Law Council
OF AUSTRALIA

Professor (Emeritus) Sally Walker
Secretary-General

3 December 2012

Ms M Tan
Australian Securities Exchange Limited
Exchange Centre
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Via email: mavis.tan@asx.com.au

Dear Ms Tan

ASX GUIDANCE NOTE 8 AND LISTING RULE CHANGES

I refer to ASX's Consultation Paper relating to a proposed new version of Guidance Note 8: *Continuous Disclosure* and proposed Listing Rule changes outlined in the document entitled *Proposed Disclosure Related Amendments to the ASX Listing Rules*.

The Corporations Committee of the Business Law Section of the Law Council of Australia (the Committee**)** welcomes the opportunity to comment on Guidance Note 8 and the proposed Listing Rule amendments.

A detailed schedule of comments on both documents is attached.

In general, the Committee supports many of the proposals contained in the draft revised Guidance Note 8. In particular, the Committee welcomes the increased emphasis on the difference between disclosure obligations while information is confidential and where confidentiality has been lost. The Committee is also appreciative of the recognition that disclosure obligations are less acute when an entity's securities are not trading. However, there are a number of aspects which the Committee believes could be clarified or improved, some of which are summarised below:

- ASX's guidance about how it interprets 'immediately' is helpful. However, it would be preferable if the relevant interpretation were incorporated into Listing Rule 3.1. Although the Guidance Note assists entities and their advisors in understanding the likely attitude of ASX, it does not bind ASIC or a private litigant (and the Guidance Note expressly states this). Since Listing Rule 3.1 has statutory backing, it is desirable that the content of an entity's legal obligations are set out in the Listing Rule itself;

- some example timeframes of the meaning of 'promptly and without delay' in different contexts would be helpful. It would assist entities to understand whether they really have time to properly review and verify information (including through an appropriate board sign off process) before an announcement is required. If this cannot be provided, even some qualitative guidance would be helpful eg that

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depending on the circumstances promptly and without delay may be measured in days or weeks if the information continues to be confidential;

- although entities are encouraged to consider trading halts to manage their disclosure obligations, it should be made clear that entities will also be afforded sufficient time to consider when a trading halt is actually needed. The emphasis on trading halts may lead entities to believe that the period for seeking a halt is extremely short in all cases. This could result in the market being shut more frequently, which may not be helpful to market participants in general;

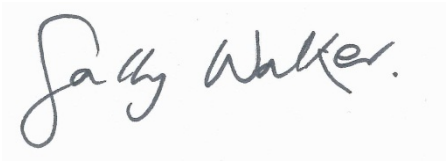
- it would be helpful to clarify that where an entity does not publish its own guidance, it is not required to make disclosures when its own internal forecasts diverge from consensus forecasts. Such forecasts are inherently uncertain and legal risk attaches to them;

- some aspects of the Guidance Note appear to focus on, and require disclosure of, specific items of information, rather than having regard to the totality of the relevant information and whether disclosure can or should be made of that overall position. This applies, for example, in relation to the suggestion that precise information about an earnings downgrade on a particular important project should be disclosed, even if the position with respect to earnings from the balance of the business is still being assessed and can only be disclosed in general terms. It also applies to the example of a breach of financial covenants where the directors believe a waiver will be forthcoming.

Please note that due to time constraints this submission has not been considered by the Directors of the Law Council

The Committee would be pleased to discuss these submissions or answer any queries that ASX may have. Any enquiries should be directed to the Chairman of the Committee, Marie McDonald on 03 9679 3264 or via email: marie.mcdonald@ashurst.com

