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How to Brief Analysts and Comply with Australia's Continuous Disclosure Law

Compliance and Ethics

With earnings announcement season upon us, entities will need to be wary of their compliance with the continuous disclosure obligations, as the penalties that result from a contravention can be far reaching, both in respect of financial impact and reputational damage.

Australia's continuous disclosure regime for listed entities has come under increased focus with the corporate regulator's growing appetite to pursue offenders. In 2014, the Australian Securities and Investments Commission (ASIC) secured a AUS$1.2 million fine against Newcrest Mining Limited for breaches of the Australian continuous disclosure laws arising from selective investor briefings. It was one of the largest monetary penalties ever imposed in Australia for breaches of continuous disclosure laws prosecuted by ASIC.

Investor and analyst briefings are a common way for entities to supplement formal market announcements and improve (or correct) the market's understanding of information that has been previously disclosed by the entity. They come in three basic forms:

a. Group briefings held by the listed entity attended by numerous analysts, brokers and investors (usually conducted by teleconference);

b. Smaller briefings held by broking firms and investment banks who host a select number of their

key clients to speak with directors and senior executives of the listed entity (often over lunch); and

c. Private on-on-one briefings with analysts organised and/or held by the listed entity.

Notwithstanding the stated benefits, such briefings are necessarily selective, not open to all participants in the market and, therefore, expose the listed entity to the real and additional risk of breaching the continuous disclosure laws and exposing participants in those briefings to insider trading risk. What is “best practice” for the conduct of investor briefings and how does this assist listed entities to mitigate the inherent risk in conducting such briefings?

Continuous disclosure in Australia — an overview

The policy objective of the continuous disclosure regime in Australia is to promote investor confidence in the integrity of Australian capital markets, providing benefits to market participants and management. The Corporations Act 2001 (Cth) (Corporations Act) and the Australian Securities Exchange (ASX) Listing Rules together constitute the continuous disclosure regime in Australia. Section 674 of the Corporations Act provides the statutory force for, and works in tandem with, the ASX Listing Rules 3.1 and 3.1A.

In essence, an ASX listed entity must notify the ASX of information as and when required by the ASX Listing Rules unless:

a. The information is “generally available.” Information will be considered “generally available” where it consists of readily observable matter, or has been made known in a manner that would bring it to the attention of investors.

b. The information could not reasonably be expected to have a “material effect” on price or value: this is judged by reference to whether a reasonable person would expect that the information would, or would be likely to, influence investors in deciding whether to acquire or dispose of the securities.

Exceptions to the continuous disclosure obligation are found in Listing Rule 3.1A and cover a number of scenarios, all of which must first meet the dual tests that the information is “confidential” and that “a reasonable person would not expect the information to be disclosed.”

In enforcing the regime, the courts may impose higher penalties where the contraventions are found to be of a “serious” nature, as was the case in the Newcrest case (AUS$200,000 for an individual and AUS$1 million for entities). Such penalties are open to a court where either the contravention:

a. Materially prejudices the interests of either acquirers or disposers of the entity’s securities, or the entity itself; or

b. Is otherwise “serious” (whether or not investors have suffered loss). A contravention can be taken to be “serious” if it was “grave or significant,” is “weighty, important, grave” or is “considerable.”

It is worth noting that the high penalty imposed in the Newcrest case was in circumstances where it:

a. Had policies in place to aid compliance with its continuous disclosure obligations;

b. Had not deliberately set out to contravene section 674(2) of the Corporations Act; and

c. Had commissioned an independent review in the wake of the June Announcement, which resulted in the reform of its continuous disclosure policies.

ASIC enforcement — listed entities — continuous disclosure

At a practical level, the selective briefing of investors and analysts (such as “one-on-one” briefings with major investors or “invitation only” events organised by brokers or analysts, as in the Newcrest case), play a positive role, particularly for companies in the energy and resources industry which do not typically publish earnings guidance by improving the market’s understanding of these entities. This upside needs to be balanced against the higher risk that such briefings will give rise to selective disclosures of confidential, market-sensitive information that may distort the market, generate confusion and give rise to a loss of faith in market integrity.

The ASX has responded to the Newcrest decision by updating ASX Guidance Note 8: Continuous Disclosure on 1 July 2015 to provide new commentary in connection with analyst and investor briefings and the provision of exploration and production forecasts. The response is clear and swift:

“An entity should not be disclosing at an analyst or investor briefing any market sensitive information, unless and until it has first been disclosed to ASX under Listing Rules 3.1 and 15.7.”

ASIC enforcement — briefing attendees — insider trading

People, such as investors and analysts, who receive or are involved in the handling of confidential, market-sensitive information may also be subject to enforcement action by ASIC under Australia’s insider trading laws. Those laws provide that, if a person possesses “inside information” (being information that is not generally available and which could be expected to have a material effect on the price of securities), they must not, and must not procure another person to, trade on the basis of that information, and must not communicate that information in circumstances where they know it may be used as the basis for trading. In the Newcrest case, ASIC investigated certain analysts who were at the briefings for potential breaches of the insider trading prohibitions.

