COMPANIES AND SECURITIES
ADVISORY COMMITTEE

# REPORT ON
# CONTINUOUS DISCLOSURE

November 1996

# The Companies and Securities Advisory Committee

## Role

The Companies and Securities Advisory Committee (the Advisory Committee) was established under Part 9 of the Australian Securities Commission Act 1989 (the ASC Act). Its functions are set out under s 148 of that Act, namely:

> "on its own initiative or when requested by the Minister, to advise the Minister, and to make to the Minister such recommendations as it thinks fit, about any matter connected with:
> - a proposal to make a national scheme law, or to make amendments of a national scheme law;
> - the operation or administration of a national scheme law;
> - law reform in relation to a national scheme law;
> - companies, securities or the futures industry; or
> - a proposal for improving the efficiency of the securities markets or futures markets".

## Membership

The Advisory Committee comprises part-time members selected from throughout Australia on the basis of their knowledge or experience in business, the administration of companies, the financial markets, law, economics or accounting. Members, other than the ASC Chairman, who is a member pursuant to s 147 of the ASC Act, are appointed to the Committee in their personal capacity by the Minister. The members are:

David Hoare (Convenor), Chairman - Bankers Trust Australia, Sydney
Reg Barrett, Partner - Mallesons Stephen Jaques
Philip Brown, Professor of Accounting - University of Western Australia, Perth
Alan Cameron, Chairman - Australian Securities Commission
David Crawford, Chairman - KPMG Peat Marwick, Melbourne
Patricia Faulkner, Partner - KPMG Management Consulting, Melbourne
Leigh Hall, Deputy Managing Director - AMP Investments Australia Ltd, Sydney
Patricia Khor, Securities Advisor - Johnson Taylor, Melbourne
Wayne Lonergan, Partner - Coopers & Lybrand, Sydney
Ann McCallum, Audit Partner - Garraway & Partners, Darwin
Alan McGregor AO, Chairman - FH Faulding & Co Ltd, Adelaide
Mark Rayner, Chairman - Pasminco Ltd, Melbourne
John Story, Managing Partner - Corrs Chambers Westgarth Brisbane.

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# Overview

## Terms of reference

0.1. The continuous disclosure requirements for listed and unlisted disclosing entities were introduced in September 1994, as part of the wider enhanced disclosure regime for capital markets.[1]

0.2. As required by ASC Law s 148A, the Minister in May 1996 requested the advice of the Companies and Securities Advisory Committee (the Advisory Committee) on how effectively the following continuous disclosure and related enforcement provisions are operating:

- ss 1001A and 1001B of the Corporations Law[2]
- ss 776, 777 and 779 of the Corporations Law
- s 127 of the ASC Law.

0.3 The Ministerial terms of reference require the Advisory Committee to examine the effectiveness of the continuous disclosure regime for listed companies, based on adherence to the Listing Rules and the respective roles of the Australian Securities Commission (ASC) and Australian Stock Exchange (ASX) in improving the integrity of the securities markets. In addition, the Advisory Committee must report on whether:

- the scope and application of the continuous disclosure provisions are sufficiently certain

- listed and unlisted disclosing entities understand and comply with their obligations

- unlisted disclosing entities should be exempt from disclosing information in the same circumstances as listed disclosing entities

- there should be any statutory defence to criminal or civil liability for breach of the continuous disclosure provisions

- the enforcement and information-sharing arrangements between the ASC and the ASX for continuous disclosure work satisfactorily.

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1 This enhanced disclosure regime includes accounting requirements, continuous disclosure requirements and prospectus relief: Part 1.2A Div 3.

2 The terms of reference do not include the periodic reporting requirements under the Corporations Law or the ASX Listing Rules (such as half-yearly and quarterly reports) or draft documents lodged with the ASX for its perusal, opinion, or granting of a waiver. These matters are not included in the continuous disclosure obligations under s 1001A: Explanatory Memorandum on the Corporate Law Reform Bill 1993, para 228.

**Outline of the Report**

0.4 This Report to the Minister is in three parts:

- Part 1: Summary of the Report and Recommendations
- Part 2: The current continuous disclosure requirements
- Part 3: Issues and Recommendations.

0.5 The Advisory Committee has made 12 recommendations for law reform. A list of these recommendations is set out in Appendix 1 of this Report.

**Methodology**

0.6 To prepare this Report, the Advisory Committee:

- advertised its terms of reference and sought submissions. A list of respondents is set out at Appendix 2 of this Report

- conducted a survey of listed disclosing entities. The survey results are set out in Appendix 3

- liaised with the Australian Investment Managers' Association (AIMA) in its surveys of unlisted disclosing entities and institutional investors. The survey results are set out in Appendices 4 and 5

- in conjunction with the ASC and the ASX, commissioned a study by the Securities Institute Research Centre of Asia-Pacific (SIRCA) on the possible impact of continuous disclosure on exchange-based capital markets. The study is set out in Appendices 6-9.

## Part 1: Summary of the Report and Recommendations

**Effectiveness of continuous disclosure for listed companies**

1.1 The Advisory Committee considers that the continuous disclosure regime for listed disclosing entities, based on adherence to the ASX Listing Rules, is operating effectively.

1.2 Some respondents, while agreeing that continuous disclosure for listed disclosing entities is effective, raised procedural questions concerning:

- the dissemination of information to shareholders

- the timing of continuous disclosure announcements

- the method of responding to speculation or rumour
- the disclosure of intentions
- selective disclosures
- confidentiality clauses, and
- further dissemination of information lodged with the ASX.[3]

1.3 The Advisory Committee considers that current arrangements in regard to each of these procedural matters work satisfactorily and that the role of the ASX in providing direction to the market through its Guidance Notes and rulings should continue.

**Scope and application of the continuous disclosure provisions**

1.4 The Advisory Committee has examined whether the scope and application of ss 1001A and 1001B are sufficiently certain. The Committee considers that these provisions, and their related definition provisions in Part 1.2A of the Corporations Law, are satisfactory, subject to statutory amendments to:

- extend the category of listed disclosing entities to cover entities that have been admitted to the Official List of the ASX, but whose securities have not yet been quoted. However, the current exemption for listed entities whose relevant securities have been suspended should continue[4]
- confine the class of unlisted disclosing entities to those entities which satisfy the current unlisted disclosing entity tests and whose securities are subject to either an exempt stock market declaration under s 771 or repurchase[5]
- exclude unlisted disclosing entities from the continuous disclosure provisions in relation to those securities for which they have a current prospectus.[6]

**Compliance by listed disclosing entities**

1.5 The Advisory Committee conducted a survey of listed disclosing entities to determine the extent to which they understand, and comply with, their continuous disclosure obligations. The Advisory Committee also liaised with AIMA in its survey of institutional investors.

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3 Part 3: Issues 1-7.
4 Part 3: Issue 8, Recommendation 1.
5 Part 3: Issue 18, Recommendation 8.
6 Part 3: Issue 19, Recommendation 9.

1.6 The Advisory Committee's survey of listed disclosing entities found that:

- respondents had no significant difficulty in applying the listed disclosing entity tests in Part 1.2A
- there was an increased use of formalised procedures to comply with the continuous disclosure requirements
- approximately one third of respondents had significantly increased their level of disclosure since the introduction of continuous disclosure
- the arrangements for lodging documents with the ASX were satisfactory
- approximately two thirds of respondents had sought some professional advice on continuous disclosure, though the continuing cost of compliance was comparatively low
- approximately one third of respondents had relied on the "carve-outs" in ASX Listing Rule 3.1, in particular the exemption for incomplete proposals or negotiations
- there was overwhelming support for the supervisory and enforcement role and powers of the ASX and the ASC in regard to continuous disclosure.

1.7 Respondents to this survey considered that continuous disclosure had helped to keep the market, and investors in listed disclosing entities, more informed. Continuous disclosure also reinforced the obligations on directors and management to disclose material information to the market. Respondents considered that investors gained a better and more timely understanding of the issues facing the company and how these might affect the value of their shares. Continuous disclosure also encouraged listed entities to formalise their lines of internal communication to ensure that the directors and senior management were fully informed of all events affecting the price or value of the entity's securities. Overall, the respondents considered that continuous disclosure encouraged greater investor confidence in the price discovery mechanism of the securities market.

1.8 The AIMA survey of institutional investors indicated a high degree of satisfaction with:

- the level and quality of information received from listed disclosing entities, and
- the level of enforcement of the continuous disclosure regime, including the supervisory role of the ASX.

**Compliance by unlisted disclosing entities**

1.9 The Advisory Committee liaised with AIMA in its survey of unlisted disclosing entities. This was designed to determine whether those entities understand, and how they comply with, their continuous disclosure obligations.

1.10 The AIMA survey found that:

- respondents were generally satisfied with, and had no difficulty in applying, the unlisted disclosing entity tests in Part 1.2A
- there was some confusion whether continuous issuers were still subject to residual continuous disclosure requirements[7]
- the majority of respondents believed that unlisted disclosing entities should have "carve-outs" similar to those for listed disclosing entities.

**Exemptions from disclosure by unlisted disclosing entities**

1.11 The Advisory Committee considers that unlisted disclosing entities should be exempt from disclosing information in the same circumstances as listed disclosing entities.[8]

**Statutory defences to criminal or civil liability**

1.12 The Advisory Committee has examined whether there should be any statutory defences to criminal or civil liability for breach of the continuous disclosure provisions. It considers that no statutory defences are necessary provided that the concepts of intention, recklessness and negligence are clarified, and a dishonesty requirement is included for criminal breach.[9]

1.13 The Advisory Committee also considers that there should be no change to the current policy that criminal and civil liability should only apply where information is not generally available.[10]

**Enforcement arrangements between the ASX and the ASC**

1.14 The Advisory Committee considers that the ASC and the ASX each assist in maintaining the integrity of the securities market through their respective roles in

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7 The Advisory Committee recommends that the continuous disclosure provisions should not apply to securities of any unlisted entities that are the subject of a current prospectus: Recommendation 9.