Yours sincerely



Professor Sally Walker
Secretary-General

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LISTING RULE AMENDMENTS

Page 9, Listing Rule 3.1B - Correction of false market
The Committee notes that ASX proposes to remove the requirement that information requested by ASX, when ASX considers there is a false market, be 'information needed to correct or prevent the false market Given that the purpose of the rule is to allow ASX to require information to correct or prevent a false market, the Committee considers that this qualifier should remain. At the time the false market limb was proposed for reintroduction, it was described as a requirement for the company to provide information necessary to avoid a false market in the company's securities.[1] The explanation accompanying ASX's proposed amendment says 'ASX is generally better placed to form a view on this matter than most listed entities'. The concept of a 'false market' involves an assessment of whether the market is trading on a mistaken basis, and whether the entity has information available that is not generally available which would change the basis on which the market is trading. The Committee submits that the entity, not ASX, is best placed to form a view about this. Elsewhere in draft Guidance Note 8 it is stated that: 'It is the entity, and only the entity, that can and must form a view as to whether the information it knows, and the rest of the market does not, is market sensitive and therefore needs to be disclosed under Listing Rule 3.1' (GN8.32, page 9).
Page 11, Listing Rule 3.16 – Chairperson, directors, responsible entity, auditors etc
The Listing Rule requires disclosure of the material terms of contracts between the entity and its directors, and also contracts between the entity and related parties of the entity. The text refers to an associate of a director, but this is not reflected in the rule. From a discussion with ASX it is understood that the proposed rule is intended to apply to a 'related party of the CEO or director'. If this change were made, it would then pick up the Listing Rule 19.12 definition of a related party 'in relation to a person'. In terms of disclosing a variation to an agreement, the Committee suggests qualifying this by materiality ie insert 'material' before 'variation'.
Page 12, Listing Rule 3.17.2 – Communications with security holders
The change to Listing Rule 3.17.2, to require an entity to disclose immediately to ASX each time it receives a call for or requisition of a meeting or a proposal to put a resolution at a meeting, would potentially extend to a call or requisition that does not comply with law or to a resolution that cannot be properly put. As ASX notes in its proposed rule amendments, it would also require the immediate disclosure of a proposed meeting or proposed resolution in advance of the notice for that meeting, even where the proposed meeting or resolution is not information that a reasonable person would expect to have a material effect on the price or value of the

[1] Exposure draft, "Proposed ASX Listing Rule Amendments Enhanced Disclosure July 2002", section 2.

entity's securities. In those circumstances, it should be sufficient that the resolution is set out and discussed in the notice of meeting subsequently disclosed to the market and sent to holders of securities. Accordingly the Committee submits that it is not appropriate to make this amendment to Listing Rule 3.17.2. The Committee submits that disclosure in the notice of meeting (and pursuant to Listing Rule 3.1, if applicable) is sufficient.

Page 12, Listing Rule 3.17.3 – Communications with security holders

The Committee submits that there should be no obligation for a listed company, or listed managed investment scheme, to give ASX a copy of any information about substantial holdings it obtained under Part 6C.2 of the Corporations Act, where the substantial holding has previously been disclosed to ASX (whether under Part 6C.1 or otherwise). This new rule should only apply in the (hopefully exceptional) cases where the relevant substantial holder has failed to comply with Part 6C.1.

Also, as ASX will be aware, some listed entities conduct routine enquiries of their shareholder base under Part 6C.2, and often such information is procured through external service providers who provide a confidential summary report. The Committee assumes that the service provider report is not intended to be covered by the new rule, and it questions whether the form of the often extensive correspondence between the service provider and the various layers of underlying holders (much of which is not seen by the listed entity), would be in a form appropriate for ASX disclosure. Perhaps the words 'a copy of any information' should be replaced with 'any relevant information' to give the listed entity some flexibility about the most appropriate form of disclosure.

Page 15, Listing Rule 3.17A – Disclosures to overseas stock exchanges

The commentary in section 3.19 of draft Guidance Note 8, and the proposed new Listing Rule 3.17A, suggests that the new rule is only intended to apply where an ASX listed entity also has a listing on an overseas stock exchange, and then only to disclosures by that entity to that overseas stock exchange about itself.

The literal wording of this draft rule goes beyond this, and could include documents given to an overseas stock exchange about another overseas listed entity under foreign laws or rules (e.g. a substantial holding notice equivalent or a routine overseas takeover notice). The Committee submits that these types of notices should not be covered by new Listing Rule 3.17A, and instead should be subject to the general market sensitivity rule in Listing Rule 3.1.

Page 36, Listing Rule 19.12 – Information

There is a proposal to extend the definition of information to 'matters of supposition and other matters that are insufficiently definite to warrant disclosure to the market' consistent with the definition of information for insider trading purposes in section 1042A.

This does not fit well in the context of a Listing Rule requiring disclosure to the market. Nor is it the way in which companies and advisers currently interpret the rule.

