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Faith/less? Market integrity and the enforcement of Australia’s continuous disclosure provisions

Cary Di Lernia

A dissertation submitted in fulfilment of the requirements for the degree of

Doctor of Philosophy at The University of Sydney

2013
The integrity of the financial market and investor confidence in that market are critical elements in our economic well-being. The credibility of the market is underpinned by our system of corporate law and regulation. Maintenance of that integrity and credibility is of the highest importance for companies, investors and other market participants and for the community more broadly.


Sunlight is said to be the best of disinfectants; electric light the most efficient policeman.

Louis D Brandeis, *Other Peoples’ Money, and How the Bankers Use It*, 1933.
DECLARATION

I hereby declare that this dissertation submitted for the degree of Doctor of Philosophy, contains no material that has been accepted for a degree or diploma at any other university or tertiary institution. This work, to the best of my knowledge and belief contains no material previously published or written by another person, except where due reference has been made in the text and bibliography.

Cary Di Lernia

December, 2013
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1. INTRODUCTION

The very idea of ‘continuous disclosure’ and all it carries with it – corporate transparency, equal access to information, a level playing field amongst market participants for trade in an entity’s securities – is of serious value to the effective and efficient functioning of the Australian market for capital.¹ The extent to which the structures supporting faith in this ideal are actually effecting it in reality is therefore an important issue for consideration.

Does a pure state of continuous disclosure of material information exist amongst listed organisations in the Australian market? If corporate responses to Australian Securities Exchange (ASX) queries are to be believed, the answer is a resounding “yes”.² If the abnormal trading volumes and price movements the subject of the ASX’s daily enforcement activities and the odd media item are brought into consideration, along with more sporadic yet protracted enforcement activity from the Australian Securities and Investments Commission (ASIC) and aggrieved investors, this “yes” begins to attract caveats, with particular sectors, companies and management teams being subjected to suspicion of less than adequate disclosure performance. In truth, it is actually impossible to know whether and to what extent material information not

² See discussion in Chapters Five and Six below.
validly withheld from release is being withheld by management for whatever reason beyond decided court cases, bare confessions, and anecdotal evidence.³

This dissertation grapples with the more modest question hinted at above: to what extent do enforcement efforts surrounding the regime justify any faith placed in the integrity of the market by lay investors? Put differently, should investors feel confident that the immediate release of material information relevant to their trading decisions is well policed, with the effect that there are likely to be few deviations from this ideal standard, and that the market can be trusted to provide information necessary to maintain a level playing field?

Given that the essence of the regime has been expressed to be the promotion of investor confidence⁴, it would seem the question as to whether a reasonable investor should feel confident that regulatory enforcement activities actually assist in achieving the aims of the regime is a pertinent one to ask in the context of a system which relies on enforcement mechanisms to compel appropriate disclosure behaviour. An important question on par with this preliminary is whether there is anything that might be learnt from enforcement activity of various kinds to improve the type of corporate reporting which has


⁴ As explained by the then Minister for Administrative Services, the legislative policy surrounding continuous disclosure was set out in the Second Reading Speech of the Corporate Law Reform Bill (No 2) introduced into the Senate on 26 November 1992, at [3581]:

An effective disclosure system will often be a significant inhibition on questionable corporate conduct. Knowledge that such conduct will be quickly exposed to the glare of publicity, as well as criticism by shareholders and the financial press, makes it less likely to occur in the first place. In essence, a well informed market leads to greater investor confidence and in turn to a greater willingness to invest in Australian business.

been subjected to it. Inquiry into these questions will serve to temper corporate and investor expectations as to just what the practical requirements and limits of a system of continuous disclosure might be.

While punitive, reformatory and detective intent underpin current modes of enforcement, there appears a marked skew towards the latter as far as actual daily enforcement activity is concerned, in spite of headlines which usually focus on the more dramatic punitive stories. Given that voluntary disclosure has not been chosen as a policy option, it is important that lay investors appreciate the mix between enforcement mechanisms and their role in generating integrity within markets for fair participation within them. Further, it is vital that the educative kernels which lie within all kinds of enforcement activity (especially at the lower reaches of the enforcement hierarchy) are harvested for the lessons companies might learn and apply to improve their reporting practices such that the full potential of this vast source of information is realised.

The purpose of this dissertation is to offer a deeper understanding of the enforcement of Australia’s continuous disclosure regime, from high profile court cases and the imposition of administrative sanctions to “everyday” enforcement activity through ASX price queries and aware letters, and offer an analysis of what might be learnt from them with a view to improving the daily function of continuous disclosure in Australian markets. Such an understanding might at the very least ensure the development of a realistic set of expectations around this interesting if unusual set of rules.
The enforcement mechanisms described above are considered in chapters three through six below with each enforcement mechanism analysed with a view to appreciating its efficacy in adding to perceptions of market integrity, and whether there are any lessons which corporations and their managers might learn from them to avoid such enforcement efforts and keep the market adequately informed. Chapter three considers decided court actions with a focus on the most recent case concerning continuous disclosure at the time of writing, the Fortescue litigation. Chapter four analyses enforcement activity at the administrative level for lessons which might be learnt from the issuance and acceptance of infringement notices and enforceable undertakings. Chapters five and six engage in a detailed review of over 1300 instances of lower level enforcement to offer an analysis of what might be learnt from corporate disclosure in circumstances involving abnormal trading activity which see the issuance of a price query or aware letter. Neither of the latter phenomena have been analysed in qualitative depth to date. A conclusion is offered in chapter seven as to the role of these enforcement activities in maintaining faith in continuous disclosure and the market integrity it is supposed to foster.
2. LITERATURE REVIEW

2.1 Introduction

It has only been relatively recently in the long history of group entrepreneurial activity that reporting obligations and attendant accounting rules with anything approaching consistency and clarity have been imposed on corporate ventures.\(^5\) Even then, the almost metronomic responsive reformulation of accounting rules following corporate crises can only but attempt to maintain a shadowy pace with the dynamic rate of change in real business practice.\(^6\) This affords the potential for the formation of serious gaps in systems of accountability, leaving distantiated investors open to serious loss, which can in turn lead to widespread crises of confidence in the market.

Outside of such epiphany inducing crises, the inability of systems of periodic disclosure to ensure the accurate reflection of the current status of a business at any one point in time in a rapidly changing globalised economy no less, is no longer a matter of debate.\(^7\) The potential for investors to be left without

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material information which could influence the value of an investment here and now, and therefore the choice to divest or acquire particular securities between set reporting periods is an eventuality which fails to inspire faith in markets for capital. The realisation of this negative potentiality in the late 1980s spurred inquiry into and was a central reason for the birth just two decades ago of a legislatively backed blanket disclosure obligation requiring the continuous updating of the market.

The latter of those two decades has seen much ink spilled over the optimal form and enforcement of the requirement to continuously disclose in the Australian market. While consisting of what are claimed to be the most robust disclosure standards in the world, important issues relating to the quality of disclosure and appropriate enforcement lie beneath the idol of market integrity venerated by regulators. The question this dissertation seeks to answer is whether faith born of the very existence of a continuous disclosure regime appears justified on available evidence relating to its enforcement, and whether there is anything that might be learnt from enforcement activity of various kinds to improve the type of corporate reporting which has been subjected to it.

(November 1991) at [8.101] (‘Lavarch Report’). Note that listed Australian entities are required to prepare audited annual and half-yearly reports, see Corporations Act 2001, Part 2M.3.

Australian Stock Exchange Limited, Continuous Disclosure - The Australian Experience, 20 February 2002. See also generally Merav Bloch, James Weatherhead and Jon Webster, ‘The Development and Enforcement of Australia’s Continuous Disclosure Regime’ (2011) 29 Company and Securities Law Journal 253, who note that Australia’s continuous disclosure regime ‘is generally regarded as being at the forefront of world’s best practice’ (258) and that it strikes an ‘appropriate balance between the benefits of a fully informed market and the need for certain information to remain confidential, at least for a period of time’ (286).
2.2 Disclosure

Information is the lifeblood of the market. In an informed market, investors have confidence because they have full possession of the information they need to make an informed investment decision. This ultimately builds market liquidity and depth.\(^9\)

The integrity of the price discovery process for financial securities is an essential ingredient in the efficient and effective operation of modern markets.\(^10\) The provision of material information relating to the existence of listed organisations in a timely fashion is crucial to maintaining investor confidence in this process, and the securities markets which attempt to facilitate it. Inaccurate, inadequate and sporadic disclosure of material information concerning the future and fortunes of listed entities can detract from the perception of the market’s ability to provide a fair and efficient mechanism for the exchange of securities. Reduced confidence in financial markets can in turn have longer-term flow on effects which can be felt throughout the economy.

Disclosure generally has been said to serve at least three important functions as a policy instrument: a transaction-cost control device, a regulatory tool for permitting entry to or sanctioning market participants, and a governance-signalling device as to the effectiveness of management.\(^11\) In Australia at

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present the *Corporations Act 2001* (Cth), along with a raft of other supporting legislation and market rules require different forms of disclosure depending on the circumstances which are broadly aimed at these ends.12

Amongst them, and arguably the most overarching and ambitious of its kind, is Australia’s continuous disclosure regime, which requires the release of material information as an organisation becomes aware of it. The aim is to ensure the market is fully informed and that investors are not disadvantaged by the lack of availability of information which might affect their investment decisions. By contributing to the development of a level playing field for the trade in a company’s securities, the continuous disclosure rules constitute a vital element of corporate regulation geared towards achieving and maintaining faith in the market.

In addition to market integrity, other important goals including allocative efficiency and more widely the encouragement of international capital flows into Australia have also been cited as beneficial results of the continuous disclosure regime.13 The effective operation of Australia’s continuous disclosure regime is, whether it is recognised as such or not, of great consequence in the Australian economic, and therefore political and social landscape.

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12 The *Corporations Act 2001* (Cth) provides a comprehensive company disclosure framework encompassing periodic reporting; continuous disclosure; takeover, acquisition and buy-out events; and fund raising. This disclosure regulation is supported by market misconduct regimes, including provisions dealing with insider trading and misleading and deceptive conduct. Listed companies are also subject to Australian Securities Exchange (ASX) Disclosure Listing Rules. Gill North, ‘A Call for a Bold and Effective Corporate Disclosure Regulatory Framework’ (2010) 28 *Company and Securities Law Journal* 331, 331.

2.3 Lineage

In spite of the loftiness of such precepts, a quick glance at the historical sources of publicity requirements in Australian corporate law and their reception demonstrates that since the dawn of corporate activity and its regulation, business people have greeted the imposition of disclosure requirements with a mixture of fear and contempt – emotions the current regime is no stranger to. Regulation in the 1844 Joint Stock Companies Act requiring the periodic provision of accounting records masked an underlying feature of the commercial mindset at the time, which was focused on maintaining the privacy of corporate activities. Incorporation statutes represented a ‘threat... to the traditional “privacy” enjoyed by English commercial enterprises. The controllers of most English businesses in the mid-nineteenth century jealously guarded the financial details of their operations from competitors, government departments and even from shareholders’, and further, ‘[i]n some instances the rudimentary nature of accounting in an enterprise might be held out as a virtue; indicating that an “older style” of entrepreneurship had been preserved in the relevant undertaking’.

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14 Bloch et al note that ‘[a]t the time the 1992 and 1993 Bills were being debated, there was considerable opposition to the introduction of a statutory continuous disclosure regime, particularly among market participants. Of particular concern was the imposition of civil and criminal penalties in respect of obligations which Young J of the New South Wales Supreme Court had earlier described as “a flexible set of guidelines for commercial people”’. Merav Bloch, James Weatherhead and Jon Webster, ‘The Development and Enforcement of Australia’s Continuous Disclosure Regime’ (2011) 29 Company and Securities Law Journal 253, 257.


16 Rob McQueen, A Social History of Company Law: Great Britain and the Australian Colonies 1854–1920 (Ashgate Publishing Limited, 2009), 93-4. McQueen notes further that ‘[t]he prevailing beliefs as to the
Nevertheless, the 1844 Act to which McQueen refers introduced a notion which saturates rhetoric surrounding the imposition, enforcement and piecemeal improvement of the continuous disclosure regime today: ‘that publicity might constitute an effective regulatory protection for investors’. Indeed, this has been a focus of attempts to control the legal person in the form of the corporation and any potential havoc it might wreak in a society constituted by natural and other artificial persons. While as far back as 1877 the Report of the Select Committee on Companies stated that it was imperative for an intending shareholder to have ‘[a] full disclosure of everything likely to influence [him/her] also [the Committee considers that] the frauds and losses which have been occasioned by companies render further regulation in the formation of companies under these Acts expedient’, reforms of the nature they were proposing were delayed another 50 years.

In the meantime, nascent conceptions of adequate accounting practices for business concerns would have provided little comfort for investors in spite of the passing of the 1896 Victorian Companies Act, which was the first piece of Australian legislation requiring Victorian companies to prepare ‘an audited

sacrosanctity of “privacy” in business affairs meant that the financial affairs of many 19th-century businesses were at best barely adequate and quite often a disastrous muddle’ (94).


18 Rob McQueen, A Social History of Company Law: Great Britain and the Australian Colonies 1854–1920 (Ashgate Publishing Limited, 2009), 123. McQueen further notes that the ‘principle of “disclosure” embodied in the 1844 Joint Stock Companies Act has been in constant conflict with companies desire to keep their internal affairs “private” ever since. Hence the later legislative division between public companies, with a range of disclosure requirements imposed upon them, and “private” or “proprietary” companies, which are accorded privacy with respect to their financial affairs, but at the expense of not being able to solicit investments from the “public”’. Rob McQueen, A Social History of Company Law: Great Britain and the Australian Colonies 1854–1920 (Ashgate Publishing Limited, 2009), 3.

balance sheet that disclosed a mandated minimum amount of information’. In the intervening century accounting standards, concepts and rules have developed exponentially from essentially unregulated systems based on convention… to the adoption of loosely-formulated generally accepted accounting principles based largely on the work of academic accountants… [to] a limited set of local accounting standards without full legislative backing given the existence of the true and fair override facility’ through the current international harmonisation project.

Nevertheless, something appears to have been missing from the matrix of accounting rules surrounding corporate endeavour. At best, such rules could only lead to the production of periodic reports, compiled after a certain period had elapsed. They therefore represent a historical snapshot of an organisation, which while meaningful, might not be as useful as more up to the minute information would be to investors given that the market is driven by investor sentiment and everchanging appraisals of the present values of future possible events.

This reality of the practice of periodic reporting creates a gaping hole through which the underlying rationale for its existence – to provide investors with relevant, reliable information to assist their decision making in real time – may

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20 ‘Auditors were required to apply “reasonable diligence” in certifying a company’s balance sheet and provision was made for auditors to be imprisoned for a period of up to two years if convicted of wilfully certifying a false or fraudulent balance sheet or account’. Garry Carnegie and Brendan O’Connell, 2013, (In Press) ‘A Longitudinal Study of the Interplay of Corporate Collapse, Accounting Failure and Governance Change in Australia: Early 1890s to early 2000s’ (2013) Critical Perspectives on Accounting, vol. Online, pp. 1-23, 13.

come crashing to earth when it is too late for investors to make any such decision meaningfully. Further, given that events of corporate significance do not perfectly time themselves for disclosure in periodic accounts the potential for the development of an uneven playing field where the temptation to use sensitive information for one’s own advantage (through insider trading or market manipulation) prior to formal disclosure to the market, where all market participants might transact on an even footing, might be expected to be high.  

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2.4 Contemporary expressions of the duty to continuously disclose

While periodic reporting is a major focus in the financial lives of companies given the effort and time spent in the preparation of annual and half yearly reports, as well as their digestion by investors during the year’s reporting seasons, its products are more accurately seen as playing a supporting role in the disclosure space.  

The crucial element of financial market regulation in Australia geared towards achieving and maintaining market integrity is the obligation of listed and other disclosing entities to continuously disclose material information to the market. Having existed in some form since the mid 1890s in the listing rules of various exchanges in Australia, it would take a further century for their importance to receive statutory backing, courtesy of

22 Indeed, the potential for shadier practices such as insider trading and market manipulation also becomes more feasible and indeed potentially more bountiful when crucial material information, as yet unknown to the market, might be used by company insiders for their own benefit.

the 1987 stock market crash, its resulting effects, and attendant government inquiries.24

In October 1989, at the request of the then Attorney-General Lionel Bowen, the House of Representatives Standing Committee of Legal and Constitutional Affairs began an inquiry into corporate practices and the rights of shareholders. At this time, after the market crash of 1987 and the collapse of several prominent Australian businesses (Rothwells Limited, the Hooker Corporation, Qintex Australia Limited) Australian corporate regulation was coming under increasing scrutiny. The abuse of reporting requirements then in existence and the employment of off balance sheet reporting to conceal risky or unfavourable transactions misled individual investors and the wider market, one of the consequences being ‘a significant loss of investor confidence, both amongst Australian and overseas investors, in the reliability of corporate financial information in Australia’.25

While the inquiry continued, in June 1991 a new Attorney-General Michael Duffy requested an examination by the Companies and Securities Advisory Committee (a prior incarnation of the current Corporations and Markets Advisory Committee) of the potential need for a strengthening of the disclosure requirements of listed corporations. As explained in an ASX reflection on the regime released 2002, ‘a spate of Australian corporate collapses in the 1980s

resulted in significant withdrawal of capital (especially foreign capital) from the
Australian market. This experience highlighted the importance of integrity to
the Australian capital markets’. 26 This is reflected in a news release from the
Attorney-General’s office which stated ‘there is a great deal of concern
amongst investors that they may not be as well informed as they ought to be
regarding the ongoing state of companies in which they have invested’. 27

At the time there did not exist in the Corporations Act ‘a comprehensive
scheme for the full and accurate disclosure of material matters on a timely
basis ... there is no general continuous disclosure requirement for the benefit of
those engaged in the secondary trading of securities’ 28, except in relation to
particular circumstances such as the issuing of a prospectus, entry into takeover
transactions, and entry into schemes of arrangement. In a report released
September 1991 CASAC recommended that statutory support be given to an
enhanced disclosure system where organisations deemed ‘disclosing entities’
would be required to lodge half yearly reports (in addition to their existing
obligation to provide annual reports), as well as disclose any material
information affecting the organisations’ securities to the Australian Securities
Commission (ASC, as ASIC was then known) within 24 hours. 29

CASAC preferred this latter requirement over another option on the table at the time to require companies to report to the market quarterly. To ensure the new requirements had enough force behind them CASAC advocated statutory backing of the continuous disclosure regime in preference to a disclosure system relying upon the ASX listing rules alone (as had been the case previously), mainly it would seem for the reasons that there would remain uncertainty as to the enforceability of the rules, and that the requirements as they existed in ASX form alone imposed no criminal or civil liability in the case of a breach. Statutory force was seen as ensuring ‘a more comprehensive, accurate and easily accessible reporting and information retrieval system [which should also be] supported by appropriate criminal liabilities and civil remedies’. Accordingly CASAC recommended that the Australian Securities Commission should be given powers to enforce compliance with the statutory continuous disclosure obligations and obtain remedies for those affected by contravention.

Some of the benefits cited by CASAC at the time relating to the integrity of Australian capital markets concerned the supposed ability of such a regime to

- overcome the inability of general market forces to guarantee adequate and timely disclosure by disclosing entities;

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• encourage greater securities research by investors and advisors, thereby ensuring that securities prices more closely, and quickly, reflect underlying economic values;
• ensure that equity and loan resources in the Australian market are more effectively channelled into appropriate investments, and that funds are withheld or withdrawn from poorly performing disclosing entities. This will promote capital market efficiency;
• assist debtholders in monitoring the performance of disclosing entities and thereby determine whether, or when, to exercise any right to withdraw or reinvest their loan funds, or convert debt to equity;
• act as a further, or substitute, warning device for holders of charges over corporate assets, that breaches in covenants may have taken place, or the risk of default has increased;
• assist potential equity or debt holders of disclosing entities to better evaluate their investment alternatives;
• lessen the possible distorting effects of rumour on securities prices;
• minimise the opportunities for perpetrating insider trading or similar market abuses;
• improve managerial performance and accountability by providing the market with more timely indicators of corporate performance;
• encourage the growth of information systems within disclosing entities, thereby assisting directors in their decision making and compliance with their fiduciary duties; and reduce the time and costs involved in preparing takeover and prospectuses (sic) documents.32

Just two months later in November 1991, the House of Representatives Standing Committee of Legal and Constitutional Affairs released its final report

entitled *Corporate Practices and the Rights of Shareholders* (the Lavarch report), recommending a regime of continuous disclosure be implemented and enforced through the ASX listing rules, rather than through new legislation in the corporations law as advocated by CASAC. This recommendation was made on the basis that if the ASX listing rules in force at the time were amended with their enforceability in mind that changes to the corporations law would be unnecessary. 33 The Committee was concerned not to create fetters on businesses struggling their way out of the recession of the early 1990s, expressing the view that the listing rules were preferable to ‘black letter law’ in such areas largely due to their flexibility.34

In its response to the Lavarch report tabled December 1992, the Federal government stated it was ‘not satisfied that an ASX administered disclosure scheme is sufficient and is therefore committed to a legislative scheme’.35 The government had recently introduced into Parliament the Corporate Law Reform Bill (No.2) 1992 which contained an enhanced corporate disclosure scheme encompassing periodic and continuous disclosure. 36 The government was of the view that legislative support would lend the regime greater weight than the listing rules would alone:

It is considered appropriate that enforceable obligations with civil and criminal consequences should be contained in legislation rather than in stock exchange rules which form part of a private contract between the exchange and listed entities. In addition, a legislative scheme has the advantage of enabling investors to claim damages against a company which does not comply with the disclosure obligations.\(^{37}\)

Despite this commitment to a statutory backed regime, following extensive public debate the government decided not to legislate directly for continuous disclosure, but rather, to reinforce the listing rules of the ASX already in existence by attaching legislative penalties to their contravention, and the creation of legislation for unlisted disclosing entities which are obviously not caught by the ASX listing rules.\(^{38}\) Speaking with the benefit of hindsight in 2002 the ASX stated ‘Australia’s experience is that, without the legislative support for continuous disclosure and a regulator with an appetite to enforce it, the regime may be perceived as being ineffectual in encouraging compliance’.\(^{39}\) The process of expansion of the legislative enforcement armoury available to the regulator has been a wellspring of debate, and is discussed further below.

