



**ASIC**

Australian Securities & Investments Commission

# **Selective disclosure of confidential, price-sensitive information**

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

*Australasian Investor Relations Association, Sydney*

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## **CHECK AGAINST DELIVERY**

### **Introduction**

Thank you for the invitation to speak to you tonight about some issues that ASIC sees as crucial to the fair and efficient operation of our financial markets.

ASIC recognises the valuable role that investor relations officers play in managing communications between listed entities and their shareholders. A sound investor relations function is an important element in ensuring that our markets are properly informed.

ASIC also acknowledges the work that AIRA does to ensure that its members are well equipped to deal with the various disclosure obligations of listed entities. AIRA's *Best practice for investor relations: Guidelines for Australasian listed entities* contains useful, practical guidance on how investor relations professionals can help listed companies ensure that material information is disclosed in a fair and timely manner to a wide range of stakeholders interested in the company's securities.

Tonight I will be speaking about three related issues:

- firstly, the continuous disclosure obligation that applies to listed companies;
- secondly, the handling of confidential information and the associated risks of leaks. As part of this issue I will touch on the topical issue of analyst briefings; and
- lastly, what ASIC has been doing and will be doing in this space.

### **Continuous disclosure and ASX Guidance Note 8**

ASIC sees continuous disclosure by listed companies as the bedrock of market integrity. It is essential to two of ASIC's priorities: fair and efficient markets and confident and informed investors.

Equal and timely access to material information by all investors is essential to ensuring confidence in our financial markets. The regime works on the basis that all investors, large and small, will have access to material information at the same time. This ensures a level playing field.

ASIC's view is that there is, broadly speaking, good compliance with the continuous disclosure regime in Australia.

However, we understand that continuous disclosure issues can sometimes be difficult and judgement calls are required. And that is why we welcome the updated guidance on continuous disclosure guidance released by ASX earlier this year.

ASX and ASIC worked closely together on the revised guidance and we are confident that it will assist listed entities in better understanding and complying with their continuous disclosure obligations.

This ASX guidance is also a very useful tool to help investor relations professionals manage communications by listed companies in accordance with continuous disclosure obligations.

## Handling of confidential information

Moving on to the topic of confidential information and concerns about the selective release of that information, I want to be clear that we think that in Australia, by and large, there are fair and efficient markets. And recent data from an extensive stakeholder survey that ASIC will release later this year bears that out.

The survey data indicates that stakeholders were generally positive about the fairness and efficiency of Australia's financial markets. Overall, stakeholders also rate ASIC positively on its work achieving fair and efficient financial markets.

However, there is no room to be complacent and the survey data does suggest that some retail investors are concerned about whether there is a level playing field, including around the areas of the asymmetry of information and the leakage of price-sensitive information.

In other research we and others have done, we have also found evidence suggesting that a number of takeovers and equity raisings were leaked before they were announced to the market. Of course, this raises concerns about the potential for abuse of confidential information that may have been selectively disclosed or acted on by an insider.

ASIC encourages the free flow of information between listed companies, investors and analysts, but it should be in way that contributes to market fairness and efficiency.

This is the aim of the continuous disclosure rules, which require that material price-sensitive information be provided promptly to the whole market via the ASX announcements platform, rather than selectively given to some participants.

At this point, it is important to recognise that in specific circumstances, material information does not need to be disclosed to the market *if* it remains confidential. For example, a listed company might not need to disclose incomplete commercial negotiations if they remain confidential.

So it is essential that listed companies have in place proper systems and procedures for handling confidential information, because if confidentiality is lost it can have significant implications for the company's disclosure obligations.

The proper handling of confidential information empowers a company to manage the timely release of its information on its terms and can help ensure the success of a transaction.

For example, if a listed company is intending to conduct a rights issue, we would expect the company to have strict controls around the appointment of potential advisers and to enter into confidentiality agreements when it engages and communicates with third-party service providers. We would also expect the company to have systems in place to ensure its employees understand that the rights issue is confidential and that they comply with policies on handling of confidential information. By having in place policies and processes that minimise the risk of the rights issue being leaked to the market, the company is able to continue to rely on the carve out under the ASX continuous disclosure rules and keep the possible rights issue confidential until it is sufficiently definite to warrant disclosure to the market. This will also help to ensure that important aspects of the rights issue, such as the pricing, are not jeopardised.

The investor relations function plays an important role in ensuring proper procedures are in place and adhered to so as to prevent loss of confidentiality.

On the flip side, let me be clear that the abuse of confidential information is market misconduct. For example, under the insider trading provisions, it is an offence for anyone with inside information to trade in affected securities or communicate the information to any other party who is likely to trade in those securities.

## **Selective disclosure at analyst briefings**

I will turn now to an aspect of information handling that is particularly topical, namely analyst briefings given by listed companies. This is also a timely issue given the impending annual reporting season.

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

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. As I said before, ASIC encourages the flow of information to analysts in a way that contributes to market fairness and efficiency.