8 Part 3: Issue 20, Recommendation 10.

9 Part 3: Issue 21, Recommendation 11.

10 Part 3: Issue 10.

enforcing continuous disclosure. These enforcement arrangements for continuous disclosure, while currently working satisfactorily, could be improved by:

- ensuring that all information provided voluntarily by the ASX to the ASC for inclusion in the ASC database can be used in evidence[11]
- reforming the notification obligation of the ASX under s 776(2A)[12]
- extending the grounds of protection for the ASX and voluntary informants[13]
- clarifying the application of the Listing Rules to trusts,[14] and
- providing the ASC with a greater range of sanctions to enforce the continuous disclosure requirements, namely, small administrative penalties and enforceable undertaking arrangements.[15]

1.15 The Advisory Committee does not support any move towards mandatory public disclosure of matters referred from the ASX to the ASC.[16]

**Other matters**

***Abbreviated prospectuses***

1.16 The Advisory Committee notes the various methods by which listed disclosing entities may include, incorporate by reference, or merely refer to, continuous disclosure information in their prospectuses. The Committee questions whether the option in s 1022AA(3)(a) of merely stating that continuous disclosure documents will be provided on request without charge is satisfactory. It recommends that this matter be further considered by the Simplification Task Force in its review of Chapter 7 of the Corporations Law.[17]

***Quarterly reporting***

1.17 As an incidental aspect of the review, the Advisory Committee sought the views of listed disclosing entities on the merits of quarterly reporting.[18] A clear majority of respondents to the survey opposed quarterly reporting. Only a small minority of respondents gave it unqualified support. However, the Advisory Committee notes that

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11 Part 3: Issue 9, Recommendation 2.
12 Part 3: Issue 11, Recommendation 3.
13 Part 3: Issue 12, Recommendation 4; Issue 13, Recommendation 5.
14 Part 3: Issue 14, Recommendation 6.
15 Part 3: Issue 22, Recommendation 12.
16 Part 3: Issue 15.
17 Part 3: Issue 17, Recommendation 7.
18 Appendix 3, final question.

this survey only covered listed disclosing entities. It does not take into account whether users of financial information would favour quarterly reporting.

**Study by SIRCA**

1.18 The SIRCA study compared the periods before and after the introduction of continuous disclosure. It found that:

- continuous disclosure appeared to have provided the market with some additional price sensitive information for smaller listed disclosing entities. It did not appear to have made any significant change to the disclosure policies or disclosure levels of larger listed disclosing entities. This is consistent with their having already been adequately disclosing under Listing Rule 3A(1) (the forerunner of Listing Rule 3.1)

- the bulk of additional information provided to the market by small listed disclosing entities consisted mainly of "bad" news

- there was an increase in both forward-looking and voluntary disclosures, though it was difficult to determine whether this increase resulted from continuous disclosure or wider macro-economic influences

- there was an increased anticipation in share prices of the content of preliminary statements, though mainly for companies less relevant to large investors, and

- there was a significant decrease in market and share price volatility, though it was difficult to confidently attribute this to the operation of continuous disclosure.

1.19 The study emphasised that any conclusions had to be qualified, in view of the limited data available within the relatively short time (some 18 months) since continuous disclosure was introduced. Overall, there was no strong evidence that the implementation of continuous disclosure had any significant impact on the efficiency of the Australian share market or on the disclosure policies of listed disclosing entities.

# Part 2: The current continuous disclosure requirements

## Overview

2.1 Prior to the introduction of continuous disclosure in September 1994, limited disclosure requirements applied:

- for listed entities, on a contractual basis between the entity and the ASX under the Listing Rules. Listing Rule 3A(1) was the principal continuous disclosure

requirement. However, any breach of the Listing Rules could be enforced by court order under s 777

- for unlisted entities, primarily by way of the prospectus provisions of the Corporations Law.

2.2 The amendments to the Corporations Law, which commenced in September 1994, provided for continuous disclosure:

- for listed disclosing entities, by way of statutory backing for the disclosure obligations in the Listing Rules, in particular what is now Listing Rule 3.1 (the Listing Rule)[19]

- for unlisted disclosing entities, through a statutory continuous disclosure regime.

## Disclosing entities

2.3 The Corporations Law provides for the following categories of disclosing entity:

- listed public companies (except those whose only quoted securities are debentures)

- listed prescribed interest (collective investment) schemes

- other entities, including collective investment schemes and borrowing corporations, which raise funds through a prospectus

- entities which offer securities (other than debentures) as consideration for a share acquisition under a takeover scheme, and

- entities whose securities are issued under a compromise or scheme of arrangement.[20]

2.4 Most proprietary companies are not disclosing entities, given the requirement, for unlisted disclosing entities, of a minimum 100 security holders. Some other entities, including public authorities, are exempt by legislation or regulation.[21]

## Disclosure obligations

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19 ASX Listing Rule 3.1 states:

"Once an entity is or becomes aware of any information concerning it that a reasonable person would expect to have a material effect on the price or value of the entity's securities, the entity must immediately tell ASX that information."

The Listing Rule contains various exemptions from this disclosure obligation.

20 Part 1.2A Div 2.

21 ss 111AE (2), (3), 111AJ, 111AS, Corp Regs 1.2A.01-1.2A.04.

2.5 Listed disclosing entities are subject to the continuous disclosure requirements of the Listing Rule.[22] In general, a listed entity must disclose to the ASX information which, if released, a reasonable person would expect to have a material effect on the price or value of its securities. This expectation would arise "if the information would, or would be likely to, influence persons who commonly invest in securities in deciding whether or not to subscribe for, or buy or sell, the securities".[23] Unlisted disclosing entities are subject to similar obligations under the Corporations Law to disclose material price sensitive information to the ASC for inclusion on its public database.[24]

2.6 The continuous disclosure obligations for listed and unlisted disclosing entities differ in that:

- a listed disclosing entity must comply with the Listing Rule, whether or not the information is generally available, though criminal or civil breach will only occur if the information is not generally available. Unlisted disclosing entities have no obligation under the statutory requirements to disclose information which is generally available[25]

- a listed disclosing entity must comply with the Listing Rule even if it has a current prospectus, though it can issue an abbreviated prospectus.[26] An unlisted disclosing entity which has a current prospectus has no obligation to disclose information under continuous disclosure which it otherwise must include in a supplementary or replacement prospectus[27]

- the Listing Rule states that an entity becomes aware of information "if a director or executive officer (in the case of a trust, a director or executive officer of the management company) has, or ought reasonably to have, come into possession of the information in the course of the performance of their duties as a director or executive officer of that entity".[28] For unlisted disclosing entities the Corporations Law deems the state of mind of various persons, including directors, to be that of the body corporate.[29] However, there is no statutory equivalent for unlisted entities of the objective "ought reasonably" test that applies to listed entities

- the Listing Rule contains specific exemptions from disclosure (carve-outs) for listed disclosing entities where:

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22 ss 111AE, 1001A(1).
23 s 1001D.
24 s 1001B.
25 Section 1001C sets out the tests of when information is generally available.
26 See post, paras 2.17-2.21, Part 3 Issue 17 (paras 3.45-3.48).
27 s 1001B(1)(b).
28 ASX Listing Rule 19.12, definition of "aware".
29 s 762(3).

- a reasonable person would not expect the information to be disclosed
- the information is confidential, and
- one or more of the following applies:
  - it would be a breach of the law to disclose the information[30]
  - the information concerns an incomplete proposal or negotiation
  - the information comprises matters of supposition or is insufficiently definite to warrant disclosure
  - the information is generated for the internal management purposes of the entity
  - the information is a trade secret.[31]

There are no equivalent carve-outs for unlisted disclosing entities, though the ASC may give relief from the disclosure of confidential or unreasonably prejudicial information. The ASC may impose conditions on any relief granted[32]

- the Listing Rule requires a listed disclosing entity to "immediately" notify the Exchange of relevant information. An unlisted disclosing entity must notify the ASC of relevant information "as soon as practicable."[33]

## ASC exemption powers

2.7 The ASC may exempt a listed or unlisted disclosing entity from the continuous disclosure obligations, with or without conditions.[34] In exercising this discretionary power, the Commission will consider:[35]

- the desirability of efficient and effective disclosure to investors in securities and to securities markets

- the need to balance the benefits of disclosure against the costs of complying with disclosure requirements[36]

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30 The Advisory Committee assumes that this exemption only refers to breaches of statutory obligations of non-disclosure. It would be anomalous if a listed disclosing entity could attract this exemption merely by entering into private confidentiality arrangements.

31 The carve-outs do not necessarily operate indefinitely. A listed disclosing entity must disclose previously exempt information once the carve-out provisions cease to apply.

32 s 111AT; ASC Policy Statement 95, para 49(b).

33 s 1001B(1). A majority of respondents to the survey of listed disclosing entities stated that they took the expression "immediately" to mean "as soon as practicable" and that the preparation of a complete and accurate disclosure may quite properly involve some time for its consideration: see Appendix 3, question 8.

34 s 111AT.

35 ASC Policy Statement 95, para 15.

36 In balancing benefits and costs, the ASC policy is that any disclosure relief "should either leave the market:

- as well informed as it would be under the [Corporations] Law, even if in a slightly different way; or

- the desirability of facilitating dealings in Australia in securities of foreign companies, subject to appropriate safeguards.

2.8 The ASC has stated that it is unlikely to grant relief for listed disclosing entities where the ASX has refused to waive the Listing Rule.[37] This reflects the primary role of the ASX in implementing and supervising continuous disclosure by listed disclosing entities.

2.9 The ASC may grant relief for unlisted disclosing entities, if disclosure of confidential information would be unreasonably prejudicial to that entity, for instance, if disclosure would expose trade secrets, matters under negotiation or details of current disputes.[38]

2.10 Relief is generally for a limited period only, as the circumstances and facts giving rise to it may change.[39]

2.11 The ASC may grant relief by class order, provided it can be applied to a specifically identifiable set, rather than an open class, of entities.[40]

2.12 The ASC will notify applicants who are denied relief of their appeal rights to the AAT.[41] Where relief from disclosure is granted, other affected persons, such as shareholders and creditors, will not be notified.[42]

2.13 Intentional or reckless breach of any condition imposed pursuant to any relief granted by the ASC is an offence.[43] Also, the Court may, upon the application of the ASC, order the person to comply with the condition.