Legislative continuous disclosure provisions were introduced into the then Corporations Law by the *Corporate Law Reform Act 1994* (Cth) as ss 1001A, B, C and D, commencing September 1994. These provisions included reference to intentional, reckless and negligent failure to disclose information not generally

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available.\textsuperscript{40} The current continuous disclosure provisions are found in Chapter 6CA of the Corporations Act which came into effect on 11 March 2002 on the commencement of the \textit{Financial Services Reform Act 2001} (Cth), amended 1 July 2004. The enactment of the current provisions saw the removal of elements relating to intentionality, recklessness and negligence in non-disclosure, making the establishment of a contravention easier than was previously the case as such elements need no longer be proven.\textsuperscript{41}

Section 674 has the effect of giving legislative force to the continuous disclosure obligation found in Listing Rule 3.1 of the Australian Securities Exchange listing rules which currently states:

\begin{quote}
Once an entity is or becomes aware of any information concerning it that a reasonable person would expect to have a material effect on the price or value of the entity’s securities, the entity must immediately tell the ASX that information.\textsuperscript{42}
\end{quote}

Several aspects of the rules require unpacking. To begin, the term ‘information concerning it’ is expansive. According to the ASX:

\begin{quote}
[it] extends beyond pure matters of fact and includes matters of opinion and intention. It is not limited to information that is generated by, or
\end{quote}

\textsuperscript{40} See discussion of Lindgren J of the history of the provisions in \textit{Australian Securities and Investments Commission v Southcorp Limited (No 2)} [2003] FCA 1369 at [7-16].

\textsuperscript{41} See discussion by French J (as he then was) in \textit{Australian Securities and Investments Commission, In the Matter of Chemeq Limited (ACN 009 135 264) v Chemeq Limited (ACN 009 135 264)} [2006] FCA 936 at [46]:

‘The importance attached to the continuous disclosure provisions of the Act by the legislature is emphasised by the penalties for their contravention which have recently been significantly increased and their widened scope since 2002 which is now not limited to intentional reckless or negligent non-disclosure. That is not to say that elements of intention or recklessness or negligence will not be relevant to the penalty to be imposed.’

\textsuperscript{42} Available at \texttt{<http://www.asx.com.au/documents/rules/Chapter03.pdf>}.  

sourced from within, the entity. Nor is it limited to information that is financial in character or that is measurable in financial terms. Under Listing Rule 3.1, an entity must disclose all information “concerning it” that it becomes aware of from any source and of any character, if a reasonable person would expect the information to have a material effect on the price or value of its securities.43

According to the definitions in the ASX listing rules at 19.12 an entity becomes ‘aware’ of information if a director or executive officer ‘has, or ought reasonably to have, come into possession of the information in the course of the performance of their duties as a director or executive of that entity’.44 This extension from actual to constructive awareness of officers forestalls any possible claim that relevant officers were simply not made aware of particular information. The objectivity in this standard also extends to requiring the entity ‘when it is on notice of information that potentially could be market sensitive, to make any further enquiries or obtain any expert advice needed to confirm its market sensitivity within a reasonable period’.45

Section 677 of the Act states that a ‘reasonable person’ would be taken to expect information to have a ‘material effect’ on the price or value of an entity’s securities 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 Enhanced Disclosure (ED) securities. While timely disclosure might be expected to entail the release of information prior to its having a market distorting effect on prices or values to ensure a level playing field is maintained, the requirement that information is to be made available to ASX ‘immediately’ may make practical management of the obligation more difficult, especially given the often claimed inverse relationship between information quality and timeliness. In its recently re-released Guidance Note 8 the ASX sanctioned the idea of immediately meaning ‘promptly and without delay’ as opposed to ‘instantaneously’:

Doing something ‘promptly and without delay’ means doing it as quickly as it can be done in the circumstances (acting promptly) and not deferring, postponing or putting it off to a later time (acting without delay). A period of time will necessarily pass between when an entity first becomes obliged to give information to ASX under Listing Rule 3.1 and when it is able to give that information to ASX in the form of a market announcement. This passing of time, of itself, does not mean

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46 The test as to materiality is set out in s 677 of the Corporations Act 2001 (Cth) and states that ‘a reasonable person would be taken to expect information to have a material effect on the price or value of ED securities of a disclosing entity 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 ED securities’. For general discussion see Damian Reichel, ‘Continuous Disclosure in Volatile Times’ (2010) 28 Company and Securities Law Journal 84. See also Janis Sarra, ‘Disclosure as a Public Policy Instrument in Global Capital Markets’ (2007) 42(3) Texas International Law Journal 875, 888. In applying this test for the purposes of the Listing Rules, ASX interprets the reference to persons who commonly ‘invest in’ securities as a reference to persons who commonly buy and hold securities for a period of time, based on their view of the inherent value of the security. In ASX’s view, it therefore does not include traders who seek to take advantage of very short term (usually intraday) price fluctuations and who trade into and out of securities without reference to their inherent value and without any intention to hold them for any meaningful period of time. See Australian Securities Exchange, ASX Listing Rules: Guidance Note 8, at [4.2]. The extent of influence necessary, in the opinion of Justice Gilmour in Australian Securities & Investments Commission v Fortescue Metals Group Ltd [No 5] [2009] FCA 1586, ‘is not... a high one’ [482], and in the words of counsel for ASIC ‘involves primarily a commonsense test for the Court upon a consideration of the primary facts’ in the circumstances. The guidance note in effect prior to the most recent update stated by way of further clarification that ‘a reasonable person would not expect information to be disclosed if the result would be unreasonably prejudicial to the company or disclosure would result in an inordinate amount of detail’. (ASX Guidance Note 8 (2003) Continuous Disclosure: Listing Rule 3.1 at [31].)
that there has been a “delay” in the provision of the information to ASX. Some announcements may be able to be prepared and given to ASX relatively quickly, while others may take longer to complete. The question in each case is whether the entity is going about this process as quickly as it can in the circumstances and not deferring, postponing or putting it off to a later time.47

Relevant considerations for ASX in determining whether information has been released in this manner include the source of information, its complexity, any warnings concerning its emergence, any need to verify its truth content, the time necessary to craft an accurate, complete announcement relating to the information, and the potential need for board or disclosure committee approval prior to the release of the information.48

An additional requirement in the legislative supplement in section 674(2) of the Corporations Act 2001 (Cth), that the relevant information was not ‘generally available’ at the time, must also be addressed to determine whether a breach of the listing rule also constitutes a contravention of the legislative supplement.49 The listing rule therefore requires disclosure regardless of

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47 Australian Securities Exchange, ASX Listing Rules: Guidance Note 8, at [4.5]. The note cites the the explanation of Cockburn CJ of related terms in Queen v Berkshire Justices (1879) 4 QBD 469, 471 approvingly: ‘The words forthwith and immediately have the same meaning. They are stronger than the expression within a reasonable time, and imply prompt, vigorous action, without any delay, and whether there has been such action is a question of fact, having regard to the circumstances of the particular case.’

48 See further Australian Securities Exchange, ASX Listing Rules: Guidance Note 8, at [4.5].

49 Corporations Act 2001 (Cth), s 674:
Continuous disclosure--listed disclosing entity bound by a disclosure requirement in market listing rules--Obligation to disclose in accordance with listing rules

(1) Subsection (2) applies to a listed disclosing entity if provisions of the listing rules of a listing market in relation to that entity require the entity to notify the market operator of information about specified events or matters as they arise for the purpose of the operator making that information available to participants in the market.

(2) If:  (a) this subsection applies to a listed disclosing entity; and
general availability while the legislative provision holds fire on more serious enforcement if the information was in fact generally available. Information is considered ‘generally available’ on s 676 if it consists of ‘readily observable matter’ or if it has been made known in a manner that would, or would be likely to, bring it to the attention of those who commonly invest in such securities.\(^5\) The management of these requirements by disclosing entities can prove tricky in practice, as seen in the case of Rio Tinto’s takeover of Canadian Aluminium producer Alcan where a one hour delay in informing the market led to its being issued a $100,000 fine.\(^5\)

No formal exemptions to these rules existed prior to 1994, with the ASX using discretionary powers to exempt companies from disclosure on a case by case basis.\(^5\) Given the fact that ‘it would be entirely contrary to the evident purpose [of the continuous disclosure regime] to construe either the listing rule or the statutory provisions as countenancing the disclosure of incomplete or

\(\text{(b) the entity has information that those provisions require the entity to notify to the market operator; and}
\)

\(\text{(c) that information:}
\)

\(\text{(i) is not generally available; and}
\)

\(\text{(ii) is information that a reasonable person would expect, if it were generally available, to have a material effect on the price or value of ED securities of the entity;}
\)

\(\text{the entity must notify the market operator of that information in accordance with those provisions.}
\)

\(^5\) R v Firns (2001) 51 NSWLR 548. See Damian Reichel, ‘Continuous Disclosure in Volatile Times’ (2010) 28 Company and Securities Law Journal 84, who notes, however, that Listing Rule 3.1 ‘effectively requires the company to announce (or, under Listing Rule 3.1B, confirm) information to the ASX even if it is otherwise “public”’. See also Angie Zandstra, Jason Harris and Anil Hargovan, ‘Widening the Net: Accessorial Liability for Continuous Disclosure Contraventions’ (2008) 22 Australian Journal of Corporate Law 51, 58.


misleading information’ and the fact that the premature disclosure of information can ‘prejudice an entity’s commercial interests’ and even give rise to false markets, the listing rules currently contain a range of valid exemptions for entities subject to the regime. These are geared towards ensuring only information ‘ripe’ for disclosure is so disclosed:

These exceptions seek to balance the legitimate commercial interests of listed entities and their security holders with the legitimate expectations of investors and regulators concerning the timely release of market sensitive information. They also seek to ensure that information is not disclosed prematurely when, rather than inform the market, it could misinform or mislead the market.

The order of considerations relevant to the assessment of whether the exemptions apply was recently amended by the re-release of Guidance Note 8 as follows:

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53 Jubilee Mines NL v Riley [2009] WASCA 62, per Martin CJ at [87] and [90].
54 ASX Guidance Note 8 (2003) Continuous Disclosure: Listing Rule 3.1 at [31]. This refers to the version in effect prior to the most recent update.
56 Australian Securities Exchange, ASX Listing Rules: Guidance Note 8, at [5.1]. ASX explains that listing rule 3.1A ‘is the balancing factor here. It seeks to avoid the premature disclosure of information initially by excluding from the requirement for immediate disclosure in Listing Rule 3.1 confidential information that is not yet ripe for disclosure (eg, because it concerns an incomplete proposal or negotiation or is insufficiently definite to warrant disclosure) and then only requiring it to be disclosed if and when it has ripened to an appropriate degree (eg, because the relevant proposal or negotiation has been completed or the matter has become sufficiently definite to warrant disclosure) or it has ceased to be confidential. It also seeks to avoid the inappropriate disclosure of information by excluding from the requirement for immediate disclosure in Listing Rule 3.1 confidential information that is a trade secret, that is generated for internal management purposes or that would give rise to a breach of law if it were disclosed’.
3.1A Listing rule 3.1 does not apply to particular information while each of the following is satisfied in relation to the information:

3.1A.1 One or more of the following 5 situations applies:

- It would be a breach of a law to disclose the information;
- The information concerns an incomplete proposal or negotiation;
- The information comprises matters of supposition or is insufficiently definite to warrant disclosure;
- The information is generated for the internal management purposes of the entity; or
- The information is a trade secret; and

3.1A.2 The information is confidential and ASX has not formed the view that the information has ceased to be confidential; and

3.1A.3 A reasonable person would not expect the information to be disclosed.\(^57\)

All three limbs above must be satisfied for the exceptions to become enlivened. Given conjecture as to the import of what was previously the first limb, the requirement that a reasonable person would not expect the information to be disclosed has been moved to become the third overarching consideration which managers must assess when deciding whether to disclose or not.\(^58\)

Accordingly, the first question management must ask is whether the information fits into any of the five categories specified. The first category, the disclosure of information which would result in a breach of the law

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\(^{57}\) Australian Securities Exchange, *ASX Listing Rules: Guidance Note 8*, at [1].

is excluded from disclosure because it would clearly be inappropriate and potentially harmful to a listed entity and its security holders to force it to disclose information if it is subject to a law prohibiting it from doing so. To fall within this category, the disclosure of the relevant information must breach a specific statute, regulation, rule, administrative order or court order binding on the listed entity. ⁵⁹

Confidentiality agreements will not satisfy this limb of the exceptions, as TZ Limited discovered in 2008. ⁶⁰ The second class of information specified in this limb of the exceptions – incomplete proposals or negotiations – exists to protect the development of a company’s negotiations and proposals and ‘because of the propensity of markets to overreact in the short term to information that a listed entity may be contemplating a market sensitive transaction, even where the likelihood of the transaction proceeding is low or unclear’. Likewise, information which is

- so vague, embryonic or imprecise;
- the veracity of the information is so open to doubt; or
- the likelihood of the matter occurring, or its impact if it does occur, is so uncertain

that a reasonable person would not expect it to be disclosed to the market ⁶¹, falls into the third category of matters which are insufficiently definite to

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⁵⁹ Australian Securities Exchange, *ASX Listing Rules: Guidance Note 8*, at [5.3].
⁶⁰ See discussion in Chapter Four below regarding the enforceable undertaking issued to TZ Limited.
⁶¹ Australian Securities Exchange, *ASX Listing Rules: Guidance Note 8*, at [5.5].
warrant disclosure. The driving force behind this exception is also likely the potential for false markets to eventuate on the release of such information.

As with the exemption relating to incomplete proposals or negotiations, information generated for the internal management purposes of the entity is afforded potential access to the exemptions to save the entity the ‘administrative burden’, not to mention the operational difficulties involved in having to conduct its business effectively in public, and the prejudice it might therefore suffer.62

Likewise, the trade secrets category is included in order to spare a company from the operational ramifications and prejudice it might suffer as a result of divulging information which ‘has economic value to a business because it is not generally known or easily discoverable by observation and for which efforts have been made to maintain secrecy. This may include a formula, recipe, device, program, method, technique or process’.63

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62 It includes information ‘generated externally (eg. by an adviser or consultant) may fall within this category provided it is going to be used for the internal management purposes of the entity (eg. to help inform a management decision). Management documents such as budgets, forecasts, management accounts, business plans, strategic plans, contingency plans, decision papers, minutes of management meetings and the like clearly fall within this category, as do board papers and board minutes. Professional advice (eg. from lawyers, accountants and financial advisers) will also usually fall within this category. However, for the avoidance of doubt, the mere fact that information may happen to be mentioned in a document generated for internal management purposes does not mean that the information itself falls within this category. Management documents often include information about potentially market sensitive events or circumstances, where those events or circumstances (as distinct from the document that refers to them) could not fairly be described as being information generated for internal management purposes. Information about such events or circumstances is not protected from disclosure by this category’. Australian Securities Exchange, ASX Listing Rules: Guidance Note 8, at [5.6].

63 Australian Securities Exchange, ASX Listing Rules: Guidance Note 8, at [5.7].
The next limb which must be satisfied is the requirement that the information is confidential and the ASX has not formed the view that the information has ceased to be of such character. For the purposes of the rule ‘confidential’ means ‘secret’.\textsuperscript{64} While the entity might believe the information is confidential, if evidence in the form of a reasonably specific and reasonably accurate media report or rumour arises, or a price or volume change in the entity’s securities of abnormal magnitude eventuates this may give ASX grounds to form the view the information in question has lost its confidential status. Given this can occur at any time, the entity employing this exception from disclosure must constantly ensure confidentiality remains intact if it wishes to validly rely on the exceptions.

In monitoring their compliance, companies must also be careful to deal with situations where a false market might be developing in their securities. A false market can eventuate when incomplete or misleading information either from the company or an outside source begins to have an effect on the ordinary course of price discovery. Selective disclosure or a loss of confidentiality resulting in certain groups having more information than others can also have the same effect.\textsuperscript{65} ASX has significant powers when dealing with a false market.

\textsuperscript{64} Information will be confidential for the purposes of that rule if:
- it is known to only a limited number of people;
- the people who know the information understand that it is to be treated in confidence and only to be used for permitted purposes; and
- those people abide by that understanding.


\textsuperscript{65} Where ‘a segment of the market is trading on the basis of market sensitive information that is not available to the market as a whole’: Australian Securities Exchange, \textit{ASX Listing Rules: Guidance Note 8}, at [6.1].
It can request the disclosure of material information which may have the valid protection of the exceptions, and conversely, information which does not have either of these characteristics, as for example in the correction of market rumours without substance.\textsuperscript{66} Overall, the listing rule provisions dealing with continuous disclosure are said to form an integrated set of rules intended to strike an appropriate balance between the interests of the market in receiving information that will affect the price or value of, or which is needed to correct or prevent a false market in, a listed entity’s securities at the earliest reasonable time, and the interests of the entity in not having to disclose information prematurely or where it would clearly be inappropriate to do so.\textsuperscript{67}

2.5 An undergirding theory? The essence of continuous disclosure

At the heart of these rules is a focus on the informational requirements of investors (actual or potential) and ensuring they are transacting on a playing field undistorted by the lack of relevant information in parts of it. Incidentally, such concern also lies at the heart of a theory which itself is often cited as the basis for continuous disclosure regulation – the Efficient Markets Hypothesis (EMH).

\textsuperscript{67} Australian Securities Exchange, \textit{ASX Listing Rules: Guidance Note 8}, at [3].
Put simply, the EMH argues that security prices move in a manner akin to a random walk, making it difficult to predict future prices with any real certainty and therefore ‘beat the market’. Depending on the market in question, security prices are said to fully reflect all relevant information, including historical prices (weak form), publicly available information (semi-strong form), and all information generally (both public and private). According to a key exponent of the EMH, Eugene Fama,

The primary role of the capital market is allocation of ownership of the economy’s capital stock. In general terms, the ideal is a market in which prices provide accurate signals for resource allocation: that is, a market in which firms can make production-investment decisions, and investors can choose among the securities that represent ownership of firms’ activities under the assumption that security prices at any time “fully reflect” all available information. A market in which prices “fully reflect” available information is called efficient.\(^{68}\)

Despite having fallen from its perch with the ascendancy of behavioural finance studies, which have cast doubt on the applicability and generalisability of central precepts of the EMH\(^ {69}\), given that continuous disclosure requires the release of some of the information which the central thesis of the EMH rests

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\(^{69}\) Faith in the EMH among economists has been weakening for some time. That is not new news; by the mid-1980s, market efficiency was already under attack by finance scholars of considerable prominence. Since then, however, the battle has turned into something akin to a siege. Critics are still increasing in visibility and numbers, with seldom an issue of the best finance journals appearing without at least one or two major papers offering either theoretical or empirical claims inconsistent with strong views of efficiency. Yet the orthodox are far from dead, and still have sizable numbers on their side.

upon (that is, information which leads to accurate pricing – prices which might then inform, among other factors, resource allocation) links are often made referring to the EMH as the driving force behind the establishment of continuous disclosure regulation. To the extent that such a link misses the regime’s central purpose – the creation of a level playing field in securities markets – this may be placing the cart before the horse.

The efficiency to which exponents of the EMH refer is tightly intertwined with the information release coterminous with compliance under a continuous disclosure regime. This efficiency also has a flow back effect on market integrity by ensuring prices reflect all available information, thereby building investor confidence that security prices are an accurate reflection of the value of their referents. The indubitable goal of the regime itself however, is to attempt to ensure all players are on an equal footing when it comes to determining those very prices which might then reflect efficiency in a market or not, which as seen above is the direct concern of proponents of the EMH.

While the information value of a security’s historical price might form information used by investors to make decisions, efficiently derived security prices themselves (what EMH focuses on) are not the type of information that the regime is geared toward the release of: should the EMH work such prices represent an amazing effect of a properly functioning regime if a market exhibits semi-strong efficiency, though price action in a simple sense is properly

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seen as an effect of the production and release of information required by the regime. To say the EMH comes first is therefore to burden a theory which speaks of the efficiency of information finding its way into prices with the weight of explaining market integrity measures such as continuous disclosure regimes. This is an important distinction in appreciating the significance of the regime, and one which is often easily glossed over when discussing the conditions required for the proper functioning of markets.

Information release therefore is a serious concern in and of itself for the confidence it breeds amongst investors in what the entities representing their securities are up to. There is no need to confuse and intertwine this importance with a separate yet related concern, the province of the EMH, as to how quickly and fully information which has been released is impounded into share prices. Indeed, if we see exchanges as playing two primary roles, providing both liquidity and price discovery, then as noted by O’Hara,

how well, and how quickly, prices adjust to fundamental values is an important metric for all exchanges. There are two main factors that influence the efficiency of this process. One is simply the fairness and integrity of prices. Exchange monitoring to prevent manipulation and front-running, as well as general regulation to prevent fraud and self-dealing, ensure greater price integrity. Second, and equally important, is the information structure itself. How much information on firms is available to investors affects how well prices reflect information. This information structure is enhanced through accounting rules, disclosure requirements and corporate governance standards. These are often
dictated by exchange listing requirements or by security market regulators. 71

The first factor mentioned by O’Hara above is embodied in market manipulation and insider trading provisions in the Corporations Act, while the latter is properly seen as the domain of continuous disclosure regulation. 72 These represent two sides of the same coin of market integrity, which as noted by O’Hara are the major factors influencing the efficiency of the price discovery process. Indeed, the very prioritisation of freedom in the market to allocate one’s capital to securities of varying risk profiles in accordance with one’s own personal appetite for risk bespeaks the underlying goal of continuous disclosure regulation: ensuring companies provide complete and accurate disclosure to enable informed decisions to be made about becoming involved with particular securities in a fair market. 73

While this levels the playing field, the skill and diligence of each player are of course left unregulated (except in instances of unfair advantage through insider trading or market manipulation to increase one’s edge) allowing the opportunity for there to exist winners and losers in the market. While corporate disclosure that is trusted by the market can result in a number of benefits, including a potentially lower cost of capital for the entity, leaving this

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71 Maureen O’Hara, ‘Designing Markets for Developing Countries’ (2001) 2(4) International Review of Finance 205, 206-7. O’Hara states that ‘[p]rice discovery refers to the ability of the market to find the efficient price. Efficient prices reflect the underlying prospects of a firm, and as these prospects change, so too should the price’ (207).

72 Although the monitoring function is also undertaken from a continuous disclosure angle through the issuance of price queries and aware letters, discussed in detail in Chapters Five and Six below.