However, this must be balanced against the obligation for a listed company to ensure that material (price-sensitive) information is disclosed first to the market operator. This obligation is paramount. Let me be clear – we expect investor relations professionals to interact with analysts in a way that complies with this obligation.

We also expect that companies should have procedures in place (and follow those procedures) so as to ensure that they do not inadvertently or intentionally disclose price-sensitive information in their communications with analysts.

We welcome the fact that AIRA is alive to the damaging impact that selective disclosure of material information can have on investor confidence and the integrity of our markets. We note that AIRA and Finsia have jointly developed best practice guidance on managing communications with investors and analysts, *Principles for building better relations between listed entities and analysts*, and I encourage you all to refer to that guidance. ASIC has also released guidance in Regulatory Guide 62 *Better disclosure for investors* (RG 62) that is relevant to this topic.

Some practical guidance companies might consider includes:

- Minimise the number of people authorised to speak on the company's behalf.
- Give advance notification of group briefings, e.g. by noting it in a company announcement lodged with ASX, and make the event widely accessible, e.g. through webcasting or other means.
- Only discuss information that has been publicly released.
- Have a procedure for reviewing briefings and if inside information has been inadvertently released, disclose the information immediately to ASX.
- If a question at a briefing can only be answered by disclosing price-sensitive information, decline to answer or take it on notice. Then announce the information through ASX before responding.
- Have policies for making briefing presentations and speeches available to the public.

## **ASIC action in this area**

My final topic for tonight is about the work that ASIC has been doing and will be doing in this area. Before I begin I should note that ASIC is mindful that information is the currency of markets and we need to make sure our actions are measured and considered when looking at this issue.

Some time ago, ASIC released guidance in this area that remains relevant to today's issues. RG 62 suggests practical steps that a listed company can adopt to ensure that the widest audience of investors has access to company information released under the continuous disclosure rules.

### **Working with industry bodies**

We also continue to engage with other stakeholder bodies such as the Australian Financial Markets Association, Chartered Secretaries Australia, the Australian Institute of Company Directors and AIRA. We are encouraging them to further lift industry standards through education and the application of existing best practice guidelines around the handling of confidential information generally.

### **Analyst briefing surveillance**

We think it is important to address any perception about there being unfair differences in access to material information and we want to get the best facts we can on this issue before we decide on any further steps.

To that end, we will be conducting targeted surveillance to focus people's attention on their existing legal obligations and to help us get a more comprehensive understanding of what is currently happening in the market and determine whether we need to intervene further on this issue.

We will do this by conducting spot checks with selected listed companies across a range of sectors so we can hear how companies brief analysts and understand these companies' procedures and protocols.

Of course, if we see evidence of market abuse during this process we will look at enforcement action for those involved.

### **Confidential information project**

More broadly, we are also speaking to a sample of market participants to understand how industry good practice guidelines on the handling of confidential information have been implemented and to assess whether market practices have improved since the release of those guidelines.

We will be speaking to accountants, investment banks, brokers and listed companies to understand how they handle confidential information prior to

its announcement to the market. As I previously mentioned, we think it important to address any perception about there being unfair differences in access to material information in our market.

The planned outcome for this work will be a publicly available report setting out the work we have done and what we have found. Depending on our findings, we will consider whether additional guidance is needed for this topic or whether stronger regulatory action might need to be considered.

### **Enforcement action**

It goes without saying that if ASIC finds evidence of market misconduct such as continuous disclosure breaches or insider trading through our surveillance work or otherwise, we have the systems, the people and the determination to take stronger action.

We have had a strong and successful focus in recent years on market misconduct matters and we will continue that focus.

Since 2009, ASIC has prosecuted 28 insider trading actions. Of those, 18 have been successfully prosecuted and five were not successful. A further five individuals are awaiting trial and are contesting their charges.

Our conviction rate in the period from 2009 to now is about four times greater than during the previous decade. We currently have 25 active insider trading investigations afoot.

An example of a recent insider trading prosecution was where ASIC prosecuted a senior consultant at a large accounting firm who accessed the firm's internal database to acquire confidential client information relating to upcoming corporate transactions on which that firm had been engaged to provide advice. The senior consultant then acquired financial products in his name and the names of two relatives ahead of eight corporate transactions, generating total profits of about \$50,000. The person pleaded guilty to nine charges of insider trading and he was sentenced to 21 months imprisonment with a minimum term of full-time custody of 12 months. This is a good example of the reasons why companies and their advisers should have in place proper controls around access to confidential information.

In addition, I should highlight that since 2010 ASIC has issued a total of 11 infringement notices to nine entities for alleged failures to meet their continuous disclosure obligations.

## Closing and questions

Finally, I would like to close by saying that ASIC is serious about market integrity. We want to raise standards to ensure markets operate fairly and that all investors can make confident and informed decisions.

We see investor relations professionals as playing an important role in this area and we call upon you to help meet that challenge.

Thank you for your attention this evening and I would be happy to take any questions.