it is lower than the consensus estimate.*

Entities should again note ASIC's guidance that any material assumptions or qualifications that underpin forward looking statements (such as an earnings forecast) in an announcement under Listing Rule 3.1 should be stated in the announcement.[306]

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

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

   Example H1: listed entity N is in confidential negotiations with overseas entity O regarding a merger of the two entities. N recognises that, even with careful precautions to preserve the confidentiality of the negotiations, there is always a risk that information about the transaction could leak. N monitors the market price of its securities, newswire services, the press, certain social media sites that it is aware of that regularly include postings about it, and enquiries from analysts and journalists for signs of information leakage. In the final stages of negotiations, a press article appears referring to the transaction. N understands that this means that information about the transaction is no longer confidential and that it is therefore no longer able to rely on the carve-outs from disclosure in Listing Rule 3.1A. It must therefore immediately make an announcement about the transaction under Listing Rule 3.1.

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

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

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

   Example H2: listed company P is proposing a scheme of arrangement to merge with another entity. It has approached the court for orders convening the necessary scheme meetings under section 411(1) of the Corporations Act. The convening of the meetings has been opposed by some security holders. The court is due to hand down its decision on whether or not to convene the meetings at 2.15 pm.

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

   See also Example H3 below.

[305] This assumes that a reasonable person would expect information about the revised earnings forecast to have a material effect on the price or value of M's securities and therefore the information has to be disclosed immediately under Listing Rule 3.1.

[306] See note 112 and accompanying text.

3. Where the event that gives rise to the need to make an announcement is within your control, be sensitive to the hours when licensed markets in Australia are trading and, where possible, try to ensure that the event happens and the announcement is made before trading commences or after trading has closed, to avoid disrupting the normal course of trading on licensed markets:

   Example H3: listed entity Q has been negotiating the purchase of a material business. It has not yet made an announcement about the transaction because it has been confidential, incomplete and subject to negotiation. The outstanding commercial points being negotiated are finally agreed late one afternoon and Q's lawyers are instructed to finalise the transaction agreements with the lawyers for the vendor and to have them ready for signing the following morning. Q's financial advisers are instructed to prepare a draft ASX announcement and a draft press release reflecting the final negotiated outcome and to circulate them to all parties for approval overnight.

   Knowing that the transaction will need to be announced immediately after the transaction agreements are signed, Q arranges for the signing to take place at 9.00 am Sydney time and for a press conference to take place at 9.30 am. As soon as the transaction agreements are signed, Q transmits the agreed ASX announcement to the ASX Market Announcements office and shortly thereafter receives back a confirmation that it has been released to the market. Q then holds its press conference, as scheduled, at which it releases the agreed press announcement.[307]

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

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

   Example H4: listed entity R has been negotiating a major contract with the Australian government. The contract is to be signed at 9.00 am Sydney time on a trading day and the relevant Minister has scheduled a major press conference for midday Sydney time on that day to announce the contract. Protocol dictates that the contract should be announced by the government and R therefore considers it appropriate to delay issuing its announcement to the market until immediately after the Minister has held the press conference.

   R should request a trading halt before the commencement of trading on the morning the contract is signed, recognising that the obligation to announce the signing of the contract would have arisen at the time it was signed.

5. An example of a situation where a reasonable person would expect information to be disclosed under Listing Rule 3.1A.3:

   Example H5: listed exploration company S has been conducting an infill drilling program. The assay results for the first five completed drill holes were very promising. S announced them to the market as soon as they became available and its share price increased by 20% and there was a significant uptick in the traded volume of its shares.

   S has just completed drilling on the next five holes, which are in close proximity to the first five. These drill holes have returned assay results which are far less promising, casting real doubts on the size and economic viability of the deposit.

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

One of S's directors asserts that the information from the latest holes is not sufficient for S to be able to form a view about the market sensitivity of the information and that S needs to drill further holes to have a more complete picture of the size and grade of the deposit before making any further announcement to the market.

Even if this assertion was correct, S would be expected to make an immediate announcement regarding the latest assay results. In these circumstances, given the significant impact that the original promising assay results had on the market price of its shares and the far less promising results from holes in close proximity, a reasonable person would expect S to make such a disclosure.