One approach to interpreting the new rule so disclosure is not required is to say that if the information is so uncertain that it does not warrant disclosure, then it cannot be material. Alternatively, the issue can be approached by saying that matters of supposition/insufficiently definite information must be disclosed unless a carveout applies; then (assuming the confidentiality and reasonable person tests are satisfied) the

information is not required to be disclosed on the basis of the carveout (in almost identical terms).

If the latter approach is taken, it may create an issue if an entity issues a cleansing notice, given that 'excluded information' is required to be disclosed (e.g. section 708A(7)). It would then be necessary to assess whether the information which has been withheld under the carveout falls within the 'reasonably required by professional investors' limb of paragraph (b) of section 708A(7)). It may well be the case that matters of supposition/insufficiently definite information would not satisfy this test. However, it seems an unnecessarily convoluted analysis to reach this conclusion.

The rationale for the proposed change includes addressing 'a possible drafting gap in the Corporations Act'. The effect of the change to the Listing Rule is to also effect a change in interpretation of section 674 of the Corporations Act, since section 674 refers to 'information that those provisions [Listing Rules] require the entity to notify to the market operator'. The Committee recommends that it would be more appropriate for the 'possible' drafting gap to be addressed through the usual legislative amendment process; it may not in fact be a gap.

GUIDANCE NOTE

Page 11, Paragraph 3.5 – Immediately

ASX's guidance about the meaning of 'immediately' is helpful. However, regardless of the interpretation which ASX gives to those words, the Committee submits that it would be preferable that the relevant interpretation is incorporated in the Listing Rule itself. Although the Guidance Note assists an entity and its advisers in understanding the likely attitude of ASX, it is preferable that the content of an entity's legal obligation is set out in the Listing Rule. Listing Rule 3.1 has statutory backing and private litigants or ASIC may take action in relation to a breach of the Listing Rule. This is clear from footnote 43 which states that although ASX may take note of whether an entity has complied with the spirit of Listing Rule 3.1 that will not preclude ASIC or a private litigant arguing that the entity has breached the Listing Rule and section 674 of the *Corporations Act*. The Committee also refers to its *Continuous Disclosure Submission*, 16 December 2011, para 2.1 and 3.1, in this regard.

ASX's guidance is to the effect that 'immediately' does not mean instantaneously, but 'promptly and without delay'. The Committee had previously recommended 'as soon as practicable' or 'promptly' (the Committee's *Continuous Disclosure Submission*, 16 December 2011, para 2.1.6). The addition of 'without delay' limits the concept.

A particular concern is that the draft Guidance Note mentions infringement notices being issued for time periods as short as 60/90 minutes (para 3.5). This suggests '"promptly and without delay' is in fact very close to instantaneous. While the footnotes acknowledge that the infringement notice is not an admission of liability, the Committee submits that the reference to infringement notices in this context is inappropriate. It gives them greater status than is warranted. Compliance with, and the publication of, an infringement notice depends on an entity agreeing to accept it. In most cases this is likely to be a pragmatic, economic decision by an entity. By its nature, an infringement notice also reflects the view of a regulator that has been untested in court. The full circumstances of the matters the subject of an infringement notice are only known to

ASIC and the company, and accordingly an infringement notice is dangerous to apply as a precedent.

It is possible that a Court may be influenced by, or a private litigant may seek to rely upon, these portions of the Guidance Note as evidence of an appropriate time frame.

The Committee's strong preference is that the infringement notice examples be deleted. If this submission is not accepted, then the Committee requests that the context be more fully drawn out in the text e.g. the notices were issued where ASIC considered confidentiality had been lost and there was significant trading.

As a general comment, it would be helpful if the various examples gave actual time periods. If ASX is concerned that this could create a precedent, it would still be helpful to give some qualitative guidance about the meaning of *promptly and without delay* in different circumstances. For example, where confidentiality continues to exist, it *may* well be measured in days or weeks (depending on the circumstances).

