

Presentation to ASIC/ASX Conference

Belinda Gibson

Brisbane, July 2008

Introduction

1. Good morning ladies and gentlemen.
2. I want to welcome you to this seminar today. It is a joint production of the Australian Securities and Investments Commission (ASIC) and the Australian Stock Exchange. We both are very pleased to have as our partners on the podium today representatives from the Institute of Company Directors, Chartered Secretaries Australia, the Australian Investor Relations Association and also a number of minerals industry bodies – JORC itself, the 2 Australian Institutes of Mining and Metallurgy and of Geoscientists and the Queensland Resources Council.
3. Our seminar today covers the 3 topics of:
 - continuous disclosure to the ASX
 - good corporate governance for a listed entity
 - and the more arcane but very important issue of disclosure in accordance with JORC.

All 3 topics are important for promoting confidence in the integrity of Australia's capital markets. I will return to the concept of market integrity a little later in these opening remarks, to set the scene as it were.

4. First though, I would like to say how pleased we are with the turn out today. 208 registrants has exceeded our expectations – so I am sorry if things are a little crowded. Queensland is very much an economic growth state. 164 Queensland companies call Brisbane their home exchange, with a market capitalisation of about \$70 billion. They have consistently outperformed the ASX All ordinaries index. Congratulations.
5. I am speaking to you today as one of the 3 ASIC Commissioners and the head of our Capital Markets Taskforce. The Taskforce was established when I joined

ASIC in November in 2007. Its task was to review what ASIC can do better to build confidence in the integrity of Australia's capital markets.

Market Integrity

6. I would like to speak briefly about the broad topic of market integrity, to place our seminar today in context. What is market integrity? It is the qualities of transparency and fairness that operate in a capital market.
7. You will be aware that ASIC has recently announced a strategic review and restructure. As part of our background work we commissioned a stakeholder survey and there are a few interesting points I want to share with you:
 - 69% of respondents felt Australia's capital markets compare well with other countries. Only 5% disagreed.
 - But only 15% felt that the markets are free from insider trading and other market abuses.
 - 72% of respondents wanted ASIC to focus more on prosecuting markets offenders – higher than any other priority.

Why does "market integrity" matter?

8. There are two answers to this question. The first is economic. There are a number of studies which conclude that markets which exhibit relatively high trends of integrity have greater liquidity. Markets with a successful record of enforcement of insider trading and disclosure rules have a lower cost of capital. These studies lead to the conclusion that market integrity is an important feature in ensuring our markets are internationally competitive for capital.
9. The second reason why market integrity matters is more human. It is psychological. People will be more willing to deal in a market where they have an equal opportunity to take profits, and others cannot take unfair advantage of company information or of power.

ASIC's steps to improve market confidence

10. There are a number of steps ASIC is taking to improve confidence in the integrity of Australia's markets. One is to bring and win some cases. The Taskforce Review focussed on improving our practices, and this is happening.
11. I had some statistics run over the weekend about our markets offences inquiries. At present our MarketWatch team is looking at 25 referrals of suspicious transactions, mostly from the ASX. There are 11 insider trading referrals, 4 market manipulation questions and 10 continuous disclosure questions. Our complaints department also has over one hundred reviews going.
12. The MarketWatch team conducts the preliminary assessment of referrals of suspicious conduct. Its team of analysts will look for evidence of associations between market traders, and proof of market price movements. If the referral is substantiated then the Enforcement team will be engaged. They must prove up the case to the point that legal proceedings can be brought. In our technical parlance, they commence an investigation.
13. At present the Markets Enforcement team has 61 active matters (including cases before the courts and with the Commonwealth DPP):
 - There are 29 insider trading investigations.
 - There are 16 market manipulation investigations.
 - There are 16 continuous disclosure investigations.
14. I have been talking about what ASIC can do to improve market confidence. The first is to actively litigate. Those figures demonstrate that we are now doing that. A second step that ASIC will take is to be a more public regulator, leading discussion in the markets about the rules and our enforcement policies. This includes letting the markets know what we believe the law requires of participants. In February and March we made a number of announcements about proper disclosure and our pursuit of unlawful predatory market behaviour. My presentation today is another illustration of ASIC's determination to make our expectations clear to the market.

Continuous Disclosure – Financial Results

15. Thus I turn now to some specific commentary on the continuous disclosure rules.
16. In this volatile market ASIC is very much focussed on ensuring bad news hits the screens early. We know that in a profit downturn the common insider traders are the loss-making company's own officers looking to get out at the best price. 30 June is the financial year-end of most Australian companies. Financial performance for the year will be crystallised as accounts are finalised and audited. Last week our Chief Accountant, Lee White, highlighted the areas we will be focusing on in this reporting cycle – including impairment of asset values, determining fair market values, and the use of off balance sheet arrangements.