73 As stated by the New South Wales Court of Appeal in the James Hardie litigation, ‘the timely disclosure of market sensitive information is essential to maintaining and increasing the confidence of investors in Australian markets, and to improving the accountability of company management’: James Hardie Industries NV v Australian Securities and Investments Commission (2010) 274 ALR 85 at [355].
completely in the hands of corporate management may not be the optimal solution in circumstances where the delayed release of material information could frustrate the goal of building trust in the market should the wind blow the wrong direction. Should a legislature defer to a voluntarist approach to the release of such information, pockets of inefficiency and unreliability may develop in the market if advocates of mandatory disclosure are to be believed, and may come to affect the efficiency of the market as a whole, or at the very least, perceptions of it. Mandatory continuous disclosure therefore appears to be the closest to a panacea one could hope for for this set of circumstances. What it attempts to achieve, should the rhetoric be believed, is the attainment and perpetuation of market integrity.

2.6 Market mythology? The aspirations of a disclosure regime

A lack of market integrity can deprive honest investors of their capital, reduce investor confidence, increase the cost of capital and deter order flow. Reduced order flow will in turn reduce market efficiency. The economic implications of such outcomes for both an exchange and the

74 ‘Since the premise of securities law is that the market will reward issuers engaged in effective governance, appropriate risk taking, and wealth maximising activities through the value of shares in the market, consequent credit ratings and other measures, information creates the conditions for those activities to be rewarded’. Janis Sarra, ‘Disclosure As a Public Policy Instrument in Global Capital Markets’ (2007) 42(3) Texas International Law Journal 875, 876.
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Former ASX Chief Richard Humphry pointed to the ASX’s market licence in making sense of the concept, stating ‘[a]s a licensed market operator, we are obliged to operate a market that is “fair, orderly and transparent” that is, a market of integrity’.\footnote{Richard Humphry, ‘ASX Business Is Market Integrity’, \textit{Australian Financial Review}, 24 July 2002, 71.
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Identifying market integrity by its effects one time chief of ASIC Tony D’Aloisio stressed the vital role of market integrity in ‘promoting confident and informed participation by firms and investors, thus contributing to an efficient and
prosperous economy'. He also made reference to its importance in attracting investors and the international competitiveness of the Australian market stating that ‘[f]or listed markets, the anonymity of transacting virtually mandates that participants have confidence that they can invest on a level playing field. Australia’s listed markets are well regarded – they are seen as clean and fair and this is reflected in the attraction of foreign investment and in the liquidity of our markets’.

This statement raises two important issues. First, while anonymity may promote integrity by providing less of a chance for preferential or other trading activity, the flipside of the coin is that it also permits covert operations to be undertaken without fear of identification. Secondly, the importance of the perception of integrity is probably as important as any potential measurement of integrity itself. This raises the possibility that investors might be distracted by rhetoric surrounding market integrity while missing the precise role, effect and promise of regulation including continuous disclosure in effecting it. It is therefore important that investors have an informed and realistic apprehension of the rules and exactly what they can and cannot achieve.

Given periodic disclosure operating solo has come to be considered somewhat insufficient in a climate where business conditions and fortunes change with

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83 Tony D’Aloisio, ‘ASIC’s Approach to Market Integrity’, speech delivered at the Clayton Utz Luncheon Lecture, Monash Centre for Regulatory Studies, 11 March 2010 at [5]. ‘Market integrity is important for promoting the liquidity and depth necessary to attract investors. This is particularly so in the case of international investors, who compare Australian financial markets against the rest of the world when deciding where to invest’, at [4].
unprecedented speed, the ideal of continuous disclosure has come to be seen as an essential structural component in the informational matrix of corporate disclosure. The sporadic release of material information at the whim of a corporation’s managers can lead to spikes and troughs and a rough ride in security prices, which often become mirrored in sharp dips in investor confidence (including importantly, international investors) in the markets in which they participate. This can lead to the choice to take their money out of play entirely leaving the game itself bereft of the market’s essential oil – liquid capital – turning the cogs of advanced industrial economies. This is perceived as anathema to continued steady economic growth and our ‘economic well-being’.

Such price fluctuations are therefore seen as undesirable in the management of the economic cycle for their effect on consumer confidence.

A well functioning set of rules around the continuous release of material information as and when the organisation becomes aware of it is therefore of serious value to the market for capital. The extent to which faith in any such system is justified by evidence relating to its enforcement and reporting practices pursuant to it is therefore an important question. Any lessons able to be drawn from the operation of such mechanisms for regulators, listed entities or lay investors is of value to their effective functioning inside a market which we wish to exhibit the quality of integrity.

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85 Investors are consumers – shareholders are properly seen as consumers of financial products including information provided as part of compliance with the regime.
To the extent that the regime is directed towards the objective of enhancing the integrity of the Australian market for capital and confidence in it, and improve the accountability of corporate management an important underlying requirement does exist.\textsuperscript{86} While the rules place a focus on materiality and timeliness, another requirement which is just as fundamental (the ignorance of which can also lead to contravention of the regime and serious consequences) is often glossed over. The quality of disclosures in terms of their completeness, truth content and digestibility by investors is crucial to adequate disclosure performance. While this point might seem basic, otiose even, many companies the subject of enforcement activity by ASIC and the ASX appear to have missed it and caused themselves serious difficulty due to their failure to observe a basic standard of quality in their releases. While most large listed entities have systems, processes and officers experienced in the handling and determination of information for release pursuant to the provisions at the ready, the continuing attention shown to companies at the smaller, less experienced end of the market by regulator enforcement activity says much about the lack of awareness of the need for quality as well as timely disclosure of material information. Analysis of enforcement activity can yield detailed insights into recurring disclosure practices which raise the ire and attention of the regulator due to a lack of quality, and from which better disclosure policies might be built.

\textsuperscript{86} The policy objective underlying the regime has been described by the NSW Court of Appeal in \textit{James Hardie Industries NV v ASIC} [2010] NSWCA 332, at [355] being concerned with enhancing the ‘integrity and efficiency of Australian capital markets by ensuring that the market is fully informed. The timely disclosure of market sensitive information is essential to maintaining and increasing the confidence of investors in Australian markets, and to improving the accountability of company management. It is also integral to minimising incidences of insider trading and other market distortions’.
2.7 Enforcement

In spite of the existence of exemptions deemed fair for the retention of information, difficult circumstances surrounding release, or the more sinister temptation for management to withhold material information from the market, can sometimes overshadow compliance and result in contravention of the regime. As noted above, legislative reinforcement of the listing rule is provided by Chapter 6CA of the Corporations Act. Section 674(2) effectively swallows up listing rule 3.1 and attaches various punitive and general civil consequences for breach.

The blending of market operator design, retro-fitted legislative support of the continuous disclosure provisions, and the continued development of both means that the responsibility for administering the regime is at the feet of the ASX and ASIC.\(^87\) The enforcement hierarchy which has developed since the inception of the regime has been said to represent an example of an enforcement pyramid, with legislative policy appearing to favour a broad array of enforcement mechanisms which might be deployed most effectively depending upon the circumstances surrounding breach.\(^88\) Higher order (ASIC

\(^{87}\) Today, compliance with listing rule 3.1 continues to be dealt with, in the first instance, by the ASX, which issues price queries wherever there appear to be irregularities in the trading of an entity’s securities or in the event of market rumours. Where the ASX forms the view that a contravention has occurred, the matter is referred to ASIC for further enforcement. See Corporations Act 2001 (Cth), s 792B. See also generally Merav Bloch, James Weatherhead and Jon Webster, ‘The Development and Enforcement of Australia’s Continuous Disclosure Regime’ (2011) 29 Company and Securities Law Journal 253.

and aggrieved investors) and lower order (ASX) enforcement mechanisms have been employed and pursued by both entities with varying levels of success.

2.7.1 Higher level enforcement involving court time

Prior to the extension of legislative support of the continuous disclosure requirements found in the listing rules, the only enforcement actions available to ASX were based on its contract with each listed entity allowing it to suspend trading in or even delist a company’s securities from the official market.89

Once legislative support was extended to the continuous disclosure provisions in the listing rules in 1994 the regime had the added force of criminal penalties behind it. Failure to comply with listing rule 3.1 is a criminal offence under s 674(2) for the disclosing entity and can lead to criminal penalties as per s 1311 of the Corporations Act, with the maximum punishment being in the order of 200 penalty units. Proof establishing guilt beyond a reasonable doubt must be led if such an allegation is to hold water, making this the least employed of all enforcement options. If directors, officers or advisors aid, abet, counsel or procure the breach by the disclosing entity they may also be found criminally liable.90

Given the lack of flexibility of the ‘big stick’ in the form of criminal penalties, s 674 was made a civil penalty provision in 2002 courtesy of the Financial Services Reform Act 2001 (Cth). This is also when the regime was freed from requirements relating to intentional, reckless or negligent behaviour inducing breach of the regime. At the time it only applied to corporations and the maximum pecuniary penalty amount was set at $200,000. Amendments in 2004 as part of the CLERP 9 Act increased the maximum penalty for corporations from $200,000 to $1 million, and extended civil liability to persons involved in an organisation’s contravention (ss 674(2A) and 675(2A)), meaning that civil penalties could be sought by ASIC against directors and executive officers involved in a contravention of the regime (ss 1317E(1) and 1317DA)\(^\text{91}\) including pecuniary penalties of up to $200,000 (s 1317G(1a)), disqualification orders (s 206C), and compensation (s 1317HA). Proof is on the balance of probabilities meaning no fault element need be established, solely that material information of which the company was aware was not disclosed and none of the exemptions applied. Of course the penalties relating to individuals are also relatively diminished when compared with jail time. The reasoning behind this change was that civil penalties might serve to act as a more forceful

\(^{91}\) A person deemed ‘involved’ in the contravention can escape liability if they took all steps reasonable in the circumstances to ensure compliance by the entity, and believed on reasonable grounds that the entity had indeed complied with its obligations: Corporations Act 2001 (Cth) s 674(2B).

and effective deterrent than financial penalties imposed solely on the entity. Persons affected may also apply for a compensation order: s 1317J.\(^{92}\)

Up until the enactment of the *Corporate Law Economic Reform Program 9 (CLERP 9)* Act (Cth) in 2004, no criminal prosecutions relating to continuous disclosure breaches had been launched and only a handful of civil penalty applications had been initiated between the extension of the civil penalty regime to market misconduct provisions including continuous disclosure breaches in 2002, and the introduction of the CLERP 9 Act on 1 July 2004.\(^{93}\) To date there has only been one (failed) attempt to prosecute continuous disclosure at a criminal level which was undertaken post the 2004 CLERP 9 changes.\(^{94}\)

A failure to continuously disclose can also be pursued via the misleading and deceptive conduct provisions in s 18 of the Australian Consumer Law in the Competition and Consumer Act 2010 (Cth) and s 1041H of the Corporations Act. An entire body of jurisprudence has grown around s 18 (formerly s 52 of the Trade Practices Act 1974) and related provisions, a detailed examination of

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\(^{92}\) ‘Civil liability can also arise under general provisions which enable a court to order the payment of damages caused by a contravention of the *Corporations Act 2001* (Cth), ss 1324 and 1325. Proceedings for damages under these general provisions can be taken by ASIC or by any person whose interests have been affected, such as, potentially, shareholders who can be encouraged by litigation funders or class action plaintiff lawyers to claim that they bought shares without the company having made disclosure required by Listing Rule 3.1 and s 674’: Damian Reichel, ‘Continuous Disclosure in Volatile Times’ (2010) 28 *Company and Securities Law Journal* 84, 87.

\(^{93}\) These powers were first used by ASIC against Southcorp Ltd, discussed in Chapter Three below.

which is beyond the scope of this dissertation. Two important points to note however are that while no set penalty exists as the section usually enlivened to make such allegations, s 1041H only attracts civil liability, and the regulator or a person aggrieved can apply for compensation for loss without having to prove any intent or like fault element.95

While Reichel has understandably argued that ‘[i]t would seem unlikely to have been Parliament’s intention that there should be a specific statutory liability regime for continuous disclosure which can effectively be ignored by taking proceedings under the misleading and deceptive conduct provisions’96, recent judgments at the highest reaches of the Australian legal system have actively considered and applied misleading or deceptive disclosure jurisprudence to address allegations of such conduct in cases involving a lack of disclosure. Some of the differences between the application and use of s 674(2) and s 18 of the Australian Consumer Law in cases brought thus far are considered below. Other civil remedies which might be of use to claimants are the directors’ duties, and Part 9.5 of the Act including s 1324 injunctions.97

The rise of the litigation funded class action lawsuit in Australia has seen a corresponding increase in aggrieved investor actions against companies for

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95 That said, it is important to note here that no fault element needed to be established in pursuing this remedy: ‘It is sufficient to establish a breach of the misleading and deceptive conduct provisions if it is established, objectively, that the company made a statement which was misleading’. See Damian Reichel, ‘Continuous Disclosure in Volatile Times’ (2010) 28 Company and Securities Law Journal 84, 88.


97 See s 180 of the Corporations Act 2001 (Cth) whereby a failure to disclose may be construed as a failure to demonstrate care and diligence in relation to the director’s company. Section 1324 allows the court to award damages and under s 1324B to require an entity to disclose information correcting any failure to disclose.
alleged poor continuous disclosure performance. There have been several large shareholder class actions relating to continuous disclosure launched in recent years, most of which have settled and not been dragged, for better or worse, through the courts.

2.7.2 Administrative sanctions

Difficulties encountered by ASIC in its policing of the continuous disclosure regime and subsequent requests from ASIC for less cumbersome firepower to be added to its enforcement armoury which could be directed at quickly responding to less serious contraventions of the regime led to the introduction of the infringement notice mechanism via the CLERP 9 Act, noted above, in 2004. This measure was designed to supplement existing criminal and civil enforcement measures and function as an “on the spot fine” for continuous disclosure breaches. Through s 1317DAC ASIC has the power to issue an infringement notice if it has reasonable grounds to believe that a disclosing entity has contravened sss 674(2) or 675(2). The measure was introduced to remedy a significant gap in the current enforcement framework by facilitating the imposition of a relatively small financial penalty (depending on the market capitalisation of the organisation – either $100,000, $66,000, or $33,000 for $1 billion, above, or below $100 million in market capitalisation respectively) and

requiring information disclosure in relation to relatively minor contraventions of the continuous disclosure provisions of the Corporations Act that would not otherwise be pursued through the courts. The capacity to issue an infringement notice also allows ASIC to signal its views concerning appropriate disclosure practices to listed entities more effectively than through court action alone.  

This has been said to represent a policy reversal from an initial position which saw the primary responsibility for enforcing contraventions of the regime as lying squarely on the ASX’s shoulders with the support of the legislative backing of the rule, the threat of criminal penalties flowing from which were expected to have preventative force. With the passing of time and legislative review however, ASIC has come to play an ever more significant role in the policing of the continuous disclosure regime. The reasons underlying this policy reversal appear to stem from the difficulties in enforcement faced by the ASX and ASIC whose earlier penalties had an ‘all or nothing’ character about them (suspension, delisting, criminal sanctions, civil penalties), resulting in a reluctance in their employment, and a potentially a resulting lack of faith in the continuous disclosure regime in the face of questionable company disclosure practices.

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100 Parliamentary Joint Committee on Corporations and Financial Services, CLERP (Audit Reform and Disclosure) Bill 2003 (Part 1, 2004) at [6.27] quoting Corporate Disclosure: Strengthening the Financial Reporting Framework (Commonwealth of Australia, 2002) at [149]. ‘If the company complies with the notice, ASIC is precluded from taking civil penalty proceedings for a pecuniary penalty order. However, the company remains exposed to a compensation order. Whether or not the company complies with the notice, the issue of an infringement notice closes off the possibility of criminal proceedings’. See Damian Reichel, ‘Continuous Disclosure in Volatile Times’ (2010) 28 Company and Securities Law Journal 84, 87.


The regulatory guide also sets out 10 steps in the infringement notice process, which begins with an ASIC investigation, and if an infringement notice is deemed appropriate, moves to the briefing of an ASIC delegate who will examine the matter with a fresh set of eyes (not having been involved in any initial investigation). If the delegate believes a breach has occurred, a hearing notice is issued to the entity where evidence may be presented, and a hearing is held to determine whether to issue an infringement notice. If reasonable grounds exist for believing a breach has occurred, an infringement notice will be issued with the entity being given 28 days to comply.

If the notice is complied with, ASIC is not able to begin civil or criminal proceedings against the entity. If it does not comply within this time frame, the entity may seek an extension or seek to have the notice withdrawn (s 1317DAI(1)), or choose not to comply with the notice at all. If it chooses the latter, ASIC faces a tough decision as to whether to commence civil proceedings against the entity under Pt 9.4B and/or s 1324B of the Corporations Act, with the maximum civil penalty being $1 million. ASIC can choose to withdraw the notice, and if it does so, it is not restricted in the action it may take against the entity.

In its Regulatory Guide 73, ASIC explained that infringement notices were ‘designed to provide a fast and effective remedy so that redress is proportionate and proximate in time to the alleged breach. The matter will be
dealt with in a timely and efficient way, while still providing significant protection to the disclosing entity’.¹⁰³

At around the same administrative level of the enforcement hierarchy exist enforceable undertakings. In November 1996 as part of its review of the first 18 months of legislative support of the listing rule, CASAC recommended that ASC have the option to accept enforceable undertakings in its policing of the continuous disclosure rules.¹⁰⁴ Simply stated, an enforceable undertaking is a promise by a company or an individual, enforceable by the court, not to do a certain act. If ASIC suspects that a party is breaching the law, either ASIC or the party can propose to enter into an undertaking under s 93AA and s 93A of the Australian Securities and Investments Commission Act 2001 (ASIC Act).¹⁰⁵

When an undertaking is made concerning the regime it usually requires an entity to review its internal compliance and disclosure systems and to have such procedures independently audited. Accordingly, enforceable undertakings go further than simply penalising the contravening conduct by facilitating good corporate governance and avoiding further breaches of continuous disclosure obligations. ASIC has itself noted that enforceable undertakings can be used to


¹⁰⁴ Bloch et al comment that ‘this was likely a response to the fact that the ASC had not yet commenced a single prosecution’: Merav Bloch, James Weatherhead and Jon Webster, ‘The Development and Enforcement of Australia’s Continuous Disclosure Regime’ (2011) 29 Company and Securities Law Journal 253, 270

influence behaviour and encourage a "culture of compliance". Both substantive (court) and cultural (market expectations) forces are at hand to compel compliance with the undertaking made.

2.7.3 Lower level enforcement options

While there exists plenty of publicity around higher and middle level (though lower frequency) enforcement activity involving court time, civil penalties and infringement notices, much less attention is paid to lower level enforcement of the regime by the ASX, and its referral of cases of suspect disclosure to ASIC. This is regrettable as it is arguably where the majority of the work involved in attempting to generate and maintain market integrity is being done, and where improvements might be made to the regime to make it more effective on a day-to-day basis.

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107 See J Coffey, 'Enforcement of Continuous Disclosure in the Australian Stock Market' (2007) 20(3) Australian Journal of Corporate Law 301, 306. Coffey insightfully notes that 'ASIC elicits a certain degree of peer pressure to enforce the undertaking by exposing the relevant person, or company, to the rigour of detailing the undertaking on a public register. The publication of these undertakings is a key element in the successful implementation of the agreements. Public awareness of the undertaking by peer companies and investors is designed to stimulate compliance by the delinquent company'.
ASX Compliance fulfils the ASX’s market oversight obligations contained in the Corporations Act 2001 (Part 7.2, Division 3) by monitoring and enforcing compliance with the market’s operating rules. In policing this requirement, the ASX Listings Unit and its dedicated surveillance team uses sophisticated technology ‘to monitor trading in listed securities to identify situations where trading may be taking place and the market is not reasonably informed’. If concerned that less than transparent behaviour may have been responsible for unusual movements in security prices or trading volumes a Listings Advisor contacts the entity to ‘explore whether it is in possession of information that ought to be announced to the market’.

Evidence of formal communication between ASX and the company concerned comes in two forms. Price and/or volume queries are issued when the ASX is concerned that a lack of disclosure might be responsible for movement in the company’s share price or unusual trading volumes. In contrast to price and volume queries which are issued prior to new information potentially being released, aware letters are usually issued after an announcement has been made by a listed entity where the company is asked for details relating to when it actually became aware of the material information contained in a recent announcement which impacted upon the price or value of its securities. This illustrates the importance of administering the regime from both ends, both post and pre (potential) announcement of sensitive information.

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109 A wholly-owned subsidiary of ASX Ltd.
Queries and responses to them are made available through the announcements platform on the ASX website once received.\footnote{\url{http://www.asx.com.au/asx/statistics/announcements.do}.} They constitute a valuable source of information concerning the type of situations which raise the ASX’s attention, and the analysis of recurring themes within them can assist in determining best practice for different issues connoting corporate compliance with the regime on a daily basis. While queried companies may learn from the immediate issuance and response to a query which they may have had to deal with themselves, it is unlikely that this wealth of information is ever waded into by managers of other entities to get a sense of points of improvement for their own disclosure performance, and this is understandably so, given the volume of data concerned.\footnote{The two years of data constituted by 1389 price queries and aware letters analysed in Chapters Five and Six of this dissertation amount to well over 2000 pages of material.}

Price queries and aware letters are important frontline elements in the enforcement of the continuous disclosure obligation. This is because they demonstrate that material price and volume changes are pursued by the ASX to obtain further potential evidence of non-compliance, which if serious enough will warrant being forwarded on to ASIC for higher level enforcement action. Indeed the process itself is productive of the release of material information by companies in some cases. The analysis of company responses to these price queries can therefore yield valuable insights into the operation of the regime at a practical level and the extent to which companies identified as having engaged in questionable conduct are in compliance with the regime.
2.8 Continuous disclosure and market integrity

While a wide array of enforcement options fashioned to encourage compliance and deal with contraventions exist, questions surrounding their efficacy haunt the regime.\(^{114}\) Despite the fact the full extent of compliance might never be reliably measured\(^{115}\), analysis of available evidence in the form of public releases of information pursuant to enforcement of the regime – both from regulators and companies – can yield insights into the nature of compliance and the practical management of the disclosure obligation by companies which is important to shareholders and potential investors, as well as regulators. This also affords the opportunity to understand the operation of different enforcement mechanisms and unearth any areas for better practice on behalf of corporations such that they might avoid mistakes previously made by others.