Page 12, Paragraph 3.6 – Trading halts

ASX's clarification (paragraph 3.6 (*How can trading halts be used to manage a listed entity's obligations under Listing Rule 3.1?*)) that *whether and how promptly an entity has requested a trading halt* is a significant factor to be taken into account when assessing whether the entity has complied with *the spirit, intention and purpose* of Listing Rule 3.1 (and also the flow charts indicating that greater latitude is allowed during a halt, or indeed outside trading hours), is helpful in confirming that the Listing Rules are to be interpreted in accordance with their spirit, intention and purpose by looking beyond form and substance. This accords with previous submissions (for example, the Committee's *Continuous Disclosure Submission,* 26 December 2011) and is a welcome confirmation that more leeway should be afforded when the market is not 'live'.

Notwithstanding this clarification, the revised guidance actively encourages listed entities to consider trading halts to assist with the management of potential disclosure issues and help reduce exposure to the legal consequences that could follow if an entity is found to have breached its obligations to disclose market sensitive information immediately. Paragraph 3.6 (*How can trading halts be used to manage a listed entity's obligations under Listing Rule 3.1?*) states that whether and how promptly an entity requests a trading halt will be significant factors taken into account in assessing whether Listing Rule 3.1 has been complied with.

The Committee is concerned that this new emphasis on requesting trading halts to manage disclosure undercuts the helpful guidance provided on the meaning of *immediately* as a requirement to act not *instantaneously* but *promptly and without delay*. In particular, the Committee is concerned that listed entities will be under greater pressure to seek trading halts and that the time permitted for a listed entity to consider whether to request a trading halt may be extremely short. This may also lead to the market being shut more frequently, and the Committee questions whether this is helpful for market participants in general.

A practical example of the difficulty created by seeking a trading halt too soon is where there is significant doubt about the materiality of the information and, accordingly, whether an announcement is required at all. If the company seeks a trading halt while the relevant decision makers within the company (potentially the Board) consider whether an announcement is required, it will be left in a most unsatisfactory position if

those decision makers (correctly) decide no announcement is required. The Committee submits that the enhanced significance of trading halts needs to be reviewed and recommends that the guidance makes it clear that, whilst listed entities are encouraged to consider trading halts, entities will also be afforded sufficient time to consider whether a trading halt is in fact needed, stemming the negative impact resulting from unnecessary trading halts and embracing the same principle of interpretation as that which construes *immediately* as a requirement to act *promptly and without delay*.
Page 14, Paragraph 3.8 – Board decision
The Committee notes that section 3.8 refers to declaration of a 'special dividend' as a situation where there will generally be no obligation to disclose until the Board has made its decision. The Committee considers that a decision to pay any dividend, not just a special dividend, should fall into this category.
Page 16, Paragraph 3.9 – Contact for ASX
There are a number of references to the contact person for ASX. There are two issues in relation to this. First, the Guidance Note says that the contact person must have authority to request a trading halt or issue an announcement (para 3.9, item 5), and, if not, there is a risk ASX may suspend quotation. As a matter of practice the usual ASX contact person is the company secretary. However, a company secretary generally does not have delegated authority to request a trading halt or issue an announcement (although the secretary may be a member of a disclosure committee). It is submitted that this requirement should be reconsidered. Second, the Guidance Note says the contact person must be available at all times between 9am-5pm (para 3.9, item 5), and, if not, there is a risk that ASX may suspend quotation. Again, while it may be desirable that the contact person is available at all times, it will not invariably be the case. Accordingly, it is submitted there should be provision for one alternative contact person before ASX suspends quotation.
Page 17, Paragraph 3.10 – Earnings
Para 3.10, page 17 says 'If, in the course of preparing a periodic disclosure document, it becomes apparent to a listed entity that its reporting earnings will differ ... disclose'. Consistent with its comments elsewhere in this submission the Committee recommends that the Guidance Note expand on when 'it becomes apparent' for LR 3.1 purposes that there will be a difference. This should take account of the need for appropriate due diligence and board consideration.
Page 19, Paragraph 3.15 – Lodging agreements
In the draft Guidance Note, para 3.15, page 19 there is reference to lodging an agreement with ASX 'to help reduce the amount of material about the agreement that needs to be included in its announcement and also avoid any issues about whether any material terms of the agreement have been properly disclosed'. Most agreements (e.g. mergers and acquisitions, equity capital markets) require a considerable amount of time

to read, interpret and understand material terms. Lodgement of a copy of an agreement is unobjectionable, but from a market perspective it is recommended that ASX propose that a complex or lengthy agreement be accompanied by a summary of material terms.

