



Australian Government

The Treasury

**Guidelines for release of
Price-Sensitive Decisions
by
Australian Government
Departments and Agencies**

Exposure Draft

April 2004

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Comments

The Government is seeking comments from interested parties on the proposed guidelines. Comments should be sent to:

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Or by fax: 02 6263 2882 or email: rsmith@treasury.gov.au

The closing date for submissions is 17 May 2004.

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It will be assumed that submissions are not confidential and may be made publicly available. If you want your submission, or any part of it, to be treated as 'confidential', please indicate this clearly. A request made under the *Freedom of Information Act 1982 (Cth)* for a submission marked confidential to be made available will be determined in accordance with that Act.

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INTRODUCTION



Disclosure is fundamental to market integrity and investor protection. Continuous disclosure is an important component of this framework. It puts investors in a position to make accurate judgements about the price of particular securities. It should ensure that the price of securities reflects their underlying economic value.

Listed entities have a legal obligation to disclose price sensitive information as soon as they become aware of it. Failure to comply with this obligation can lead to a partially informed market and the possibility of insider trading. This outcome is not in the interests of investors or the economy as a whole.

In the light of this, it has been decided to explore the desirability of introducing a back up mechanism, under which departments and agencies would seek to advise market operators of impending price sensitive decisions.

If adopted, these draft guidelines would not supersede the obligation already imposed on listed entities to inform the market operator, typically the Australian Stock Exchange, of the price-sensitive information required by the Listing Rules. The obligation on the relevant agencies and departments would be on a 'best endeavours' basis.

I would welcome any comments which investors, listed entities and the wider community may have on the draft guidelines. Your comments will be carefully considered before any further steps are taken to adopt the guidelines.

A handwritten signature in black ink, appearing to read 'Ross Cameron', with a long horizontal flourish extending to the right.

The Hon Ross Cameron MP
Parliamentary Secretary to the Treasurer

GUIDELINES FOR RELEASE OF DECISIONS BY AUSTRALIAN GOVERNMENT DEPARTMENTS AND AGENCIES REGARDING LISTED ENTITIES

THE ISSUE

In April 2003, the securities of Pan Pharmaceuticals Ltd (Pan) were traded on the Australian Stock Exchange (ASX) for a short time while only some market participants were aware of the action of the Therapeutic Goods Administration (TGA) against Pan.

Some were not aware of the TGA action because, according to the ASX, neither Pan nor the TGA contacted the ASX directly to advise them of it.

The obligation under the *Corporations Act 2001* and the ASX Listing Rules is on the listed entity to advise the ASX of price-sensitive information that is not generally available. Listed entities are required to provide information, which might have an impact on the price at which their shares are traded immediately after this information becomes known and before it becomes generally available.

The market operator, for example the ASX, also has an obligation to ensure a fair, orderly and transparent market.

A decision by a government agency to take action that might have a significant impact on the business of a listed company is likely to be price sensitive.

It is therefore important that information about such decisions be disseminated efficiently through the usual mechanisms of the markets, such as ASX, so that all people who trade in shares have an equal opportunity to have access to that information. (Once the information becomes generally available, the concern is dissipated.) The Listing Rules require that the listed entity provide information to the market operator first, so that this can be achieved.

But experience indicates that listed entities cannot always be relied upon to comply with these information requirements.

For this reason, as a back-up mechanism, it is desirable that government agencies who are about to announce price-sensitive decisions also inform the market operator (the ASX usually). Doing so will provide a safeguard to enable market operators to take timely action in circumstances where companies may be unaware of certain decisions or have failed to meet their legal obligations.

A number of regulators already have such arrangements in place. These arrangements provide for the market operator to keep the decision confidential pending its release.

The purpose of this document is to encourage other agencies and departments to examine the types of decisions they are involved in making and, where appropriate, put in place procedures for handling decisions that may be price-sensitive. The arrangements suggested by these guidelines are informal and in the nature of 'best endeavours'. They do not, in any way, alter the legal obligation on the disclosing entity.

The draft guidelines for disclosure appear below. We note that this issue has also been raised by the ASX with the States and Territories.

These guidelines do not:

- expect agencies to make premature disclosure of investigative action;
- have any effect on legal restrictions on the release of decisions;
- affect the accountability which currently exists between departments and agencies on the one hand, and ministers and the Parliament on the other;
- envisage the release of cabinet decisions which are not final;
- apply to announcements of general policy decisions, for example, interest rate changes;
- require agencies to monitor trading in order to judge whether rumours of an impending decision are affecting it;
- address decisions by ministers or Cabinet, on the basis that ultimately that is a matter for ministers, but will be relevant when providing advice to ministers regarding the manner in which their decisions should be released.

