



ASIC

Australian Securities & Investments Commission

REPORT 98

Market assessment report: Golden Circle Limited (ACN 054 355 618)

August 2007

About this report

This report summarises ASIC's second assessment of Golden Circle Limited under s794C of the Corporations Act 2001 (Corporations Act).

About ASIC regulatory documents

In administering legislation ASIC issues the following types of regulatory documents.

Consultation papers: seek feedback from stakeholders on matters ASIC is considering, such as proposed relief or proposed regulatory guidance.

Regulatory guides: give guidance to regulated entities by:

- explaining when and how ASIC will exercise specific powers under legislation (primarily the Corporations Act)
- explaining how ASIC interprets the law
- describing the principles underlying ASIC's approach
- giving practical guidance (e.g. describing the steps of a process such as applying for a licence or giving practical examples of how regulated entities may decide to meet their obligations).

Information sheets: provide concise guidance on a specific process or compliance issue or an overview of detailed guidance.

Reports: describe ASIC compliance or relief activity or the results of a research project.

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Key findings and recommendations

Key findings

- 1 We conclude that Golden Circle Limited (GCL) has adequate arrangements for supervising its market, including arrangements for:
 - handling conflicts between its commercial interests and the need to ensure that the market operates in a fair, orderly and transparent manner;
 - monitoring the conduct of participants in the market; and
 - enforcing compliance with its operating rules.
- 2 In reaching this conclusion we have particularly taken into account the:
 - size and nature of GCL's market; and
 - the restrictions on participation in the market.
- 3 However ASIC has made recommendations about how GCL can better manage its disclosure obligations and improve its arrangements for supervising the market in this report. ASIC has discussed these recommendations with GCL. GCL has implemented new continuous disclosure and market supervision practices in response.

Recommendations

- 4 We recommend that GCL:
 - (a) in relation to its continuous disclosure obligations, make records of all decisions to disclose or not to disclose information to the market. GCL should implement a formal policy of recording decisions about disclosures to the market that includes documenting the issues considered and the reasons supporting the decision;
 - (b) review its continuous disclosure policy and procedures to ensure that the price sensitive information is appropriately identified, and disclosed to the market on a timely basis;
 - (c) should ensure that the Audit Committee's oversight of GCL's market supervision is undertaken with independence and objectivity; and
 - (d) should properly document its supervisory activity including any investigations regarding unusual trading activity.

A The assessment

Key points

ASIC conducts annual assessments of market licensees because it is required to do so under s794C.

The scope of our assessment must include the obligations found in s792A(c), but we can include other Chapter 7 obligations too.

Our first report about GCL was publicly released in July 2005.

Purpose and scope

- 5 We are required to assess, at least once a year, how well a market licensee complies with its obligations in s792A(c), (s794C).
- 6 A market licensee is required to have (under s792A(c)) adequate arrangements for supervising the market including arrangements for:
 - handling conflicts between the commercial interests of the licensee and the need for the licensee to ensure that the market is fair, orderly and transparent;
 - monitoring the conduct of participants on or in relation to the market; and
 - enforcing compliance with the market's operating rules.
- 7 A market licensee's obligations are ongoing, and whether it is likely to comply with its obligations in the future cannot be judged merely by reference to its past compliance. We therefore use the assessment process to:
 - reach conclusions about the adequacy of the arrangements a market licensee has in place for supervising its market in accordance with its obligations under the Act at the time of the assessment; and
 - identify issues that in our view need, or may need, to be addressed to ensure ongoing compliance.

Background

- 8 GCL was granted an Australian market licence (AML) on 17 August 2004. The licence permits GCL to operate a market in its own shares. Participation in the market is limited to growers of pineapples or vegetables who have been admitted by the company as GCL growers. In the last two calendar

years ended December 2006 and 2005, annual market turnover was about \$370K and \$280K respectively.