Given such information reflects the only publicly available record of potential and actual continuous disclosure breaches available (short of decided cases and the basic information provided by ASIC through its issuance of infringement notices and enforceable undertakings), their analysis can provide deeper insights into the extent to which enforcement activities surrounding the regime are supportive of market integrity, and therefore provide a solid basis for faith in the regime itself. Indeed the extent to which the seeming failure to disclose


\(^{115}\) This is due to the potential lack of a perceptible effect of non-disclosure, for example, withholding material information a reasonable person would expect to be released which remains confidential until released to the market as a whole at a later date, and which has no impact on security prices or trading volumes.
information at an earlier date, volatility in price and trading volumes and other pieces of circumstantial evidence are pursued and adequately explained (or not) can have an important effect on perceptions of the integrity of the market. Should too few of such instances merit the attention of regulators, faith in the regime would likely be low as perceived breaches would appear to go unpunished. While previous research has found that ‘the greatest impact on compliance is likely to occur when a regulator is seen to be actively enforcing contraventions of the law’\textsuperscript{116}, as far as the market is concerned, active enforcement is also the key to achieving the end of the regime itself – the development and maintenance of investor confidence.\textsuperscript{117}

The analysis of enforcement activity including the circumstances surrounding their enaction, the quality of disclosures complained of, and the operation of the rules upon them can provide a deep sense of issues surrounding the regime both from a company and lay investor perspective. Prior literature on continuous disclosure has been diverse, with research focussing on a number of themes from the theoretical underpinnings of the regime, through empirical analyses of some measure of compliance, to modes of enforcement and their practical operation given the co-regulatory structure shared by the ASX and ASIC. Given the general operation and development of the regime as a whole has attracted its fair share of interest, and the fact such papers choose to deal with multiple cases in the one discussion, there has only been the odd paper

\textsuperscript{116} Michelle Welsh, ‘Continuous Disclosure: Testing the Correspondence between State Enforcement and Compliance’ (2009) 23 \textit{Australian Journal of Corporate Law} 206, 232.

engaging in sustained doctrinal analysis of major court decisions, with fewer engaging in deeper forensic analyses of the circumstances surrounding potential breaches.

While the former have done well to clearly explain the attraction of the continuous disclosure provisions to a set of circumstances as well as the decision of the relevant court in a particular case, none appear to have analysed the entire body of cases to springboard into an assessment of the state of play surrounding regulatory pursuit and judicial interpretation of the provisions to assess whether the use of court based remedies is effective in this space, and what lessons might be learnt from such enforcement thus far.

This is understandable given the few instances which have admitted of continuous disclosure issues, yet given ASIC’s latest attempt in the Fortescue litigation the question as to the proper role of court action in the enforcement of the regime is as ominous as ever. Important as this reason for in depth analysis of past cases is, a further reason as regards this project as a whole is the detailed understanding and establishment of a standard for the analysis of conduct attracting enforcement activity which does not proceed to court level, which is the subject of later chapters of this dissertation.

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The mechanism in the enforcement hierarchy attracting the most scholarly attention has been the infringement notice mechanism, followed by sparse yet interesting research on the issuance of price queries by the ASX. The former vein of research has uncovered several important themes underlying the operation of the infringement notice in the enforcement of the continuous disclosure provisions including the scope of the penalty and the discretionary element in its use by ASIC; the reality of the ‘business nature’ of a decision to comply with a notice; ASIC’s seemingly arduous journey in deciding whether to issue an infringement notice leading to enforcement action which is not proximate to the breach alleged; the difficulty in augmenting a ‘culture of

121 The only public information available as far as infringement notices are concerned involves only the entities which have actually complied with one. ASIC publishes details of infringement notices which have been complied with when finalised, presumably keeping with the educative goals of the mechanism. Most companies studied (though not all) also make their own announcement in relation to the payment of the fine. Unfortunately, information regarding infringement notices issued but not complied with is, strictly speaking, unavailable. While s 1317DAI(1) of the Corporations Act prohibits ASIC from publicising details of companies which fail to comply with an infringement notice, this has not stopped ASIC revealing its suspicion of Telstra on one occasion, though despite issuing an infringement notice which was not complied with, ASIC chose not to pursue the company further. Nevertheless, there is no real way of knowing whether a company has been issued an infringement notice if it has chosen not to comply with it. For more on the Telstra story, see Senate Estimates Committee hearing on 16 February 2006 available at <http://www.aph.gov.au/hansard/senate/committee/S9100.pdf>.

122 ASIC and its officers appear to give insufficient weight to the day-to-day commercial realities omnipresent in companies and the priorities and pressures on directors that come with those realities. ASIC has the benefit of perfect hindsight when it comes time to determine the appropriateness of a director’s conduct. It appears that these inherent practical difficulties faced by directors are not taken into account when that conduct comes to be questioned by ASIC. ... At times, ASIC appears to be unreasonable in applying its discretion. Rebecca Langley, ‘Over Three Years On: Time for Reconsideration of the Corporate Cop’s Power to Issue Infringement Notices for Breaches of Continuous Disclosure’ (2007) 25 Company and Securities Law Journal 439, 459.

123 Greg Golding and Natalie Kalfus, ‘The Continuous Evolution of Australia’s Continuous Disclosure Laws’ (2004) 22 Company and Securities Law Journal 385, 406: ‘In view of the maximum fine of A$100,000, for most companies there is no economic reason to dispute the issue with ASIC, and indeed every commercial and economic reason to pay the penalty and move forward. As such, the question will be whether there are significant disincentives to pay the penalty’.

compliance\textsuperscript{125}; the (under)use of other mechanisms such as enforceable undertakings\textsuperscript{126}; and the possible need to tweak with the decision-making apparatus in making the final decision to issue an infringement notice.\textsuperscript{127}

While analyses of the performance of ASIC as regards its employment of the infringement notice mechanism vis a vis stated goals at its inception have been performed at the early stages of the use of this tool, given the sample has doubled it is time once again to determine whether the use of the infringement notice is living up to its aims. Important compliance lessons can also be learnt from entry into enforceable undertakings, conditions of which are also published. Enforceable undertakings are of potential use to company

\textsuperscript{125} In her review of the enforcement options available to ASIC in 2007, Coffey stated that ‘[i]nevitably, even with the complete enforcement pyramid of deterrent sanctions, the Australian market still requires a positive “culture of disclosure” on the part of listed companies rather than the more negative “culture of compliance” that now exists’, a sentiment which appears crucial in view of recent financial history: Josephine Coffey, ‘Enforcement of Continuous Disclosure in the Australian Stock Market’ (2007) 20 Australian Journal of Corporate Law 301, 315.

\textsuperscript{126} In their 2007 paper on the sanctions available to ASIC in the policing of continuous disclosure, Nehme et al conclude that

\textsuperscript{127} Rebecca Langley, ‘Over Three Years On: Time for Reconsideration of the Corporate Cop’s Power to Issue Infringement Notices for Breaches of Continuous Disclosure’ (2007) 25 Company and Securities Law Journal 439, 466: An initial proposal to address the main concerns relating to the infringement notice process is to replace the private hearing conducted by the ASIC delegate with an inexpensive and informal review hearing before an independent tribunal with the power to make the final decision on the issue of an infringement notice. While the author concedes that this initial proposition would not perfect the current unsatisfactory regime, it would be a move in the right direction.
management as the conditions therein illustrate what ASIC believes to be better practice relating to continuous disclosure compliance in modern organisations.

While much has been written concerning the operation of higher and middle levels of enforcement activity, comparatively little has been written concerning lower level enforcement activity and the referral of any instances of suspected breaches to ASIC.

The first study in the area by Neagle and Tsykin in 2001, investigated price queries issued between January 1999 and December 2000. Their study sought to investigate whether particular company characteristics (for example, profitability) might explain difficulties in compliance with the regime as indicated by the incidence of ASX queries. From an analysis of characteristics of companies in receipt of a price or volume query in the period under investigation they were able to build a profile of a company with a propensity for potential non-disclosure. Neagle and Tsykin’s study concluded that characteristics which might assist the regulator in identifying such companies include profitability (with over 75 per cent of companies in the sample registering negative current earnings), size (over 80 per cent of companies with price queries issued having a market capitalisation of less than $100 million).


129 Anne-Marie Neagle and Natasha Tsykin, ‘Please Explain’: ASX Share Price Queries and the Australian Continuous Disclosure Regime (2001), Centre for Corporate Law and Securities Regulation, The University of Melbourne, 41.

130 Anne-Marie Neagle and Natasha Tsykin, ‘Please Explain’: ASX Share Price Queries and the Australian Continuous Disclosure Regime (2001), Centre for Corporate Law and Securities Regulation, The University of Melbourne, 41. ‘Potential’ for the issuing of a query of course does not necessarily indicate an actual case of non-disclosure.
and industry group classification, with materials and biotechnology securities being the subject of the most ASX query attention.\footnote{Anne-Marie Neagle and Natasha Tsykin, ‘Please Explain’: ASX Share Price Queries and the Australian Continuous Disclosure Regime (2001), Centre for Corporate Law and Securities Regulation, The University of Melbourne, 3. The authors note of course that ‘not all unexplained price movements are necessarily a result of non-disclosure’.
}

Neagle and Tsykin also studied subsequent disclosures made by companies after the issuing of a query to determine whether companies had engaged in poor disclosure practices and only released material information after their response to the ASX query. Their conclusion was that ‘companies may not be adequately answering the ASX questions’\footnote{Anne-Marie Neagle and Natasha Tsykin, ‘Please Explain’: ASX Share Price Queries and the Australian Continuous Disclosure Regime (2001), Centre for Corporate Law and Securities Regulation, The University of Melbourne, 29.} as they found announcements containing material information being made in the period immediately following the initial query. Neagle and Tsykin also highlighted the fact that many companies exhibited reactivity as opposed to proactivity as far as their disclosure obligations were concerned. This was evidenced by the fact that nearly 16 per cent of companies queried included a release of material information after being prodded by an ASX query. The report advocated a change to the questions posed in the ASX’s queries, which have since been made. The report also advocated further education and training surrounding the regime.

Another contribution by Gong in 2007\footnote{Ning Gong, ‘Effectiveness and Market Reaction to the Stock Exchange’s Inquiry in Australia’ (2007) 34(7-8) Journal of Business Finance & Accounting 1141.} analysed price queries issued in the period between 1 July 1998 and 30 June 2000 (three quarters of this period also being covered by the Neagle and Tsykin study). While categorising responses
differently from Neagle and Tsykin, Gong’s conclusions are interesting as they demonstrate that once replies to queries were made public trading volumes and bid-ask spreads were reduced, share prices stabilised in most cases with the following two exceptions: (1) The price continued to rally on average if the company released only partial information when questioned after a significant price jump; (2) The downward price trend reversed if the company stated that no new information could explain the decline.\textsuperscript{134}

Gong’s study draws attention to the likelihood that the circumstances surrounding the initial query involved a lack of disclosure of price sensitive information. Evidence in the form of trading volumes, bid-ask spreads and price movements prior and post the release of a company’s response to an ASX query illustrates the importance of ASX surveillance of the market in weeding out suspect cases and effecting prompt disclosure.

In relation to this surveillance, a study by Marsden and Poskitt in 2009\textsuperscript{135} goes further still in interrogating the data to critique an ASX response to the Neagle and Tsykin study which ‘suggested that most of the unexplained price and volume movements detected by its market surveillance systems reflect speculative trading rather than information-based trading’.\textsuperscript{136} The ASX also noted that small stocks often traded infrequently and this illiquidity contributed to the relatively high number of alerts and price queries for these stocks.

Marsden and Poskitt analysed price queries from 1 July 2001 to 30 June 2003 to test whether the speculative trading explanation by the ASX could account for price movements prior to the issuing of a query in cases of a no-news response by a company. The study found there was no strong evidence consistent with the speculative trading hypothesis, the authors stating their results were ‘more consistent with trading by informed investors’. 137 While stating that further research was required before providing a definitive answer as to the source of such trading, they state that ‘one possibility is trading by company insiders (or their associates) or by investors who have benefited from the selective disclosure of non-public information by company officers’. 138 Recent research such as that performed by Drienko and Sault in 2011 also suggest interesting future directions which research might take, such as the analysis of the propensity of companies reporting negative answers in response to ASX queries to release information subsequent to their response to a query. 139 Such research into the regime is to be welcomed, especially for the empirical measures which have been employed to direct attention to the potential existence of informed trading in the market. 140 Indeed, the picture painted by these studies relating to the probability of non-continuous disclosure in the Australian market is cause for great concern and worthy of further detailed

140 While the use of such tools is beyond the scope of this dissertation, they are important to keep in mind as they may provide results on the same data which widen the perspective provided by qualitative analysis of the same phenomena.
investigation. This is especially the case in view of the fact that none of these previous studies analyse query data any more recent than June 2003 (with the recent exception of Drienko and Sault). Nevertheless, while these studies have generated important findings at a more generalised level concerning the potential extent of non-continuous disclosure in the Australian market, specific instances and patterns of questionable disclosure activity have not been analysed to the same extent in the literature.

While pioneering in their approach, these studies chose to remain quantitative in their focus, analysing the frequency of the incidence of particular phenomena over a particular period; there has been no analysis of the content of the disclosures themselves however beyond placing them into a category and explaining basic qualitative considerations. This is regrettable as such instances are worthy of further detailed investigation for the fresh insights they might offer into the operation of the regime. Indeed, such analysis, with a view to determining whether any recurring issues can be dealt with through better disclosure practice such that less price spikes occur and fewer price queries and aware letters are issued because of them, may be contributive to longer term positive trends in market integrity and perceptions of it.

While the empirical accounts discussed above are valuable in their own way, other empirical investigation into the regime demonstrates the need for a more detailed consideration of the content of disclosures themselves and the process
of their generation within organisations.\textsuperscript{141} An approach which is able to drill down into the actual instances of potential non-disclosure and understand what has generated the anomalous readings picked up by more aggregative research methods is necessary. For this reason a methodology involving content analysis of company responses to ASX queries, and their categorisation into groups for analysis of discrete recurring themes has been chosen for the purposes of this dissertation. This approach allows for the detailed analysis of vast and complex data and allows for the generation of ‘thick’ and ‘rich’ insights into it.\textsuperscript{142}

While this is deeply involved and time-consuming work with its own attendant difficulties surrounding the consistent coding of disclosure type and quality\textsuperscript{143}, if researchers are interested in improving poor disclosure practice in addition to counting it, attention must be focused on disclosure behaviour potentially found wanting by the ASX, as evidenced through its issuance of price queries and aware letters. While many of these queries indicate no wrongdoing on the part of the company being questioned, there do appear to be instances where a failure to initially disclose or an inadequacy of any initial or subsequent disclosure to satisfy the regime might fruitfully be analysed to determine points of best practice. This is especially important in view of claims that conditions ripe for insider trading exist in markets including Australia’s.\textsuperscript{144} The potential


\textsuperscript{142} R K Yin, \textit{Case Study Research: Design and Methods} (1994), Sage Publications, CA.

\textsuperscript{143} See differences in approaches of Neagle and Tsykin on the one hand, and Gong on the other, noted above.

damage this can do to market integrity and perceptions of it is of serious
concern.

Perhaps due to the inability in a single published paper to capture the entire
panoply of enforcement measures in the one snapshot within the constraints of
a journal article, there has not been a detailed qualitative analysis of the regime
as a whole to clearly articulate points of recurring concern at different levels,
and gain or offer a sense of the relative merit of each type of enforcement
mechanism and the extent to which its use builds or detracts from the faith one
might place in the integrity of the market. Nor has there been an attempt to
offer an analysis of the types of circumstances inviting enforcement attention
and an assessment of the quality or lack thereof of corporate disclosures
pursuant to compliance with the regime in certain circumstances, notably at
the lower reaches of the enforcement hierarchy.

Through the analysis of all species of enforcement activity this dissertation aims
to provide a deeper understanding of the relative merit of each type of
enforcement mechanism as well as any recurring issues with each for both
corporate and lay investor attention. Such analysis will allow a realistic
assessment of the limits of continuous disclosure as a prophylactic device in
financial markets, and might therefore temper expectations surrounding it, as
well as the enforcement activity or the seeming lack thereof supporting it.
3. JURISPRUDENCE SURROUNDING THE CONTINUOUS DISCLOSURE REGIME

The course of development of the enforcement artillery surrounding Australia’s continuous disclosure regime has been well charted.\(^{145}\) Aside from immediate suspension or removal from the official list of any particular market for a continuous disclosure breach, litigation and the potential consequences flowing from it are likely causative of the most distress amongst directors and executive management. Given their position at the top of the enforcement hierarchy and their attendant consequences (criminal, civil, financial and reputational) this should be no surprise. Consider the Fortescue Metals Group saga, which after 8 years of litigation had spent hundreds of hours before various benches in the court hierarchy, seen millions of dollars chewed up in legal fees (ASIC’s exposure to this was reportedly $30 million\(^ {146}\)) and cost the company and its management significant time and stress while casting a pall over its reputation. All this, without necessarily advancing the ends of the regime except to signal to the market that ASIC was not afraid to bark at shadows.

Nevertheless, with the nascent popularity of litigation funding and its appeal to aggrieved investors, it is important to understand existing jurisprudence from decided cases in the continuous disclosure space more than ever. The actual carriage of the matters constituting this body of jurisprudence and the steps traced by particular courts in the final determination of a result are important.


factors to bear in mind when assessing whether the interaction of the judiciary and ASIC with the regime and possible sanctions serves the regime’s broader aims. This chapter analyses the handful of fully determined cases involving allegations of a breach of the regime to discern wanting aspects of corporate disclosure which might be learnt from, offer an understanding of the judicial application of relevant legislation to disclosure issues, and assess the efficacy of such activity in the frame of the broader ends of the regime.

3.1 Australian Securities and Investments Commission v Southcorp Limited [2003]

In Australian Securities and Investments Commission v Southcorp Limited (No 2) [2003] FCA 1369147 Lindgren J approved a $100,000 pecuniary penalty in settlement of an Australian wine producer’s contravention of the continuous disclosure regime.148 This case represents the first civil action brought by ASIC for contravention of the regime.149 While the contravention – involving the selective briefing of analysts prior to releasing material information to the market as a whole – was found to have been an inadvertent one, the penalty exacted from the company (and ultimately borne by the company’s shareholders) was half the maximum penalty able to be imposed at the time.

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148 Southcorp Limited was Australia’s 17th largest company by market capitalisation at the time.
149 Given the difficulty of proving breach of the regime to a criminal standard, as well as the regulator having all but forsaken this option in favour of civil penalty provisions, the single case dealing with this enforcement activity, which was unsuccessful, is not here reviewed. For a description of the Hart’s litigation see Elisabeth Boros, ‘Public and Private Enforcement of Disclosure Breaches in Australia’ (2009) 9(2) Journal of Corporate Law Studies 409.
The circumstances surrounding the selective briefing involved a downgrading of the company’s year 2000 vintage prospects by 6% compared with the 1999 vintage.\footnote{Southcorp Limited press release dated 7 June, 2000.} The company’s CEO explained in the release that ‘while the vintage volume was lower than expected in premium fruit, the financial impact would not be felt this year [2000] but would be spread over the next five years as the premium wine from the 2000 vintage is released’.\footnote{Australian Securities and Investments Commission v Southcorp Limited (No 2) [2003] FCA 1369 at [24].} The effects of the poor wine harvest were expected to stretch out to 2005 due to the time expended from vintage intake to sale which involved wine maturation.

In March 2002 at the company’s Annual Business Conference it was estimated that the effect of the poor 2000 vintage on Southcorp’s profit for 2003 could be in the order of $32 million. In the management of analyst and market expectations of Southcorp’s financial performance, it was the company’s Executive General Manager of Corporate Affairs, Glen Cunningham’s practice to review analyst reports and ensure the board was informed of consensus or average profit forecasts estimated by major analysts. In conducting his review of analyst profit forecasts in April 2002, Mr Cunningham became aware that ‘at least one analyst may not have taken into account the adverse impact of the 2000 vintage’.\footnote{See statement of agreed facts at [23] of Australian Securities and Investments Commission v Southcorp Limited (No 2) [2003] FCA 1369 at [28].}

Mr Cunningham decided to email analysts covering the entity at 11 separate broking and research firms to ensure they were all aware of the impact of the poor 2000 vintage on the 2003 financial results would be in the order of $30
million. In doing so however he ‘inadvertently’ let slip two pieces of information which had not yet been aired outside of the company at that time, namely that

[a]s I have discussed with a number of you the Gross Profit impact on 2003 compared to this year (which will have the normal 1999 vintage flow on) is expected to be in the order of $30 million. Because of the small vintage all the 2000 vintage super premiums are expected to be sold in the 2003 year. I know some of you have taken this into account while others have not.153

Three analysts in receipt of the email issued updated reports to clients concerning Southcorp prior to market open the day after receiving the email. After falling 5% the next day the ASX placed Southcorp’s securities in a trading halt, which was lifted after a profit clarification announcement via the ASX.154 Trading action the day after the halt was lifted saw shares fall further making the total loss 7%, wiping almost $320 million in value from the company’s market capitalisation.155

ASIC accepted that this information need not have been released earlier as it had the protection afforded by the exceptions to the listing rules concerning incomplete and internal management information.156 At the time of its release, Mr Cunningham thought that ‘the information contained in the 18 April email was not material and was already in the public domain’. Being characterised as an ‘honest blunder’ without impropriety, Mr Cunningham failed to realise that

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154 Falling from a close of $6.27 on 18 April, 2000 to $5.94 on 19 April, 2000, before falling to $5.84 the following day: Australian Securities and Investments Commission v Southcorp Limited (No 2) [2003] FCA 1369 at [37].
155 Australian Securities and Investments Commission v Southcorp Limited (No 2) [2003] FCA 1369 at [43].
156 Australian Securities and Investments Commission v Southcorp Limited (No 2) [2003] FCA 1369 at [45].
information disclosed in his email provided more detail than Southcorp’s 
previous disclosures to the entire market on the subject.\textsuperscript{157} Nevertheless, ASIC 
accepted that there was ‘no evidence that Mr Cunningham acted dishonestly or 
with any intent to obtain a benefit or to cause detriment to Southcorp or to the 
market’.\textsuperscript{158} Due to the fact that the legislation no longer required the 
establishment of an element of intent this did not affect the level of penalty to 
be applied.