This prohibition prevents an analyst or investor who is given inside information by an entity at an investor briefing, inadvertently or otherwise, from using that information to acquire or dispose of shares in the company. To be in breach, however, the analyst or investor must know or ought reasonably know that the information is “inside information.” Given their expertise in tracking and interrogating listed companies, it is likely that they will be expected to be appraised of what a company has or hasn’t disclosed previously and, therefore, not always be able to claim that they “didn’t know” it was inside information.

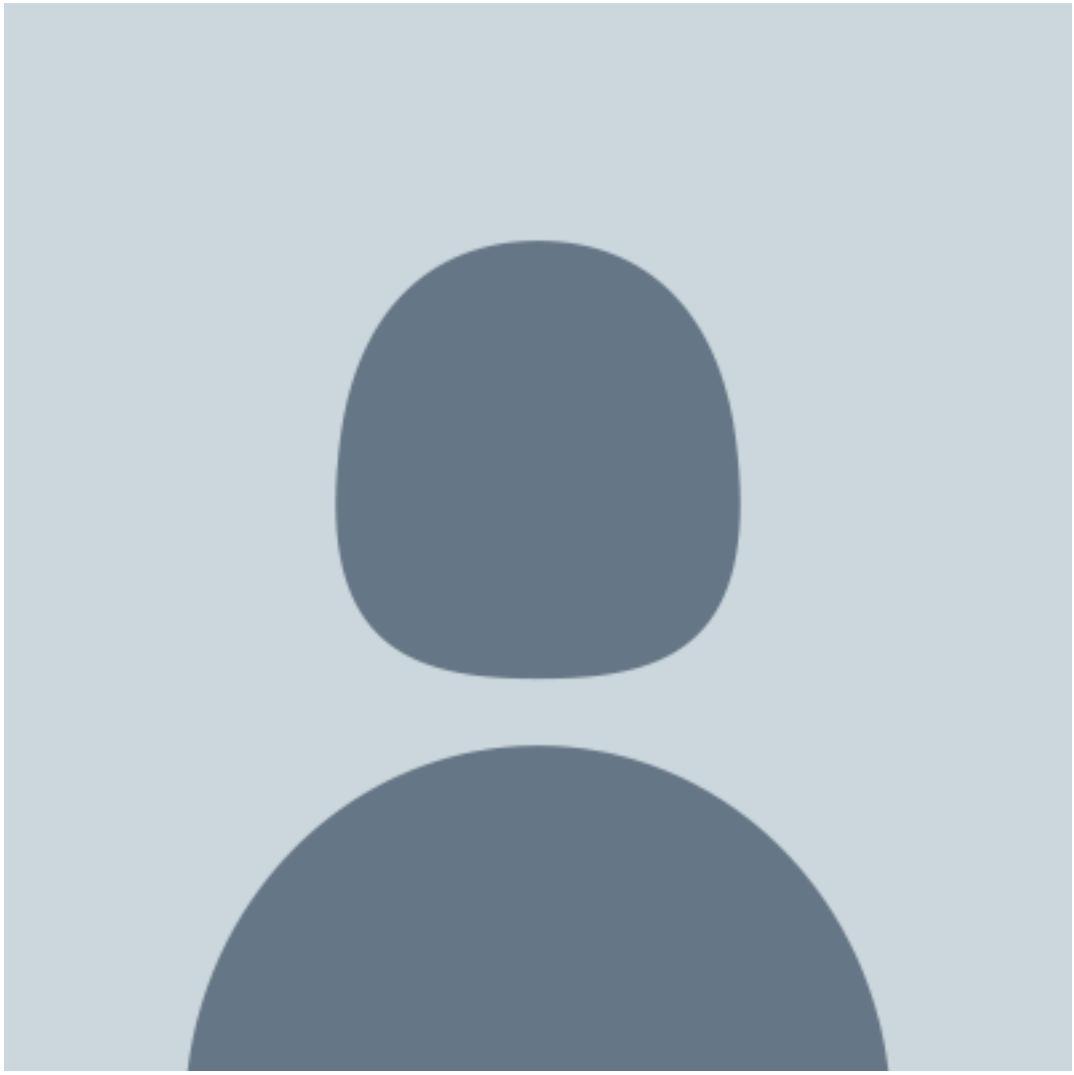
“How to” internal governance checklist for investor and analyst briefings

Consolidating the lessons learnt from the Newcrest case and existing guidance issued by the ASX and ASIC on the handling of confidential information, we have created a checklist of internal governance measures for listed entities to consider when planning for and dealing with investor briefings. The checklist covers policy and procedure requirements, personnel allocation, training, pre and post briefing publication, records and transcripts and ‘no go’ topics.

Conclusion

Most listed entities will have some or all of these internal governance arrangements in place. Now might be the time to run through the checklist as a prudent diligence action if investor or analyst briefings are planned for the coming months. As ASIC Commissioner John Price recently said, “good continuous disclosure compliance comes down to preparation and organization.”

Deanna Constable



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