Annexure B:
Relevant provisions of the Corporations Act

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

The statutory requirement for timely disclosure

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

(a) an ASX listed entity has information about specified events or matters that the provisions of the Listing Rules require the entity to notify to ASX as they arise for the purpose of ASX making that information available to participants in the market; and

(b) that information is not generally available and is information that a reasonable person would expect, if it were generally available, to have a material effect on the price or value of ED securities[308] of the entity;

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

The consequences for an entity in failing to make timely disclosure

The consequences for an entity in breaching section 674(2) are potentially serious. It is both a criminal offence and a financial services civil penalty provision, punishable in the former case by a fine of up to 1,000 penalty units[309] and in the latter case by a civil penalty of up to $1,000,000.[310] Alternatively, if ASIC has reasonable grounds to suspect such a breach it may, by administrative action, issue an infringement notice imposing a penalty of up to $100,000.[311]

Persons who suffer loss or damage as a result of an entity's breach of section 674(2)[312] may recover that amount from the entity under section 1317HA.[313] ASIC may bring representative proceedings on behalf of such persons[314] and has used its power to enter into enforceable undertakings[315] to require an entity to establish a compensation fund to meet prospective claims under section 1317HA.[316]

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

[309] Sections 1311 and 1312. At the time of writing, a penalty unit was equivalent to $180.

[310] See sections 1317DA, 1317E(1)(ja), 1317G(1A) and 1317G(1B)(b).

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

[312] For example, someone who has purchased or sold securities in the entity while the information was withheld from the market.

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

[314] Section 1317J(1).

[315] Section 93AA of the Australian Securities and Investments Commission Act 2001 (Cth) (referred to in this Guidance Note as the "ASIC Act").

[316] See ASIC Media Release 06-443.

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

A director, secretary or other officer of an entity who is "involved in"[317] a contravention by the entity of section 674(2) may breach section 674(2A). This is also a financial services civil penalty provision punishable by a penalty of up to $200,000.[318] Again, persons who suffer loss or damage as a result of an officer's breach of section 674(2A) may recover that amount from the officer in question under section 1317HA.

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

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

Hence, it is important that an entity has in place appropriate policies and procedures to comply with its disclosure obligations under Listing Rule 3.1.[319] The absence of such policies and procedures may make it difficult for an officer of an entity to rely on the due diligence defence in section 674(2B).

Finally, it should be noted that an officer of an entity who is involved in a breach of Listing Rule 3.1 may also breach his or her statutory duties of care and diligence to the entity under section 180(1) (in the case of a listed company) or section 601FD(1)(b) (in the case of a listed trust).[320] Both of these sections are corporation/scheme civil penalty provisions. Breaching them can lead to the imposition of a civil penalty of up to $200,000, a liability to compensate the entity for any loss or damage it suffers and the person being disqualified from managing a corporation.[321]

The statutory prohibitions against false or misleading disclosures

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

A misleading or deceptive announcement under Listing Rule 3.1 breaches section 1041H of the Corporations Act and section 12DA of the ASIC Act. While this does not attract criminal or civil penalties, it will empower the court to grant an injunction to cure the breach or to order the disclosure of corrective information.[322] In addition, any person who has suffered loss or damage as a result of the breach may recover that amount from the entity, as well as from any other person (such as a director, secretary or other officer) who was "involved in"[323] the entity's breach.[324]

An officer or employee of an entity who gives, or authorises or permits the giving of, materially false or misleading[325] information to ASX under Listing Rule 3.1:

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317 Section 79 defines what it means to be "involved in" a breach of the Corporations Act. It includes aiding, abetting, counselling or procuring the breach or being in any way, by act or omission, directly or indirectly, knowingly concerned in the breach.

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

319 For further guidance on continuous disclosure compliance policies, see Annexure C.

320 See *ASIC v Macdonald (No 11)*, note 76 above, where the court found that the non-executive directors, CEO, CFO and company secretary/general counsel of a listed company all breached their duties to the company under section 180(1) as a result of their involvement in a failure by the company to announce certain information in breach of Listing Rule 3.1 and section 674 and in the company making a misleading announcement about other information in breach of section 1041H. The decision against the non-executive directors and the company secretary/general counsel was ultimately affirmed on appeal by the High Court in *ASIC v Hellicar*, note 76, and *Shafron v ASIC* [2012] HCA 18 respectively. The decision against the CFO was affirmed on appeal by the NSW Court of Appeal in *Morley v ASIC*, note 77). The CEO did not appeal the decision at first instance.