Southcorp admitted that the information conveyed to analysts in Mr 
Cunningham’s email that ‘[a]ll the 2000 vintage super premium[wine]s were 
expected to be sold in the 2003 [financial] year and (b) the gross profit impact 
of the poor 2000 vintage on [the] 2003 [financial year] compared to the 2002 
[financial] year was expected to be [of] the order of $30 million was 
information that it had not previously released to the market by notifying it to 
the ASX or otherwise’.\textsuperscript{159} Due to its material nature, the company admitted that 
through the sending of the email it contravened s 674(2) of the Act. Lindgren J 
noted that specific guidance on the company’s dissemination of information to 
analysts in the form of ASIC policy papers on the area had been in the public 
domain from 23 August 2000.\textsuperscript{160} Given that Southcorp had admitted its 
contravention of the regime, all that was left for his Honour was to decide 
whether the penalty sought by ASIC was appropriate. While both parties agreed

\textsuperscript{157} Australian Securities and Investments Commission v Southcorp Limited (No 2) [2003] FCA 1369 at [37]. 
\textsuperscript{158} Australian Securities and Investments Commission v Southcorp Limited (No 2) [2003] FCA 1369 at [52]. 
\textsuperscript{159} See statement of agreed facts at [44]: Australian Securities and Investments Commission v Southcorp Limited (No 2) [2003] FCA 1369 at [29]. 
\textsuperscript{160} See His Honour’s discussion of ASIC’s Heard it on the Grapevine, Consultation Paper 5 (November 1999) 
s.pdf>): Australian Securities and Investments Commission v Southcorp Limited (No 2) [2003] FCA 1369 at [13].
that Southcorp would not have contravened s 674(2) if it had either chosen not to disclose the information at all or if it had disclosed it to the market as a whole, the company was ordered to pay a pecuniary penalty of $100,000 pursuant to s 1317G as well as ASIC’s costs.

Importantly, in relation to the precipitous fall in Southcorp’s share price, Lindgren J stated that although the precise extent of the price drop directly referable to the information selectively released to analysts was impossible to gauge due to ‘other factors relating to Southcorp’s performance mentioned by the analysts in their reports which may have caused the fall, in whole or in part’, that

the fall in market price which occurred is, nonetheless, relevant for present purposes; that is, even though the fall cannot be shown to have resulted from the disclosure to the eleven analysts. The reason is that selective disclosure is apt to generate confusion and a loss of faith in the market. In the present case, this was likely both to demonstrate itself in, and to arise from, after-the-event belief and assertions that the fall in market price was caused by favoured informants’ offloading. Speculation and rumour deriving from selective disclosure is apt to cause a loss of confidence in the market. Selective disclosure is inimical to belief that a level playing field exists, as well as to its existence in fact.161

The effect of such behaviour on potential perceptions of the integrity of the market is therefore an important consideration which managers must bear in mind when weighing the disclosure decision. His Honour also listed factors

161 Australian Securities and Investments Commission v Southcorp Limited (No 2) [2003] FCA 1369 at [35-36].
which he believed effectively took the edge off the ultimate penalty imposed on Southcorp. The company’s admission\(^\text{162}\), a lack of demonstrable dishonesty or impropriety in the selective release and the non-involvement of any Southcorp staff other than Mr Cunningham\(^\text{163}\), the immediacy of action taken by Southcorp and the unlikeliness of further contravention by the company given its introduction of a new disclosure policy shortly after 18 April 2002 (in spite of the fact that Southcorp at the time knew that ASIC was investigating Mr Cunningham’s selective briefing)\(^\text{164}\) all worked in its favour in the determination of a penalty. According to Justice Lindgren’s rough math, ‘the notion of “about half” of the maximum of $200,000 strikes me as an entirely fitting description of the level of penalty ‘called for in the circumstances in this case’.\(^\text{165}\)

3.2 Australian Securities and Investments Commission v Chemeq Limited [2006]

In December 2004 ASIC commenced proceedings seeking declarations and penalties in relation to eight alleged contraventions of s 674(2) of the Corporations Act by Chemeq, a biotechnology company which owned intellectual property associated with an antimicrobial developed as an alternative to antibiotics for the prevention and control of intestinal bacteria

\(^{162}\) Australian Securities and Investments Commission v Southcorp Limited (No 2) [2003] FCA 1369 at [47].

\(^{163}\) Australian Securities and Investments Commission v Southcorp Limited (No 2) [2003] FCA 1369 at [48].

\(^{164}\) Australian Securities and Investments Commission v Southcorp Limited (No 2) [2003] FCA 1369 at [38].

\(^{165}\) Australian Securities and Investments Commission v Southcorp Limited (No 2) [2003] FCA 1369 at [59].
diseases in intensively reared livestock. The technology underlying the Chemeq Product had other possible applications including inorganic sunscreens, preservatives in cosmetics and human pharmaceuticals. In the event that a compromise might be reached ASIC agreed to reduce the number of contraventions alleged to two, to which Chemeq eventually agreed.

The first contravention related to the construction of a commercial-scale production facility at East Rockingham in Western Australia which was estimated in April 2002 to cost AU$25 million over a period of approximately 12 months and communicated to the market through the ASX announcements platform. Justice French, as he then was, found that between February 2003 and April 2004 Chemeq was aware that the total anticipated cost of the Rockingham facility was in excess of $25 million, with evidence that estimates had increased to $35 million by February 2003, to $45 million by August 2003, to $50 million by September 2003, and that it would be in excess of $50 million by December 2003. The company’s failure to update the information conveyed to the market in April 2002 led to the first contravention of s 674(2) established by ASIC.

This occurred in the context of the company continuing to update the market on any positive news stories concerning it over the relevant period, while failing to disclose information that might affect investors’ perceptions of the value of

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the company’s securities, leading to the market not being able to assess the company’s true position for over 14 months.\textsuperscript{169}

The second contravention, described as ‘moderately serious’\textsuperscript{170} by ASIC related to the company’s release of information to the market on 6 October 2004 that it had been granted an additional US patent, ‘which extended the defendant’s exclusive protection in manufacture and marketing of its veterinary products in that country to the year 2020’.\textsuperscript{171} ASIC alleged that Chemeq was aware at the time of the announcement that this information was not material to the commercial position of its business because

(i) it protected a particular method of formulating the defendant’s product but not the product itself;
(ii) it was difficult to detect an infringement of the intellectual property rights conferred by the patent and therefore difficult to enforce those rights.\textsuperscript{172}

The increase in the price of the company’s securities by 58% was said to have been created, at least in part, by the overstatement.\textsuperscript{173} Despite only falling 15% after the release of a clarifying statement, the company took two days to make

\textsuperscript{169} Australian Securities and Investments Commission, In the Matter of Chemeq Limited (ACN 009 135 264) v Chemeq Limited (ACN 009 135 264) [2006] FCA 936 at [107-108].
\textsuperscript{170} Australian Securities and Investments Commission, In the Matter of Chemeq Limited (ACN 009 135 264) v Chemeq Limited (ACN 009 135 264) [2006] FCA 936 at [114].
\textsuperscript{172} Australian Securities and Investments Commission, In the Matter of Chemeq Limited (ACN 009 135 264) v Chemeq Limited (ACN 009 135 264) [2006] FCA 936 at [5].
\textsuperscript{173} Australian Securities and Investments Commission, In the Matter of Chemeq Limited (ACN 009 135 264) v Chemeq Limited (ACN 009 135 264) [2006] FCA 936 at [114].
same to address the abrupt uptick\textsuperscript{174}, which ASIC labelled ‘careless’ and ‘slow’.\textsuperscript{175}

The non-disclosure of cost overruns constituting the first contravention resulted in a pecuniary penalty of $150,000 (75% of the relevant maximum) while the second relating to incomplete disclosure resulted in a penalty of $350,000 (35% of the relevant maximum). The company also had to pay ASIC’s costs of $170,000. While the former contravention was undoubtedly the more demonstrably flagrant of the two, because each contravention occurred under different statutory penalty conditions, with a maximum $200,000 fine for a corporation until 21 July 2004 increased to $1 million thereafter, Chemeq serendipitously managed to avoid more serious penalties.

Chemeq admitted that the Rockingham Cost Increase Information was information that a reasonable person ‘would expect to have a material effect on the price or value of the fully paid ordinary shares of Chemeq as it was information which would, or would be likely to, influence persons who commonly invest in securities in deciding whether to acquire or dispose of fully paid ordinary shares in Chemeq’.\textsuperscript{176}

In considering the aspects relevant to determining a proper penalty French J, like Lindgren J in \textit{Southcorp}, discussed the importance of general and specific deterrence\textsuperscript{177}, Chemeq’s admission of contravention, its cooperation with ASIC

\textsuperscript{174} \textit{Australian Securities and Investments Commission, In the Matter of Chemeq Limited (ACN 009 135 264) v Chemeq Limited (ACN 009 135 264)} [2006] FCA 936 at [115–6].
\textsuperscript{175} \textit{Australian Securities and Investments Commission, In the Matter of Chemeq Limited (ACN 009 135 264) v Chemeq Limited (ACN 009 135 264)} [2006] FCA 936 at [117–8].
\textsuperscript{176} \textit{Australian Securities and Investments Commission, In the Matter of Chemeq Limited (ACN 009 135 264) v Chemeq Limited (ACN 009 135 264)} [2006] FCA 936 at [57].
\textsuperscript{177} \textit{Australian Securities and Investments Commission, In the Matter of Chemeq Limited (ACN 009 135 264) v Chemeq Limited (ACN 009 135 264)} [2006] FCA 936 at [90].
and ‘steps it has taken internally to avoid repetition and relevant changes in the composition of the board or senior management should also be taken into account in the kind of risk assessment that informs a deterrent approach to punishment’. His Honour drew attention to the fact that in the relevant period encompassing the contraventions there had been significant changes in the composition of the company’s board and executive management. Relevant to this was the fact that Chemeq was a small listed company which employed only 15 people in 2002 and 29 in 2003. His Honour also took the time to specify a non-exhaustive list of factors relevant to determining the level of penalty for a contravention of the continuous disclosure provisions. He concluded that Chemeq’s board did not engage in deliberate reckless conduct, yet he was unable to conclude the company’s disclosure performance was the result of ‘mere carelessness’, instead stating:

The directors and officers of Chemeq during the relevant period were kept informed of the cost overruns. It simply does not seem to have occurred to them that this was a matter which required disclosure. This suggests that at the time the Board of Chemeq had a serious lack of appreciation of its obligations... During the relevant period there do not seem to have been in place effective compliance systems in relation to the disclosure obligation.

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179 Australian Securities and Investments Commission, In the Matter of Chemeq Limited (ACN 009 135 264) v Chemeq Limited (ACN 009 135 264) [2006] FCA 936 at [65].
180 Australian Securities and Investments Commission, In the Matter of Chemeq Limited (ACN 009 135 264) v Chemeq Limited (ACN 009 135 264) [2006] FCA 936 at [80].
182 Australian Securities and Investments Commission, In the Matter of Chemeq Limited (ACN 009 135 264) v Chemeq Limited (ACN 009 135 264) [2006] FCA 936 at [112].
3.3 Australian Securities and Investments Commission v Macdonald [2009]

In Australian Securities and Investments Commission v Macdonald [No 11] (‘Macdonald’)[183] ASIC pursued James Hardie Industries Limited (JHIL), eight of its former directors (including one executive director, CEO Peter Macdonald) and two of its officers for breaches of the Corporations Act with several allegations involving the continuous disclosure regime. A brief sketch of the company’s history prior to the alleged breaches will assist in appreciating the conduct pursued by ASIC.

The James Hardie Group was a major producer of asbestos products in the early part of the 20th century, manufacturing some 70% of Australia’s asbestos consumption.[184] While being widely used last century in the production of building, insulation and automotive products, asbestos fibres – which can lie innocuously for long periods of time before affecting their host – can be deleterious to human health and causative of fatal diseases including asbestosis, mesothelioma and lung cancer.

JHIL, later known as ‘ABN 60 Pty Ltd’, had manufactured asbestos products in its own name as well as through two subsidiaries, one known as James Hardie & Coy Pty, which ceased production in the late 1980s[185], the other, known as

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Jsekarb Pty Ltd, which manufactured brake lining products until its sale to an unrelated party in 1987.¹⁸⁶

While successfully making the transition out of asbestos products, JHIL nevertheless became liable for the damage to ordinary people affected by its hazardous products, and carried a significant future liability for damage caused by past products. In the early 2000s, JHIL management figured the company’s future success would be hampered by mounting asbestos liabilities, and the decision was made to split the liabilities off from the company’s core business with a view to listing in the US market where most of its business was now being done. This plan would have been considered ‘commercially unrealistic’¹⁸⁷ had accruing asbestos liabilities remained on its books.

The company decided to restructure its liabilities out of its main operations thus: The subsidiaries carrying the asbestos liabilities – James Hardie & Coy Pty (subsequently ‘Amaca Pty Ltd’) and Jsekarb Pty Ltd (subsequently ‘Amaba Pty Ltd’) – would remain liable to claimants through a new company which was set up to receive the two subsidiaries and separate them off from JHIL proper via creative use of the corporate veil. The company which would operate independently of JHIL, known as Medical Research and Compensation Foundation Ltd (MRCF), became the trustee of the Foundation Trust which was to manage the liabilities arising from Amaca and Amaba through payments made to it by JHIL.¹⁸⁸

¹⁸⁶ Jackson Report, Vol 1, 18.
To hermetically seal off JHIL from the asbestos liabilities of its (soon to be former) subsidiaries, an arrangement was made whereby ‘JHIL was to be indemnified by [both these companies] against any asbestos-related liabilities which JHIL might have’ in return for the payments mentioned above, to be made over a period of time by JHIL to Amaca and Amaba. Both companies also agreed to indemnify JHIL from claims arising from any past dealings including the payment of dividends or management fees. Recovery of such intra-group payments was barred by a deed of covenant and indemnity (‘DOCI’) entered into by the contracting parties.

At the time, JHIL conveyed the certainty of funding for the MRCF to be able to meet projected future claims through ASX releases dated 16 and 23 February 2001. It transpired that the MRCF was tragically underfunded, with a total of $293 million at its disposal to deal with liabilities of at least $1.5 billion.

A Special Commission of Inquiry was established to examine the circumstances surrounding what has been described as a ‘contentious corporate reconstruction’. The report of Commissioner David Jackson QC, released September 2004, found there was ‘no prospect [of the Foundation] meeting the liabilities of Amaca and Amaba in either the medium or long term’ due to the rapid depletion of the funds used in the payment of current claims, the

189 Jackson Report, Vol 1, 28.
193 Jackson Report, Vol 1, 7.
likelihood the life of the Foundation was about three years ‘or a little less’\textsuperscript{194}, and that ‘[t]he evidence demonstrated that the February 2001 estimates of future liabilities were far too low and that the results of the financial modelling were wildly optimistic’.\textsuperscript{195}

ASIC used Commissioner Jackson’s report to launch civil penalty proceedings in February 2007 against James Hardie, its directors and certain officers. Several allegations were made, many of which either directly or indirectly concerned the disclosure and non-disclosure of material information (yet which may have been framed as breaches of directors’ duties or misleading or deceptive conduct instead) and most succeeded at first instance. After an appeal to the Full Court which rejected some of the findings and penalties imposed by the Court below, an appeal to the High Court resulted in a reinstatement of the findings at first instance.

ASIC’s misleading or deceptive disclosure case centred on the allegation that a draft announcement, considered and approved for release to the ASX by the JHIL board at a meeting on 15 February 2001 relating to the formation of the Foundation, was false and misleading in its statement that the Foundation was fully funded and would have sufficient reserves to meet all legitimate asbestos claims. All non executive directors, with the addition of CEO and director Peter Macdonald, company secretary and general counsel Peter Shafron, and CFO Philip Morley were alleged to have contravened s 180(1) as officers of JHIL for their involvement in the approval of the release in the case of board members,

\textsuperscript{194} Jackson Report, Vol 1, 63.  
\textsuperscript{195} Jackson Report, Vol 1, 12.
and for the failure to caution the board of issues with it in the case of the relevant executives. The core of ASIC’s allegations in relation to the misleading character of this announcement were made out.

February 16 saw the release, with some variation, of the draft ASX announcement alleged by ASIC to have been approved by the board the preceding day. This final ASX announcement was alleged by ASIC to contain false and misleading statements as to the sufficiency of funding of the Foundation. ASIC further alleged that JHIL’s CEO failed to advise the final announcement should not have been released, or that it should have been amended to remove matters which were false and misleading, thereby breaching s 180(1). CEO Macdonald was found to have breached s 180(1) for approving the release of the final ASX announcement, failing to advise it not be released, or advise that it be amended to remove false and misleading matters within it. Due to its false or misleading nature, JHIL was found to have contravened ss 995(2) and 999 of the Corporations Law.

ASIC also alleged that false and misleading statements similar to those made in the final ASX announcement were made at a press conference on the same day by CEO Macdonald, with further announcements on 23 February and 21 March which were capable of conveying that it was certain that the funding would be sufficient to meet all legitimate claims. CEO Macdonald was found to have breached s 180(1) in making these press conference statements and approving

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196 See Australian Securities and Investments Commission v Macdonald (No 11) [2009] NSWSC 287 at [6].
197 All of ASIC’s allegations were made out except the allegations of breach by Macdonald, Shafron and Morley for failure to advise the board of the issues with the actuarial reports before them at the time of the decision to release the ASX announcement.
without amendment the 23 February release as they were false or misleading and exposed JHIL to potential harm.\textsuperscript{198}

ASIC also alleged that by virtue of the announcements made on behalf of JHIL through the final ASX announcement, the press conference, the 23 February and 21 March announcements that JHIL had contravened s 995(2) for their misleading or deceptive nature, as well as breaching s 999 for their being false in material particulars or materially misleading. The company was found to have breached ss 995(2) and 999 for each of these representations, except that relating to the breach of s 999 in the case of the 21 March announcement.

Representations made as part of JHINV roadshows at Edinburgh and London, slides of which were released through the ASX that the Foundation was fully funded were alleged by ASIC to be false or materially misleading, and misleading or deceptive and that JHINV contravened ss 1041E and 1041H of the corporations Act thereby. CEO Macdonald was alleged to have failed to have discharged his duties under s 180 to JHINV by making the representations on the roadshows and releasing the slides to the ASX without amending them for false or misleading matters.\textsuperscript{199} Again, CEO Macdonald was found to be in breach of s 180(1), and JHINV was found to have contravened s 1041E of the Corporations Act with respect to representations made in the UK slides and s 1041H for forwarding the UK slides to the ASX.

\textsuperscript{198} ASIC also alleged that the press conference statement, the 23 February and 21 March announcements also gave rise to a charge of a breach of s 181 by CEO Macdonald.

\textsuperscript{199} The knowledge or alternatively recklessness to the reality of the false or misleading nature of these statements by CEO Macdonald also gave rise to allegations of breach of s 181(1) for the potential harm they may have caused JHINV through potential contravention of ss 1041E, 1041H and s 52, although they did not succeed.
The continuous disclosure allegations pursued by ASIC concerned a resolution made at the 15 February board meeting to execute a Deed of Covenant and Indemnity (DOCI). This information was not released, and JHIL’s failure to release it was alleged to constitute a breach (by it, JHIL, in its corporate personality) of the continuous disclosure provisions in the ASX Listing Rules and s 1001A(2) of the Corporations Act (the predecessor of the current s 674(2)). ASIC also alleged that CEO Macdonald knew or ought to have known that failure to release such information if approved by the board could be harmful to JHIL and that it risked JHIL contravening s 1001A(2). ASIC alleged that Macdonald’s failure to advise the chairman as to the potential need for disclosure, to seek and consider advice relating to the need for disclosure, and to determine whether or not to disclose the DOCI information, that Macdonald failed to discharge his duties to JHIL, thereby breaching s 180(1).

JHIL’s secretary and counsel Shafron, was alleged to have failed to advise the CEO and the board of its need to consider potential disclosure of the DOCI Information, and failing to avail the board of his own advice as to the potential need to disclose the information and in failing to advise the CEO or the board to resolve whether or not JHIL would disclose the DOCI Information thereby breaching s 180(1).

ASIC was successful in its claim that JHIL negligently failed to disclose the DOCI information in contravention of listing rule 3.1 and s 1001A(2) of the Corporations Law ‘in that it did not obtain any legal advice as to whether it
should disclose the DOCI Information and in that neither the board nor management of JHIL considered disclosure of the DOCI Information'.

In relation to the failure of CEO Macdonald, his Honour Justice Gzell at first instance stated:

I have found that ASIC has made out its claim that by failing to advise the chairman of the board of JHIL as to whether or not the DOCI Information was required to be disclosed to the ASX; by failing to seek and consider advice and satisfy himself in relation to whether JHIL was required to disclose the DOCI Information to the ASX; by failing to resolve or determine that JHIL would disclose the DOCI Information to the ASX; or by failing to raise with or propose to the chairman of the board of JHIL that they needed to consider and determine whether or not to disclose the DOCI Information to the ASX; Mr Macdonald was in breach of Section 180(1).

In relation to secretary Shafron, his Honour found that:

ASIC has made out its claim that by failing to advise Mr Macdonald or the board of JHIL that it needed to consider whether JHIL was required to disclose the DOCI Information to the ASX; in failing to obtain advice for Mr Macdonald or the board or provide his own advice to the board as to whether they were required to disclose the DOCI Information to the ASX; or in failing to advise Mr Macdonald or the board to resolve or determine that JHIL would disclose the DOCI Information to the ASX; Mr Shafron was in breach of Section 180(1).

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200 Australian Securities and Investments Commission v Macdonald (No 11) [2009] NSWSC 287 at [1275].
201 Australian Securities and Investments Commission v Macdonald (No 11) [2009] NSWSC 287 at [1276].
202 Australian Securities and Investments Commission v Macdonald (No 11) [2009] NSWSC 287 at [1277].
Another allegation concerning breach of the regime involved the company’s failure to advise the market of the fact it had resolved in March 2003 to engage in a complicated bout of corporate restructuring. JHINV was found to have contravened s 674(2) of the Corporations Act for its failure to advise the market of this information.

It is difficult to do justice to the complicated host of allegations of poor disclosure conduct involved in this case in the space available. Suffice to say, as discussed in detail further below, that officers must be mindful of the vast array of remedies which might be pursued against them and their companies for poor disclosure behaviour, including misleading or deceptive conduct, straight breach of the regime itself, and the breach of directors’ and officers’ duties, all of which were alleged in the Fortescue litigation. Before moving to a consideration of this important case however two further cases – one of which did not involve the continuous disclosure provisions directly, the other which was not brought by the regulator but rather an aggrieved investor – are also worthy of note for the different avenues available against a company in breach of the regime.