## Criminal and civil contravention

2.14 A disclosing entity (which, for collective investment schemes, is the management company) is criminally liable if it contravenes the disclosure requirements intentionally

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- not materially less well informed as it would be under the [Corporations] Law, while allowing material savings to the disclosing entity" (ASC Policy Statement 95 para 20).

37 Id, para 49(a).

38 Id, para 49(b). Any relief would be conditional upon the entity immediately disclosing this information if it is no longer confidential.

39 Id, para 50.

40 Id, para 24.

41 ASC Practice Note 57, paras 25, 26.

42 Id, paras 28, 29.

43 s 111AU.

or recklessly.[44] Also, officers of that disclosing entity and other involved persons, such as advisers, may be criminally liable as accessories.[45]

2.15 The disclosing entity is civilly liable if it contravenes the disclosure requirements intentionally, recklessly or negligently.[46] A person who suffers loss or damage may recover that amount by action against the disclosing entity,[47] or any person involved in the contravention,[48] whether or not the defendant has been convicted of an offence.

2.16 In addition, a person may be liable for misleading disclosures under other provisions of the Corporations Law, for instance for misleading or deceptive conduct[49] or for providing false or misleading statements to the market.[50]

## Prospectus relief for listed disclosing entities

2.17 Listed and unlisted disclosing entities have no "carve-out" disclosure exemptions for their prospectuses, given that prospectuses are for the purpose of fundraising. Thus, any relevant information that has been lawfully withheld by a disclosing entity under the continuous disclosure regime must be disclosed in the prospectus.[51]

2.18 However, reduced prospectus disclosure rules apply to any primary offering of quoted securities of eligible listed disclosing entities. The information to be included in these offerings is limited to transaction-specific details.[52] The rationale for this prospectus relief is that there is already an externally determined price for the securities of the issuing entity, based on market scrutiny through continuous disclosure.

2.19 To be eligible for prospectus relief, the listed entity must have been a disclosing entity for at least 12 months immediately prior to the offer of securities and not have had the benefit of exemptions from the enhanced disclosure requirements.[53]

2.20 The ASC may modify these requirements in appropriate circumstances.[54] Alternatively, the ASC may require a disclosing entity to prepare a full prospectus, if

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44 ss 1001A(3), 1001B(3).

45 Crimes Act (Cth) s 5. To form the requisite intention for ancillary liability, a person "must have knowledge of the essential matters which go to make up the offence, whether or not he knows that the matters amount to a crime": *Yorke v Lucas* (1985) 158 CLR 661.

46 ss 1001A(2), 1001B(2).

47 s 1005.

48 s 79.

49 s 995.

50 ss 999, 1308.

51 For instance, s 1022AA(6), (7).

52 s 1022AA.

53 s 1022A(1).

54 s 1084. The Explanatory Memorandum on the Corporate Law Reform Bill 1993, para 256, gives the examples of where there has been either a temporary suspension of an entity's securities, or an ASC exemption or modification from the disclosure requirements, but neither resulted in a material adverse

satisfied, for instance, that the entity has not complied with its continuous disclosure obligations during the preceding 12 months.[55]

2.21 An eligible listed disclosing entity may abbreviate its prospectus by:

- including in, or attaching to, the prospectus, all documents disclosed under the continuous disclosure rules, since the last financial year statement,[56] or
- incorporating those documents by summary reference,[57] or
- stating that the documents will be provided on request without charge.[58]

## Enforcement arrangements

2.22 The ASX and the ASC have entered into various Memoranda of Understanding (MOUs) to promote cooperation and mutual assistance to monitor and enforce the continuous disclosure obligations in the Listing Rules.[59] Under the MOUs, the ASX:

- takes primary responsibility for monitoring and enforcing compliance with the Listing Rules, and
- will notify the ASC, as soon as practicable, if it believes that a person has committed, or will commit a serious contravention of the continuous disclosure requirements.[60] Information provided by the ASX to the ASC will not be publicly disclosed.

2.23 The ASC may exercise its statutory powers to investigate the matter, and may seek administrative or judicial remedies.

2.24 Under the continuous disclosure regime, the ASX must:

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effect on the level of information available to the market. See further ASC Draft Practice Note *Part 7.12 (s 1022AA) Transaction Specific Prospectuses* (January 1996) paras 21-29.

55 s 1022AA(8); ASC Draft Practice Note *Part 7.12 (s 1022AA) Transaction Specific Prospectuses* (January 1996) paras 30-32.

56 s 1022AA(3)(b).

57 s 1024F. There is a technical problem with the drafting of the provisions. Section 1024F applies to any "document lodged under this [Corporations] Law". However, the combined effect of ss 776(2B) and 1274(2A) is that continuous disclosure documents given by a listed disclosing entity to the ASX, and subsequently provided by the ASX to the ASC, are deemed lodged under the Corporations Law for limited purposes only (s 1274(2)). These purposes do not include incorporating the documents in a prospectus. ASC Class Order 95/86 overcomes this problem by providing that a document used by a listed entity to notify the ASX of information under Listing Rule 3.1 can be incorporated in a prospectus by reference.

58 s 1022AA(3)(a).

59 ASC/ASX Information Transfer MOU (August 1994); ASC/ASX Companies Matters MOU (September 1994).

60 cf s 776(2A).

- formally notify the ASC if it believes that a person has committed, or is committing, a serious contravention of the Listing Rules[61]

- provide the ASX with a copy of any information (other than excluded information) that it has received from a listed disclosing entity,[62] for inclusion on the ASC public database.[63]

2.25 The ASX has been given qualified privilege (an immunity from liability for defamation, except upon proof of malice) where it publishes any continuous disclosure information, or information obtained through its general functions of supervising listed entities, including ensuring compliance with the general disclosure obligation.[64]

2.26 The ASX or ASC may seek a court order that any listed entity must comply with the Listing Rules, including the continuous disclosure requirements.[65] The court may issue an order for compliance against the directors of a listed disclosing entity.[66]

2.27 The court has other powers to enforce the Listing Rules, or make appropriate orders, in consequence of breach of the continuous disclosure requirements.[67] Where the ASC or ASX commences these proceedings, the court cannot require any undertakings as to damages.[68]

2.28 The ASC can seek other remedies for breach of the continuous disclosure requirements, such as:

- a prohibition on the trading of particular securities, where this is in the public interest[69]
- an order that the disclosing entity publish corrective information,[70] or
- an injunction, or order for payment of damages, for an actual or anticipated contravention of the Corporations Law.[71]

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61 s 776(2A).

62 s 776(2B). Corp Reg 7.2.01 excludes information of a minor nature, namely ASX notification messages and voiceline announcements.

63 s 1274(2)(a)(ia).

64 s 779(5)-(10). However, this protection does not apply where the listed entity is entitled to, and does, limit the purpose for which the information was given, and any publication by the Exchange was not for that purpose (s 779(6)).

65 s 777.

66 s 777(1). This overcomes the doubts raised in *Hillhouse v Gold Copper Exploration NL* (1988) 14 ACLR 423.

67 s 1114.

68 s 1114(3).

69 s 775.

70 s 1004.

71 ss 1324, 1325.

2.29 The ASC may obtain other remedies, or commence civil proceedings, if it is conducting a formal investigation which involves a breach of the continuous disclosure requirements.[72]

72 s 1323; ASC Law s 50.

2.30 The ASX may:

- remove a disclosing entity from the Official List
- suspend the securities of a disclosing entity from Official Quotation

where the disclosing entity is unwilling or unable to comply with any of the Listing Rules, including the continuous disclosure Listing Rule.[73]

## Exchange of information on continuous disclosure

2.31 The ASC may provide non-public information to other agencies for various purposes, including to enable or assist enforcement of the continuous disclosure regime.[74] The ASC Chairman or delegate may impose conditions on release of that information[75] which may not otherwise be used or disclosed by the recipient agency without the written consent of the ASC Chairman or delegate.[76]

2.32 Before releasing any information, the ASC may be obliged to afford any person who would be directly adversely affected by the disclosure, an opportunity to object to this course, or make submissions on how the ASC should exercise its discretion, including whether any, or what, conditions should be imposed.[77]

# Part 3: Issues and Recommendations

## Listed disclosing entities

### Issue 1: Procedure for disseminating continuous disclosure information to shareholders

3.1 One submission argued that:

> "Individual investors are generally not in a position or equipped to access and capitalise on the information disclosed until considerable time has elapsed. Professional analysts, portfolio managers etc, via their industry positions and their access to technology, are able to receive the information speedily and capitalise on its content. Individual investors are disadvantaged in that the market has often

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73 ASX Listing Rules, Introduction; Appendix 1A, Part 3.

74 ASC Law s 127(4B), (4C), ASC Law Regs Schedule 3. The ASC will notify the ASX, with appropriate details, if it believes that a person has committed, is committing or is about to commit a serious or material contravention of the Listing Rules, including the continuous disclosure requirements: ASC Policy Statement 95, para 59(d).

75 ASC Law s 127(4D), (5).

76 ASC Law s 127(4E), (4F).

77 *Johns v ASC* (1993) 116 ALR 567. See ASC Policy Statement 103, para 29 ff.

responded to the disclosure before it is conveyed to them in the financial section of the daily paper".[78]

3.2 Another submission argued that shareholders normally depend on the media for receiving information disclosed by listed companies to the ASX. The respondent suggested that:

- where a company makes an announcement to the ASX, a similar announcement should be made to shareholders either by mail or newspaper advertisement, or
- the ASX should be required to publish a daily list of companies that make announcements.[79]

3.3 The Advisory Committee notes that continuous disclosure information is publicly available for listed disclosing entities through the ASX search facilities and subscription service, and for listed and unlisted disclosing entities through the ASC database (available through ASC Business Centres or through on-line providers of ASCOT) and the ASC ALERT subscription service. The Advisory Committee considers that no additional mandatory procedures for dissemination of information are necessary.