Our methodology

- 9 Our assessment and the views expressed in this report are a combination of processes :
- the ongoing interaction we have with GCL in our role as regulator of companies and financial markets;
 - an on-site inspection of books and records; as well as
 - interviews and discussions with GCL personnel.
- 10 In preparing this report, we have provided written findings to GCL and when appropriate, our report reflects GCL's responses to those findings.
- 11 In conducting our assessment, we took into account the matters set out in our Regulatory Guide 172 *Australian market licences: Australian operators* [RG 172]. RG 172 explains how we assess how well a market licensee is complying with its obligations. This is our second s794C assessment of GCL. Our first report is available as Report 43, at www.asic.gov.au/reports.
- 12 In conducting our assessment we:
- analysed information we received from and about GCL in the ordinary course of our dealings with GCL;
 - reviewed GCL's most recent annual report and their annual regulatory report under s792F;
 - sought additional information from GCL;
 - analysed information from external sources, including media commentary and material on GCL's website;
 - monitored the operation of the market throughout the period;
 - undertook an onsite visit to GCL's Brisbane premises and interviewed the personnel responsible for the day-to-day operation of the market; and
 - considered how well GCL might comply with its obligations in the future.
- 13 GCL had an opportunity to view and comment on the findings and recommendations contained in this report.

Focus of assessment

- 14 Our assessment involved a review of the changes made by GCL in response to the comments we made in our previous assessment report and the issues that came to our attention during this assessment period.
- 15 In our previous report we noted that there had been an instance in February 2005 when price sensitive information that was required to be disclosed as soon as practicable to the market in accordance with GCL obligations as a market licensee, was not disclosed for seven calendar days. Our concern was to ensure that GCL release material information to the market in a timely manner in accordance with its obligations.
- 16 At that time, GCL advised us that it:
- had a greater awareness of the continuous disclosure requirement since that event; and
 - was recruiting an in-house legal counsel who would assume responsibility for GCL's continuous disclosure obligations.
- 17 In September 2005, we raised another instance with GCL about the timing of disclosure of price sensitive information in a letter to shareholders dated 9 August 2005. In this instance, the information was not disclosed to the market for six business days.
- 18 As part of this assessment, we reviewed all disclosures made by GCL to its market and all financial statements issued by GCL while it has been the holder of an AML.
- 19 We also reviewed GCL's processes and procedures about:
- identifying price sensitive matters;
 - determining whether disclosure is required; and
 - documenting such decisions by the company.

B Observations and recommendations

Key points

After conducting our assessment, we conclude that GCL has adequate arrangements for supervising its market in accordance with its obligations under s792A(c) of the Act.

In reaching this conclusion we have considered:

- the size and nature of GCL's market; and
- the restrictions on participation in the market.

However, GCL needs to address problems in its continuous disclosure policies, procedures and practices. We also recommend changes to GCL's supervisory arrangements.

Future regulation of GCL's market

20 GCL's market has quite low levels of trading, with participation restricted to growers of pineapples or vegetables who have been admitted by the company as GCL growers.

21 We have concluded from an overall perspective that GCL is meeting its obligations as a market licensee. However, we have had, and continued to have at the time of this assessment, concerns about how GCL has been managing its continuous disclosure obligations which arise:

- under s675 of the Act, and
- as a condition of their AML which requires it to place price sensitive announcements on its own website.

22 In December 2006 we wrote to GCL detailing our concerns with compliance and suggesting that GCL consider whether the company should continue to hold an AML. Given the market's scale and their performance in meeting certain of its obligations we were doubtful that:

- GCL and its shareholders were extracting value from the current market's structure; and
- whether the type of regulation imposed by an AML was justified for their ongoing needs.

CGL decided to retain its market license.

23 In light of our concerns about GCL's management of its continuous disclosure obligations, we closely scrutinised GCL's arrangements and

performance in meeting its continuous disclosure obligations in the following s794C assessment of GCL conducted in August 2007. We found that GCL's disclosure performance had substantially improved. The report about the 2007 assessment will be sent to the Minister in due course. This report deals with the matters identified in our 2006 assessment.

Decision making about continuous disclosure matters

- 24 GCL has an obligation to disclose, as soon as practicable, information that a reasonable person would expect, if it were generally available, to have a material effect on the price or value of its securities (under s675(2) of the Act and s9 of GCL's AML). Also, the disclosure of information is not required if a reasonable person would not expect the information to be disclosed, the information is confidential and among other things, the information is about a matter of supposition, is not definite enough or is about an incomplete proposal (reg 6CA.1.0.1 of the Corporations Regulations 2001 (Cth)).
- 25 GCL implemented a continuous disclosure policy (policy) in July 2005. The policy makes the company secretary the disclosure officer and states that the officer is responsible for among other things, ensuring officers and employees understand the continuous disclosure obligations. The policy also states that the disclosure officer and GCL management are in the first instance responsible for deciding if information should be disclosed, and gives samples of types of information that may be price sensitive.