Page 20, Paragraph 3.15, Footnote 74 – Guidelines – Contents

Paragraph 3.15 states that ASX may refuse to accept an announcement that does not meet certain standards or 'may require the entity to lodge a corrective announcement'. Footnote 74 refers to the decision of the Full Federal Court in *ASIC v Fortescue Metals Group Limited* [2011] FCAFC 19, and states that the Court held that making a false and misleading announcement under Listing Rule 3.1 will trigger a separate obligation under that Listing Rule and section 674 to make a corrective announcement.

The basis for this part of the Full Federal Court's decision in *Fortescue* is not entirely clear. In any event, the Committee considers that the finding was specific to the facts of that case and that the Full Federal Court was not stating a rule that applies in all cases. This is apparent from para 184 where Keane CJ said 'The point is that publication of corrective information was necessary because, *in the circumstances which then obtained* [emphasis added], the information was information which would, or would be likely to, influence investors in deciding whether to acquire or dispose of shares in FMG …'. The Committee suggests that if Footnote 74 is retained, it should make it clear that the Court's decision applied in the circumstances of that case.

Page 23, Paragraph 3.22 – Party to NDA liability under s674

Para 3.22, page 23 discusses a party to an NDA attempting to enforce the NDA and prevent disclosure of information. It states 'if it succeeds ... may potentially be liable to civil penalties under section 674(2A) and to pay compensation to anyone who has suffered loss or damage … as someone who has procured (and therefore been 'involved in') a breach of section 674(2)' is of concern.

In the unlikely event that a court makes an order enforcing a person's contractual rights to prevent disclosure, it would not be expected that another court would find the person was involved in a contravention by the listed entity. The Committee suggests that this section be amended.

Page 25, Paragraph 4.4 – Incomplete proposals and negotiations

Para 4.4, pages 24-26, discusses when disclosure of an agreement is required (as well as unilateral proposals). There are a number of helpful observations, including to the effect that an agreement is not binding while any party is free to walk away, and that signing can be deferred to a convenient time before markets open or after markets close.

However, at the top of page 25 it refers to a 'legally binding agreement or the entity is otherwise committed to proceeding with the transaction being negotiated'; and at the top of page 26, it refers to disclosure being required as soon as the agreement is 'legally binding on a listed entity or it is otherwise committed to proceeding with the transaction in question'. These statements could be read as inconsistent with the remainder of the text. It is suggested that the inconsistency be removed by referring to 'legally committed' in both cases.

Page 26, Paragraph 4.5 – Matters of supposition

Section 4.5, page 26 deals with matters of supposition/insufficiently definite to warrant disclosure.

The discussion in the fourth and fifth paragraphs of this section propose that if a known event or circumstance is expected to have a material effect it requires disclosure, even though it is not possible to quantify the effect.

While this is understandable in the context of an event that is readily observable by the market e.g. a flood or cyclone, it can be more problematic in the case of an internal circumstance, such as adverse results in one division. It may take some time to work through the variables, including overall quantum and whether there are opportunities to improve overall results, taking into account other divisions and possible cost saving initiatives. While the entity should work through the variables as a matter of urgency, an announcement may be premature and potentially create a false market. A two day trading halt is unlikely to provide the time necessary to conduct this kind of analysis. If those paragraphs are intended to address 'event' driven changes of the kind discussed in the last paragraph of 6.3, rather than the variables discussed in item 2 on page 37, it would be desirable to make this clear.

See also comments below in relation to Example G.

Page 27, Paragraph 4.6 – Internal management purposes

A related point to that above arises from para 4.6, page 27.

An example is given of management accounts revealing a material difference in earnings. The Committee suggests it is clarified that this information may nonetheless be withheld if it comes within the 'insufficiently definite' category.

This concept is reflected in para 6.3, page 37, which says that over/under-performance part way through a reporting period does not mean that by the end of the reporting period this will be the case.

See also comments below in relation to Example G.

Page 27, Footnote 98 – Confidentiality

This footnote mentions confidential disclosures to employees, advisers and regulators as examples of disclosures to third parties which would not result in the confidentiality requirement under Listing Rule 3.1A.2 being lost.