**Issue 2: Timing of continuous disclosure announcements**

3.4 One submission argued that the timing of an announcement can pose difficulties, particularly when it is unclear whether information is sufficiently mature to warrant disclosure.[80] The respondent suggested that the ASX Guidance Note could be improved by adopting relevant statements in the Rules of other Exchanges. For example, the New York Stock Exchange Listed Company Manual states that:

> "Judgement must be exercised as to the timing of a public release on those corporate developments where ... disclosure would endanger the company's goals or provide information helpful to a competitor. In these cases, the company should weigh the fairness to both present and potential shareholders who at any given moment may be considering buying or selling the company's stock."[81]

3.5 The American Stock Exchange provides an exemption from disclosure:

> "when immediate disclosure would prejudice the ability of the company to pursue its corporate objectives ... [or] when the facts are in a state of flux and a more appropriate moment for disclosure is imminent. Occasionally, corporate developments give rise to information which, although material, is subject to rapid change. If the situation is about to stabilize or resolve itself in the near future, it may

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78 ASA *Submission*.

79 Mr JB Nicholson *Submission*.

80 Mr G Hone of Blake Dawson Waldron *Submission*.

81 New York Stock Exchange Listed Company Manual para 202.06(A), Procedure for Public Release of Information: Immediate Release Policy.

> be proper to withhold public disclosure until a firm announcement can be made, since successive public statements concerning the same subject (but based on changing facts) may confuse or mislead the public rather than enlighten it."[82]

3.6 The submission argued that the current ASX Guidance Note encourages companies in this situation to seek a trading halt or suspension until a firm announcement can be made. It may be inappropriate for a company conducting confidential negotiations to make any sort of announcement or to seek a trading halt or suspension. Either step could lead to uninformed speculation and to the market being misled. The ASX Guidance Note could be amended to adopt the precedent used on the US Exchanges.

3.7 The Advisory Committee considers that this is a matter for the ASX. It has drawn the Exchange's attention to this submission. However, it notes that, unlike Australia, the US Exchanges have mandatory quarterly reporting and that the New York and American Stock Exchange rules referred to must be considered in that context.

**Issue 3: "No comment" responses to speculation or rumour**

3.8 One submission questioned whether directors who legitimately choose to make no public comment on speculation or rumour are fully protected from possible legal action. The respondent argued that the Corporations Law should confirm that no civil liability can arise where "no comment" is an appropriate response. The ASX should clarify whether "no comment" is acceptable when a response is requested in terms of para 30 of its Guidance Note.[83]

3.9 The Guidance Note paragraph states as follows:

> "From time to time an entity may be required to respond to speculation in order for the market to remain properly informed. The most frequent example of this is in relation to media speculation. ASX does not expect an entity to respond to all comments made in the media or to respond to all market speculation. However, when the comment or speculation becomes reasonably specific, or when the market moves in a way that appears to be referable to the comment or speculation, and the entity has not already made a statement in response, ASX will call on it to make a statement so that the market remains properly informed."

3.10 The Advisory Committee considers that the existing provisions do not exclude the use of "no comment" responses in appropriate circumstances. The content of the Guidance Note is a matter for the ASX. The Advisory Committee has drawn the ASX's attention to this submission.

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82 American Stock Exchange Listing Standards and Requirements s 402.

83 Coopers & Lybrand *Submission*.

**Issue 4: Disclosure of intentions**

3.11 A submission pointed out that:

> "An entity may regard the intention to do something as being material to an investor, whereas another entity may only regard the doing of an act as material. The danger is that an entity may disclose an intention to do something as a safeguard against it being judged in hindsight. Consequently, the market may be 'ill informed'."[84]

3.12 The Advisory Committee notes that the exemptions from disclosure in Listing Rule 3.1.3 may apply to intentions, in particular:

- the information concerns an incomplete proposal or negotiation
- the information comprises a matter of supposition or is insufficiently definite to warrant disclosure.

3.13 Each listed disclosing entity has a discretion whether to rely on an exemption to withhold information concerning its intention. An entity would not attract any liability if it chooses to disclose its intentions, even where an exemption was available. For these reasons, the Advisory Committee considers that no legislative changes are warranted.

**Issue 5: Selective disclosures**

3.14 One respondent argued that Listing Rule 3.1 could be used by companies to justify selective disclosure to institutional and other large shareholders, analysts, advisers and financiers, and quarantining of information to these parties. These selective disclosures may consist of information that should be disclosed to the market generally under s 1001D.[85]

3.15 The Advisory Committee considers that it is not possible to selectively disclose under the Listing Rules. The terms of s 1001A would prohibit selective disclosures where the undisclosed material information is not generally available. No legislative changes are required.

**Issue 6: Confidentiality clauses**

3.16 One submission questioned whether there should be a specific exemption in the Listing Rule concerning agreements containing confidentiality clauses.[86]

3.17 The Advisory Committee considers that there should be no additional exemption for material covered by confidentiality clauses. This could fundamentally undermine

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84 Coopers and Lybrand *Submission*.

85 ASA *Submission*.

86 Association of Mining and Exploration Companies *Submission*.

continuous disclosure by permitting parties to enter into private agreements to withhold information.

**Issue 7: Further dissemination of information lodged with the ASX**

3.18 Some respondents to the Advisory Committee questionnaire to listed disclosing entities were critical of Listing Rule 15.7 which prohibits the further dissemination of information provided to the ASX until the ASX has confirmed that it has released the information to the market. These respondents expressed concern about the time delay experienced in receiving this ASX confirmation. One respondent pointed to the New York Stock Exchange rules which did not impose any similar restriction on the further dissemination of information, once lodged with the Exchange.

3.19 The Advisory Committee notes that some timing problems could arise during peak periods. However, the current arrangements under Listing Rule 15.7 appear to work satisfactorily overall and there is no evidence of widespread undue delay. The Advisory Committee understands that the ASX continually monitors this process.

**Issue 8: Mismatch between "listed disclosing entity" and an entity subject to the Listing Rules**

3.20 The ASX pointed out that, under s 111AE, an entity is a listed disclosing entity, and therefore subject to the statutory disclosure obligations, only if any of its securities are "quoted on a stock market of a securities exchange". This definition does not cover entities:

- which have been admitted to the official list of a stock market but whose securities have not yet been quoted, or

- whose quoted securities have been suspended,

notwithstanding that these entities remain subject to the Listing Rules.

3.21 The ASX proposed that the definition of listed disclosing entity be amended to cover both these situations, thereby ensuring that the statutory obligation to disclose under Listing Rule 3.1 applies to all listed entities once admitted to the Official List, whether or not their securities have been or currently are being quoted.

*Securities not yet quoted*

3.22 The Advisory Committee agrees that listed disclosing entities should include any entity which has been admitted to the official list of a stock exchange but whose securities have not yet been quoted.

*Securities suspended*

3.23 The ASX submitted that, for the purposes of enforcement, a listed entity whose securities are suspended should remain a listed disclosing entity, particularly where it had been suspended for apparent failure to comply with continuous disclosure. The ASX pointed out that, currently, a suspended listed entity could not be in breach of the statutory continuous disclosure provisions during the suspension period. Criminal or civil action under the continuous disclosure provisions could only apply to any breach prior to suspension.

3.24 The Advisory Committee does not support the statutory continuous disclosure obligations applying to listed entities during suspension of their securities. Likewise, these entities should not become unlisted disclosing entities during that period.[87] They should have time to arrange their affairs without the added requirement of complying with statutory continuous disclosure. Public trading in their securities cannot take place during suspension. Also, under the Listing Rules, the ASX does not automatically grant suspension.[88]

3.25 The Advisory Committee also notes that the ASX has enforcement powers under ss 777 and 1114 to seek a judicial remedy in the event of continuing non-compliance with Listing Rule 3.1 (which still applies to an entity whose securities have been suspended, notwithstanding that it is not a listed disclosing entity). The Court could impose suitable remedies which could have a comparable effect to the remedies otherwise given for a continuing breach of the continuous disclosure requirements.

3.26 The ASX was also concerned that s 776(2B) (the obligation on the ASX to pass information to the ASC) did not apply during the suspension period. The Advisory Committee notes however that the ASX could still volunteer this information to the ASC. The Exchange would be fully protected under the proposals for more comprehensive protection against defamation and breach of confidentiality.[89]

**Recommendation 1.** Section 111AE should be amended to cover entities which have been admitted to the official list of a stock market of a securities exchange, but whose securities have not yet been quoted.

*(cont.)*

A listed disclosing entity whose securities are suspended from quotation should not become an unlisted disclosing entity during that period.

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87 The apparent combined effect of the concept of "listed disclosing entity" in s 1001A, the ss 9 and 111AL definitions of "listed disclosing entity" and the ss 9, 111AM and 111AE definitions of "quoted ED securities" is that an entity which has been admitted to the Official List of the Stock Exchange but whose shares are not quoted is not a listed disclosing entity. That entity may be an unlisted disclosing entity under s 1001B, in view of the definitions of disclosing entities in Part 1.2A Div 2.

88 ASX Listing Rule 17.2.

89 See Issue 12, Recommendation 4.

**Issue 9: Evidential use of volunteered information**

3.27 The ASX questioned the evidential standing of information voluntarily passed from it to the ASC, other than pursuant to s 776(2B). It pointed out that only documents lodged with the ASC were admissible in evidence under s 1274(5). Subsection 1274(2A) (documents lodged with the ASC) only covers documents provided by the ASX to the ASC under s 776(2B).

3.28 The Advisory Committee agrees that s 1274(5) should cover all information provided by the Exchange to the ASC, including volunteered information.

**Recommendation 2.** Subsection 1274(5) should be amended to include any information provided by the ASX to the ASC which has been made publicly available by the ASX.

**Issue 10: Generally available information**

3.29 The effect of s 1001A is that criminal and civil liability only applies to listed or unlisted disclosing entities where undisclosed relevant information is "not generally available" (as defined in s 1001C). By contrast, ASX Listing Rule 3.1 requires listed disclosing entities to disclose relevant information under the Listing Rule, whether or not it is otherwise generally available. The ASX argued that this mismatch between the Listing Rule and s 1001A may prevent effective enforcement of continuous disclosure for listed disclosing entities, and should be resolved.

3.30 The Advisory Committee supports the current provision that imposes criminal and civil liability on listed, as well as unlisted, disclosing entities only where information is not generally available. It would be difficult to justify imposing civil and/or criminal liability on listed entities and their involved officers merely for failing to comply with the continuous disclosure Listing Rule, where that information was in the public domain and was available to investors and the market generally. As previously noted, the ASX has other remedies against a listed disclosing entity that breaches the Listing Rule.