Board meetings

- 26 At each board meeting there is a standing agenda item which requires the board to consider whether any of the matters discussed in the meeting ought to be disclosed to the market and ASIC.
- 27 A number of minutes we reviewed contained the statement 'after consideration the Board confirmed that there were no matters that required disclosure to the market'. There were no details recorded of the board's actual deliberations and the reasons the board formed its view in these cases.

Documenting decisions

- 28 There were three file notes on decisions made during the review period about market disclosures. We reviewed each file note. It appears that GCL's process for documenting decisions about disclosure of information is limited to the disclosure officer making a file note about the decision to not disclose particular information. The file note is brief and does not record the issues considered. For instance, a file note for a decision to not disclose

would simply note ‘disclosure of specific information is not required as the information is generally available’.

29 GCL does not create any documents to record the decision to disclose information to the market other than the information released in the announcement itself. That is, GCL does not record the decision and the reasons for it in supporting files.

30 During the onsite stage of the assessment we were advised that GCL did in practice consider whether information needed to be disclosed to the market but that file notes were not necessarily made because when the matter was considered at a Board meeting then that decision would be captured by the minutes. However, as noted above the decision itself is noted in minutes but details about the consideration of the issue is not recorded.

Recommendation 1

31 GCL should make records of all decisions to disclose or not to disclose information to the market.

32 GCL should implement a formal policy for recording decisions about disclosures to the market that includes documenting the issues considered and the reasons supporting the decision.

33 In response to our findings, GCL has agreed to:

- document in board minutes all matters considered by the board on continuous disclosure; and
- create file notes for all considerations by the disclosure officer regarding disclosure (including matters considered not to require disclosure).

Identifying matters that require disclosure

34 As part of this assessment we reviewed all disclosures made by GCL since the grant of its AML.

35 We consider that there have been instances during this period when information has not been disclosed to the market as being price sensitive in nature, when it was, or has not been disclosed to the market in a timely manner. We reviewed these cases for potential further regulatory action. However we decided that no further action would be taken in each case because of the difficulty in establishing the materiality of the information in GCL’s market which experiences very low trading levels. Without a background of active trading it’s often difficult to prove the materiality of information after it becomes known. This is because there is no course of

normal trading to reference the impact of the information on the market price of the subject issuer's securities.

Disclosure of financial accounts

36 We have previously advised GCL that there had been an unacceptable delay in disclosing price sensitive information in two instances since its AML was issued. In addition we also note the following instances when GCL did not make disclosure in accordance with its obligations as a licensee.

Half yearly report 2004

37 GCL lodged its 2004 half yearly report with us on 10 September 2004. In this report GCL reported: an operating loss after tax of \$26.9 million dollars for the half year; that it was in default of banking covenants; and that the ability of the company to operate as a going concern was dependent on the continued support of its bankers.

38 ASIC considers that this information ought to have been disclosed to the market as price sensitive in nature. Yet GCL did not make a price sensitive announcement about this result, and did not place it on the announcements section of its website.

Annual report 2004

39 GCL lodged its 2004 annual report with us on 3 May 2005, which reported an operating loss of \$19,460,000. This appears to us to be information that ought to have been disclosed to the market as price sensitive in nature. But GCL did not make a price sensitive announcement about this result, and did not place it on the announcements section of its website.

40 We consider that the timing of disclosure of this report is also an issue because the auditor signed the report on 28 February 2005, but disclosure was made on 3 May 2005 after we received the report. This report also makes projections of GCL planning to achieve an EBIT of \$35,000,000 by the end of the 2007 financial year.

41 We raised the matters about the lack of disclosure of the financial accounts of 2004. GCL advised us that it was not required to disclose the information to the market because the information was generally available after the reports were lodged with us and therefore s675 did not apply.

42 We consider that the reports lodged contained information that was arguably price sensitive in nature, and therefore they were required to be lodged as soon as practicable after GCL became aware of the information. This is the requirement of s675 and the GCL market licence.

