



ASIC

Australian Securities & Investments Commission

Handling of confidential information

*A speech by John Price, Commissioner,
Australian Securities and Investments Commission*

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CHECK AGAINST DELIVERY

Introduction

I would like to thank AIRA for inviting me to speak at their annual cocktail party. Tonight I would like to speak to you about the handling of confidential information by listed entities.

The integrity and efficiency of our financial markets depends on all investors having access to market-sensitive information about listed entities at the same time. Leakage of information prior to market announcement can lead to continuous disclosure problems, insider trading and an undermining of investor confidence. It can also pose threats to the outcome of corporate transactions.

This issue remains a central focus for ASIC. Last year we undertook a review of a limited number of listed entities and their advisers in order to consider the practices employed in our market to handle and protect confidential, market-sensitive information.

We released a report on this review in May this year in ASIC Report 393 about handling confidential information.

The review focused on two specific scenarios:

- briefings given by listed entities to analysts and institutional investors, and
- the handling of information prior to the announcement of a market-sensitive corporate transaction.

Tonight I want to discuss a couple of aspects of our report, including our overall findings and recommendations.

Analyst briefings

In recent times a spotlight has been shone on analyst briefings and whether some listed entities are disclosing material information to analysts before telling the rest of the market.

No doubt many of you will be aware of the outcome of ASIC's civil penalty proceedings against Newcrest Mining for briefing analysts on confidential, market-sensitive information ahead of it being disclosed to the market. We alleged that in a series of select briefings to analysts, Newcrest's investor relations manager disclosed market-sensitive information regarding Newcrest's expected gold production and capital expenditure. Newcrest

admitted to contravening continuous disclosure laws and admitted that the contraventions were serious. On 2 July 2014 the Federal Court imposed a \$1.2 million penalty on Newcrest. Private legal proceedings have also been started against Newcrest in a class action.

This matter should send a strong message to market participants to be mindful of the care needed when interacting with analysts. It should also reinforce the message that equal access to market-sensitive information is paramount in ensuring that markets operate fairly.

It is important to note ASIC recognises that analysts, and the work they do, play an important role in helping people make decisions about their investments. ASIC encourages the flow of information to analysts in a way that contributes to market fairness and efficiency. We also recognise that effective engagement with institutional investors can enhance the long-term performance and corporate value of listed entities.

However, when listed entities conduct briefings with analysts and institutional investors, it can be a key risk area for selective disclosure of confidential, market-sensitive information. Continuous disclosure obligations must take precedence over any other stakeholder engagement goals. So it is vital that listed entities remain vigilant about this issue. Boards and officers need to be aware of their responsibilities under the Corporations Act and the Listing Rules and, ideally, they should be guided by best practice principles, such as those set out by groups like AIRA.

Listed entities should have procedures in place which ensure that they do not disclose market-sensitive information in their communications. Importantly, entities need to monitor whether these policies are actually being followed on a consistent basis.

A particular issue of concern for ASIC is the temptation that listed entities may have to manage broker consensus or market expectations through selective analyst briefings. If market expectations diverge in a material way from the entity's internal forecasts, it is not acceptable to conduct selective briefings to try and bring the analysts 'in line' with the entity's views. Instead the entity needs to consider making a market announcement.

On a broader note, we recommend that listed entities and their investor relations professionals:

- make access to any analyst and investor briefings as broad as possible and as quick as possible, including through making webcasts, podcasts and transcripts publicly available
- read and apply the guidance for listed entities and their advisers that is already out there. For example, AIRA already has very useful best practice guidance on investor relations which deals with these issues. We understand this guidance is in the process of being updated to take

into account, among other things, the findings of our ASIC report and will be reissued soon. Also look at ASIC's Regulatory Guide 62, which sets out ASIC's guidance for listed entities about briefing analysts, and refer to ASX Guidance Note 8, which contains a wealth of guidance on the continuous disclosure obligation, and

- think about perception as well as what the law and listing rules might strictly require. Perception is a key consideration for listed entities. If the market thinks that a company is favouring a select audience, serious commercial consequences can follow. Good boards will think about the 'front page' test as well as legal obligations.

