



ASX Circular

Date: 6 April 2010

Key topics

1. Bell Potter Securities Limited

Reading List

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

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No responsibility is accepted for any inaccuracies contained in the matter published.

DISCIPLINARY MATTERS

The Appeal Tribunal has dismissed an appeal by Bell Potter Securities Limited ('Bell Potter') against the determination of the Disciplinary Tribunal. Bell Potter appealed the quantum of the fine imposed in respect of Contraventions 1A and 1B.

The result of the appeal is that the total sanction imposed by the Disciplinary Tribunal of \$25,000 (plus GST) remains unchanged.

The Disciplinary Tribunal had made the following determinations:

Contraventions 1A and 1B – Changes to Bell Potter's AFSL

1A: Bell Potter contravened ASX Market Rule 4.3.2(b)(iii), by failing to notify Australian Securities Exchange Limited ('ASX') in writing immediately of changes made to Bell Potter's Australian Financial Services Licence ('AFSL') on or around 20 June 2007;

1B: Bell Potter contravened ACH Clearing Rule 4.7.1(d)(iii), by failing to notify Australian Clearing House Pty Limited ('ACH') in writing immediately of changes made to Bell Potter's AFSL on or around 20 June 2007.

Fine imposed: \$2500 (plus GST).

Contraventions 2A, 2B, 3A, 3B, 4A and 4B – Appointment of three directors to the Board of Bell Potter

2A, 3A, 4A: Bell Potter contravened ASX Market Rule 4.3.2(a), by failing in three instances to notify ASX in writing on or before 30 November 2007 of the appointment of three persons as new directors of Bell Potter;

2B, 3B, 4B: Bell Potter contravened ACH Clearing Rule 4.7.1(c), by failing in three instances to notify ACH in writing at least five days before the appointment of three persons as new directors of Bell Potter on 30 November 2007.

Fine imposed: \$15,000 (plus GST).

Contraventions 5A and 5B – Resignation of a Responsible Executive of Bell Potter

5A: Bell Potter contravened ASX Market Rule 4.3.2(b)(i), by failing to notify ASX in writing immediately of the resignation of a Responsible Executive of Bell Potter on 16 May 2008; and

5B: Bell Potter contravened ACH Clearing Rule 4.7.1(d)(i), by failing to notify ACH in writing immediately of the resignation of a Responsible Executive of Bell Potter on 16 May 2008.

Fine imposed: \$7500 (plus GST).

The facts of the matter were not in dispute.

At all material times, Bell Potter's AFSL authorised Bell Potter to carry on its business as an ASX Market Participant and ACH Participant. There were certain conditions on Bell Potter's AFSL which were effective from 14 December 2004. On or about 20 June 2007, parts of Bell Potter's AFSL were changed.

First, Bell Potter was given authority to use the term 'Futures Broker'; and second, a Financial Services sector wide licence condition upgrade was made by the addition of Condition 29 - Compliance with Class Order 02/294 as an IDPS operator and the addition of a definition of a term in that Condition 29.

Bell Potter was required to notify the ASX and ACH in writing immediately of changes made to Bell Potter's AFSL. However, it was not until 27 October 2008 that Bell Potter provided its first written notification to ASX and ACH of the changes to its AFSL.

Around late November 2007, Bell Potter resolved to appoint three new directors of Bell Potter ('Relevant Appointments'). The Relevant Appointments became effective on 30 November 2007. Bell Potter was required to notify ASX and ACH in writing on or before 30 November 2007 of the Relevant Appointments. However, it was not until around March 2008 that Bell Potter provided its first written notification to ASX and ACH of the Relevant Appointments.

A Responsible Executive for Bell Potter resigned in April 2008. On 16 May 2008, the Responsible Executive's employment with Bell Potter ended and he ceased to be a Responsible Executive for Bell Potter. Bell Potter was required to notify ASX and ACH in writing immediately of the resignation of the Responsible Executive. However, it was not until around 18 July 2008 that Bell Potter provided its first written notification to ASX and ACH about the resignation of a Responsible Executive for Bell Potter on 16 May 2008.

The Tribunal took into account the following factors when determining sanction:

- a) Bell Potter cooperated with ASX in relation to the conduct of its investigation into the matter;
- b) The misconduct was inadvertent; however the Tribunal notes that Bell Potter ought to have been on notice of its obligations in relation to notification of the appointment of directors,
- c) The misconduct did not result in loss or injury to other parties despite the potential to result in loss or injury to other parties;
- d) Bell Potter advised that it has taken steps to prevent a recurrence of the alleged misconduct. In particular, Bell Potter has established a monthly reporting regime of ASX Notification obligations, which is raised by Bell Potter Compliance and is distributed to all key executives;
- e) The disciplinary history of Bell Potter, having had three unrelated disciplinary sanctions recorded against it; and
- f) The misconduct occurred over an extended period of time.

Appeal Tribunal

The Appeal Tribunal heard an appeal from a decision of the Disciplinary Tribunal given on 13 November 2009. The sole issue was whether the penalty of \$2,500 for contraventions 1A and 1B should be replaced by a censure. The Appeal Tribunal does not conduct a rehearing. The function of the Appeal Tribunal is not to decide whether one penalty or another is more appropriate. Rather, the Appeal Tribunal is only able to act on the basis of error. If the Appeal Tribunal concludes that there was some legal, factual or discretionary error in the decision, it may vary or set aside the decision.

In the case of a discretionary decision, such as the nature or amount of a penalty, it is even more important to identify the error that justifies the appeal being upheld. It is in the nature of a discretionary decision that a range of outcomes may be open and none of them will necessarily involve error. It is not sufficient for the members of the Appeal Tribunal to take the view that they may have adopted a different course or may have imposed a different penalty. A challenge to a discretionary decision will only be successful if error in the decision making process is demonstrated. This will usually only be if it is shown that the Disciplinary Tribunal acted on a wrong principle, misconstrued its powers, allowed extraneous or irrelevant matters to affect its decision, mistook the facts or did not take into account some material consideration.

The misconduct in Contraventions 2, 3 and 4 occurred before 31 March 2008, that being the Effective Time under the Australian Securities Exchange Disciplinary Processes and Appeals Rulebook ('Rulebook'). Therefore, the applicable Tribunal sanction guidelines for Contraventions 2, 3 and 4 are those contained in ASX Market Rules Guidance Note 18 which was in effect at the material time. The misconduct in Contraventions 1 and 5 occurred after 31 March 2008. The applicable Tribunal sanction guidelines for Contraventions 1 and 5 are those contained in Annexure A to the Procedures in the Rulebook.

The Tribunal determined that these contraventions were properly categorised as Level 1 Contraventions of Concern for which the applicable penalty range is a censure to \$20,000 (plus GST). The Tribunal imposed a total fine of \$25,000 (plus GST) for the five contraventions. The Tribunal is satisfied that the imposition of this fine appropriately serves the purposes of protecting the interests of ASX and its participating organisations, and of promoting confidence in the integrity of the markets.