203 Including changing its name to ABN 60 000 009 263 Pty Ltd (ABN 60), resolving to create a new trust – the ABN 60 Foundation, approve a $1.5 million capital reduction by JHIL (which was to be paid to JHINV), that it request JHIL to issue 100 shares to the ABN 60 foundation, that JHIL enter into a Deed of Covenant, indemnity and access whereby JHIL agreed to make regular payments to Coy and Jsekarb in accordance with the DOCI, not claim against JHINV, and agree that the cancellation of the 1 fully paid ordinary share held by JHINV was in its interests.
Citrofresh International Limited (CIL) was a company listed on the exchange which manufactured and supplied a disinfectant product which had exhibited virucidal characteristics in relation to four viruses, including Human Immunodeficiency Virus (HIV), Human Influenza A-Type virus (Influenza), Urbani SARS virus (SARS) and Human Rhinovirus (the cause of common colds) in in-vitro tests. Mr Narain, the CEO of CIL, was involved in the release of an announcement to the ASX which stated that:

[CTF] can now offer a global solution to reduce and eventually stop the spread of [HIV] using Citrofresh; Citrofresh provides a non-hazardous, non-toxic and effective solution that deal[s] with ... emergency disease control and prevention [of the four viruses]; [CTF] will market a range of ‘Barrier Protection’ products to be used in the first instance for Men’s Health (post intercourse spray or lotion); [T]he use of Citrofresh as a postcoital application will act as an ‘invisible condom’ for the prevention of STD[s] including HIV; The ability to use Citrofresh as a postcoital application will have a significant impact on reducing the transmission of HIV and STD[s].

The market surged on the news, with the price of Citrofresh securities rising from $0.225 to $0.70. After requesting a trading halt and issuing a further statement to the effect that the company’s product was neither a vaccine nor a

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204 Australian Securities and Investments Commission v Narain [2008] FCAFC 120, per Finkelstein J at [3].
cure for HIV, the price of its securities fell to $0.295. ASIC alleged that the releases contained misleading representations (as to present facts, future matters and implicitly by non-disclosure) relating to the company’s shares because the product ‘(1) was a disinfectant and not a cure or vaccine; (2) would not stop the spread of HIV; and (3) would have only a minimal impact in controlling or preventing HIV, Influenza, SARS and the common cold’, and that due to his role in preparing the releases Narain contravened both s 1041H and s 180 by exposing CIL to ‘jeopardy’. CIL consented to orders being made against it although ASIC was unsuccessful at first instance against Mr Narain, with Justice Goldberg in the Full Court taking a narrow interpretation of s 1041H, which requires misleading conduct to be related to a financial product. On appeal to the Full Court however, the matter was sent back to the primary judge as it held that the statements made to the ASX related to a financial product in the form of the company’s shares, therefore coming within the remit of s 1041H. The opinion of the Full Court was effectively that ‘[i]t is plain in our view that Mr Narain was personally liable for any contravention of s 1041H’. While *prima facie* exhibiting more misleading or deceptive conduct elements rather than continuous disclosure breaches for downright false and baseless claims, an important pillar of ASIC’s allegations relied on the non-disclosure of material information. ASIC alleged that releases did not disclose a number of issues which were material to the matters disclosed in the letters and were also

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205 *Australian Securities and Investments Commission v Narain* [2008] FCAFC 120, per Finkelstein J at [4].
206 *Australian Securities and Investments Commission v Narain* [2008] FCAFC 120, per Finkelstein J at [5].
207 *Australian Securities & Investments Commission v Citrofresh International Ltd* [2007] FCA 1873 at [42].
208 *Australian Securities and Investments Commission v Narain* [2008] FCAFC 120 at [100].
209 *Australian Securities & Investments Commission v Citrofresh International Ltd* [2007] FCA 1873 at [27].
material to the prospects of commercial success for CIL, ‘material to its business prospects, relevant to its share price and were matters that should have been disclosed in the letters in order to avoid the letters being misleading or deceptive or likely to mislead or deceive’. The fact the releases did not mention the Citrofresh product was not a vaccine but merely a disinfectant, that the tests exhibiting the results were in vitro and not in vivo in living subjects, that such tests would be necessary before the product could actually be marketed as a pre or post-coital application for the prevention of STDs were alleged to be material issues which were central to the company’s planned efforts and potential successes, relevant to the company’s share price and should have been disclosed in its releases to the market.

These failures to disclose in the context of otherwise misleading or deceptive disclosure were nevertheless pursued via s 1041H of the Act and relevant directors duties provisions. On remittance to the primary judge, Mr Narain was banned from managing corporations for seven years and ordered to pay a $20,000 pecuniary penalty for his role in the making of the announcements.

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210 Australian Securities & Investments Commission v Citrofresh International Ltd [2007] FCA 1873 at [27].
211 Australian Securities & Investments Commission v Citrofresh International Ltd [2007] FCA 1873 at [38].
212 Australian Securities & Investments Commission v Citrofresh International Ltd [2007] FCA 1873 at [42].
3.5 Jubilee Mines NL v Riley [2009]

Only one case brought by an aggrieved shareholder plaintiff has been carried through the full course of legal proceedings with a decision being made by the Western Australian Supreme Court of Appeal in 2009.\footnote{Jubilee Mines NL v Riley [2009] WASCA 62.} Jubilee Mines had been listed on the ASX since 1987. In 1993 the company acquired a tenement called McFarlane’s Find, which was in two unconnected parts, and between which ran another tenement held by another mining company WMC. While the tenement was located in a known nickel field, there was no suggestion that Jubilee acquired it for this reason – it was focussed on gold exploration. In 1994 Jubilee began negotiations to purchase the Bellevue Gold mine, although Jubilee lacked the financial resources to complete the transaction.

In August 1994 Jubilee received a letter from WMC explaining that it had unintentionally drilled into part of Jubilee’s McFarlane’s Find tenement, enclosing data relating to the drill samples with a statement that analytical data were not yet available but that they would be provided as soon as available. This was provided in September 1994 and was discussed by the MD and the company’s geologist, who concluded there would be a great deal of work and expense involved in interpreting the data. Further, on the evidence in front of him, and in view of other comparable results at other mines, the site did not seem economically viable. While future exploration may have been appropriate, due to Jubilee’s restrained financial position and focus on...
acquiring the Bellevue Mine the view was formed that it was not appropriate for Jubilee to undertake exploration of McFarlane’s Find at the time and therefore that the information received from WMC was not of any significance to Jubilee. As such, the information was not reported to the other directors nor to the market through the ASX.

In May 1996, WMC initiated discussions with Jubilee in relation to the McFarlane’s Find tenement. On 11 June, the next business day after a meeting between WMC and Jubilee representatives took place and where the cross sections were produced, Jubilee provided an announcement to the ASX disclosing the inadvertent drilling of McFarlane’s Find by WMC and stating that ‘significant disseminated nickel mineralisation was encountered on Jubilee’s ground’. The announcement advised that Jubilee intended to undertake further drilling work to explore the mineralisation during the months of June and July 1996. The weighted average share price of Jubilee over the 10 trading days preceding the media release was 22.5 cents, compared with a weighted average share price of 24.5 cents for the 10 business days following the media release representing an increase of 9%. Nevertheless, after some initial exploration activities the results of which were announced, no further exploration was carried out. The announcement had no impact upon the price at which the shares of Jubilee traded. Oddly enough, after making a significant nickel discovery while drilling another site it owned, Jubilee became a significant nickel producer and its share price increased accordingly.

In the time between WMC’s inadvertent drilling and Jubilee’s exploration of the McFarlane’s find nickel deposit, a shareholder, Riley, sold shares in Jubilee. Because of the appreciation in Jubilee’s share price which occurred after it released the information to the market in 1996, Riley sued Jubilee for its failure to disclose price sensitive data relating to McFarlane’s find to the market as per its obligations under the continuous disclosure regime. Riley alleged that he lost money as a result of selling his shares at a lower price than he otherwise would have.

At the first instance Riley was awarded close to $2 million, plus interest of another $1 million. On appeal, the Court decided that because Jubilee had no interest in developing the nickel find through further exploration due to its focus on gold exploration at the time, that if any disclosure was made it would have come with the proviso that it had no intention of further development as releasing the data on its own would have been misleading, and suggestive of exploration by Jubilee. If this option was taken, the Court stated that a reasonable person would not have expected information in this context to have a material impact on Jubilee’s share price or the value of its shares, and therefore would not influence investors in their making a decision to buy or sell Jubilee shares.

Materiality therefore can be seen to depend upon the informational matrix within which any given piece of news takes its place. Given the fact Jubilee had no intention of exploring the Nickel deposits struck by WMC at the time, the information was not material to the company at the time. The fact it may have
become so at a later date was of no relevance to Mr Riley, who made his decision with all relevant information necessary at the time. The potential for changes in assessments of materiality in relation to the same information over time is therefore an important feature of this decision.

### 3.6 The Fortescue litigation

The cases discussed above, with the exception of *Jubilee*, exhibit relatively clear cut failures to disclose and involved relatively straightforward applications of predetermined meanings of the terms anchoring the regime. While *Jubilee* provided some guidance on materiality and the effect of the passage of time upon it, commentary and debate surrounding the practical effect of the regime carried latent hopes that as yet lesser understood elements of it might one day be dealt with via judicial pronouncement at the highest level.216

Enter ASIC’s pursuit of mining company Fortescue Metals Group and its chi, Mr Andrew Forrest, which was widely expected to produce a panacea for continued doubt as to the meaning and practical application of key terms in the listing rule and its legislative supplement. While judgments at first instance217 and on appeal218 promised a regulatory gourmand’s feast, the High Court had

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216 Such hopes rose through the course of the Fortescue litigation and fell with the High Court’s decision in *Forrest v Australian Securities and Investments Commission* [2012].


other, more sensible plans – simplify a commotion of allegations and adjudge conduct from a realistic, commercial perspective.

Instigated in March 2006 against FMG and its then CEO and chairman Andrew Forrest, the Fortescue litigation concerns both the disclosure of what was alleged to be misleading or deceptive information as well as the failure to disclose alleged facts relating to the legal effect of a cluster of contracts purportedly entered into by FMG and three Chinese state-owned engineering companies.

FMG, which held mining tenements in the Pilbara region of Western Australia, had from 2003 been pursuing a strategy designed to enable it to compete with mining giants BHP Billiton and Rio Tinto and become a “new force” in the iron ore industry. This strategy was based on FMG pursuing mineral deposits previously relinquished by BHP and RIO, firstly through resource definition and feasibility assessment, and then the completion of what was named the Pilbara Infrastructure Project (the Project), which would require the construction of major infrastructure (in the form of a mine, rail line, and port) to transfer resources to international markets. According to expert evidence presented by ASIC, in early 2004 the project was perceived by the market as a speculative ‘early stage project development concept’. While a prefeasibility report (PFR) concluded that the Project had the potential to become an attractive investment proposition, it was ultimately contingent upon the bankability of a

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Definitive Feasibility Study (DFS) to be completed by mining services company Worley Pty Ltd.

The aim of the DFS was to define the scope, design, native title issues, environmental impact, scheduling, cost, and overall viability of the project. Whether the resources to be mined could guarantee the finance required for the estimated $1.85 billion project was of obvious significance to any potential creditors and ultimately FMG, which, given its lack of financial resources at the time required their support. Should the DFS have failed in its search for ‘sufficient quantities of JORC compliant resource to support the proposed mining operations’ the ambitious plan would have to be abandoned. ‘Significant’ doubt existed amongst market participants around FMG’s capacity to extract a sufficient amount of iron ore with the requisite quality to support the Project, and also apparently exhibited scepticism concerning Mr Forrest himself.

In August and November 2004, with the DFS yet to be completed, three framework agreements with China Railway Engineering Corporation (CREC), China Harbour Engineering Company (CHEC) and China Metallurgical Construction Corporation (CMCC) were entered into. This was despite the

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220 This was constituted by a $450 million mining and processing facility, a $930 million railway between the Pilbara and Port Hedland, and a $470 million dedicated iron ore loading and berthing facility at Port Hedland. FMG needed to raise only 10% of this amount as the deal struck with its Chinese state-owned contractual counterparties had seen the latter agreeing to undertake the remainder of the project’s financial risks: Australian Securities and Investments Commission v Fortescue Metals Group Ltd [No 5] [2009] FCA 1586 at [187].

221 FMG only had $9 million in cash at the time. Australian Securities and Investments Commission v Fortescue Metals Group Ltd [No 5] [2009] FCA 1586 at [189].

222 Australian Securities and Investments Commission v Fortescue Metals Group Ltd [No 5] [2009] FCA 1586 at [194-8] and [201].

223 Given the similarity of the terms of the agreements, the fact that the CREC agreement was the first in time made it the focus of judgments at all levels of the judicial hierarchy.
lack of any firm long-term off-take agreements for the purchase of iron ore, and the lack of any regulatory or statutory approvals to commence the project.\footnote{224}{Australian Securities and Investments Commission v Fortescue Metals Group Ltd [No 5] [2009] FCA 1586 at [200].}

These contracts were heralded as ‘binding agreements’ to build, finance and transfer the railway, port and mine through ASX announcements and media releases.\footnote{225}{Letters dated 23 August 2004, 5 November 2004 and 8 November 2004 and related media releases dated 23 August 2004 and 5 November 2004.}

In late March 2005, an article published in the \textit{Australian Financial Review} asserting that the framework agreements did not impose legally binding obligations on the Chinese Contractors\footnote{226}{‘Doubts Hit Fortescue’s Iron-ore Project’, \textit{Australian Financial Review} (24 March 2005), see Australian Securities and Investments Commission v Fortescue Metals Group Ltd [No 5] [2009] FCA 1586 at [9].} prompted the ASX to issue FMG with queries relating to its content\footnote{227}{ASX queries of 24 and 30 March 2005, available at <http://www.asx.com.au/asx/statistics/announcements.do>.,} and which produced information upon which ASIC relied to allege that:

FMG did not have a genuine and/or reasonable basis for making these disclosures concerning the framework agreements […] and that FMG engaged in a course of knowing and deliberate conduct to make the disclosures, by the notifications to the ASX and other statements, which were false, unqualified and emphatic as to the significance and effect of the framework agreements.\footnote{228}{Australian Securities and Investments Commission v Fortescue Metals Group Ltd [No 5] [2009] FCA 1586 at [12].}

Effectively alleging dishonesty on the part of FMG’s board and Forrest specifically, ASIC argued that FMG contravened both the continuous disclosure (s 674(2)) and misleading or deceptive conduct (s 1041H and s 52) provisions of both the \textit{Corporations Act 2001} (Cth) and the \textit{Trade Practices Act 1974} (Cth)
(TPA) (as it then was). It also submitted that Forrest was the ‘architect of this course of conduct or, at the least, he was aware of it and did not prevent it’. Forrest was therefore alleged to have contravened s 674(2A) through his involvement in FMG’s contravention of s 674(2) as well as the duty of directors to exercise due care and diligence in s 180(1) of the Corporations Act for his failure to ensure FMG did not engage in contraventions of the Act and thus expose it to the risk of harm, which would include civil penalty proceedings.

The kernel of ASIC’s argument was that rather than bind each of the Chinese companies to build, transfer and finance the Project infrastructure as purported by FMG, the framework agreements were actually “agreements to agree”, binding parties only to negotiate agreements which might have that effect, or, which alternatively, might result in no binding contracts at all.

The precise legal effect of these framework agreements, their “agreement to agree”-ness, constituted information which ASIC argued should have been disclosed given its potential to ‘influence persons who commonly invest in securities in deciding whether to acquire or dispose of FMG’s securities’. These alleged contraventions occurred and continued until the three framework agreements were provided to the market in response to the ASX’s

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231 Australian Securities and Investments Commission v Fortescue Metals Group Ltd [No 5] [2009] FCA 1586 at [19].
queries of late March 2005. Accordingly, declarations of contravention of ss 674(2) and 1041H, 674(2A) and 180(1) were sought against FMG and Forrest respectively for what were characterised as very serious contraventions, as well as compensation orders, pecuniary penalties, and the disqualification of Forrest from managing corporations. This web of civil and punitive measures had the potential to result in significant financial repercussions for Forrest and FMG, given ASIC’s allegations at trial that Forrest had contravened s 180 some 22 times. ASIC also sought orders for Forrest to compensate FMG for any pecuniary penalty sustained by it for each contravention of s 674(2), the maximum penalty for which is $1 million.

In its defence FMG argued that the disclosures it made to the market were correct: That the framework agreements were binding ‘first agreements’ intended by the parties to them to have immediate legal effect and therefore that it did not breach s 674 or mislead the market. FMG contended that despite the fact that (as the market was aware) fundamental aspects of the project were yet to be determined given the continuing definitive feasibility study, the agreements actually required the contractors to build and transfer the infrastructure on the basis that FMG would pay 10% of the value of the works

233 Australian Securities and Investments Commission v Fortescue Metals Group Ltd [No 5] [2009] FCA 1586 at [26].
234 Australian Securities and Investments Commission v Fortescue Metals Group Ltd [No 5] [2009] FCA 1586 at [29].
235 Australian Securities and Investments Commission v Fortescue Metals Group Ltd [No 5] [2009] FCA 1586 at [84].
236 Australian Securities and Investments Commission v Fortescue Metals Group Ltd [No 5] [2009] FCA 1586 at [84].
before completion. Their binding character was not affected by the fact that the parties intended ‘more fulsome agreements in addition to, or in substitution for, the framework agreements [that would] not detract from the binding nature of the framework agreements’.  

FMG also submitted that, regardless, each disclosure was ‘an expression of opinion which was honestly and reasonably held’, argumentation which as it transpires, seems to have appealed to Gilmour J. Forrest adopted FMG’s defence as his own, before submitting his own specific defence towards the conclusion of the trial.

### 3.6.1 The decision of the Federal Court at first instance

At first instance, Justice Gilmour of the Federal Court decided in rather emphatic fashion to dismiss the case. The heart of ASIC’s allegations hinged upon a particular epistemic perspective taken to the framework agreements,

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238 *Australian Securities and Investments Commission v Fortescue Metals Group Ltd [No 5] [2009] FCA 1586* at [30].  
240 *Australian Securities and Investments Commission v Fortescue Metals Group Ltd [No 5] [2009] FCA 1586* at [32].  
241 *Australian Securities and Investments Commission v Fortescue Metals Group Ltd [No 5] [2009] FCA 1586* at [34]. Forrest argued firstly, that since FMG had not contravened s 674(2) that he could not have been involved in a contravention pursuant to s 674(2A); secondly, that he could make out the due diligence defence found in s 672(2B) requiring reasonable steps to comply in the circumstances and a belief formed on reasonable grounds that the company was in compliance; and thirdly, that ASIC had not established the threshold element of s 674(2A) that Forrest was ‘involved in’ the alleged contravention because he was not aware of the information ASIC says FMG was required to announce (and therefore be aware of) to the ASX. ASIC’s allegation of a breach of s 180(1) was, Forrest argued, contingent on ASIC proving FMG’s breach of s 674(2) and s 1041H, and also that these were serious contraventions pursuant to s 1317G(1)(b)(iii) of the Act. Forrest also argued that the business judgment rule in s 180(2) would apply to his conduct, exonerating him from any breach of the section. See *Australian Securities and Investments Commission v Fortescue Metals Group Ltd [No 5] [2009] FCA 1586* at [35-7].
namely, that they were not binding contracts in themselves, but rather, agreements to agree. This constituted information ASIC alleged should have been disclosed as part of FMG’s continuous disclosure obligations, the failure to do so resulting in contravention of the Act. Gilmour J found that due to the fact FMG and Forrest never held the epistemic perspective in relation to the framework agreements argued by ASIC – that is, that neither FMG nor its directors (including Forrest) believed the agreements were not binding contracts – that they were never in possession (or ought reasonably to have come into possession of same in the performance of their duties) and therefore never ‘aware’\(^{242}\) of such information for the purposes of the Act:

The information which ASIC contends ought to have been disclosed in this case principally comprises an assertion as to the meaning and legal effect of the framework agreements. This assertion is necessarily the product of a judgment or opinion as to what is the meaning and legal effect of these agreements. There is no evidence that FMG by any of its directors or officers, including Forrest, ever held the opinions postulated by ASIC and which underpin its case as to what FMG ought to have disclosed as to the meaning and legal effect of the framework agreements. I find that the opinions contended for by ASIC do not self-evidently or obviously emerge upon merely reading the terms of the framework agreements.\(^{243}\)

In arriving at his decision to dismiss ASIC’s case, Gilmour J focussed on the four key elements of the continuous disclosure regime: The existence of information, the awareness on the part of FMG and Forrest of this information, a demonstrated lack of general availability of the information, and the

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\(^{242}\) Australian Securities and Investments Commission v Fortescue Metals Group Ltd [No 5] [2009] FCA 1586 at [50-55].

\(^{243}\) Australian Securities and Investments Commission v Fortescue Metals Group Ltd [No 5] [2009] FCA 1586 at [41].
requirement that a reasonable person would have expected the information to have had a material effect on the price or value of FMG’s shares if generally available.\(^{244}\)

In addressing the first element relating to the “information” said by ASIC to have required disclosure (that the agreements were not binding in themselves but only agreements to agree) and assessing its character, Gilmour J isolated ASIC’s perception of the nature of the contracts as one of a number of possible opinions concerning their existence and effect. The precision exhibited by Gilmour J in separating out various strands of belief in arguments led by ASIC exposed the fact that its allegations of contravention were pregnant with the implicit submission that ‘its opinion as to the substance of the legal effect of the framework agreements is unarguably and obviously correct’.\(^{245}\) ASIC submitted that the question as to whether information actually exists is an objective one which was not dependent upon the company’s perception of the information, lest ‘idiosyncratic and unreasonable notions as to the effect of information would prevent the market being kept fully informed’.\(^{246}\) Gilmour J, precisely delineating the raw epistemic phenomena necessary to establish this element of the alleged contravention in this case could not agree, stating that ‘[w]here “information” is constituted by or includes the expression of an opinion, then the belief, or opinion, of the disclosing entity is, in my view,

\(^{244}\)Australian Securities and Investments Commission v Fortescue Metals Group Ltd [No 5] [2009] FCA 1586 at [240].

\(^{245}\)Australian Securities and Investments Commission v Fortescue Metals Group Ltd [No 5] [2009] FCA 1586 at [247].

\(^{246}\)Australian Securities and Investments Commission v Fortescue Metals Group Ltd [No 5] [2009] FCA 1586 at [251].
relevant’. His Honour’s conclusion here was that ASIC’s characterisation of the agreements was ‘a combination of fact and opinion’ and was “information” for the purposes of s 674(2).

