



ASX Circular

Date: 16 January, 2008

Key topics

1. DJ Carmichael Pty Ltd

Reading List

Client Advisers
Compliance Managers
DTR Operators
Managing Directors
Office Managers
Operations Managers (back office)

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DISCIPLINARY MATTERS

The ASX Disciplinary Appeal Tribunal ("the Appeal Tribunal") determined that DJ Carmichael Pty Limited ("DJC") engaged in Unprofessional Conduct and contravened old ASX Business Rule 5D.2.3 in that DJC:

- (a) authorised an employee to use confidential client trade information to obtain a personal financial benefit; and
- (b) engaged in unfair dealing between a client account and an account on behalf of a Prescribed Person.

The Appeal Tribunal imposed a fine of \$135,000 plus GST.

In addition the Appeal Tribunal determined that DJC contravened old ASX Business Rule 1.2.1 as follows:

- (a) Contravened old ASX Business Rule 1.2.1.2 (Records of Orders) on 3 separate occasions;
- (b) Contravened old ASX Business Rule 1.2.1.3 (Records of orders to be made immediately) on one occasion.

The Appeal Tribunal imposed a fine of \$14,000 plus GST in respect of these contraventions.

For the purposes of these proceedings, DJC did not contest the contraventions before the Tribunal.

The circumstances of this matter are detailed as follows:

Unprofessional Conduct/ASX Business Rule 5D.2.3

On 21 October 2003 DJC employees acted on behalf of two clients ("Client A and Client B"). On this day, DJC was promoting a buy recommendation on shares in Amity Oil Limited ("AYO"). At this time two DJC employees ("the First Employee and the Second Employee") were aware Client B was a potential seller of a large volume of AYO. Further, the First and Second Employees were aware of an instruction placed by Client B relevant to any potential sale of AYO shares ("the Trade Instruction").

Subsequently on 21 October 2003, the Second Employee contacted Client A recommending the purchase of AYO. About 11:02am, Client A placed an order with the Second Employee to buy 1,500,000 AYO at a price limit of \$1.26 ("Client A buy Order"). The Client A Buy Order was not executed or entered into the market at this time.

About 2:00pm, the First Employee, who was aware of Client B's desire to sell and the Client A Buy Order, was authorised by management of DJC to buy 1,565,000 AYO at \$1.25 on his personal account ("Employee Buy Order") and to sell 1,565,000 AYO at \$1.26 on his personal account ("Employee Sell Order").

Up until 3:12:04pm, none of the Client A buy Order, the Employee Buy Order or the Employee Sell Order were executed or entered into the market.

Between 3:12:04pm and 3:50:25pm, DJC sold 60,810 AYO on market to various third parties pursuant to the Employee Sell Order. This established a crossing market for DJC in AYO at \$1.25BID/\$1.26ASK.

At about 3:45pm, Client B placed orders to sell a total of 3,000,000 AYO at \$1.25 with the First Employee ("Client B Sell Order").

At 3:51:42pm, DJC executed a priority Crossing for 3,000,000 AYO at \$1.25, representing the Client B Sell Order crossing with the Employee Buy Order of 1,565,000 AYO and 1,435,000 AYO to various third parties.

At 3:52:20pm, DJC executed a second priority Crossing for 1,500,000 AYO at \$1.26, representing 1,500,000 AYO of the Employee Sell Order and the Client A Buy Order.

As a result of the first and second Crossings, the First Employee realised a personal trading profit of \$15,000 from buying 1,500,000 AYO from Client B at \$1.25 and selling the same volume of AYO 38 seconds later to Client A at \$1.26 per share, a one cent premium on the purchase price.

The nature and extent of the First Employee's involvement in the trading was not disclosed by DJC to either Client A or Client B.

The Appeal Tribunal has determined that by the First Employee utilising confidential client trade information to obtain a personal trading profit in the above circumstances was unprofessional conduct, in that it was conduct that could reasonably be considered as likely to be prejudicial to the interests of the Exchange or its Participating Organisations or Affiliates. Further, the Appeal Tribunal determined that the conduct was unfair dealing between a client account and an account on behalf of a Prescribed Person (the First Employee).