The Committee submits that two other helpful examples would be disclosures to a listed entity's:

- banks, who owe a general law duty of confidentiality. An example would be a quarterly notice of financial covenant compliance, or dealings about refinancing the existing debt arrangements or financing an (incomplete) acquisition proposal; and/or
- majority owner/holding entity on a confidential basis. Examples are disclosures for the holding entity's regulatory compliance, financial reporting or other legitimate purposes approved by the listed entity board.

These additional examples (as with the examples already given in footnote 98) would not override the listed entity's broader continuous disclosure obligations.
Page 28, Paragraph 4.8 – Confidential and rumours/media
ASX may form the view that information has ceased to be confidential if, among other things, there is a sudden and significant movement in the market price or traded volumes of the entity's securities that cannot be explained by other events or circumstances. The last paragraph on p 28 states that if a listed entity informs ASX that there is price sensitive information that it has not disclosed in reliance on the carveout, ASX will form the view that the information has ceased to be confidential and require disclosure unless the entity is able to explain the unusual trading. The paragraph does not directly deal with the situation where, as is often the case, the listed entity is relying on the carveout in relation to a number of items of information. The Committee submits that in some circumstances it may be appropriate for the entity to make a more general disclosure in relation to these matters, rather than being required to disclose each specific matter.
Pages 31-33, 5.4-5.5 – Media and analysts
For reasons which apply even more strongly to market rumours (see below), the Committee submits that ASX should be cautious about requiring an entity to make an announcement in response to an inaccurate media or analyst's report (unless the inaccurate report can be sourced to the entity). The Committee also suggests that the second last paragraph on page 32 is clarified to make it clear that a false answer (rather than a refusal to answer) may constitute a criminal offence.
Page 33, Paragraph 5.5 – Market rumours
Paragraphs 5.4 (*Responding to comment or speculation in media or analysts reports*) and 5.5 (*Market rumours*) place increased emphasis on the need for listed entities to respond to market rumours and speculation, even where the rumours are untrue. The Committee is concerned that this will require entities to be significantly more pro-active in responding to rumours, notwithstanding that most listed entities will have a policy not to do so. This may also encourage journalists and others to spread rumours in order to force a listed entity to confirm or deny whether it is proposing to engage in a particular transaction. The Committee recommends that the guidance be toned down to ensure that a listed entity is not faced with a blanket obligation to respond to all market rumours, especially those arising from fishing expeditions of the news media and not from a loss of confidentiality (for example, false rumours should not require a response).
Page 37, Paragraph 6.3 – Earnings surprises
The proposal to remove existing guidance that significant variations in earnings from the prior corresponding period may require disclosure is helpful. Paragraph 6.3 (*Earnings surprises*) sets out some factors to consider when assessing materiality (from a continuous disclosure perspective) of a variation in earnings from

previously published guidance or market expectation. Although these factors are helpful, entities and their advisers do find a rule of thumb useful (noting of course that disclosure may still be required even if the variation is under the rule of thumb threshold).

The Committee considers it would be helpful for paragraph 6.3 (*Earnings surprises*) to include a rule of thumb if possible, and more worked examples, which may be used by listed entities more generally in determining whether a variation is significant enough to require disclosure.

ASX recommends that where an entity has previously given earnings guidance, it use a lower threshold (5-10%) for determining materiality, apparently based on potential exposure under section 1041H *Corporations Act 2001* rather than Listing Rule 3.1. Although ASX may wish to remind listed entities that they *may* have other sources of liability in connection with their announcements (or failures to announce) the Committee considers that the Guidance Note should only provide benchmarks in the context of continuous disclosure obligations, rather than other heads of liability. Put another way, it is not clear why ASX has recommended a benchmark in the section 1041H context, but not for Listing Rule 3.1 (where it appears a higher benchmark may be appropriate).

Notwithstanding the abovementioned limitations, the guidance provided as to changes to earnings during a reporting period is helpful and the Committee supports ASX's view that *for a disclosure obligation to arise in relation to an expected difference in earnings compared to market expectations there needs to be a reasonable degree of certainty that there will be such a difference*. Similarly, revised guidance at paragraph 6.3 (*Earnings surprises*) confirming that *in assessing whether an entity has acted immediately under Listing Rule 3.1 ASX will make due allowance for the fact that the* preparation *of earnings guidance will need to be properly vetted and signed off before it is released* is helpful and provides a welcome acknowledgement of submissions (for example the Committee's *Continuous Disclosure Submission,* 16 December 2011) that a company should only be required to make disclosure of material variations once internal forecasts have been properly verified, are in final form, and have received board approval.