**Issue 11: Notification obligations of the ASX**

3.31 Subsection 776(2A) requires the ASX to forward a statement to the ASC where it believes that a person has committed, is committing or is about to commit a serious contravention of the Business or Listing Rules or the Corporations Law. That statement must set out particulars of the alleged contravention and the reasons for the ASX's belief.

3.32 The ASX submitted that the subsection places a heavy onus on the Exchange in determining whether it is required to report under this subsection. The ASX also argued that the substance of any information that had to be formally provided under this

subsection would almost invariably have been provided under the existing Memorandum of Understanding (MOU) arrangements between itself and the ASC.

3.33 The Advisory Committee notes that any referral by the ASX to the ASC under the current MOU would pre-date, or certainly not post-date, any requirement for the formal lodgement of a statement under s 776(2A). One option, short of repeal of the sub-section, would be to provide that no formal statement concerning a matter was necessary where, to the satisfaction of the ASC (given that the provision is for its benefit) details of that matter had been, or were being, referred to it. This would overcome any duplication of effort by the ASX and avoid it having to form any belief of a serious contravention of a matter that had been satisfactorily referred to the ASC pursuant to the MOU. Also, enforcement would be expedited to the extent that the ASX can rely upon the informal referral process without having to also comply with the formalities of s 776(2A). The subsection would remain as a residual assistance provision in other circumstances.

**Recommendation 3.** Subsection 776(2A) should be amended to permit the ASC to exempt the ASX from the obligation to lodge a statement under this provision in relation to any matter stipulated by the Commission.

**Issue 12: Qualified privilege of the ASX**

3.34 The ASX has qualified privilege (an immunity from liability for defamation, except upon proof of malice) in limited circumstances under s 779. The ASX submitted that the protection of qualified privilege may not cover information provided by the ASX to the ASC voluntarily (including pursuant to an MOU) or in the mistaken belief that it is required by s 776(2A). The ASX may also be exposed to an action for breach of confidentiality in volunteering information to the ASC.

3.35 The ASX has argued that it be given a general protection similar to that applying to the ASC under s 246 of the ASC Law. This would protect the ASX against any liability for damages for any act done in good faith in the performance or the purported performance of any of its functions or powers. Alternatively, s 779 could be amended to put beyond doubt that the ASX has qualified privilege and immunity from any breach of confidentiality action when it provides information to the ASC for any reason (voluntarily or under s 776(2A)).

3.36 The Advisory Committee agrees that the ASX should be immune from liability for defamation or breach of confidentiality in any circumstances where, in good faith, it gives the ASC information related to continuous disclosure. The Committee also considers that the Simplification Task Force (as part of its review of Chapter 7) should examine the broader question of the ASX being similarly protected when it makes public any information held by the Exchange. However, any wider protection should not cover any negligence by the Exchange, given that the Exchange may soon become a demutualised profit-making entity.

**Recommendation 4.** The ASX should have qualified privilege and an immunity from liability for breach of confidentiality in all circumstances where it gives the ASC information related to continuous disclosure, provided it acts in good faith.

**Issue 13: Protection of informants**

3.37 The ASX submitted that its members may be exposed to an action for breach of confidentiality if they volunteer information to the Exchange. This could significantly undermine the ability of the ASX to obtain relevant information about the market.

3.38 The Advisory Committee, in both its *Collective Investments Report* and its *On-exchange Derivatives Markets Draft Report*, recommended that persons who volunteer information to the ASC should have statutory qualified privilege and an immunity from related common law actions, such as breach of confidentiality. The same protection should apply to persons who, in good faith and without malice, volunteer information to the ASX related to continuous disclosure. The Simplification Task Force could consider applying the protection to other types of information.

**Recommendation 5.** Any person who, in good faith, volunteers to the ASX information related to continuous disclosure should be given qualified privilege and an immunity from liability for breach of confidentiality.

**Issue 14: Application of the Listing Rules to trusts**

3.39 The ASX submitted that s 777 (power of the court to order compliance with the Business or Listing Rules, including Listing Rule 3.1) may not apply to replacement management companies of collective investment schemes. Also, trustees are not covered by s 777.

3.40 The Advisory Committee agrees that s 777 should apply to any management company, and trustee, of a collective investment scheme.

**Recommendation 6.** Section 777 should apply to any current management company, and trustee, of a listed disclosing entity that is a prescribed interest scheme.

**Issue 15: Public disclosure of matters referred from the ASX to the ASC**

3.41 The majority of institutional investor respondents to the AIMA questionnaire supported the market being informed where the ASX has referred a breach of the continuous disclosure regime to the ASC for action.[90]

3.42 The Advisory Committee considers that any public disclosure requirement would be contrary to the policy and practices of enforcement under the MOU arrangements between the ASX and the ASC, and could be unfairly detrimental to affected parties. Any public comment should be a matter of discretion for the Commission and the Exchange.

**Issue 16: Other statutory reporting by the ASX to the ASC**

3.43 Under ss 776(2) and 862, the ASX must report various matters to the ASC, principally concerning breaches by, or disciplinary action against, licensed dealers. The ASX submitted that these reporting obligations are in some respects too onerous and cover relatively minor matters. They also partly duplicate other reporting obligations.

3.44 The Advisory Committee notes that these issues are outside the ambit of the continuous disclosure review. They might best be considered by the Simplification Task Force in its review of Chapter 7.

**Issue 17: Abbreviated prospectuses**

3.45 An eligible listed disclosing entity may abbreviate its prospectus by:

- including in, or attaching to, the prospectus all continuous disclosure documents issued since the last financial year statement[91]
- incorporating those documents by summary reference,[92] or
- stating that the documents will be provided on request, without charge, during the prospectus application period.[93]

3.46 Under either the first or second procedure, the continuous disclosure documents are treated as part of the prospectus, and are subject to the same grounds of liability for material misstatements as apply to any other information in the prospectus. Under the

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90 Appendix 5.

91 s 1022AA(3)(b).

92 s 1024F.

93 The ASC Draft Practice Note *Part 7.12 (s 1022AA) Transaction Specific Prospectuses* (January 1996) para 42 states: "An issuer must provide copies of documents referred to in s 1022AA(3)(a) on request and without charge [s 1022AA(5)]. This obligation subsists during the 'application period' of the transaction specific prospectus as defined in s 9. The documents should be provided within a reasonable time of the issuer receiving the relevant request. This is so that the investor has sufficient time to consider the material before the end of the application period".

third procedure, the continuous disclosure documents are not treated as part of the prospectus, though the other grounds of liability for continuous disclosure documents will still apply.[94]

3.47 The Advisory Committee questions whether the third option is appropriate. It was not recommended in the Advisory Committee Report.[95] It also seems contrary to the policy of the other two options which require the continuous disclosure information to be included, or at least summarised, in the prospectus. The Committee questions whether it is satisfactory that, under the third option, intending investors may not gain any knowledge of this information, other than possibly the title of each relevant document,[96] unless they specifically request it from the issuing company.

3.48 The Advisory Committee proposes that the Simplification Task Force consider this matter further in its review of Chapter 7, with a possible view to excluding the third option.

**Recommendation 7.** The Simplification Task Force should consider whether the option of abbreviating a prospectus by stating that continuous disclosure documents will be provided on request without charge (s 1022AA(3)(a)) should be repealed.

## Unlisted disclosing entities

### Issue 18: Reducing the categories of unlisted disclosing entities

3.49 The ASC submitted that the existing categories of unlisted disclosing entity are too wide.[97] The obligation should be restricted to those unlisted entities whose securities are currently subject to:

- an exempt stock market declaration under s 771, or

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94 Explanatory Memorandum on the Corporate Law Reform Bill 1993 para 258; ASC Draft Practice Note *Part 7.12 (s 1022AA) Transaction Specific Prospectuses* (January 1996) para 41.

95 Companies and Securities Advisory Committee, *Report on an Enhanced Statutory Disclosure System* (1991), p 13 at para 16: "The prospectus should include the summary of [continuous disclosure] information, as provided for in the [continuous disclosure] statement."

96 ASC Draft Practice Note *Part 7.12 (s 1022AA) Transaction Specific Prospectuses* (January 1996) para 40 states: "The ASC considers that this statement [under s 1022AA(3)(a)] must at least identify each document which is available on request. If this is done, it is sufficient to give the title of the document or a description of its content, without describing the document's key points. However, it is not sufficient for the statement to simply note that the issuer will supply on request copies of certain documents, described in terms such as those in s 1022AA(4), without saying more about the identity of the documents." One respondent was unsure whether para 40 of the draft ASC Practice Note required a short form prospectus to contain a list of all documents issued under the continuous disclosure regime during the relevant period. If so, this might be an onerous and unnecessary gloss on s 1022AA.

97 Sections 111AF-111AI set out the categories of unlisted disclosing entity.

- repurchase by the disclosing entity (for instance, by redemption or buy-back).

3.50 The Advisory Committee agrees that the unlisted disclosing entity concept should be narrowed. It should be limited to those entities that:

- involve a significant number of investors (as per the tests in s 111AF-s 111AI), and
- make a market in, or repurchase, the securities of those investors.

3.51 One respondent to the AIMA survey proposed that continuous disclosure should not apply to prescribed interest schemes if unitholders have passed a resolution to wind up the scheme or the manager has given a winding up notice to the trustee and redemptions have been suspended.

3.52 The Advisory Committee notes that the current definition of unlisted disclosing entity draws no distinction between active and inactive entities. Its proposed category of unlisted disclosing entity would not include any prescribed interest scheme which did not have an exempt stock market declaration and whose securities were no longer subject to repurchase through buy-back or redemption (in consequence of a resolution of unitholders which has that effect, or otherwise).

**Recommendation 8.** The following additional tests should apply in determining what is an unlisted disclosing entity:

- its securities are subject to an exempt stock market declaration under s 771, or
- its securities are subject to repurchase by the unlisted entity (for instance, by buy-back or redemption).

