



Disclosure and the role of ASIC

ASX and ASIC Listed Companies Conference



ASIC

Australian Securities &
Investments Commission

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Discussion Topics

1. Continuous disclosure
2. Announcements
3. Investor briefings
4. ASIC and private remedies
5. Infringement notice regime

Continuous disclosure

Corporations Act obligations

- A corporation must disclose information to the ASX in accordance with the Listing Rules, where the information:
 - is not generally available; and
 - a reasonable person would expect it to have a material effect on price or value (s674(2))
- A person “involved in a contravention” by the corporation also contravenes unless they can prove:
 - he took all reasonable steps to ensure compliance; and
 - he was then satisfied that the corporation was compliant. (s674(2B))

Continuous disclosure

Key elements of the disclosure regime

- Disclosure of price sensitive information to the market in a timely fashion
- Announcements must not be false, misleading or deceptive
- Announcements must be clear, accurate and complete

Continuous disclosure

Disclosure of contracts

- Signing of new contracts can be price sensitive and must be announced immediately
- The fact terms are confidential is not an excuse – negotiate the terms of announcement
- Don't try and “time” signing by leaving one comma open for final negotiation. The fact there is substantial agreement may be announceable
- An escrow agreement for a full agreement may be announceable

Continuous disclosure

Key elements of the disclosure regime

- Release confidential information only on a “need to know basis”
- Persons with non-public price sensitive information cannot trade until the information is released to the market
- Directors will often have price sensitive information so commonly are restricted in their dealings by their own rules
- Directors’ trading must be disclosed to the market

Continuous disclosure

Manipulative market behaviour

- Spreading of false information or rumours, knowing them to be false, or without regard to the truth, is illegal
- Trading whilst holding confidential price sensitive information is illegal insider trading
- Also market manipulation is illegal - trading on the market should be a reflection of natural supply and demand

Continuous disclosure

Benefits of disclosure

- Assist efficient price discovery in the market.
- Encourage greater securities research by investors and advisers, which ensures that securities more closely, and quickly, reflect underlying economic values
- Ensure equity and loan resources in the Australian market are more effectively channeled into appropriate investments, and funds are withheld or withdrawn from poorly performing disclosing entities
- Lessen the possible distorting effects of rumours on securities prices

Continuous disclosure

Benefits of disclosure

- Assist investors in deciding whether to buy, sell, or hold securities, including the prospect of a switch to alternative securities
- Minimise the opportunities for insider trading or similar market abuses
- Improve managerial performance and accountability by giving the market more timely indicators of performance
- Reduce the time and costs when preparing prospectuses

Announcements

Content requirements

1. Clear: information contained in a market release or announcement should be factual and expressed in an objective and clear manner. The use of emotive or intemperate language should be avoided. Puffery should be avoided.

Example: reserves as big as the XYZ field.

Announcements

Content requirements

2. Complete: it should not be necessary to refer to other documents to locate the price sensitive information. The document should be able to be read as a standalone

Example: our announcement of 7 July is still correct as at that date

Announcements

Content requirements

3. Accurate: entities should disclose information that is factually correct, easily understandable, and gives due prominence to positive and negative information

Don't bury the bad news

Examples of poor disclosure

Chemeq

The Federal Court fined Chemeq \$500,000 for two contraventions of s674(2) of the Corporations Act

- In April 2002 the forecast cost of construction of a facility was estimated at \$25m. This figure was carried through a series of capital raisings. Announcements were made about upgrades but not at a 45% cost increase, nor subsequent increases

Examples of poor disclosure

Chemeq

- In February 2000 Chemeq applied in the US for certain patents. Late in 2004 it announced a grant of a new patent, in the context of capital raisings. In the media (not ASX) it said this was a milestone for the company. The patent was not material to Chemeq's business, and not an appreciable addition to value

Announcements

- Announcements are to inform investors of new information that is important, not simply for promotional purposes (ASIC Report 83: *Small mid-cap miners study, 2006*)
- Announcements must not be misleading or deceptive (s1041H)

Investor briefings

I heard it on the grapevine...

