



ASIC

Australian Securities & Investments Commission

Launch of the Australasian Investor Relations Association

Mr David Knott
Chairman, Australian Securities and Investments Commission

13 August 2001

Ladies and Gentlemen, I am delighted to be officially launching the Australasian Investor Relations Association this afternoon.

There is a saying that 'timing is everything'.

It seems especially appropriate that I am launching AIRA at a time when protocols surrounding investor/market interactions are being scrutinised around the world. There is additional poignancy, in a timing sense, that I should be doing so in this splendid Boardroom.

AIRA's stated mission is to 'advance the awareness of, and best practice in, investor relations in Australasia and thereby improve the relationship between listed entities and the investment community.'

There is much captured within that mission that requires elaboration before it can be embraced as sufficiently expansive and inclusive. The words are capable of being interpreted in a narrow sense – one which is primarily targeted to the interests of *wholesale* market participants, which has long been familiar ground for investor relations professionals.

Much comfort is therefore gained by reading AIRA's very recent publication *Best Practice Guidelines for Communication between Listed Entities and the Investment Community*. It becomes clear that the mission statement's reference to *investment community* is wide ranging and inclusive and that, indeed, a key focus of the Association's work is directed to the interests of retail investors.

It is also clear that AIRA is alive to the damaging impact that asymmetric information can have on retail investor confidence in the integrity of our markets. The maintenance of such confidence and the encouragement of direct retail investor participation in traded markets has long been considered a matter of national interest. All of a sudden it has become a reality, with opportunity fuelled by privatisation of national enterprise, the availability of technology, increased reliance of self funded retirement, the emergence of multiple distribution channels and the (at least partial) demystification of traditional intermediation.

Australia was one of the first countries in the world to prepare itself for direct retail market participation. We recognised that unless investors had confidence that the market was informed and that there was equal access to price sensitive information, we could not hope to attract and retain investor support for our markets. In the early 1990s we engaged in a vigorous debate about the preferred nature of corporate reporting – whether it should be quarterly or continuous – and we introduced laws which were far in advance of the USA and UK at that time, and have only very recently been matched. We substantially beefed up our insider trading laws as a further demonstration of a national commitment to a market in which investors can trade on equal terms and with confidence in transaction transparency. I believe that taken overall there is much to be proud of in the way we have tackled these issues.

Yet despite all this, there remains a reasonably widespread community perception that wholesale market participants are advantaged over retail participants in access to information and trading opportunity. There is also disquiet that the 'continuous' character of continuous disclosure is overly discretionary in its applied form. Some of this sentiment is probably unwarranted, but regrettably it has been reinforced far more often than we would like by practices which are at best careless and at worst intentionally manipulative. Selective briefing of analysts in an attempt to manage profit expectations is just one of the manifestations of such practice – and it is the selective nature of the practice which generates public cynicism and distrust.

Over the past 12 months ASIC has had to intervene on issues of disclosure far too often. Some of this is attributable to the decline in fortune of the new economy sector and has involved companies which lack an adequate understanding of governance frameworks. In fact we are releasing details today of nine recent interventions requiring provision of additional information by listed new economy companies which followed from our review of the latest round of quarterly cash flow statements.

I wish I could confine my criticism to this sector of the market, but I cannot. There continue to be instances of unacceptable information leakage, and late or inadequate disclosure, from companies of substance and experience which are inexcusable in light of the publicity and exposure directed to these issues over the past 18 months.

'Heard it on the Grapevine'

Against that background, the launching of AIRA and the publication of its guidelines are a very positive development and are warmly applauded by ASIC. Many of the best practice suggestions made by AIRA are easily reconciled with ASIC's own guidance note which emanated from our 1999 paper 'Heard it on the Grapevine'. Obviously there is room for continuing discussion around the margin, but the early adoption of the AIRA guidelines by our listed companies would go a long way towards meeting the concerns I have expressed today.

However I do not believe that this will end the debate. For one thing you will recollect that at the time we released our grapevine principles the ASX also committed to reviewing its continuous disclosure guidance note and we are awaiting developments on that front with much interest.

In addition, ASIC will continue to press for powers to impose fines for market offences, particularly for inadequate disclosure, and to reassess the effectiveness of other remedies for these offences. Let me say something briefly about that.

Civil Penalties

The introduction of the civil penalty regime through the Corporate Law Reform Act in 1993 reflected an awareness of the legislature of the need to

address those parts of the Corporations Law of which a breach was technically an offence, but for which the Courts might be reluctant to impose criminal sanctions because of the absence of 'criminality'.

We have seen Parliament continue to expand their application. For example, on 1 July 1998 a number of statutory provisions involving share capital transactions and the management of managed investment schemes were added. Again with the commencement of the CLERP legislation in March of 2000 the provisions to which a civil penalty order applied were expanded. Under FSR we will also gain a new civil penalty regime for market offences including a breach of the continuous disclosure provisions for the first time. We welcome these developments.

It would however be wrong to assume that these reforms alone will deliver the necessary 'sharp end' to deal effectively with issues like late disclosure or partially inadequate disclosure.

The need to institute formal proceedings, even of a civil nature, is not necessarily the best means of regulating and improving disclosure conduct. Moreover, there are issues connected with the burden of proof and with the Courts' approach to evidentiary and procedural requirements in civil penalty matters that may tend to limit their practical use to ASIC.

For example, while intervention by ASIC often confirms inadequate disclosure and leads to additional information being released to the market, there is seldom sufficient evidence to support a prosecution once the corrective information has been released.

It is for those reasons that I earlier this year raised the question of the regulator being given power to issue fines for market offences. There is usually a deep drawing of breath when regulators ask for additional powers and I accept that such requests demand careful scrutiny. However, I do not believe that this proposal is either unique or ground breaking.

Such a debate has certainly been conducted in the UK where our regulatory counterpart, the Financial Services Authority (FSA), has been given considerable powers to levy financial penalties. Their powers are contained in the Financial Services and Markets Act 2000 which commences in November, and follow a long tradition of similar penalties for market offences in the UK (formerly exercised by SROs). The FSA may impose a financial penalty where a firm has breached an FSA rule regarding compliance; where a firm or a person has breached a Principle – which sets out the Standard of Conduct expected of firms or 'approved person' employed by regulated firms; where an issuer of securities, or an applicant for listing, has breached the Listing Rules; and where there has been Market Abuse by any person.

This last point is particularly interesting as under the Market Abuse provision, the FSA can impose a penalty on any person, whether that person is regulated or not, who engages in behaviour which:

- is likely to give a false or misleading impression as to the supply, demand, price or value of an investment; or,
- is likely to distort the market in investments, or
- is based on information which is not generally available to other market users.

In Australia, I think that such powers could be especially effective in the case of companies failing to make full and prompt disclosure to shareholders. There should, in my view, be a penalty for making late disclosure which currently escapes effective recourse and provides little disincentive for sloppy practice.

Whilst we acknowledge the role of the ASX as having front line responsibility for ensuring continuous disclosure, I believe that a power by ASIC to impose fines of substance would add discipline to the market's processes – not just because of their financial impact but more importantly perhaps through their public nature. I do not believe that it would be reasonable on the ASX, as the market operator, to be charged with this additional regulatory responsibility.

Conclusion

In the meantime, we all understand that punitive measures should be a backstop to underpin voluntary compliance with the Law and the adoption of best practice conduct. That returns me to the pleasant task of officially launching AIRA which I now do with great enthusiasm for its charter. I look forward very much to a lively and productive interchange with you and your members in the years to come.