As noted above, in relation to paragraph 3.5 (*The meaning of 'immediately'*), the guidance offered in relation to the meaning of *immediately* is helpful, and would appear to assist listed entities who encounter a situation similar to Leighton Holdings Limited (Leightons). However, the Committee is disappointed that the opportunity to provide explicit guidance on the Leightons issue has not been taken (Example G is not directly on point as a cyclone is readily observable matter, whereas the issues faced by Leightons remained confidential for some time). In particular, the Committee considers that it would be extremely helpful if Guidance Note 8 were to confirm that, where the particular issue remains confidential, listed entities do have a period for confidential reflection to determine the impact of a particular event on that entity's financial position and performance, before an announcement is required.

Page 38, Paragraph 6.4 – Correcting analyst forecasts

In paragraph 6.4 (*Correcting analysts' forecasts*) of the draft Guidance Note, ASX states it does not believe that a listed entity has an obligation, whether under the Listing Rules or otherwise, to correct analysts' forecasts to bring them into line with its own. Yet in paragraph 6.3 (*Earnings surprises*), it states that where the entity is covered by analysts and has not given earnings guidance to the market, if the difference between its own earnings forecasts and consensus analyst forecasts is such that a reasonable person would expect it to have a material effect on the price or value of its securities, its

forecasts should be disclosed (this is reinforced in Example G which uses consensus estimates as the benchmark for determining disclosure obligations). The statements are inconsistent and the position in paragraph 6.4 *(Correcting analyst forecasts)* should be preferred. If an entity is not in the practice of making forward-looking statements, it should not be obliged to disclose information about its internal forecasts merely because they diverge from consensus forecasts.

Forward-looking statements are by nature inherently uncertain, and particularly so for some listed entities. Potential legal risk attaches to forward looking statements where actual outcomes disappoint. In many cases, the value of forward looking statements prepared for internal management purposes is outweighed by their potential to mislead the market where there is considerable uncertainty surrounding the prospects of the listed entity.

The Committee further notes that in the case of consensus forecasts, an additional issue is the starting point for measurement/monitoring. The Australasian Investor Relations Association published an issues paper in 2010, *The what, when and where of consensus estimates for listed entities in Australia*. It noted that consensus estimates may be collated by the company or sourced from third party suppliers. Consensus is typically the mean or median estimate of NPAT or EPS from the sell side sample of estimates. However problems include differences in the date when each individual estimate is compiled, how frequently they are updated, and whether different definitions exist in the market place (e.g. whether EPS is pre- or post- non-recurring items, adjustment for tax and other items etc) so the comparison is not like for like.

Page 41, Paragraph 7.3 – Price query letters

In relation to section 7.3 of draft Guidance Note 8, the Committee refers to section 2.8 of its previous submission and notes:

- the emphasis on discussions between ASX and the listed entity before any price query letter is issued; and
- the changes to the pro forma letter which no longer presumes that confidentiality has been lost on all Listing Rule 3.1A information of which the listed entity is aware.

The Committee supports these changes, and looks forward to these processes being administered in a way which gives listed entities a genuine opportunity to protect Listing Rule 3.1A information for which confidentiality has not been lost.

Page 48, Example B, Item 2 – Control transactions

The example addresses whether disclosure is required in circumstances of a rejected takeover approach, while the existence of the approach remains confidential. The guidance seems to suggest that disclosure is unlikely to be required (possibly because the information is not price sensitive, although it is unclear whether ASX considers that the entity could also rely on the carveout).

However, the guidance is equivocal and begins with the words 'Whether disclosure is required will depend on the circumstances' but does not elaborate on when disclosure would be required.

The Committee suggests that this portion of the guidance is clarified to identify the circumstances in which an announcement may or may not be required.