A description of the current continuous disclosure requirements is at [Attachment A](#).

RELEASING PRICE-SENSITIVE DECISIONS

To which decisions the guidelines apply

Any decision that:

- is not generally available; and
- a reasonable person would expect, if it were generally available, would have a material affect on the price or value of the securities of a particular entity.

But not any decision that the listed entity itself would not be obliged to disclose, if it were aware of it.

We acknowledge that it will be difficult for agencies and departments to form a view as to what decisions are price-sensitive. Consideration of the impact or potential impact on the business of a company may assist.

Decisions within the ambit of these guidelines are decisions by regulators and departmental officers, for example, to cancel a licence, or to prevent a particular takeover from proceeding.

The guidelines relate to regulatory decisions of a final nature, although they may be reviewable by a Tribunal or court. Thus they do not expect that the decision to issue a notice to show cause why a licence should not be revoked would be subject to these guidelines.

They assume that all significant government decisions with price implications will be announced.

While there are exceptions, the expectation that the market operator (for example, the ASX) will be informed is dependent on whether the decision relates to a listed entity and is price-sensitive (not whether the decision is expected to be announced publicly by other means).

If a department or regulator has concerns that release of a decision would breach a requirement for confidentiality, then it should seek legal advice.

To whom the guidelines apply

All agencies that make decisions that can be expected to affect the price or value of securities need to be aware of these guidelines and to consider how they will be put into practice in their particular situation.

All government departments that are responsible for the release of decisions of ministers that may have such an effect also need to be aware of the guidelines and consider their relevance.

To what securities the guidelines apply

These guidelines apply to listed entities and securities quoted on the ASX or another financial market in Australia, whether those securities be shares, debentures, interests in managed investment schemes or units of shares.

The websites of the market operators will assist in identifying whether the issuer is listed: www.asx.com.au; www.newsx.com.au; www.bsx.com.au.

The guidelines relate to decisions about a listed entity. There is no obligation to determine the holders of beneficial interests in an entity about which a decision is being made and whether those holders are listed.

The guidelines do not envisage that the department or agency will make inquiries about the ownership of an unlisted entity which is the subject of a decision. However, in cases where relevant officers are aware of the significant interest of a listed entity, then compliance with the guidelines would be appropriate.

What should be done

- Examine the categories of decision which the agency makes, or for which the portfolio minister is responsible, that fall within these guidelines.
- Examine the current policy and procedure for announcing or not announcing relevant decisions.

- Could the current procedure lead to a partially informed market?
- Set up appropriate lines of communication with the ASX to facilitate the drafting of more detailed procedures for the relevant agency, as well as the obtaining of advice and provision of information when the occasion arises.
 - The contact at the ASX is Ms Catherine Officer (telephone: (02) 9227 0379; fax: (02) 9241 7620; email: Catherine.Officer@asx.com.au);

And, if your department or agency is likely to be involved in relevant decisions relating to companies listed on the Bendigo or Newcastle Exchanges:

- : The contact at the Stock Exchange of Newcastle is Mr Scott Evans, General Manager (telephone: (02) 4929 6377; fax: (02) 4929 1556; email: scott.evans@newsx.com.au);
- : The contact at the Bendigo Stock Exchange is Mr Ian Craig, Markets Manager (telephone: (03) 9664 0000; fax: (02) 9664 0011; email: ian.craig@bsx.com.au).
- Determine, preferably on an agency or departmental basis, the particular procedures for handling contact with the ASX or other market operator;
 - and make sure that all relevant officers (including ministers' staff) are aware of these procedures.
- When price-sensitive decisions have been made (but before they have been released), the agency or department should:
 - remind the relevant entity of the continuous disclosure obligations in general terms:
 - : an example is at Attachment B;
 - : this assumes an interval between informing the affected entity of the decision and the regulator announcing it generally, which may not always be the case.
 - contact the ASX or other market operator:
 - : advising that a price-sensitive announcement regarding a particular entity is about to be released either publicly or to the relevant parties; or
 - : providing an advance copy of the relevant press release or otherwise describing the decision.

In some circumstances, only contact with the market operator will be appropriate because the listed entities affected may not easily be identifiable.