- **Selective Briefings**

- selective briefings create opportunities for insider trading and also undermine ordinary investor's confidence in the market as a level playing field
- an entity must ensure only public information is given when answering an analyst's questions or reviewing an analysts' draft report

Investor briefings

ASIC guidelines

- 1. Review discussions** - Have a procedure for reviewing discussions with analysts afterwards to check whether any price sensitive information has been inadvertently disclosed. If so, give investors access to it by announcing it immediately through the ASX, then posting it on the company web site
- 2. Handling unanticipated questions** - 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 ASX
 - 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 ASX before responding

Investor briefings

ASIC guidelines

3. Responding on financial projections and reports

- Confine comments on market analysts' financial projections to errors in factual information and underlying assumptions.
- Seek to avoid any response which may suggest the company's, or market's, current projections are incorrect
- The way to manage earnings expectations is by using the continuous disclosure regime, through the ASX, to establish a range within which earnings are likely to fall
- Publicly announce any change in expectations before commenting to anyone outside the company

4. Slides and presentations – information used in briefings should be given to the ASX for immediate release to the market and posted on the company website

Investor briefings

ASIC guidelines

- 5. Written policies and procedures** – have policies on information disclosure that focus on continuous disclosure and improving access to information for all investors
- 6. Websites** – maintain a website on which information is posted as soon as it is disclosed to the market
- 7. Senior compliance officer** – ensure a senior officer has responsibility for continuous disclosure and overseeing and coordinating information disclosure to the stock exchange, analysts, brokers, shareholders, the media and the public

ASIC remedies

1. Private caution

- Stem discussion

2. Yellow card

- Public outing – “not happy Jan” – Directors say their reputation paramount

3. Enforceable Undertaking

- Multiplex Group - \$32 million compensation fund

4. Infringement penalty

- \$33,000 - for an entity with market cap less than \$100 million.
- \$66,000 – for an entity with market cap greater than \$100 million, but less than \$1000 million.
- \$100,000 – for an entity with market cap greater than \$1000 million.

ASIC remedies

5. Civil

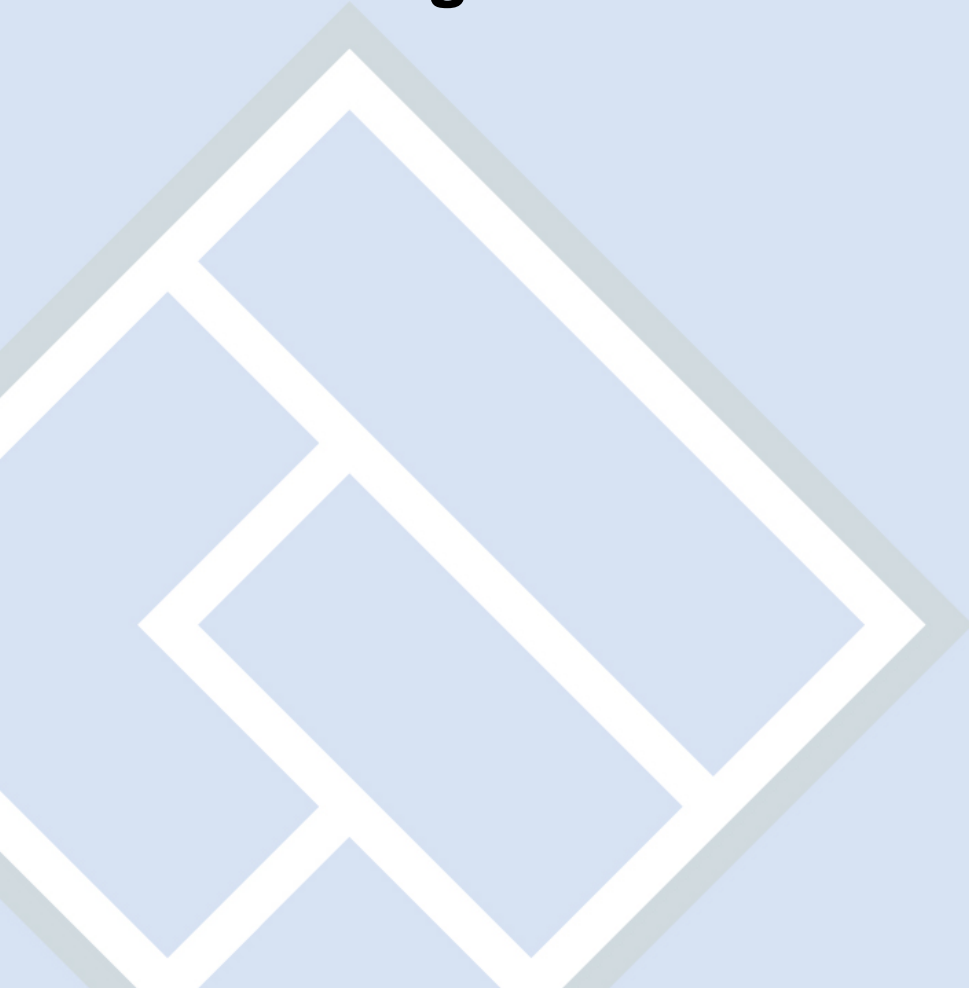
- Pecuniary penalties of up to \$200,000 for a person or \$1 million for a company
- Compensation order
- Banning of directors and managers