Page 54, Example E – Material Lawsuit

Whilst the Committee agrees that a listed entity must take care not to mislead the market when making announcements (for example, by including a statement that a claim has little or no merit and therefore will be vigorously defended when the entity has not sufficiently investigated the claim to determine whether it can include such a statement), it is concerned that Example E does suggest that in making any announcement regarding the litigation the entity should state whether it intends to defend the claim. This gives rise to a tension between the requirement to make *immediate* disclosure of the claim and having sufficient time to take legal advice and make an assessment as to whether the claim is bona fide and could give rise to a material exposure. As such, it would be helpful if the guidance could clarify that, provided that confidentiality is maintained, a listed entity does have time to take legal advice and make a proper assessment of the claim before a disclosure obligation arises.

Page 56, Example G – Earnings

As noted above (paragraph 6.3 (*Earnings surprises*)), the Committee is disappointed that the opportunity to provide explicit guidance on the Leightons issue has not been taken (Example G is not directly on point as a cyclone is a readily observable matter, whereas the issues faced by Leightons remained confidential for some time). In particular, the Committee considers that it would be extremely helpful if Guidance Note 8 were to confirm that, where the particular issue remains confidential, listed entities do have a period for confidential reflection to determine the impact of a particular event on that entity's financial position and performance, before disclosure is required.

In relation to Example G, paragraph 2 it is unclear why an entity should be required to publish precise information about one project (especially if it has not previously given guidance in relation to that project). It is the change in overall earnings (from all sources) which is important. Accordingly the Committee recommends that more clarity is included in the guidance as to how the situation in Example G, paragraph 2 should be dealt with.

Page 58, Example H1 – Financial covenants

While it is correct that Directors must make disclosure decisions in the face of potential personal liability, Example H1 of the draft Guidance Note implies that Directors should be 'risk averse' and should, when unsure as to whether or not disclosure is required, choose to disclose in order to avoid the risk of potential litigation. However, premature disclosure may have a seriously adverse effect on the company and in some cases be a self-fulfilling prophecy.

The Committee submits that if Example H1 is to be included, it should focus on whether disclosure is actually required under LR 3.1. If it is unclear whether an announcement is required, then the Committee suggests that the Example give some indication of factors which may tip the balance one way or the other. The serious prejudice to the entity which could be caused by a premature disclosure is relevant in this context. Example H1 is apparently suggesting (in the text relating to footnote 209 discussing the

'counterfactual') that the disclosure decision is determined with the benefit of hindsight. While the disclosure decision must be determined objectively, having regard to the information of which the issuer was aware, facts that were not in existence at the time of the decision not to disclose cannot be relevant (for example, whether or not the breach was or was not waived at a later point in time). Of course, as soon as the issuer became *aware* that the covenant breach would not be, or is unlikely to be waived, the situation would change, but there should be no disclosure obligation until that time is reached. The issue is whether the issuer is aware that the covenant is likely to be relied upon by the financier in order to trigger a default or acceleration. Even then, the availability of replacement financing in a suitable timeframe (and the materiality of the associated costs) needs to be considered. It is the totality of the information of which the issuer is aware that is relevant to the question of materiality, having regard to the approach in *Jubilee Mines v Riley* [2009] WASCA 62.

Of course, if the issuer refuses to confront the obvious, or engages in wilful blindness or wishful thinking, then liability should arise. Further, if the issuer's financial position has material adversely deteriorated (quite apart from any issue concerning covenant breaches) then disclosure may be required for that reason.

Page 60, Example H6 – Further takeover approach

The Committee consider that this Example needs reconsideration. It says a reasonable person would expect disclosure 'in these circumstances, where shareholders need to make a decision whether or not to accept'. That is unlikely to be the case unless the existing hostile bid is unconditional and the end of the offer period is close (which would mean the competing bidder has left its run very late). Otherwise it would mainly be those selling on market who would be affected (and that is equally the case where there is no bid on foot).

Further, the effect of H6 may well be to discourage some competing offers from ever being made due to potential bidders being advised that the approach may be disclosed before it is approved by the target.

Page 60, Example H7 – Negative drill result

In relation to Example H7 about the negative drill results, if there is a reasonable expectation that the results were errors, the Committee would question whether a reasonable person would require disclosure. While the retesting can also be announced, the announcement is likely to have an impact, even if the company's expectation is that the results will be proved wrong. It is not clear that a reasonable person would expect disclosure in circumstances where five results were positive and two subsequent results were negative, and in the company's judgement the two negative results may be wrong.