321 See sections 1317E(1)(a) and (g), 1317G(1), 1317H and 206C.

322 Sections 1324 and 1324B.

323 See note 317.

324 Section 1041I of the Corporations Act and section 12GF of the ASIC Act.

325 This includes omitting material which renders the information given to ASX misleading in a material respect.

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

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

- in the case of an individual, by up to 10 years' jail and/or a fine of up to the greater of: (a) 4,500 penalty units; or (b) if the court can determine the total value of the benefits that have been obtained by one or more persons and are reasonably attributable to the commission of the offence, 3 times that total value; and
- in the case of a body corporate, a fine of up to the greatest of: (a) 45,000 penalty units; or (b) if the court can determine the total value of the benefits that have been obtained by one or more persons and are reasonably attributable to the commission of the offence, 3 times that total value; or (c) if the court cannot determine the total value of those benefits, 10% of the body corporate's annual turnover during the 12 month period ending at the end of the month in which the body corporate committed, or began committing, the offence.[326]

Entities and their officers should note, in particular, the legal issues that may arise when making forward looking announcements (eg, announcements containing earnings guidance or exploration or production targets). Under both the Corporations Act and the ASIC Act, when a person makes a representation with respect to any future matter and the person does not have reasonable grounds for making the representation, the representation is taken to be misleading.[327]

The duty to implement proper information reporting systems

As a matter of general law, it seems reasonably clear that the directors of an entity have a duty to ensure that the entity has appropriate information reporting systems in place so that they are kept apprised of material developments affecting the entity in a timely manner.[328] Failure to do so is likely to breach their statutory duties of care and diligence to the entity under section 180(1) (in the case of a listed company) or section 601FD(1)(b) (in the case of a listed trust). As mentioned above, such a breach may lead to the imposition of a civil penalty of up to $200,000, a liability to compensate the entity for any loss or damage it suffers and the person being disqualified from managing a corporation.

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[326] Section 1311.

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

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

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

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

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

Annexure C:
Guidance on compliance policies

Every entity should have an effective[329] written policy on continuous disclosure aimed at ensuring that information which may be market sensitive and which may require disclosure under Listing Rule 3.1:

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

Not only will this aid the entity in complying with its obligations under Listing Rule 3.1, in the event that the entity does happen to breach those obligations, the fact that it has such a policy may well be taken into account by a court as a mitigating factor in assessing the level of penalty that should be imposed in relation to that breach.[330] It may also assist the directors, secretaries and other officers of the entity in being able to assert the due diligence defence in section 674(2B).[331]

The recommendations of the ASX Corporate Governance Council

In designing their disclosure policies, entities should have regard to the commentary accompanying Recommendation 5.1 of the ASX Corporate Governance Council's *Corporate Governance Principles and Recommendations*.[332] This recommends that entities have a written compliance policy that includes vetting and authorisation processes designed to ensure that:

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

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[329] The case law on compliance systems suggests that to be effective, a compliance system should:

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

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

[331] See 'The consequences for directors, secretaries and other officers in failing to make timely disclosure' on page 79.

[332] Recommendation 5.1 states that: "[a] listed entity should (a) have a written policy for complying with its continuous disclosure obligations under the Listing Rules; and (b) disclose that policy or a summary of it." This recommendation supports Principle 5, namely, that "[a] listed entity should make timely and balanced disclosure of all matters concerning it that a reasonable person would expect to have a material effect on the price or value of its securities."

The *Corporate Governance Principles and Recommendations* are underpinned by Listing Rule 4.10.3, which requires a listed entity each annual reporting period to publish a corporate governance statement disclosing the extent to which it has followed those recommendations during the reporting period. If the entity has not followed a recommendation for any part of the reporting period, its corporate governance statement must separately must identify that recommendation and the period during which it was not followed and state its reasons for not following the recommendation and what (if any) alternative governance practices it adopted in lieu of the recommendation during that period.

The *Corporate Governance Principles and Recommendations* are available online at:
http://www.asx.com.au/documents/asx-compliance/cgc-principles-and-recommendations-3rd-edn.pdf.

- announcements by the entity are factual, complete, balanced[333] and expressed in a clear and objective manner that allows investors to assess the impact of the information when making investment decisions.

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

- the roles and responsibilities of directors, officers and employees in complying with the entity's disclosure obligations;
- safeguarding confidentiality of corporate information to avoid premature disclosure;
- media contact and comment;
- external communications such as analyst briefings and responses to security holder questions; and
- measures for responding to or avoiding the emergence of a false market in the entity's securities.