6. Criminal

- Person is liable for a maximum penalty of \$22,000 and/or imprisonment for 5 years
- An entity is liable for a maximum penalty of \$110,000

Civil “class action” litigation

The big unknown



Infringement notice regime

What is it?

- Designed to be a fast and effective remedy so redress is proportional and proximate in time to an alleged breach
- ASIC will decide to use an infringement notice after having regard to:
 - the seriousness of the alleged breach
 - the impact of the alleged breach
 - the materiality of the information
 - the factual circumstances giving rise to the alleged breach.
 - the view of the relevant market operator

Infringement notice regime

ASIC procedure

- 1. Investigation of alleged breach** - If a possible breach of the continuous disclosure obligations has been identified ASIC may issue letters seeking information and/or may conduct an investigation using its compulsory powers. In the course of the investigation ASIC will decide whether use of the infringement notice remedy is appropriate
- 2. An ASIC delegate is briefed** - If ASIC considers that the issue of an infringement notice may be an appropriate remedy, an ASIC delegate is briefed on the matter to determine if there has been a breach. The delegate will not have been involved in the investigation of the suspected breach, and will look at the matter for the first time when receiving the brief

Infringement notice regime

ASIC procedure

- 3. A hearing notice is issued** - If the delegate believes there has been a breach, a written statement (the hearing notice) will be issued to the disclosing entity. The notice will set out the reasons for believing there has been a breach
- 4. The hearing is conducted** - The delegate will hold a hearing to determine whether to issue an infringement notice. In the hearing the disclosing entity may give evidence and make submissions, verbal or written

Infringement notice regime

ASIC procedure

- 5. An infringement notice may be issued** - The delegate takes all submissions and evidence into account and may decide to issue an infringement notice if there are reasonable grounds to believe there has been a breach. The infringement notice is served on the disclosing entity, with a compliance period of 28 days
- 6. The disclosing entity responds to the notice** - The disclosing entity may comply with the notice or seek an extension of time to comply or seek to have the notice withdrawn or choose not to comply with the notice

Infringement notice regime

ASIC procedure

- 7. Action following response to the notice** - If the infringement notice is complied with, ASIC cannot begin proceedings against the entity. If the notice is not complied with, ASIC may commence civil proceedings against the entity under Pt 9.4B and/or s1324B of the Corporations Act. If the notice is withdrawn, ASIC is not restricted in the action it may take against the entity
- 8. Publication by ASIC** - If the infringement notice is complied with, ASIC will publish details of the notice. If ASIC begins proceedings against the entity following withdrawal of, or failure to comply with, a notice ASIC will publish that fact