Unannounced corporate transactions

I will now move on to discuss the handling of information prior to the announcement of a market-sensitive corporate transaction.

In preparing ASIC's report, we interviewed a limited number of listed entities and their advisers on the management of confidential, market-sensitive information in the context of a recent corporate transaction. We primarily focused on pro-rata rights offers in our sample.

In the transactions that we reviewed, we found that most of the small- to mid-market capitalisation entities relied heavily on advisers to determine how to handle confidential information about their unannounced corporate transactions. But this delegation of responsibility has risks. This is particularly so when the interests of the listed entity and the adviser do not perfectly align, such as in underwritten capital raising transactions.

For example, we were concerned by the timing and number of soundings conducted by underwriters in a live market before either the announcement of the transaction or a trading halt being requested. This is a significant risk area for leaks and insider trading.

In our review we found that, in some capital raisings, soundings were conducted as early as four days before the entity's securities were placed in a trading halt. We also found that there were often a significant number of investors that were sounded. In one of the sample transactions, more than 50 investors were sounded before the announcement of the capital raising, although some of these soundings were conducted after a trading halt was in place.

It is interesting to note that in the transactions in our review where soundings were conducted, the price of the entity's securities fell by a material amount in the days immediately preceding the announcement. This in itself might highlight some commercial risks in not having control of a company's confidential information. In the single transaction in our review where no

soundings were conducted, there was no material price movement in that entity's shares prior to the announcement. From a commercial perspective, a fall in the price of the entity's securities before a capital raising can jeopardise the pricing and overall success of the transaction. From a regulatory perspective, it can also indicate that insider trading may have occurred.

With that in mind, we make the following recommendations to listed entities:

- Ensure that comprehensive written policies are in place and that they are understood within the listed entity and are consistently followed. Be aware of best practice guidelines and follow them where possible.
- Talk to advisers about what procedures they have in place to make sure your information will be protected. Stress the importance of this issue with your advisers. Make sure confidentiality agreements or other appropriate arrangements with advisers and other service providers are in place.
- Have frank discussions with underwriters about the number and timing of soundings required prior to the announcement of the transaction, particularly where soundings may be conducted in a live market. Query why the sounding can't be conducted the night before the announcement of the transaction.
- Think carefully about the use of a trading halt to manage the information leakage risks (including commercial risks) posed by soundings.
- Compose draft requests for trading halts and draft ASX announcements so that the entity can move quickly to make market announcements if there is a leak.

Further work / Conclusion

It's important for you to know that ASIC has the people, powers and systems to detect misconduct, and will act when misconduct occurs following poor handling of confidential information.

Further, our supervision of financial markets has recently been bolstered by the successful rollout of our new market surveillance system. The system was purpose built and designed to handle the dynamics of our financial markets.

A significant benefit of the new system is the ability to run reports for very large trading periods in a fraction of the time when compared with the previous system. This allows our surveillance analysts to identify suspicious

transactions and traders more quickly, and request information from brokers earlier, than under the previous system.

Using our systems, it is easier for us to identify suspicious trading by connecting patterns and relationships. This enhances the detection of insider trading relationships and market manipulation.

Since the introduction of this system, we have also been able to commence inquiries into matters that traditionally we have not had the information to pursue.

ASIC is also currently conducting a further targeted review of analysts' research reports. We are considering the type of information that is available to analysts at the time they make a material change in their forecasts or recommendations. We are looking to ensure that changes in research recommendations are not based on non-public, material information.

To wrap up, we consider that the existing guidance provided by ASIC, AIRA, ASX and other industry bodies on the handling of confidential information is sound. The challenge for listed entities and their advisers is to implement the guidance in a consistent manner and approach issues with a view to following the spirit underlying the guidance.

Our key focus for our future work in this area is therefore not on more guidance but on assessing whether entities, advisers and analysts are implementing the guidance in a consistent manner and, if not, taking appropriate enforcement action.

We encourage boards and investor relations professionals to think carefully about these issues and be prepared when handling and discussing confidential, market-sensitive information.