The next question to be answered was whether FMG and Forrest were aware of the information said to exist by ASIC. Again his Honour’s precision in relation to the epistemic positions of FMG and ASIC, and their characterisation as fact, opinion or a mix of both is clear. His Honour did not find evidence that FMG through its directors ever ‘possessed’ the opinions as to the meaning and legal effect of the framework agreements argued by ASIC to be ‘self-evident and obvious simply from a consideration of the terms of each framework agreement’. If FMG actually held the opinion contained in the disclosures honestly and reasonably to the exclusion of any other opinion, then quite simply it could not be said that FMG and Forrest ‘ought reasonably’ to have come into possession of the ‘markedly different opinion postulated by ASIC’ and therefore disclose it. What ASIC’s case effectively amounted to was the argument that the opinion as to the meaning and legal effect of the framework agreement proffered by FMG in its announcements was not reasonably open to

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248 Australian Securities and Investments Commission v Fortescue Metals Group Ltd [No 5] [2009] FCA 1586 at [252] and [266].
249 Australian Securities and Investments Commission v Fortescue Metals Group Ltd [No 5] [2009] FCA 1586 at [259].
being held\textsuperscript{251}, due to the ‘brevity, lack of essential terms and genesis’ of the contracts.\textsuperscript{252}

FMG argued that the agreement came under the first category envisaged by \textit{Masters v Cameron} [1954] HCA 72 such that the parties have agreed all terms and intend to be bound immediately but propose ‘to have the terms restated in a form which will be fuller or more precise but not different in effect’ and that the lack of key terms as to pricing was not fatal in any way to the effect of the agreement.\textsuperscript{253} It is these critical matters left unsaid in the agreements that ASIC focussed on in its submission that ‘the agreement was a bare agreement to negotiate the scope and terms of a further contract to build, transfer and finance the infrastructure, and that it did not impose any legally enforceable obligations’.\textsuperscript{254} ASIC argued that the uncertainty relating to contractual terms foreshadowed at the beginning of the agreements was not addressed by other clauses in the contract, making the claim that the contract imposes any real constraints on the parties ‘illusionary’.\textsuperscript{255}

Gilmour J preferred to consider the agreements as a whole in order to determine the reasonableness of FMG’s perception of them,\textsuperscript{256} stating ‘it may be seen already that ASIC has brought a considerable degree of legal

\textsuperscript{251} \textit{Australian Securities and Investments Commission v Fortescue Metals Group Ltd [No 5]} [2009] FCA 1586 at [267]; see also [271].

\textsuperscript{252} \textit{Australian Securities and Investments Commission v Fortescue Metals Group Ltd [No 5]} [2009] FCA 1586 at [254].

\textsuperscript{253} \textit{Australian Securities and Investments Commission v Fortescue Metals Group Ltd [No 5]} [2009] FCA 1586 at [280].

\textsuperscript{254} \textit{Australian Securities and Investments Commission v Fortescue Metals Group Ltd [No 5]} [2009] FCA 1586 at [281].

\textsuperscript{255} \textit{Australian Securities and Investments Commission v Fortescue Metals Group Ltd [No 5]} [2009] FCA 1586 at [277].

\textsuperscript{256} \textit{Australian Securities and Investments Commission v Fortescue Metals Group Ltd [No 5]} [2009] FCA 1586 at [268] and [272].
sophistication to its analysis. It is not the kind of analysis that would be self-evident to lay people’. On the evidence before him, his Honour found that there was a ‘very respectable’ argument the parties sought to achieve what the announcements recorded, namely the build and transfer of the railway. He based this on facts relating to CREC’s representations that it could complete the railway works, its offer to execute those works, and FMG’s acceptance of this offer, which constituted an intention to be bound. Taken together with the absence of any statement or implication within the contracts as to their simply being ‘an informal arrangement, or a mere agreement to negotiate’ in Gilmour J’s view it was effectively reasonable for FMG to see the agreements as ‘recording the parameters of the intended agreement’ and that the fact issues had been slated for further development and agreement did not detract from the obligations therein. Indeed, given the definitive feasibility study was still being undertaken it is difficult to see how any further detail could be included – was FMG unable to enter contracts of this nature until such a study was completed? Commercially speaking, arguably not, and a project of this size and nature needed to get things rolling lest it falter, and ultimately fail.

257 *Australian Securities and Investments Commission v Fortescue Metals Group Ltd [No 5] [2009] FCA 1586* at [277].
258 *Australian Securities and Investments Commission v Fortescue Metals Group Ltd [No 5] [2009] FCA 1586* at [290].
259 *Australian Securities and Investments Commission v Fortescue Metals Group Ltd [No 5] [2009] FCA 1586* at [284].
261 Citing *Anaconda Nickel Ltd v Tarmoola Australia Pty Ltd* (2000) 22 WAR 101 (see *Australian Securities and Investments Commission v Fortescue Metals Group Ltd [No 5] [2009] FCA 1586* at [348]), Gilmour J stated that despite the lack of key terms argued by ASIC that the framework agreements and documents referred to within them ‘would have, no doubt, assisted in clarifying the matters absent from the agreements. ...The asserted uncertainty or incompleteness may therefore be overcome once the requisite intention to contract is found to be present’: *Australian Securities and Investments Commission v Fortescue Metals Group Ltd [No 5] [2009] FCA 1586* at [323].
His Honour did not consider it necessary to arrive at a comprehensive conclusion as to whether the framework agreements were actually binding: It was sufficient that ‘reasonably arguably’ they were such, given that is what the parties intended. Gilmour J cited legal oversight and advice, the position adopted by the Chinese Contractor, FMG’s internal records, its external communications and the position adopted by FMG executives as ‘cogent evidence from which it may be inferred that the opinions were genuinely held.’

In the vein established by his epistemological perspective of the technicalities of compliance with the continuous disclosure requirements, his Honour recognised the difficulties inherent in such cases for businesses, and it might be added, especially for those dealing with international counterparties and government agencies whose customary business practices might differ from our own:

Where that advice is as to the meaning and legal effect of an agreement the position becomes problematic. Even the best of legal minds can differ. The competing submissions of the eminent senior counsel who appeared before me, as to the meaning and legal effect of the framework agreements

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263 Australian Securities and Investments Commission v Fortescue Metals Group Ltd [No 5] [2009] FCA 1586 at [46], [48], [49], [70], [353]. For His Honour’s commentary on the role of FMG’s in-house solicitor Mr Huston: Australian Securities and Investments Commission v Fortescue Metals Group Ltd [No 5] [2009] FCA 1586 at [366]–[372], [380]–[394].
265 Australian Securities and Investments Commission v Fortescue Metals Group Ltd [No 5] [2009] FCA 1586 at [414]–[423] [452]–[456].
266 Australian Securities and Investments Commission v Fortescue Metals Group Ltd [No 5] [2009] FCA 1586 at [355].
highlights the difficulties involved for corporations generally and for FMG in particular in such circumstances.  

Nevertheless, his Honour concluded that ASIC failed to establish the awareness, either actual or constructive, of FMG or Forrest of the information alleged to have required disclosure. ASIC was therefore unable to demonstrate that FMG or Forrest held or ought reasonably to have held the opinions underlying the perspective as to the meaning and legal effect of the framework agreements held by ASIC.

ASIC’s case failed for this reason alone. Nevertheless his Honour continued with his analysis, confirming that the information ASIC alleged FMG was aware of was not generally available (s 674(2)) to common investors (because FMG was not aware of it as above) before moving to consider whether a reasonable person would have expected that information to have had a material effect on the price or value of FMG’s shares, if it had been generally available. His Honour considered evidence presented relating to materiality assuming ASIC’s perspective on the agreements did constitute information of which FMG should have been aware. While ASIC submitted that the information was of a material nature, his Honour found that even if FMG had been aware of ASIC’s

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268 Australian Securities and Investments Commission v Fortescue Metals Group Ltd [No 5] [2009] FCA 1586 at [465-7].
269 Australian Securities and Investments Commission v Fortescue Metals Group Ltd [No 5] [2009] FCA 1586 at [470].
270 Australian Securities and Investments Commission v Fortescue Metals Group Ltd [No 5] [2009] FCA 1586 at [240].
271 In spite of his finding that FMG could not have contravened s 674(2) based on his findings in relation to FMG and Forrest’s awareness or lack thereof of the information/s. See Australian Securities and Investments Commission v Fortescue Metals Group Ltd [No 5] [2009] FCA 1586 at [474] onwards.
272 His Honour noted that ASIC seemed ‘ambivalent as to the effect of the Framework Agreements. It says, on the one hand, that they are merely agreements to negotiate and are probably not even enforceable as
perspective on the agreements, that they need not have disclosed such information to the market.\textsuperscript{273} If the information had the quale, meaning and effect ASIC submitted – entry into unenforceable agreements or agreements merely to enter negotiations – this would not be information that Gilmour J thought was likely to influence common investors in deciding to acquire FMG securities due to the highly contingent nature of the project at that time, meaning there was no materiality to the information.\textsuperscript{274}

In the circumstances, Gilmour J found that FMG, its board and Forrest held their opinion as to the meaning and legal effect of the framework agreements honestly and reasonably. FMG submits that the framework agreements actually do have the legal effect claimed in its disclosures. It is unnecessary for me to reach a concluded view as to that. I have concluded that FMG’s and Forrest’s opinion, which underpinned the disclosures, in each case was honestly and reasonably held at the times of the disclosures and thereafter. This is sufficient for present purposes.\textsuperscript{275}

So the very fact that FMG did not hold the opinion ASIC did as to the legal effect of the agreements meant it could not have been in possession of it to then disclose it, regardless of the actual legal effect of the agreements.

\textsuperscript{273} Australian Securities and Investments Commission v Fortescue Metals Group Ltd [No 5] [2009] FCA 1586 at [484].
\textsuperscript{274} Australian Securities and Investments Commission v Fortescue Metals Group Ltd [No 5] [2009] FCA 1586 at [486]. See also [594].
\textsuperscript{275} Australian Securities and Investments Commission v Fortescue Metals Group Ltd [No 5] [2009] FCA 1586 at [54].
ASIC also alleged that FMG and Forrest through a series of ASX releases and press conferences, periodic reports, interviews and presentations (16 in total) made false and misleading statements conveying false impressions about the three framework agreements between August 2004 and March 2005. ASIC argued that these communications revealed ‘a relentless pursuit for a positive news story by FMG and Forrest and a persistent disregard for truth or accuracy, and, in particular a relentless pursuit of a deceitful campaign to distort and exaggerate the content and significance’ of the agreements. This was problematic given the audience to whom these statements were directed being lay investors, with the intent according to ASIC being to ‘encourage reasonable investors in the ASX’s financial market to invest, or to continue investments’ in FMG. ASIC alleged that FMG and Forrest’s ‘emphatic, unequivocal and unqualified’ disclosures were deceptive due to the fact they did not oblige the Chinese Contractors to construct, finance and transfer the various projects.

As he characterised ASIC’s perspective on the agreements, his Honour considered FMG’s statements as to the legal effect of the agreements as constituting a mix of fact and opinion: ‘an assertion as to the meaning and legal effect of an agreement is necessarily the product of an opinion formulated to

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279 Australian Securities and Investments Commission v Fortescue Metals Group Ltd [No 5] [2009] FCA 1586 at [668].
280 Australian Securities and Investments Commission v Fortescue Metals Group Ltd [No 5] [2009] FCA 1586 at [669].
281 Australian Securities and Investments Commission v Fortescue Metals Group Ltd [No 5] [2009] FCA 1586 at [681].
that effect. However the disclosures are characterised, a question as to the
reasonableness of the underlying opinion and, in this case, whether or not it
was honestly held, arises’. 282 His Honour’s conclusion arrived at in relation to
ASIC’s s 674 allegations, that ASIC’s view of the contracts was not the only view
to be reasonably held in the circumstances, and that FMG and Forrest had
honestly and reasonably arrived at theirs, reverberated through his rejection of
ASICs misleading or deceptive conduct case:

FMG’s disclosures concerning the binding nature of the framework
agreements were assertions, necessarily underpinned by an opinion that
the agreements were such. In my view, such an opinion was reasonably
based and honestly held by FMG and Forrest. The expression, in effect, of
that opinion, by its assertions as to the effect of the framework agreements
misrepresented nothing. That there was scope for alternative opinions to
be held as to the legal effect of the framework agreements does not mean
that FMG engaged in misleading or deceptive conduct. 283

Accordingly, the impugned disclosures did not constitute misleading or
deceptive conduct under s 1041H. 284 ASIC’s case against Forrest in his alleged
accessorial role therefore failed and was also dismissed. 285

283 Australian Securities and Investments Commission v Fortescue Metals Group Ltd [No 5] [2009] FCA 1586 at [59].
285 Australian Securities and Investments Commission v Fortescue Metals Group Ltd [No 5] [2009] FCA 1586 at [71] and [903-4].
3.6.2 The decision of the Full Court of the Federal Court

ASIC lodged an appeal, which was heard by the Full Court of the Federal Court comprising Keane CJ, Emmett and Finkelstein JJ. ASIC challenged Gilmour J’s decision for its treatment of FMG’s disclosures necessarily as statements of opinion of the legal character of the framework agreements, his supposed failure to appreciate the misleading nature of FMG’s disclosures which were allegedly nothing more than agreements to agree and the likely effect of such disclosures on lay investors, and the finding that FMG and Forrest held their opinions genuinely and reasonably.

Chief Justice Keane’s judgment sought answers to the following questions:

Firstly, whether an ordinary and reasonable person, being a member of the investing public would have regarded FMG’s statements to the ASX and others as asserting that the framework agreements obliged the Chinese Contractors to build, finance or transfer the relevant infrastructure as opposed to assertions of FMG’s belief that the framework agreements could arguably be regarded as having that effect.

Secondly, if the answer is the former, then the second issue arises, viz, whether those assertions were accurate. The resolution of this second issue

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depends on whether the framework agreements were legally enforceable agreements to build and transfer the infrastructure for the Project.\textsuperscript{289}

In view of the fact that arguments at trial ‘concentrated upon issues relating to the honesty and reasonableness of FMG and Forrest, whereas, in this Court, the parties’ focus shifted to an objective assessment of the conduct of FMG and Forrest\textsuperscript{290}, the Full Court allowed the appeal as emphasis was placed on what the Court thought of the effect of the disclosures made, rather than the state of mind of their makers.

Approaching the question as to whether an ordinary and reasonable person would have regarded FMG’s disclosures as assertions proper or assertions of FMG’s belief relating to the legal effect of the framework agreements, Keane CJ stated that ‘[a]s a matter of general law, authority does not support the proposition that a statement about the existence or effect of a term of an agreement must necessarily be understood as a statement of opinion’.\textsuperscript{291} This apprehension of the situation was justified by his Honour by reference to principles relevant to the application of s 52 of the TPA, which informed the application of s 1041H. The lack of a need to demonstrate intent to mislead or deceive or even evidence of the actual misleading or deception of another, a well established principle in s 52 cases, was reiterated by Keane CJ.\textsuperscript{292}

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\textsuperscript{289} Australian Securities and Investments Commission v Fortescue Metals Group Ltd [2011] FCAFC 19 at [99].
\textsuperscript{290} Australian Securities and Investments Commission v Fortescue Metals Group Ltd [2011] FCAFC 19 at [16].
\textsuperscript{291} Australian Securities and Investments Commission v Fortescue Metals Group Ltd [2011] FCAFC 19 at [100].
\textsuperscript{292} Australian Securities and Investments Commission v Fortescue Metals Group Ltd [2011] FCAFC 19 at [102].
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As noted above, Gilmour J’s finding that FMG’s opinion as to the legal effect of the agreements was reasonably and honestly held meant the company effectively misrepresented nothing due to the fact there was scope for alternative perspectives as to the legal effect of the framework agreements.\textsuperscript{293} In contrast, Keane CJ’s focus was at the next stage of the phenomenon of disclosure, the receipt of the information by the audience:

as the authorities show, the issue which arises under s 1041H of the Act and s 52 of the TPA is what ordinary and reasonable members of the investing public would have understood from FMG’s announcements. It is the effect of a statement upon the persons to whom it is published, rather than the mental state of the publisher, which determines whether the statement is misleading or deceptive, or likely to mislead or deceive.\textsuperscript{294}

Indeed, his Honour considered Gilmour J to have erred to the extent he relied upon the idea that ordinary, reasonable members of the audience of FMG’s announcements would have perceived them simply as statements of FMG’s opinion as to the legal gravity of the agreements, ‘\textit{identifiable as such}’.\textsuperscript{295}

The fact these were announcements made through the ASX platform would only have lent weight to their authority as a finalised, vetted, piece of corporate disclosure which had effectively been quarantined for lay investor digestion.\textsuperscript{296}

Keane CJ further specified that since s 52 of the TPA and s 1041H do not distinguish between statements of fact and statements of opinion, misleading

\textsuperscript{293} See \textit{Australian Securities and Investments Commission v Fortescue Metals Group Ltd [No 5] [2009] FCA 1586} at [686].

\textsuperscript{294} \textit{Australian Securities and Investments Commission v Fortescue Metals Group Ltd [2011] FCAFC 19} at [106].

\textsuperscript{295} \textit{Australian Securities and Investments Commission v Fortescue Metals Group Ltd [2011] FCAFC 19} at [108] emphasis added.

\textsuperscript{296} \textit{Australian Securities and Investments Commission v Fortescue Metals Group Ltd [2011] FCAFC 19} at [107]–[110].
conduct may still exist. The motivation for his Honour’s approach was the deeper purpose of the regime:

In my respectful opinion, the approach adopted by the trial judge artificially limits the protection afforded to the investing public by the Act by giving effect to a distinction which is not drawn by the legislation and not warranted by the facts of the case. If the trial judge’s view were upheld, then responsibility for a statement presented as a statement of historical fact, could be avoided by the representor on the basis of reservations not apparent to the persons to whom the statement was published. It would permit reasonable belief in a matter of opinion to justify the making of a statement in terms not qualified so as to alert the audience to the possibility of a contrary view and the possible existence of reasonable grounds for the contrary view. That is an unattractive result.

Entering the mind of the hypothetical ordinary and reasonable investor, Keane CJ stated that FMG’s announcements to the effect that binding agreements had been struck were statements which would not be understood as statements of opinion as to which a contrary view was also reasonably open, but rather as ‘conveying the historical fact that agreements containing terms accurately summarised in the announcements had been made between the parties’. His

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In the circumstances of any particular case, the effect of a statement upon its audience may well vary, depending on the nature of the information conveyed and the terms in which it is couched. A representation may be couched in terms which are apt to be understood by an ordinary and reasonable audience only as a statement of opinion. On the other hand, a representation may be couched in terms which may ordinarily and reasonably be understood only as a statement of fact. In the first case, the existence of a reasonable basis for the statement means that the representation cannot be characterised as misleading or deceptive if the opinion is genuinely and reasonably held by the representor. That cannot be said in relation to the second category.


Honour derided FMG’s arguments to the effect that the announcements were not material, using terms within them to demonstrate their importance in the circumstances, notwithstanding the incomplete DFS.

Given his Honour’s conclusion that ordinary and reasonable members of the investing public would have perceived the disclosures as presenting assertions proper (as opposed to assertions of belief) relating to the legal status of the framework agreements, he then proceeded to an analysis of the second question surrounding the accuracy of the assertions relating to the legal enforceability of the contracts. Keane CJ thus set out to determine whether, objectively speaking, a contract was actually made to build the infrastructure which would make the announcements valid and not misleading.

For his Honour a non-interventionist approach was required due to the failure of the parties to agree upon ‘the content of essential terms ... the application of an objective standard to measure their obligations or to provide a mechanism to fix the content of essential terms (as by third party determination)’ meaning it was ‘no business of the courts to foist upon the parties a bargain which they have not made.’ A major reason for the incompleteness of the purported contract was that given the DFS was incomplete and the preliminary feasibility study (PFS) was no longer entirely relevant due to changes in the location of the mine, and additionally because it was unclear on the evidence whether the PFS had been shown to the Chinese Contractors prior to signing the framework agreements.

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agreement, or whether the recitals had just referred to it. 302 In this context, the
Chief Justice was unable to concur with FMG that parties to the agreement
were ad idem as to content:

I am unable to accept that, objectively speaking, the framework agreements
expressed a common intention that the Chinese Contractors were bound to
build the infrastructure for the Project without an agreed description of the
works that formed the subject matter of the contract. It is theoretically
possible that the Chinese Contractors might be taken to have agreed to
construct, at their own initial expense, whatever infrastructure FMG might
require for whatever price FMG might ultimately agree to pay. But the
Court must be slow to attribute to the parties the intention to achieve such
an uncommercial result. 303

Keane CJ placed less weight on the parties’ expressed intentions (both
contractual and those surrounding the contract) than Gilmour 304, preferring to
situate them in their context whereby evidenced enthusiasm relating to a
certain course of action did not ‘afford a reliable indication of the extent of the
mutual involvement upon which they had actually achieved agreement’. 305
Indeed, he saw correspondence as to a lack of consensus between the parties
on essential terms including a price as demonstrating the opposite, leading to

302 *Australian Securities and Investments Commission v Fortescue Metals Group Ltd* [2011] FCAFC 19 at [129].
303 *Australian Securities and Investments Commission v Fortescue Metals Group Ltd* [2011] FCAFC 19 at
[130], (emphasis added). At [131]:

“...It must be borne in mind that this was a large, speculative project which had spent years in
planning stages and would spend years in construction and operational stages, and in relation
to which the preparation of the DFS to identify the work necessary to build the infrastructure had not
been completed. In this regard, in *G R Securities v Baulkham Hills Private Hospital Pty Ltd* McHugh
J said, at 634:

“The magnitude, subject matter, or complexities of the transaction may indicate that the
agreement was a limited one not intended to have legal effect”: *Sinclair, Scott & Co Ltd v Naughton* (1929) 43 CLR 310 at 316-317.

304 *Australian Securities and Investments Commission v Fortescue Metals Group Ltd* [No 5] [2009] FCA 1586
at [131].
305 *Australian Securities and Investments Commission v Fortescue Metals Group Ltd* [2011] FCAFC 19 at
[134].
his conclusion the parties did not wish to be bound.\textsuperscript{306} Accordingly, his Honour did not place the agreements within the first category of \textit{Masters v Cameron}\textsuperscript{307} as Gilmour J elected to due to their envisaging a further contract and their failure to ‘manifest an existing consensus upon the subject matter of the work, or the price, or the schedule for performance’ which were seen as ‘essential to the conclusion of an enforceable contract to build and transfer the infrastructure for the Project’.\textsuperscript{308} His Honour therefore concluded that the framework agreements were not enforceable agreements obliging performance.