- The ASX operates an electronic 'online' facility for lodgement of announcements that is used by all listed entities and other parties such as the Australian Competition and Consumer Commission (ACCC) and the Takeovers Panel. Departments may wish to make arrangements with ASX so that they can utilise this facility.
- The guiding principle should be 'when in doubt, consult the market operator'.

Consultation

Australian Securities and Investment Commission (ASIC), the ASX, Bendigo and Newcastle Exchanges and Commonwealth Secretaries were consulted in the preparation of these guidelines.

ATTACHMENT A

THE CONTINUOUS DISCLOSURE REQUIREMENTS

In general

- A wide range of listed and unlisted entities are subject to the requirement in Chapter 6CA of the *Corporations Act 2001* (the Act) regarding the disclosure of information that:
 - is not generally available; and
 - a reasonable person would expect, if it were generally available, would have a material effect¹ on the price or value of the securities of the entity.

The obligations on listed entities

- The continuous disclosure requirements that apply to ASX listed entities are contained in the ASX Listing Rules and Chapter 6CA of the Act.
- ASX Listing Rule 3.1 requires the immediate disclosure to ASX of information that, if it were generally available, could reasonably be expected to have a material impact on the price or value of an entity's securities.
 - Information is not required to be disclosed if:
 - (1) a reasonable person would not expect its disclosure; and
 - (2) it is confidential; and
 - (3) it falls within any of the following:
 - : it would be a breach of the law to disclose the information; or
 - : the information concerns an incomplete proposal or negotiation; or
 - : the information comprises matters of supposition or is insufficiently definite to warrant disclosure; or
 - : the information is generated for the internal management purposes of the organisation; or
 - : the information is a trade secret.

- A comparable situation applies in relation to entities listed on other Australian licensed markets which have in their listing rules an obligation to notify the market operator of information about specified events or matters as they arise so that the operator can keep participants informed.
 - The relevant Newcastle Stock Exchange rules are Listing Rule 6.4 of Chapters IIA, IIB and IIC. (There are separate rules in relation to equity, debt and managed investments.) The carve outs from the disclosure requirement are in Rule 6.5 of each of those chapters.
 - BSX Listing Rule 3.1. The carve out is in Listing Rule 3.2.

Enforcement of the obligations

- The ASX is the front-line regulator in relation to continuous disclosure by ASX listed entities. As a market licensee, it is responsible for maintaining a fair, orderly and transparent market.
 - It is able to suspend or de-list entities that fail to comply with its Listing Rules.
- Section 674 of the Act provides statutory backing to the disclosure requirements of the ASX.
 - It is a criminal offence for an entity to intentionally fail to disclose in accordance with the ASX Listing Rules (but only where this information has not been made generally available).
- ASIC may, alternatively, apply to the court for a pecuniary penalty of up to \$200,000 in relation to breaches of the continuous disclosure provisions.
- Breaches of these provisions can also give rise to civil proceedings for compensation.

Proposed reforms

- The Corporations Law Economic Reform Program No. 9 (CLERP 9) reforms propose that ASIC should be given greater flexibility to deal with contraventions of the continuous disclosure provisions:
 - The maximum civil penalty that a court can impose on a body corporate will be increased from \$200,000 to \$1 million (but remain at \$200,000 for an individual).
 - ASIC will be able:
 - : to seek civil penalties against persons involved in a contravention of the continuous disclosure provisions; and

1 If the information would, or would be likely to, influence persons who commonly invest in securities in deciding whether to acquire or dispose of the securities, then a reasonable person is taken to expect information to have a material effect on the price or value of the securities (see section 677).

- : to issue infringement notices in relation to less serious contraventions of the continuous disclosure provisions.
- These provisions are included in the Corporate Law Economic Reform Program (Audit Reform and Corporate Disclosure) Bill 2003.

ATTACHMENT B

Sample paragraphs reminding an entity of its continuous disclosure obligations

Chapter 6CA of the *Corporations Act 2001* requires disclosing entities to release information that is not generally available and that a reasonable person would expect, if it were generally available, would have a material effect on the price or value of enhanced disclosure securities.

The chapter addresses the obligations of listed disclosing entities which are subject to continuous disclosure obligations through market listing rules, and other disclosing entities. In the case of entities listed on the Australian Stock Exchange, the Listing Rules specify the information required to be disclosed.

These requirements are central to the integrity of the market and are designed to ensure efficient dissemination and equal access to information for all market participants.

If your company is subject to these requirements or similar requirements imposed by the Bendigo or Newcastle Stock Exchanges, you should consider what steps you may need to take to ensure compliance with them. Non-compliance renders the entity liable to a civil penalty or prosecution.