43 As noted above, GCL was aware of the nature of the information in the annual report when the auditor signed the report in February 2005, yet we were not sent a copy until May 2005.

44 Based on GCL becoming aware of the information in February we do not consider that the information was lodged as soon as practicable.

Disclosures about Numico deal

45 GCL suspended its market on 27 April 2006, pending a price sensitive announcement. *The Australian Financial Review* of 28 April 2006, published an article reporting that Royal Numico N.V (Numico) was in discussions with GCL to purchase its baby food business. The article speculated that the deal involved an up front payment of approximately \$24,000,000 and licensing payments for the use of the GCL brand name over the next 5–6 years.

46 In response to this article, GCL issued an announcement stating that:

- it was evaluating opportunities with a third party about a sale of certain assets and operations of its baby food business; and
- more information would be released after an agreement was reached.

47 Subsequent to the announcement, we found two references to this deal in the press, both published before GCL suspended the market and made the announcement. As a result, we contacted GCL and advised that we considered the press reports to be sufficiently detailed and recommended that GCL issue an announcement that dealt specifically with the media reports. We advised the disclosure officer that we considered that the confidentiality of the information was lost and that disclosure was required if the information in the press reports was accurate as to either the identity of the party or the terms of the deal.

48 In response, GCL advised that Numico did not agree to be named as a party in an announcement. After discussion with GCL's Chairman, GCL opted to not follow our recommendation. Instead GCL suspended the market on 27 April to ensure that shareholders were not disadvantaged. It did not reopen until 22 June 2006.

49 GCL, in response to our report, advised that it considers suspending of the market to be a perfectly legitimate way to deal with an issue if it is not in a position to make an announcement. Further GCL submits that it was not obliged to disclose further information, as by way of the press reports, it was generally available in sufficiently accurate detail to shareholders.

50 We accept that significant terms of the sale were being negotiated between the parties during this time. However, we consider that the disclosure made by GCL did not adequately deal with media commentary and that a

clarifying announcement ought to have been made. Our approach is in line with the Australian Securities Exchange's position on disclosures in response to media commentary or speculation. However we accept GCL's argument that it is not subject to any obligation that is equivalent to ASX Listing Rule 3.1B, which requires ASX listed entities to provide information to correct or prevent a false market.

Recommendation 2

- 51 We recommend that GCL reviews its continuous disclosure policy and procedures to ensure that price sensitive information is appropriately identified, and disclosed to the market on a timely basis.

Market supervision

Oversight of market supervision

- 52 A market licensee is required to have adequate arrangements to supervise its market (s792A(c)). The company secretary in practice performs most functions associated with the supervision of the GCL market. According to GCL procedures, the Audit Committee's role is to supervise and oversee the procedures of the market and it can authorise a delegate to perform this review and report to the committee.
- 53 However, during the period the company secretary undertook the review and reported to the board on the way in which he supervised the market. This was not an appropriate delegation as it is obviously deficient in terms of an oversight process for the company secretary to review and report on his own performance.

Recommendation 3

- 54 The Audit Committee should ensure that oversight of GCL's market supervision is undertaken with independence and objectivity.
- 55 GCL has advised us that the company risk manager will conduct the reviews in future.

Investigations

- 56 During April 2006, there was unusually heavy trading in GCL shares. We asked GCL to give us all documents about their investigations during the review period. However, GCL did not produce any documents.

57 During the interview phase of our assessment, we queried GCL on the heavy trading in April 2006. Their company secretary said that trading was reviewed but that the review itself was not formally documented, because it did not raise any further issues or concerns.

58 We are satisfied that GCL did review the trading that occurred in April 2006, however, we consider a written record of the review ought to have been kept.

Recommendation 4

59 We recommend that GCL should properly document its supervisory activity including any investigations of unusual trading activity.

60 GCL has adopted this recommendation and will ensure that all accounts of unusual trading and investigation conducted by the company secretary will in future be documented and reported to the board.

Key terms

Term	Meaning in this document
The Act	The Corporations Act 2001 (Cth)
AML	Australian Market Licence
ASIC	Australian Securities and Investments Commission
GCL	Golden Circle Limited
