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Review of Continuous Disclosure Obligations

The current global financial turmoil has highlighted the need for companies to make timely disclosure of market-sensitive information. In particular, companies whose share price or operations have been significantly impacted by the crisis, such as financial and mining entities, should ensure that they keep the market up to date with material changes to their businesses and financial status. Continuous disclosure has been a particular focus in the media and by regulatory authorities following the Federal Court's recent approval of the largest class action settlement (amounting to \$144.5 million) in Australian history involving claims that Aristocrat Leisure failed to comply with its continuous disclosure obligations.

General Rule

Subject to limited exceptions, ASX Listing Rule 3.1 requires an entity that 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, to immediately tell ASX that information. Information that is required to be disclosed under Listing Rule 3.1 must be disclosed notwithstanding that an entity may be subject to a contractual restraint not to disclose that information.

For the purposes of the above obligation, an entity is deemed to become "aware" of information if a director or executive officer has, or ought reasonably to have, come into possession of the information in the course of the performance of their duties as a director or executive officer of that entity.

Section 677 of the Corporations Act 2001 (Cth) provides that a reasonable person would be taken to expect information to have a material effect on the price or value of listed 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 the securities.

In *Kim Riley in his capacity as trustee of the Ker Trust v Jubilee Mines NL* [2006] WASC 199 the court cited with approval the comment made in *TSC Industries Inc v Northway Inc* (1976) 426 US 438 that, in respect of materiality, "There must be a substantial likelihood that the omitted fact would have been viewed by the reasonable investor as having significantly altered the total mix of information available."

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When is disclosure required?

A few examples of the infinite number of circumstances where disclosure may be required include where there is a change in an entity's financial forecasts, the recommendation or declaration of a dividend, the commencement of material litigation against the company, the giving or receiving of a takeover notice or a proposal to acquire or dispose of an asset. The requirement for disclosure may also extend to such matters as a proposal to change auditor or a change in the company's accounting policy, if material. Even the illness of key personnel within an organisation may be a matter requiring immediate disclosure – as was recently demonstrated when Apple's share price fell dramatically following news that its CEO, Steve Jobs, decided to take leave due to medical concerns.

Whether a matter requires disclosure depends on the nature of the information as well as the company itself.

In *Flavel v Roget* (1990) 1 ACSR 595, O'Loughlin J stated that:

“...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.”

Accordingly, careful consideration is needed when assessing whether information should be disclosed. Such consideration must occur in an expeditious manner so that disclosure, if required, is made to the market as soon as possible. Where there is doubt as to whether information is required to be disclosed, companies should generally err on the side of caution and disclose the information – as was highlighted by the decision in *Jubilee Mines NL*. However, unnecessary or premature disclosure of information could lead to allegations of share price “ramping” and should therefore normally be avoided.

Exceptions

Disclosure under ASX Listing Rule 3.1 is **not** required if **each** of the following is satisfied:

- (a) a reasonable person would not expect the information to be disclosed;
- (b) the information is confidential and ASX has not formed the view that the information has ceased to be confidential; and
- (c) *one or more* of the following applies:
 - (i) it would be a breach of a law to disclose the information;
 - (ii) the information concerns an incomplete proposal or negotiation;

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- (iii) the information comprises matters of supposition or is insufficiently definite to warrant disclosure;
- (iv) the information is generated for the internal management purposes of the entity; or
- (v) the information is a trade secret.

ASIC Guidance

ASIC Regulatory Guide 62 provides guidance to assist listed entities in complying with their continuous disclosure obligations. The principles suggested in the Guide include, among others:

1. ensuring the company has a written policy and procedure on information disclosure;
2. posting price sensitive announcements on the company's website immediately after releasing the information to the market. It is important that disclosure first be made to the ASX Company Announcement Platform, before the company releases the information on its website or to the media;
3. appointing a senior executive to take responsibility for continuous disclosure issues and generally to be a primary "point of contact" between the company and the ASX;
4. limiting inadvertent disclosure by only having one or a handful of authorised company spokespersons. For example, a company must ensure that it does not give any price sensitive information to a broker or analyst which has not already been disclosed to the market; and
5. having procedures in place for dealing with market speculation, inadvertent disclosures, information leakages and rumours.

Other required disclosures

In addition to continuous disclosure obligations, companies must comply with periodic disclosure in accordance with Chapter 4 of the Listing Rules, including quarterly, half-year and annual reports. Mining and exploration entities are subject to further additional reporting requirements under Chapter 5. For instance, a report prepared by a mining entity, or an entity which has an interest in a mining tenement, must be prepared in accordance with the JORC Code if the report includes a statement relating to exploration results, mineral resources or ore reserves.

Continuous disclosure is likely to be a continued focus given recent findings by ASX and cases of inadequate or late disclosure of directors' trades and substantial shareholder notices, current unstable financial markets and high-profile court cases. One such case is the current class action against Centro Properties in which investors are seeking millions of dollars in compensation in respect of allegations that Centro Properties made misleading statements to the market and failed to make proper disclosure.



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