**Issue 19: Exempting unlisted disclosing entities with a current prospectus from continuous disclosure**

3.53 An unlisted disclosing entity with a current prospectus is not subject to continuous disclosure for any information that is required to be included in a supplementary or replacement prospectus.[98] However, the wording of the relevant provision appears to suggest that the unlisted disclosing entity may nevertheless still be subject to continuous disclosure for residual information (that is, any information that may have an effect on the price or value of ED securities, but does not require the issue of a supplementary or replacement prospectus). This may be an unintended effect of the drafting. The Explanatory Memorandum to the continuous disclosure legislation stated that continuous disclosure would only apply to any unlisted disclosing entity "which does not have a current prospectus".[99] Presumably, any unlisted disclosing entity that did have

98 s 1001B(1)(b).

99 Explanatory Memorandum on the Corporate Law Reform Bill 1993, para 237.

a current prospectus (and therefore was subject to the supplementary and replacement prospectus requirements) was not intended to come within s 1001B.

3.54 The Advisory Committee considered various reform options for unlisted disclosing entities with current prospectuses:

- extend the exemption from disclosure under continuous disclosure to any information that is actually included in a supplementary or replacement prospectus (whether or not it is required to be there)

- apply uniform tests for updating prospectuses and disclosing information under continuous disclosure. Currently, the continuous disclosure test for unlisted disclosing entities is whether information may "have a material effect on the price or value of ED securities" of those entities.[100] By comparison, an initial prospectus for a prescribed interest scheme must contain all the information which prospective investors and their advisers would reasonably require, and reasonably expect to find in the prospectus, for the purpose of making an informed assessment of the assets and liabilities, financial position, profits and losses of the scheme, the rights attaching to the securities and the merits and risks of participating in the scheme.[101] A supplementary or replacement prospectus must be issued if a "significant change or a significant new matter" has occurred during the life of a prospectus[102]

- exclude an unlisted disclosing entity from continuous disclosure in regard to any securities for which that entity has a current prospectus. The Investment Funds Association submitted that the initial and supplementary or replacement prospectus obligations impose a sufficiently broad disclosure obligation on unlisted disclosing entities, and that the continuous disclosure provisions do not add any useful disclosure requirement.

3.55 The Advisory Committee supports the last option. There should be no additional disclosure requirements for an unlisted disclosing entity that has a current prospectus. This reflects the apparent intention of the legislation. It would also avoid any need to alter the language of the existing provisions. The Advisory Committee also considers that to ensure the market is properly informed, the ASC database should advise users that they should check both the disclosure notices and the prospectus notices for unlisted disclosing entities.

**Recommendation 9.** Unlisted disclosing entities that have a current prospectus should have no additional continuous disclosure obligations for those securities the subject of

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100 ss 1001B(1)(a)(ii), 1001D.

101 s 1022, as modified by Corp Reg 7.12.12.

102 s 1024.

the prospectus.

*(cont.)*

The ASC database should advise users that they should check both the disclosure notices and the prospectus notices for unlisted disclosing entities.

**Issue 20: Applying the listed disclosing entity exemptions to unlisted disclosing entities**

3.56 A number of respondents argued that the same exemptions from disclosure should apply to listed and unlisted disclosing entities.[103]

3.57 A majority of respondents to the AIMA survey of unlisted disclosing entities supported their having carve-out exemptions.[104] Some respondents supported these exemptions being in equivalent terms to those for listed disclosing entities. Some other respondents supported additional or substitute grounds for exemption, such as:

- the disclosure may be commercially damaging, or
- to disclose the information would, in the opinion of the trustee and manager, be detrimental to the interests of unitholders (or non-disclosure would be in the best interests of these holders).

3.58 The Advisory Committee considers that the equivalent of any exemptions for listed disclosing entities should also apply to unlisted disclosing entities. No different exemptions for unlisted disclosing entities should apply.

**Recommendation 10.** Unlisted disclosing entities should have the same "carve-out" exemptions as listed disclosing entities have from time to time.

## Listed and unlisted disclosing entities

**Issue 21: Civil and criminal liability**

3.59 One article has argued that the test of determining what information must be disclosed by listed and unlisted disclosing entities is inevitably imprecise.[105] The article said that, given this unclear test, a qualification should be placed on civil or criminal liability for non-compliance. The article suggested two options:

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103 IFA *Submission*, Coopers and Lybrand *Submission*, ASX *Submission*.

104 See Appendix 4.

105 W Koeck, "Continuous disclosure" (1995) 13 *Company and Securities Law Journal* 485.

- the ASX and ASC could identify a specified list of matters. Criminal and civil liabilities could attach only for failing to disclose information related to that specified list, or

- the legislation could include a due diligence defence to civil and criminal liability, where a disclosing entity establishes that:
  - it has a system reasonably designed to cause material price or value information to be disclosed
  - it has monitored the operation of that system, and
  - the relevant company officer acted reasonably in determining not to disclose the known information.

3.60 The ASC suggested an alternative approach, namely that a provision similar to s 1002G(1) (relating to the relevant mental element under the insider trading provisions) be introduced into continuous disclosure.

3.61 The Advisory Committee sought the advice of its Legal Committee on the existing grounds of civil and criminal liability and the possible need for a statutory defence. The Advisory Committee, taking into account the Legal Committee's advice, considers that a statutory defence for listed and unlisted disclosing entities is unnecessary if:

- the concepts of intention, recklessness and negligence are clarified, and
- a dishonesty requirement is included for criminal breach, namely, that the person acted dishonestly and intending to gain, whether directly or indirectly, an advantage for that person or any other person, or intended to deceive or defraud someone (cf s 1317FA(1)(b)).

**Recommendation 11.** Persons should be liable for intentional breach of the continuous disclosure requirements (as a principal or accessory) only if:

- they intended that their acts or omissions would breach those requirements (that is, they were aware that the information should have been, but was not, disclosed), and
- (for criminal liability) they acted dishonestly (as per s 1317FA(1)(b)).

Persons should be liable for reckless breach of the continuous disclosure requirements (as a principal or accessory) only if:

- they were reckless as to whether their acts or omissions would breach those requirements, and
- (for criminal liability) they acted dishonestly (as per s 1317FA(1)(b)).

*(cont.)*

Persons should be liable for negligent breach of the continuous disclosure requirements (as a principal or accessory) only if they did not take sufficient care over whether their acts or omissions could breach those requirements.

**Issue 22: Sanctions for contraventions of the continuous disclosure provisions**

3.62 The ASC submitted that it would be useful to have a wider range of enforcement options to encourage compliance with continuous disclosure, rather than having to rely only on civil and criminal litigation. The ASC proposed that it have a power to:

- impose a small administrative penalty (not constituting a criminal or civil penalty) of up to, say, $5,000, for minor contraventions

- enter into enforceable undertakings with disclosing entities regarding remedial action to be taken by those entities (for instance, disclosure of information and/or implementation or amendment of an internal information processing system).

3.63 The Advisory Committee in its *Collective Investments Report* (1993) recommended that the ASC have power to accept voluntary enforceable undertakings. The Australian Competition and Consumer Commission (ACCC) already has power to accept undertakings from companies in connection with any matter for which the ACCC has a power or function. Undertakings, once voluntarily entered into, can be enforced by the ACCC in the courts, including through appropriate orders for breach. These orders may direct the company to comply with its voluntary undertaking, pay compensation to anyone who has suffered loss through breach of the undertaking, and/or pay to general revenue any financial benefit that it has obtained through the breach.

3.64 The Advisory Committee agrees that the ASC should have the power to impose a small administrative penalty or obtain enforceable undertakings from disclosing entities in connection with the statutory continuous disclosure requirements.

**Recommendation 12.** The ASC should have powers to:

- impose small administrative penalties (not constituting a criminal or civil penalty) for minor contraventions, and
- enter into enforceable undertakings with disclosing entities

regarding any aspect of continuous disclosure.

# Appendix 1

# List of Recommendations

**Recommendation 1.** Section 111AE should be amended to cover entities which have been admitted to the official list of a stock market of a securities exchange, but whose securities have not yet been quoted.

A listed disclosing entity whose securities are suspended from quotation should not become an unlisted disclosing entity during that period.

**Recommendation 2.** Subsection 1274(5) should be amended to include any information provided by the ASX to the ASC which has been made publicly available by the ASX.

**Recommendation 3.** Subsection 776(2A) should be amended to permit the ASC to exempt the ASX from the obligation to lodge a statement under this provision in relation to any matter stipulated by the Commission.

**Recommendation 4.** The ASX should have qualified privilege and an immunity from liability for breach of confidentiality in all circumstances where it gives the ASC information related to continuous disclosure, provided it acts in good faith.

**Recommendation 5.** Any person who, in good faith, volunteers to the ASX information related to continuous disclosure should be given qualified privilege and an immunity from liability for breach of confidentiality.

**Recommendation 6.** Section 777 should apply to any current management company, and trustee, of a listed disclosing entity that is a prescribed interest scheme.

**Recommendation 7.** The Simplification Task Force should consider whether the option of abbreviating a prospectus by stating that continuous disclosure documents will be provided on request without charge (s 1022AA(3)(a)) should be repealed.

**Recommendation 8.** The following additional tests should apply in determining what is an unlisted disclosing entity:

- its securities are subject to an exempt stock market declaration under s 771, or
- its securities are subject to repurchase by the unlisted entity (for instance, by buy-back or redemption).

**Recommendation 9.** Unlisted disclosing entities that have a current prospectus should have no additional continuous disclosure obligations for those securities the subject of the prospectus.

The ASC database should advise users that they should check both the disclosure notices and the prospectus notices for unlisted disclosing entities.

**Recommendation 10.** Unlisted disclosing entities should have the same "carve-out" exemptions as listed disclosing entities have from time to time.

**Recommendation 11.** Persons should be liable for intentional breach of the continuous disclosure requirements (as a principal or accessory) only if:

- they intended that their acts or omissions would breach those requirements (that is, they were aware that the information should have been, but was not, disclosed), and
- (for criminal liability) they acted dishonestly (as per s 1317FA(1)(b)).

Persons should be liable for reckless breach of the continuous disclosure requirements (as a principal or accessory) only if:

- they were reckless as to whether their acts or omissions would breach those requirements, and
- (for criminal liability) they acted dishonestly (as per s 1317FA(1)(b)).