Timing of disclosure

17. Companies must be mindful of disclosing major changes in financial position to the market promptly. In the past 6 months we have reviewed a number of financial reports by listed entities, both as to content and timing of release. I have been surprised that some entities do not release their results immediately they are determined. Their directors must be taking a very bold view that the content of a results announcements is not disclosable material price sensitive information. I believe most cases it will be.
18. Some companies look to manage the timing of the release of results by delaying the finalisation of accounts. Everything is agreed between the directors and the auditors except a line that needs to be checked. No one is in any real doubt about the content of the line, and it is unlikely to be material. Presumably the directors will say that these accounts are incomplete or generated just for management purposes, so are within the continuous disclosure exemption in the Listing Rules.
19. Directors should consider if this practice is prudent. If the "almost final" accounts contain items which of themselves are material price sensitive information then disclosure before finalisation of the accounts is required.
20. There is one other "announcement timing" practice I wish to touch on. This relates to signing and announcement of material agreements. Take a situation where a listed company reaches substantive agreement on a deal, then delays

formal signing until it is ready to announce to the market. Perhaps a minor provision is left open, so the incomplete proposal exemption from disclosure in the Listing Rules is available. Perhaps agreements are finalised and placed in formal escrow, to be released automatically when a technical condition is met.

21. The point at which such an agreement ceases to be an incomplete proposal is a matter for debate on a case by case basis. The second limb of the Listing Rule disclosure exemption requirements is that the agreement remains confidential. ASIC expects companies that are managing the timing of disclosure in this way to be especially vigilant for any loss of confidentiality, and to immediately announce the agreement if confidentiality appears to be lost.

Insider trading by directors

22. I would also like now to turn to the vexed question of director's trading in their company's securities. Eric Mayne will shortly speak to some recently released ASX research about disclosure of trading. It is important to analyse that research, and be careful about the conclusions one draws from it. Some commentators have suggested that the (unacceptably) high rates of late disclosure means that insider trading by directors is rampant. It follows that Australia's capital market has low integrity – which is a conclusion I submit one should only draw if the evidence clearly supports it.

23. There are 3 categories of restriction on directors trading in their company's securities:

- First – directors cannot trade when they have price sensitive information that is not generally available. That is insider trading. It is a criminal offence and ASIC and ASX commit significant resources to detecting and enforcing the law.
- Second – directors may only trade within the confines of the company's own share trading policy. Most policies will bar trading in certain "black out" periods, though give the chairman a power to authorise trading if he considers the market is full informed. The usual blackout period is from year-end or half-year-end to announcement of results. The ASX study refers to 52 trades in the blackout period in ASX 200 companies, and 135 in the companies

included in the All Ordinaries Index (top 500). The study does not record if the policy was followed and consent obtained. ASX is still analysing if any of these trades were done at a time when directors may have had confidential material price sensitive information. In other words, trading in a block out period does not equate to insider trading. For completeness, compliance with a share trading policy is a matter for the directors of the company. Breach of the policy is reflective of poor governance but it is not illegal.

- Third – directors must disclose their trading to the ASX. The company must do it within 5 working days of the dealing. The director must personally do it within 14 days if the company has failed to do it in 5 days. Since 2004 ASIC and the DPP have brought 6 prosecutions for breach of section 205G. It is clear from public commentary that more activity is desired. We released RG 193 last week. That outlines the factors we will take into consideration in commencing a prosecution. We will look first at disclosure of active or on-market trades by directors, as this is the conduct that is of most immediate relevance to other markets.

24. ASX's study disclosed 538 filings of directors trades that were outside the Listing Rule 5 day limit. Of these 249 were also outside the Corporations Act 14 day limit. Some 70 of these disclosed active on-market trades and by the end of this week ASIC will have written to all the persons concerned seeking an explanation. We will then consider prosecution.

25. It might be helpful to give you some more background about the 70 trades:

- Trading occurred in 49 listed entities. 3 of those were in the S&P/ASX 200.
- 23 of these filings were less than 1 month from the dealing date. Only 13 were more than 3 months late.

These figures do not suggest systematic significant insider trading by directors. They might suggest that directors who are insider trading do not lodge trading notices at all with the ASX. Certainly ASIC and ASX do not rely on a director's own trading disclosures for detection of unlawful insider trading by directors.

Conclusion

26. Ladies and gentlemen, thank you for giving me this opportunity to speak for so long on some general propositions. Just to recap:

- At this time of year directors must be conscious of timely announcement of financial results.
- Directors trading in their companies shares. Don't do it if you have inside information. It's unwise to do it in a trading blackout. Do disclose.

I am now very pleased to introduce Eric Mayne to you. Eric has been the Chief Supervisory Officer of the ASX for 4 years. He is at the forefront of the market surveillance entrusted to ASIC and ASX.