The following matters mitigate the gravity of the contravention:

- (a) DJC was co-operative in the investigation and disciplinary process, and agreed not to contest the matter.
- (b) There was no evidence that this type of conduct was or is systemic within DJC.
- (c) DJC has taken measures to prevent the reoccurrence of this type of conduct including compliance training.
- (d) The contravention occurred in October 2003, and there has been no evidence before the Appeal Tribunal of similar breaches since this relevant conduct occurred.
- (e) There is no basis for a finding that the management of DJC intended (or was aware) that the employee undertake the relevant trading, without making appropriate disclosures and obtaining the appropriate consents. Management assumed that disclosures and consents had been (or would be) made and obtained.
- (f) There has only been one prior Disciplinary Appeal Tribunal finding against DJC in the past 5 years.

However, the following factors aggravate the gravity of the contravention.

- (a) The conduct of the employee was intentional, both in terms of the relevant trading and the acquisition of the profit.
- (b) The relevant trading (without informed consent from the clients) was clearly contrary to the concept of fair dealing and the fiduciary relationship existing between the client and adviser. Fair dealing and the fiduciary relationship between brokers and clients are fundamental aspects to maintaining a fair, orderly and transparent market.
- (c) Notwithstanding the highly unusual nature of the trading, which clearly required client consent following detailed disclosures, DJC management did not take reasonable steps to inquire as to what (if any) disclosures had been made by the employee, prior to DJC management approving the trade. There appeared to be no policy as to what investigatory steps should be taken before the provision of management consent to staff trading with clients, in order to determine that appropriate client disclosures were made and client consents obtained.
- (d) DJC management was dismissive of concerns initially raised by the DJC Compliance Officer in relation to the propriety of the trading, without apparently having undertaken appropriately rigorous investigations as to the nature and extent of client disclosures made and client consents obtained.
- (e) DJC did not self-report the contravention.

Contravention of ASX Business Rule 1.2.1

On 21 October 2003, in contravention of old ASX Business Rule 1.2.1.2, DJC failed to record the Trade Instruction on Client B's Sell Order Record. As the Trade Instruction was an instruction by a client relevant to the sale of the securities, pursuant to old ASX Business Rule 1.2.1.2(a) it was required to be recorded on the Sell Order Record for Client B. The Client B Sell Order Record did not record the Trade Instruction.

The Appeal Tribunal imposed a fine of \$6,000 plus GST.

On 15 October 2003, in contravention of old ASX Business Rule 1.2.1.2, DJC failed to maintain an accurate record of the number of securities to be bought and the price to be paid. About 12:59pm on 15 October 2003, Client A placed an order with DJC to purchase 1,000,000 AYO at a price of \$1.26 - \$1.27 ("Purchase Order"). On this date, DJC was only able to purchase 200,000 AYO for \$1.27. The order record showing the particulars of the Purchase Order record the quantity to be purchased as 200,000 and the price \$1.27, particulars which reflected a record of the transaction executed for Client A rather than Client A's instructions.

The Appeal Tribunal imposed a fine of \$4,000 plus GST.

On 15 October 2003, in contravention of old ASX Business Rule 1.2.1.3, DJC failed to immediately record the instructions for the Purchase Order after the Purchase Order was placed with DJC. While the order record for the Purchase Order recorded a time of 10:59am [Perth time – 12:59pm AEST], a review of SEATS course of sales report for AYO on the 15 October 2003 shows that the 200,000 AYO bought pursuant to the Purchase Order did not occur until 3:51pm AEST that day. As the order record for the Purchase Order recorded the trade resulting from the instructions rather than the instructions received, the order record was made sometime after 3:51pm, not immediately after the instructions were received.

The Appeal Tribunal imposed a fine of \$4,000 plus GST.

On 20 October 2003, in contravention of old ASX Business Rule 1.2.1.1, DJC failed to maintain an accurate record of the number of securities to be purchased. About 10:00pm on the 20 October 2003, a client placed an order to purchase 250,000 AYO. The contract note issued to this client was in respect of the purchase of 250,000 AYO for the client, however the order record reflected instructions to buy 25,000 AYO.

The Appeal Tribunal imposed a censure.

Market Participants should expect that penalties for unprofessional conduct, or conduct that could reasonably be considered as likely to be prejudicial to the interests of the ASX, and likely to undermine trust and confidence in the market, will be very substantial.