Persons should be liable for negligent breach of the continuous disclosure requirements (as a principal or accessory) only if they did not take sufficient care over whether their acts or omissions could breach those requirements.

**Recommendation 12.** The ASC should have powers to:

- impose small administrative penalties (not constituting a criminal or civil penalty) for minor contraventions, and
- enter into enforceable undertakings with disclosing entities

regarding any aspect of continuous disclosure.

# Appendix 2

# List of Respondents

Association of Mining and Exploration Companies (Inc)

Australian Investment Managers' Association

Australian Securities Commission

Australian Shareholders' Association Ltd

Australian Stock Exchange

Chartered Institute of Company Secretaries in Australia Ltd

Mr W Edge of Coopers & Lybrand

Mr G Hone of Blake Dawson Waldron

Investment Funds Association of Australia

Mr JB Nicholson

# Appendix 3

## Listed disclosing entities: Continuous Disclosure Questionnaire

The questionnaire on continuous disclosure was prepared by the Advisory Committee Secretariat and distributed to over 300 entities listed on the ASX. Some 70 of these entities replied. Set out below is an analysis of their responses.

### Categories of disclosing entity

**1. Has your company, or any of its related companies, had any difficulty applying the disclosing entity tests in Pt 1.2A of the Corporations Law? If yes, please elaborate.**

| | | |
|---|---|---|
| *Summary of responses* | **No** | **98%** |
| | **Yes** | **2%** |

**2. Do you consider that any of those related companies are inappropriately classified under the disclosing entity tests? If yes, please elaborate.**

| | | |
|---|---|---|
| *Summary of responses* | **No** | **98%** |
| | **Yes** | **2%** |

**3. Has your company, or any of its related companies, at any time sought any ASC exemption from being a disclosing entity? If yes, please elaborate.**

| | | |
|---|---|---|
| *Summary of responses* | **No** | **97%** |
| | **Yes** | **3% (application refused)** |

### Procedures for compliance

**4. Who is responsible on a day-to-day basis for supervising your company's continuous disclosure responsibilities (eg Board, Managing Director, Chief Financial Officer, Company Secretary, other)?**

| | | |
|---|---|---|
| *Summary of responses* | **Company Secretary** | **38%** |
| | **CFO/Coy Sec** | **10%** |
| | **Combination of above** | **9%** |
| | **MD/Coy Sec** | **9%** |
| | **CFO** | **8%** |
| | **Board** | **6%** |
| | **Board plus Coy Sec** | **5%** |
| | **MD** | **5%** |

| | |
|---|---|
| **Coy Sec/Chairman** | **5%** |
| **Dir/Coy Sec** | **3%** |
| **CFO/MD** | **2%** |

**5. Did your company have an internal procedure before continuous disclosure was introduced (September 1994) for disclosing information to the Australian Stock Exchange (ASX) under Listing Rule 3A(1) (as it then was)?**
**If yes, what form did it take (for instance, written guidelines)?**

| | | |
|---|---|---|
| *Summary of responses* | **No** | **47%** |
| | **Yes** | **53%** |

Those respondents who answer 'yes' referred to a variety of written and other, more informal, guidelines.

**6. Does your company currently have an internal procedure for disclosing information to the ASX under continuous disclosure?**
**If yes, what form does it take (for instance, written guidelines)?**

| | | |
|---|---|---|
| *Summary of responses* | **No** | **26%** |
| | **Yes** | **74%** |

**7. If you answered yes to both questions 5 and 6, does the current internal procedure differ from the previous procedure?**
**If yes, please elaborate. In particular, is this a result of continuous disclosure?**

53% of total respondents answered 'yes' to questions 5 and 6. Of that 53%, two thirds indicated they had not changed their internal procedures. The remaining third indicated that, in general, they changed to a more formal procedure.

The overall trend of questions 5, 6 and 7 is that a majority of respondents had some procedures, of differing level of formality, to comply with Listing Rule 3A(1) as it operated prior to September 1994. The effect of continuous disclosure has been to increase the use of formalised procedures (from 53% to 74%), including written guidelines, to comply with the continuous disclosure Listing Rule 3.1.

**8. Has your company encountered any problems in complying with the Listing Rule requirement that continuous disclosure information must be "immediately" notified to the ASX?**
**If yes, are these problems continuing?**

| | | |
|---|---|---|
| *Summary of responses* | **No** | **79%** |
| | **Yes** | **21%** |

Most respondents who answered 'no' tended to regard the expression "immediately" as meaning "as soon as practicable", and that the preparation of a complete and accurate disclosure may quite properly involve some time for its consideration.

**9. Has your company found the procedures for lodging continuous disclosure documents with the ASX satisfactory?**

| | | |
|---|---|---|
| *Summary of responses* | **Yes** | **88%** |
| | **No** | **9%** |
| | **N/A** | **3%** |

**10. Has your company had to employ any additional staff or consultants to satisfy the continuous disclosure requirements?**
**If yes, please elaborate.**

| | | |
|---|---|---|
| *Summary of responses* | **No** | **94%** |
| | **Yes** | **6%** |

**11. Could you estimate the annual cost to your company of complying with continuous disclosure?**

| | | |
|---|---|---|
| *Summary of responses* | **No** | **76%** |
| | **Yes** | **24%** |

Those respondents who replied 'yes' estimated that complying with continuous disclosure cost them between $5,000 and $50,000 per annum, with most respondents indicating that the cost was at the lower end of that range.

## Information to be disclosed

**12. Since continuous disclosure was introduced, has your company ever been in serious doubt about whether an item should be disclosed?**
**If yes, was this doubt over whether:**
**(a) the information would materially affect the price or value of your company's securities, or**
**(b) the Listing Rule exemptions from disclosure applied?**
**Do you still have any doubts?**
**If so, please elaborate.**

| | | |
|---|---|---|
| *Summary of responses* | **No** | **62%** |
| | **Yes** | **38%** |
| | **(a)** | **60% of Yes** |
| | **(b)** | **56% of Yes** |
| | **Doubts still exist** | **52% of Yes-(ie, 20% of overall respondents)** |

A number of respondents had doubts about both (a) and (b). Smaller listed entities appear to face the greatest continuing doubt.

The most significant problem encountered by respondents under question 12(a) was in determining the criteria of "persons who commonly invest in securities" (s 1001D provides that information will be considered to materially affect the price or value of

securities "if the information would, or would be likely to, influence persons who commonly invest in securities in deciding whether or not to subscribe for, or buy or sell, the first-mentioned securities"). Some respondents said that different categories of persons may invest for quite different reasons. A particular event might influence one group, but not another group, of investors in determining whether to buy or sell their shares. For instance, a decision to reduce dividends in return for increased capitalisation of profit may have a different effect on long- and short-term investors. Long-term investors might not see this as detrimentally affecting the price or value of securities or influencing them to buy or sell. It may have a contrary effect on short-term investors.

In regard to question 12(b) one respondent referred to the perceived problem in applying the carve-out in Listing Rule 3.1.3(b) (incomplete proposal or negotiation) in relation to commercial negotiations, using the example of the typical stages in creating a joint venture project, namely:

- the initial and follow up meetings
- the agreed-upon letter of intent
- the creation of a Memorandum of Understanding, and
- entering into a legally binding joint venture agreement.

Until the signing of the joint venture agreement, the transaction was incomplete although its general intent was known and was increasingly certain.

Another respondent referred to information becoming available to a third party during the course of negotiations over a contract. This may negate the exemption from disclosure under Listing Rule 3.1.3(b) (incomplete proposal or negotiation), which requires that the information remain confidential.

**13. How many separate items did your company disclose to the ASX in:**
**(a) the 20 months before continuous disclosure was introduced (January 1993 to August 1994, inclusive), and**
**(b) in the 20 months since continuous disclosure was introduced (September 1994 to April 1996, inclusive)?**

| *Summary of responses* | | |
|---|---|---|
| | **Significant increase** | **30%** |
| | **No signif. increase** | **42%** |
| | **No change** | **17%** |
| | **Not specified** | **6%** |
| | **Decrease** | **5%** |

Most respondents did not provide details concerning the number of separate items. Instead, they indicated whether there had been an overall increase, decrease or no change between the time periods in (a) and (b). For this reason, the summary deals with whether there has been an increase in the period since continuous disclosure was introduced.

**14. How many items are included in (b) that would not have been notified if continuous disclosure had not been introduced?**

| | | |
|---|---|---|
| *Summary of responses* | **Nil** | **73%** |
| | **Extras** | **18%** |
| | **Unknown** | **6%** |
| | **N/A** | **3%** |

The responses to questions 13 and 14 indicated that, in general, respondents considered that they complied with Listing Rule 3A(1) prior to September 1994. The introduction of continuous disclosure increased the level of material disclosure in only a minority of companies. The general familiarity of companies with Listing Rule 3A(1) meant that the transition to continuous disclosure was relatively uncomplicated for a majority of them.

**15. Has the content of your company's disclosures changed since continuous disclosure (eg, the type of items disclosed, frequency of forward-looking disclosures, length of a typical disclosure, style of disclosure)?**

| | | |
|---|---|---|
| *Summary of responses* | **No** | **80%** |
| | **Yes** | **20%** |

For those companies that did identify a change in the content of their disclosures, it was towards a more structured and detailed form of disclosure.

**16. Since continuous disclosure was introduced, has your company withheld any material information on the basis that it falls within any of the confidentiality exceptions from disclosure in Listing Rule 3A(1)? If yes, on how many occasions under paras (a), (b), (c), (d) and (e) respectively of Listing Rule 3A(1) have you withheld this information?**

| | | |
|---|---|---|
| *Summary of responses* | **No** | **59%** |
| | **Yes** | **36%** |
| | **(a) (breach of law to disclose)** | **0% of Yes** |
| | **(b) (incomplete proposal or negotiation)** | **54% of Yes** |
| | **(c) (supposition or indefinite information)** | **29% of Yes** |
| | **(d) (internal management purposes)** | **20% of Yes** |
| | **(e) (trade secrets)** | **13% of Yes** |
| | **Unsure** | **5%** |

## Prospectus relief

***This Section only applies if your company has issued a prospectus since continuous disclosure was introduced, or is considering issuing a prospectus.***

**17. Since continuous disclosure was introduced, has your company used, or is it considering using, abbreviated prospectus disclosure?**
**If yes, what form of prospectus abbreviation have you used, or do you propose to use, and for what reasons?**

| | | |
|---|---|---|
| *Summary of responses* | **Yes** | **15%** |
| | **No** | **21%** |
| | **N/A** | **64%** |

There was some use of the prospectus relief provisions, mainly through short form prospectuses.