ASIC Regulatory Guide 62

In designing their disclosure policies, entities should also have regard to the 10 principles set out in ASIC Regulatory Guide 62 *Better disclosure for investors*. Those principles are:[334]

1. Establish written policies and procedures on information disclosure. Focus on continuous disclosure and improving access to information for all investors.
2. Use current technology to give investors better access to your information. In particular, post price sensitive information on your company's website as soon as it is disclosed to the market.
3. Nominate a senior officer to have responsibility for:
   - making sure that your company complies with continuous disclosure requirements;
   - overseeing and co-ordinating disclosure of information to the stock exchange, analysts, brokers, shareholders, the media and the public; and
   - educating directors and staff on the company's disclosure policies and procedures and raising awareness of the principles underlying continuous disclosure.[335]

   In smaller companies, this person is likely to be the company secretary.
4. Keep to a minimum the number of directors and staff authorised to speak on your company's behalf. Make sure that these persons know they can clarify information that the company has released publicly through the stock exchange, but they should avoid commenting on price sensitive matters. The senior officer responsible for disclosure should outline the company's disclosure history to these persons before they brief anyone outside the company. This will safeguard against inadvertent disclosure of price sensitive information.[336]

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[333] In the sense of disclosing both positive and negative information.

[334] This Regulatory Guide was originally published in August 2000 under the title "*Better disclosure for investors*". It was the result of a joint exercise by ASIC and ASX. The introduction to the Guide notes that the measures in the Guide:

> "should be implemented flexibly and sensibly to fit the situation of individual companies. Each listed company needs to exercise its own judgement and develop a disclosure regime that meets legal requirements and its own needs and circumstances."

A footnote to the Guide also notes that references in the Guide to listed companies are to be read as including other listed entities.

[335] As to who would be a suitable person to have this responsibility, note point 5 under '4.9 What other steps can an entity take to facilitate compliance with Listing Rule 3.1?' on page 21.

[336] As noted under '5.8 Listing Rule 3.1A.2 – the requirement for information to be confidential' on page 35, it is incumbent on a listed entity which wishes to rely on the carve-out from disclosure in Listing Rule 3.1A to ensure that it has in place suitable and effective arrangements to preserve confidentiality.

5. The senior officer responsible for disclosure should be aware of information disclosures in advance, including information to be presented at private briefings. This will minimise the risk of breaching the continuous disclosure requirements.

6. Price sensitive information must be publicly released through the stock exchange before disclosing it to analysts or others outside the company. Further dissemination to investors is desirable following release through the stock exchange. Posting information on your company's website immediately after the stock exchange confirms an announcement has been made [and] is one method of making it accessible to the widest audience. Investor information should be posted in a separate area of your website from promotional material about the company or its products.

7. Develop procedures for responding to market rumours, leaks and inadvertent disclosures. Even if leaked or inadvertently disclosed information is not price sensitive, give investors equal access by posting it on the company website.

8. Have a procedure for reviewing briefings and discussions with analysts afterward to check whether any price sensitive information has been inadvertently disclosed. If so, give investors access to it by announcing it immediately through the stock exchange, then posting it on the company website. Slides and presentations used in briefings should be given to the stock exchange for immediate release to the market and posted on the company website.

9. Be particularly careful when dealing with analysts' questions that raise issues outside the intended scope of discussion. Some useful ground rules are:

   - only discuss information that has been publicly released through the stock exchange;
   - if a question can only be answered by disclosing price sensitive information, decline to answer or take it on notice. Then announce the information through the stock exchange before responding.

10. Confine your comments on market analysts' financial projections to errors in factual information and underlying assumptions. Seek to avoid any response which may suggest that the company's or the market's current projections are incorrect. The way to manage earnings expectations is by using the continuous disclosure regime to establish a range within which earnings are likely to fall.[337] Publicly announce any change in expectations before commenting to anyone outside the company.

Additional guidance

In addition to the guidance in the *Corporate Governance Principles and Recommendations* and ASIC Regulatory Guide 62, ASX would suggest that an entity's disclosure policy should also:

- address how and when to use trading halts to manage continuous disclosure issues;
- provide a clear delineation between those announcements that require prior board approval and those that management can make; and
- ensure that continuous disclosure announcements are copied to board members and senior managers by email immediately after they have been released to ASX.

Additional guidance on the contents of a disclosure policy can also be found in the Governance Institute of Australia publication *Good Governance Guide: Disclosure and communications policy*.[338]

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[337] Note that this sentence should not be taken to be suggesting that an entity has any obligation to "manage" earnings expectations. Rather it is simply stating that if an entity wishes to release information about its earnings – for example, to avoid a market sensitive earnings surprise – the appropriate way to do that is through a market announcement under Listing Rule 3.1 and not through selective disclosures to analysts (see '7.1 Earnings guidance', '7.3 Market sensitive earnings surprises' and '7.4 Correcting analyst forecasts and consensus estimates' on pages 43, 44 and 50 respectively).

[338] Available online at: http://www.governanceinstitute.com.au/media/365559/ggg_disclosure_and_comms_policy-v3.pdf.