**18. Does your company consider that there is any scope for greater prospectus relief for listed disclosing entities?**
**If yes, please elaborate.**

| | | |
|---|---|---|
| *Summary of responses* | **Yes** | **8%** |
| | **No** | **24%** |
| | **No opinion** | **68%** |

The majority of respondents either had no opinion or did not see any scope for greater prospectus relief. The 8% who answered 'yes' mainly argued for less detail in the prospectus.

**19. Has your company applied to the ASC for exemption from the prospectus requirements on the basis of your continuous disclosure?**
**If yes, was your application successful?**

| | | |
|---|---|---|
| *Summary of responses* | **Yes** | **8% (no application unsuccessful)** |
| | **No** | **92%** |

## Takeovers

***This Section only applies if your company has been involved in a takeover since continuous disclosure was introduced.***

**20. Has continuous disclosure assisted your company in preparing takeover documents, either as:**
**(a) a bidder (Part A or Part C), or**
**(b) a target (Part B or Part D)?**
**In answering, please indicate whether (a) or (b) applies.**

| | | |
|---|---|---|
| *Summary of responses* | **Yes** | **5%** |
| | **(a)** | **100% of Yes** |
| | **(b)** | **33% of Yes** |
| | **No** | **15%** |
| | **(a)** | **20% of No** |
| | **(b)** | **10% of No** |

| | | |
|---|---|---|
| | **(Rest of 'no' did not indicate)** | |
| | **N/A** | **80%** |

## Schemes of arrangement

***This Section only applies if your company has entered into a scheme of arrangement since continuous disclosure was introduced.***

**21. Has continuous disclosure assisted your company in preparing the documentation for a scheme of arrangement?**

| | | |
|---|---|---|
| *Summary of responses* | **Yes** | **3%** |
| | **No** | **5%** |
| | **N/A** | **92%** |

## External advice

**22. Has your company ever sought professional advice on any aspect of continuous disclosure or prospectus relief? If yes:**

- **on what aspects**
- **from what type of professional adviser (eg, auditor or law firm)?**

| | | |
|---|---|---|
| *Summary of responses* | **Yes** | **67%** |
| | **No** | **33%** |

The majority of listed disclosing entities have sought professional advice, mainly from law firms, on the application of continuous disclosure requirements. This advice included:

- whether disclosure was required in the circumstances
- the operation of the carve-out provisions
- the abbreviated prospectus provisions
- the timing of any notification
- whether certain information would have a material effect on the price or value of securities
- the establishment of suitable compliance programs.

## Administration of the continuous disclosure provisions

**23. Do you have any view on whether the ASX has appropriate powers to support its supervisory and enforcement role concerning continuous disclosure by listed disclosing entities?**

| | | |
|---|---|---|
| *Summary of responses* | **Yes** | **45%** |
| | **No view** | **55%** |

Of those respondents that answered 'yes', the overwhelming majority supported the supervisory and enforcement role and powers of the ASX in relation to continuous disclosure.

**24. Do you have any view on whether the ASC has appropriate powers to support its supervisory and enforcement role concerning continuous disclosure by listed disclosing entities?**

| | | |
|---|---|---|
| *Summary of responses* | **Yes** | **41%** |
| | **No view** | **59%** |

Of those respondents that answered 'yes', the overwhelming majority supported the supervisory and enforcement role and powers of the ASC in relation to continuous disclosure.

**25. Do you have any comments on ASC Policy Statement 95 "Disclosing entity provisions relief" or ASC draft Practice Note "Part 7.12 (s 1022AA) Transaction specific prospectuses"?**

| | | |
|---|---|---|
| *Summary of responses* | **Yes** | **5%** |
| | **No** | **95%** |

One respondent was unsure whether para 40 of the draft ASC Practice Note required a short form prospectus to contain a list of all documents issued under the continuous disclosure regime during the relevant period. If so, this might be an onerous and unnecessary gloss on s 1022AA.

## Using continuous disclosure information of other disclosing entities

**26. Has your company ever researched and analysed continuous disclosure information provided by any other disclosing entity?**
**If yes, was this process useful?**

| | | |
|---|---|---|
| *Summary of responses* | **Yes** | **30%** |
| | **No** | **70%** |

The 30% who answered yes also found this process useful.

**27. Do you consider that the amount of useful information about other disclosing entities has materially increased since continuous disclosure was introduced?**

| | | |
|---|---|---|
| *Summary of responses* | **Yes** | **36%** |
| | **No** | **58%** |
| | **Unsure** | **6%** |

**28. What general benefits, if any, do you consider have been derived by:**
**(a) your company, or**
**(b) the market generally**
**from continuous disclosure?**

| | | |
|---|---|---|
| *Summary of responses* | **Benefit** | **71%** |
| | **No benefit** | **21%** |

| | | |
|---|---|---|
| | **No comment** | **8%** |

The majority of respondents considered that continuous disclosure had helped to keep the market generally, and investors in listed disclosing entities, more informed. It also reinforced the obligation on directors and management to disclose material information to their shareholders and the market generally. Investors gained a better and more timely understanding of the issues facing the company and how they might affect the value of the shares. continuous disclosure also encouraged companies to formalise their lines of internal communication to ensure that the directors and senior management were fully informed of all the events that may affect the price or value of the company's securities. Overall, continuous disclosure encouraged greater investor confidence in the price discovery mechanism of the securities market.

**29. What general detriments, if any, do you consider have been incurred by:**
**(a) your company, or**
**(b) the market generally**
**from continuous disclosure?**

| | | |
|---|---|---|
| *Summary of responses* | **Detriment** | **30%** |
| | **No detriment** | **62%** |
| | **No comment** | **8%** |

The majority of respondents saw no detriment from continuous disclosure.

Critics of continuous disclosure argued that:

- gathering and analysing information requires a greater internal administrative workload
- the market may be receiving too much relatively unimportant information
- premature release of information can cause, rather than overcome, confusion and misinformation in the market
- the ASX sometimes overreacts to rumours or press speculation, with possible consequential premature release of continuous disclosure information.

**30. What, if any, further comments about continuous disclosure would you like to make, taking into account the Advisory Committee's terms of reference? For your information, these terms of reference are as follows:**

**"The Advisory Committee must examine the effectiveness of the continuous disclosure regime for listed companies, based on adherence to the Listing Rules and the respective roles of the ASC and ASX in improving the integrity of the securities markets. In addition, the Advisory Committee must review:**

- **whether the scope and application of ss 1001A and 1001B are sufficiently certain**
- **whether listed and unlisted disclosing entities comprehend and comply with their obligations**

- **whether unlisted disclosing entities should be exempt from disclosing information in the same circumstances as apply to listed disclosing entities**
- **whether there should be any statutory defence to civil or criminal liability for breach of the continuous disclosure requirements**
- **whether the enforcement arrangements for continuous disclosure in ss 776, 777, 779 of the Corporations Law and s 127 of the ASC Law work satisfactorily."**

| *Summary of responses* | **Comment** | **23%** |
|---|---|---|
| | **No comment** | **77%** |

Respondents expressed the following range of views.

- The internal continuous disclosure procedures should be disclosed either in the corporate governance statement or the report of the audit committee, to be included either in the annual report or an annual statement to the exchange.

- A company should have a defence against prosecution if it can show that it had given proper consideration to disclosure and had sound reasons for not disclosing all or some information.

- There should be different penalties and consequences for knowingly withholding information, particularly where financial gain is sought in consequence. There should be more indulgence for inadvertent non-disclosure or non-disclosure where a company has appropriate systems but a wrong judgement has been made in terms of whether an exemption applies, or a matter would have materially affected price.

- The need for due diligence may not be substantially reduced under the "transaction-specific prospectus" provision (s 1022AA), because it is necessary to provide information about the effect of the offer or invitation on the disclosing entity (s 1022AA(2)(b)(i)). This may require considerable investigation of what needs to be disclosed and whether existing disclosures are complete.

- There are some specific disclosure requirement in the Listing Rules applicable to mining and exploration activities (eg, Rules 5.4 (immediate reporting of significant petroleum exploration test results) and 5.5 (weekly report of petroleum exploration results)) which are too detailed and prescriptive. These requirements, which do not appear to have any materiality threshold, are not expressly made subject to a confidentiality exception, unlike the general disclosure provisions, particularly Listing Rule 3.1.

## Quarterly reporting

**Do you have any views on the merits of quarterly reporting requirements for all, or particular categories of, listed entities?**

| | | |
|---|---|---|
| *Summary of responses* | **Unqualified support** | **15% (of which one third were mining companies)** |
| | **Qualified support** | **12% (confine quarterly reporting to large listed entities or introduce on a qualified basis)** |
| | **Opposed** | **60%** |
| | **No view** | **13%** |

*Arguments by respondents who supported quarterly reporting*

Quarterly reporting would:

- put Australian listed entities on a par with their US counterparts, and would be consistent with overseas requirements for quarterly reporting
- formalise much continuous disclosure reporting, and would probably replace many non-routine disclosures
- become a major enforcement mechanism for regulators.

*Arguments by respondents who opposed quarterly reporting*

- The existing continuous disclosure and half yearly and annual reporting requirements suffice to keep investors and the market fully informed. Quarterly reporting may create an "information overload" for investors.
- Quarterly reporting would be time-consuming and have significant resource and cost implications, including increased audit costs (whether or not auditing was mandatory).
- Given the trend towards director liability, external quarterly reporting would in practice require the procedures of audit review currently applied to half yearly and annual reporting.
- Quarterly reporting may result in too much concentration on short-term results to the detriment of longer-term corporate performance.
- Quarterly reporting may give false impressions to the market where companies trade on a seasonal or cyclical basis.