With questions 1 and 2 answered and generating the conclusion that FMG had engaged in misleading disclosure contravening s 1041H, it was apparent to his Honour that FMG had also contravened s 674(2) in its failure to correct its disclosures.\textsuperscript{309}

In the state of affairs brought about by FMG’s misleading statements, there can be no room for any suggestion that the corrective information which FMG was obliged to provide was not material within the meaning of s 677 of the Act. There can be no serious suggestion that FMG was not obliged by s 674(2) to correct the impression created by the misleading statements which FMG made. It would be fanciful to suggest that information showing that FMG had misled the market about having secured binding contracts for

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\textsuperscript{306} \textit{Australian Securities and Investments Commission v Fortescue Metals Group Ltd} [2011] FCAFC 19 at [151].
\textsuperscript{308} \textit{Australian Securities and Investments Commission v Fortescue Metals Group Ltd} [2011] FCAFC 19 at [161].
\textsuperscript{309} \textit{Australian Securities and Investments Commission v Fortescue Metals Group Ltd} [2011] FCAFC 19 at [181].
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the building and finance of the Project would not have influenced common investors in deciding whether to acquire or dispose of FMG’s shares.310

As for Forrest’s role in and responsibility for the contraventions, his Honour dismissed arguments that it could be inferred Forrest took reasonably necessary steps to ensure the agreements were binding and could therefore access the defence in s 674(2B). He did not accept inferences drawn by Gilmour J relating to the role of FMG’s solicitor in this setting in the absence of direct evidence of his involvement in the vetting of the contracts and ASX announcements prior to the solicitor’s evidenced examination of the agreements in January 2005, well after the disclosures to the market had been made.311

His Honour instead placed emphasis on ASIC’s argumentation relating to inconsistencies in Forrest’s communications with his asserted belief in the binding nature of the agreements:

Forrest’s own document, his email of 27 October 2004 ... shows that he knew that further steps were necessary to reach agreement on the scope, financing, subject matter and price of the Project. This email shows that Forrest knew that FMG was still involved in a bargaining process with the Chinese. At the time when this email was written, Forrest plainly did not entertain, and it may be inferred had never entertained, reasonably or at all, the opinion that the terms of the framework agreements were effective

311 ‘There is no evidence Huston [FMG’s lawyer] was consulted by Forrest before this time. There is also no evidence that Forrest consulted with any other adviser other than Huston to seek advice as to whether the agreements he had signed were apt to achieve a binding agreement to build and transfer the infrastructure for the Project’: Australian Securities and Investments Commission v Fortescue Metals Group Ltd [2011] FCAFC 19 at [193].
as binding agreements to build, finance, and transfer the infrastructure involved.312

Forrest was therefore unable to access the defence in s 674(2B) meaning ASIC’s allegation relating to a breach of s 674 was made out, as was its s 180 case for a failure to act with care and diligence as Forrest was unable to argue the Business Judgment Rule defence successfully.313

In a short judgment agreeing with the Chief Justice, Emmett J was convinced that the absence of a clear mechanism for the determination of key issues – until then left untouched within its four walls – meant that the agreement created was no more than a ‘framework for discussion and negotiation with a view, ultimately, of reaching a binding agreement for the construction of a railway’.314 Because of this, it was misleading to describe the agreement as anything more. He was also convinced that the approach taken by Gilmour J effectively ignored the fact that lay investors would have perceived the disclosures as statements as to the ‘actual legal effect’315 of the agreements in the absence of their clear expression as statements of opinion which would have allowed lay investors to discount their reliability accordingly. Since the

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agreements did not have the legal effect ordinary readers of the disclosures would have perceived them to have had they were liable to being deceived, meaning a contravention of ss 1041H and 674 were made out.\(^\text{316}\)

Finkelstein J concurred with his Full Court brethren, stating the agreements in question did not raise a Masters v Cameron issue\(^\text{317}\) due to their incompleteness, notwithstanding their intention to create binding legal relations, due to the difficulty of enforceability by the courts, and lest the Court imposed ‘its own perception of what the bargain is rather than implementing what has been agreed by the parties’\(^\text{318}\). His Honour stated:

This case is a good example. The projects contemplated by the agreements were, on any view, complex multi-million dollar projects. ... Yet almost nothing was agreed about the nature and extent of those projects. One would expect that it would require significant time, effort and expertise to resolve these matters and arrive at the appropriate terms...In construction contracts the price is of fundamental importance. If it is not agreed, or there is no agreed method of ascertaining it, there can be no bargain.\(^\text{319}\)


\(^{317}\) Australian Securities and Investments Commission v Fortescue Metals Group Ltd [2011] FCAFC 19 at [222].

\(^{318}\) Australian Securities and Investments Commission v Fortescue Metals Group Ltd [2011] FCAFC 19 at [223].

\(^{319}\) Australian Securities and Investments Commission v Fortescue Metals Group Ltd [2011] FCAFC 19 at [226-7].

The reason no price was agreed is the inevitable consequence of another major omission: the scope of the works were barely described, let alone defined. One agreement contemplates the construction of a railway line which would likely be several hundred kilometres in length. But the parties had not turned their mind to its type, design, or even the route over which the line
As will be explored further below, this approach to the commerciality of the agreements contrasts sharply with that offered by the High Court.\(^{320}\)

### 3.6.3 The decision of the High Court

In a matter which had by early 2012 been suspended in varying states of action/appeal limbo for over six years, the High Court unanimously held that the announcements at the heart of the litigation, and the representations therein that FMG had entered into binding contracts, were not misleading or deceptive. Given that the information released was held to have accurately represented the agreements made, ASIC’s argument that FMG had breached the continuous disclosure requirements by misrepresenting their effect and failing to subsequently correct them was not established as there was in effect, nothing to correct. In turn, allegations that Mr Forrest breached his duty of care and diligence under s 180(1) of the *Corporations Act* also failed as no dereliction of duty was in evidence.

Diving headlong into the technicalities of ASIC’s case – which in addition to its main allegation of misleading or deceptive disclosure mixed ‘two radically different and distinct ideas’ in its pursuit of FMG and Forrest and led to...
different cases being advanced at trial and at appeal to the Full Court – the joint judgment of French CJ, Gummow, Hayne and Kiefel JJ was quick to strip ASIC’s case back to its essentials and settle into an analysis as to whether the descriptor “binding contract(s)” was in fact misleading or deceptive.

This necessitated an analysis of what this terminology conveyed to the audience to which they were directed. Tracing the Full Court’s reasoning on this issue, the majority exposed how ASIC’s case brought what Gilmour J called a fair amount of ‘legal sophistication’ to trial, and which influenced the Full Court’s perception of it by ascribing more depth to the message conveyed than arguably necessary in the commercial context in which it was made:

[T]he Full Court treated the references to “binding contract” as conveying more than the message that the parties had made an agreement which the commercial community (or some relevant section or sections of it, such as “investors”) would describe in the terms Fortescue had used in its statements. And critically, the Full Court assumed that the impugned statements conveyed the message to the intended audience that the parties had made what an Australian court would decide to be a “binding contract”.

That is, the Full Court found, in effect, that it would be (and in this case was) misleading or deceptive or likely to mislead or deceive to say that the parties to the framework agreements had made “binding contracts” unless the parties had made bargains that could be and would be enforced by action in an Australian court.321

The use of the words “binding contract” in the release, no doubt instrumental in exciting ASIC’s initial attention and driving its argument on appeal, saw the

321 Forrest v Australian Securities and Investments Commission [2012] HCA 39 at [35].
Full Court focus its attention on the projection of a message as to the legal gravity of the agreements. While ASIC disclaimed any real reliance on the use of the epithet “binding” in argument at the High Court, its basic argument was that it was misleading or deceptive to announce the creation of the contract or agreement unless it could withstand a legal challenge in an Australian court.\(^{322}\)

Identifying the relevant audience as being those involved or considering involvement in a venture which at the time was little more than an ambitious, speculative ‘early stage project development concept’, the relevant question became ‘what would that audience have understood of the claim that FMG had made “binding contracts” with Chinese state-owned entities’?\(^{323}\)

The idea that the terms “binding”, “contract” or “agreement” conveyed a message about the actual enforceability of the contracts, and in an Australian court at that, was just ‘too broad a proposition’ for the majority.\(^{324}\)

The wider message that ASIC claimed to have been projected by the language in the releases, effectively that the agreements the parties had made were not open to legal challenge in an Australian court, was simply, in the absence of evidence that members of the relevant audience would have understood the announcements in these terms,\(^{325}\) not shown to have been conveyed to an ordinary and reasonable member of that audience.\(^{326}\)

\(^{322}\) *Forrest v Australian Securities and Investments Commission* [2012] HCA 39 at [41].

\(^{323}\) *Forrest v Australian Securities and Investments Commission* [2012] HCA 39 at [37]: ‘Would they, as the Full Court assumed, ask a lawyer’s question and look not only to what the parties had said and done but also to what could or would happen in a court if the parties to the agreement fell out at some future time? Or would they take what was said as a statement of what the parties to the agreements understood that they had done and intended would happen in the future? The latter understanding is to be preferred’.

\(^{324}\) *Forrest v Australian Securities and Investments Commission* [2012] HCA 39 at [38].

\(^{325}\) *Forrest v Australian Securities and Investments Commission* [2012] HCA 39 at [39].

\(^{326}\) *Forrest v Australian Securities and Investments Commission* [2012] HCA 39 at [43].
The majority’s other ‘fundamental difficulty’ in accepting the Full Court’s analysis was the assumption that the incompleteness and therefore lack of legal enforceability held to exist (and which was instrumental in creating their misleading or deceptive character) in the agreements were determined to be so by a consideration of Australian domestic law. This assumption was not justified because the audience would not necessarily have ‘understood the impugned statements as inviting any attention to what the courts of Australia could or would do if a party to one of the agreements did not perform its part of the bargain’. Analyses of the possible enforceability of the agreements under any body other than Australian law were not entered into by ASIC or in the Full Court’s judgment as it was assumed that the Australian law relating to contract was sufficient:

The impugned statements conveyed to their intended audience what the parties to the framework agreements said they had done — make agreements that they said were binding — and no more. ASIC did not demonstrate that members of the intended audience for the impugned statements would have taken what was said as directed in any way to what the parties to the agreements could do if the parties were later to disagree about performance. ASIC did not demonstrate that the impugned statements conveyed to that audience that such a disagreement could and would be determined by Australian law.

Given ASIC’s failure to demonstrate the foundational misleading or deceptive nature of the statements it made which would then require correction to ensure compliance with the continuous disclosure requirements, ASIC’s web of

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327 Forrest v Australian Securities and Investments Commission [2012] HCA 39 at [45].
328 Forrest v Australian Securities and Investments Commission [2012] HCA 39 at [50].
allegations collapsed, and the highly anticipated consideration of the continuous disclosure provisions effectively proved a red herring to the misleading or deceptive disclosure case. The Court pithily concluded ‘[t]he premise for ASIC’s argument about the application of the continuous disclosure requirements, and for the Full Court’s conclusions about those issues, was not established’. Given that the s 180 claim against Mr Forrest was contingent on success in claims under s 1041H and s 674, no breach of duty was found to exist.

Heydon J structured his separate judgment around three ideas which he saw as answering ASIC’s allegations that the CREC agreement was not what it was communicated to be, and that FMG had created the impression that it had a genuine and/or reasonable basis for making the impugned statements.

The first was that outside of what might be held “contractually binding”, an agreement – to ensure the relevant infrastructure was built by compelling further detailed negotiations which would attempt to keep future decisions as to precise content within the intent of the initial agreements – was in existence. Quoting relevant parts of the agreements his Honour concluded that ‘by a process of unattributed quotation, paraphrase and summary, the ASX release had correctly represented the effect of the agreement, leaving aside the question of its contractual force... it correctly represented that there was

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agreement, and that it was in the view of the parties binding from the time of board approval’. 330

The second of Heydon J’s undergirding postulates related to what, if any, binding force the agreements actually had. His Honour held that even if the agreement was not a “binding contract” to actually build the railway, that ’it was a “binding contract” to engage in the necessary further negotiations and enter the necessary further agreements’. Whether it was binding or not in terms of having the railway itself actually built was not a question which required resolution ‘because the impugned statement about the contract being binding was a statement of opinion rather than fact, and ASIC must fail because it did not establish that Fortescue did not genuinely and reasonably hold that opinion’. 331

His Honour appeared comfortable wading into the depths of the fact/opinion distinction made at first instance, stating that at least in the context of the matter before him ‘whether an agreement is a binding contract involves a question of law – that is, a question of opinion... The binding quality of an alleged contract is an inherently controversial matter of professional judgment. It is distinct from the historical facts that negotiation occurred and a written agreement was signed and in contrast to the Full Court’s perception that while not expressly stated in the language of opinion, the impugned announcement’s

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330 Forrest v Australian Securities and Investments Commission [2012] HCA 39 at [90]: ‘It did not follow from the fact that some matters were left to be the subject of ‘a fuller and more detailed agreement’, particularly matters concerning general conditions of contract, that other matters were not the subject of a binding agreement’.

331 Forrest v Australian Securities and Investments Commission [2012] HCA 39 at [93].
statement that the CREC agreement was a “binding contract” was actually identifiable as such.\(^{332}\)

His Honour considered this issue in more depth in the third vein of this judgment: ‘so far as Fortescue had represented that there was a “binding contract” to build the railway, the statement was one of opinion, and only fell within s 1041H if ASIC established that Fortescue did not hold that opinion, or, if it did, that it had no reasonable basis for stating it. ASIC did not establish either proposition’.\(^{333}\) Given the allegation that FMG had no ‘genuine and/or reasonable basis’ for making the impugned statements, his Honour firstly inquired into whether FMG had been fraudulent in lacking a genuine basis on which to make the statements it did. There was always going to be difficulty with this proposition given that ASIC had conceded that the agreements were intended to be legally binding, his Honour stating ‘in a practical sense, it is difficult to contend that where a party to an agreement intended it to be legally binding, it knew it was not legally binding’.\(^{334}\) Evidence in the form of near contemporary minutes of an FMG board meeting which described it as such, the evidence of a former employee My Heyting, called by ASIC, who conceded the existence of an oral offer and who himself had referred to the agreement as a contract, and the fact that the contractual counterparties in the form of the Chinese state-owned entities appeared through their actions to share FMG’s view as to the binding nature of the agreements was conclusive for his Honour.

\(^{332}\) *Forrest v Australian Securities and Investments Commission* [2012] HCA 39 at [94].

\(^{333}\) *Forrest v Australian Securities and Investments Commission* [2012] HCA 39 at [85].

\(^{334}\) *Forrest v Australian Securities and Investments Commission* [2012] HCA 39 at [97].
The second alternative on this argumentation – lacking a reasonable basis for believing the agreement was a binding one – required his Honour to ask a question ‘the parties did not raise explicitly’, that is, whether the absence of a reasonable basis for the representation made meant that FMG had engaged in misleading or deceptive behaviour. His Honour stated:

It is often said that to state an opinion one does not hold misleads the audience about one's state of mind. That is understandable. It is also often said that to state an opinion which one does hold implies that one has reasonable grounds for holding it. In some circumstances that may be so, but why should it be so in all? Assume that two people are asked: “In your opinion, is that document a contract?”, one answers “Yes”, and the other answers “Yes, and I have reasonable grounds for that view”. The two answers are different. The first answer does not imply the second, unless there are special circumstances indicating that it should.335

His Honour left the resolution of this question to a later date for it was not necessary in this case336 as the threshold element relating to establishing what the relevant audience had understood the statement to have said was not made out.337

ASIC contended that the relevant audience ‘understood Fortescue to have said that the parties had agreed on all the terms necessary for it to be “practicable

335 Forrest v Australian Securities and Investments Commission [2012] HCA 39 at [102].
336 Fortescue was held to have had a reasonable basis for what it had said, on his Honour's reasoning: Forrest v Australian Securities and Investments Commission [2012] HCA 39 at [103]: ‘The matter calls for examination on some future occasion. Certainly, the creation of a widespread duty to have reasonable grounds if offering an opinion is but one example of the way the model for s 1041H, namely s 52 of the Trade Practices Act 1974 (Cth), has been widened since its inception. Liability has widened. Curial jurisdiction has widened. And the power of judges, in every sense of those words, has widened – perhaps with Actonian effects’.
337 ‘ASIC bore the burden of proving, to use the language of the statement of claim, both “representation”/”impression” and “false representation”/”false impression”. What the representation and impression were depended on the audience’: Forrest v Australian Securities and Investments Commission [2012] HCA 39 at [106].
to force CREC to design, build, transfer and finance the railway’’.\textsuperscript{338} His Honour concluded that the relevant audience would not have understood the announcements in this way, especially given the character of the audience to whom they were directed:

Fortescue’s remarks were not directed to the public as a whole. They were directed to a section of the public. It comprised superannuation funds, other large institutions, other wealthy investors, stock brokers and other financial advisers, specialised financial journalists, as well as smaller investors reliant on advice. This was not a naive audience. ... It was an audience conscious of the difficulties of creating infrastructure for mining projects in the harsh conditions of Western Australia. It was an audience conscious of their vast expense. It was an audience conscious of the problems of doing so in cooperation with a Chinese group described in the ASX announcement as China’s largest construction group. And it would have learned – not from the announcement itself but from the simultaneous media release – that CREC was “a State-owned enterprise in China”, the state in question being the People’s Republic of China. The audience was sufficiently tough, shrewd and sceptical to know something of the difficulties of “forcing” a builder to build and finance anything. Whether an agreement can "force" one party to it to do something depends on whether another party can get the state to employ any “force” against that first party to do that thing.\textsuperscript{339}

It was likely the relevant audience would not have understood representations made by FMG in the way ASIC had argued, but more likely in a ‘less high and less intense’ sense.\textsuperscript{340} That is, they would not have treated the agreements as sealing FMG’s ability to force a Chinese state-owned entity to do anything.

\textsuperscript{338} Forrest v Australian Securities and Investments Commission [2012] HCA 39 at [104].
\textsuperscript{339} Forrest v Australian Securities and Investments Commission [2012] HCA 39 at [105].
\textsuperscript{340} Forrest v Australian Securities and Investments Commission [2012] HCA 39 at [105].
‘because even the tightest of terms would not do that. Instead the target audience probably took the representation to be that there was a binding contract containing machinery capable of procuring the result that CREC would voluntarily design, build, transfer and finance the railway even if it was impossible to force it to do so’. FMG’s representations therefore had a reasonable basis, given that the contract entered into provided for this on its face, with Clause 7 of the framework agreement requiring future agreements be consistent with the intent of the framework agreements. Because of these factors FMG’s conduct was not misleading or deceptive, and therefore there was nothing to correct as part of FMG’s disclosure obligations.

3.7 Higher level enforcement and market integrity

While representing a small group of finalised decisions, these cases nevertheless provide detailed insights into the actual application and workings of the enforcement machinery supporting the continuous disclosure regime. They simultaneously provide detailed particulars concerning alleged breaches, precisely the type of information which progressively diminishes as one approaches enforcement activity at the lower reaches of the enforcement hierarchy.

Perhaps one of the more important observations which might be made at the outset is the avenue chosen to pursue the alleged breach depending on the

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341 Forrest v Australian Securities and Investments Commission [2012] HCA 39 at [107].
circumstances surrounding it, and the twists and turns which argumentation and decision making can take through different courts in relation to breach of the provisions, as illustrated by the FMG litigation. The continuous disclosure provisions themselves, despite carrying inherent within them the assumption that a high standard of accuracy will attend disclosures, are usually addressed as though they are primarily directed at compelling the actual disclosure of material information. While any such regime would of course prefer and encourage quality disclosure given its underlying aims, the main provisions are themselves *prima facie* silent on the issue of quality and accuracy, being seemingly concerned more with materiality, timeliness and disclosure per se.\(^{342}\)

As such, allegations of a breach of the continuous disclosure provisions usually centre around a lack of disclosure.

Enter the misleading or deceptive conduct provisions, which are usually directed at the quality or character of a disclosure itself, after the obligation to disclose has been met as opposed to the withholding of information and the failure to continuously disclose at all. Cases involving Citrofresh and James Hardie constitute examples of disclosure behaviour where the content of the releases made was not of sufficient quality, or was outright misleading and thereby failed to provide full disclosure. Some allegations in the latter could no doubt have been pursued by ASIC via the continuous disclosure provisions for the failure to disclose but it chose misleading or deceptive conduct instead,

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\(^{342}\) More pointed references to the quality of information to be released are found elsewhere than the primary rule itself in supporting listing rules (eg the exception relating to incomplete information in 3.1A), other pieces of legislation (s 1041H) and best practice documents (ASX Guidance Note 8).
possibly to diversify its risk across a variety of allegations, something which was not done in the FMG litigation, with attendant consequences (discussed below).

This is a subtle distinction, especially given the potential for overlap between the two. While this difference is apparent in allegations made thus far this is not necessarily something which will exhibit any certainty in practice going forward as a result of parties throwing every possible allegation at a counterparty in the hope something will stick. It is important from a compliance perspective therefore that managers are aware that both types of avenues can and likely will be thrown at any suspect disclosure behaviour, and therefore to be aware of the consequences of each when deciding whether and precisely what to disclose or not. This carries to other avenues including directors’ and officers’ duties, which can be breached as a result of allowing the entity to suffer harm.

Another important consideration is the importance of the correct sense of materiality on behalf of management as they navigate the often treacherous waters of continuous disclosure. Chemeq and James Hardies’ breaches in this regard appeared blatant, or at the very least demonstrated a serious lack of diligence as regards the company’s disclosure obligations and keeping the market informed. Indeed, Chemeq’s breach occurred in the context of the company continuing to update the market of positive news stories while failing to disclose information that might affect investors’ perceptions of the value of
the company’s securities for over 14 months.\textsuperscript{343} This makes the company’s defence that the cause of its failure to disclose the cost overruns was due to a lack of understanding, not an intent to deceive, somewhat hard to believe.\textsuperscript{344} Indeed, the company even raised $40 million in capital to fund upgrades and expansion of its manufacturing capacities during this time, representing a truly flagrant misuse of the disclosure provisions which in the Court’s opinion warranted the application of a serious penalty.\textsuperscript{345} Overstating the importance of information (which could also have been pursued via the misleading or deceptive conduct provisions) and allowing it to potentially seem material when in fact it is not is also a danger managers need to protect against, not least because of the potential to mislead the investing public, but also because of the attendant sanctions which may be pursued against them.

The best way to ensure avoidance of breach in this way is to declare fully and clearly what the information means and how it affects the company, not in the sense of providing caveat after caveat, but simply making the full import of the information beyond doubt or conjecture. Any such information release can spread through the market at breakneck speed, requiring clarifying disclosures at the very least. While this might not provide the media buzz the company might prefer it will save it from the potential ignominy of regulator attention. It will also ensure the market is not rocked by wild movements which retrace their steps when the full ambit of information released is actually made clear.

\textsuperscript{343} See Australian Securities and Investments Commission, \textit{In the Matter of Chemeq Limited (ACN 009 135 264) v Chemeq Limited (ACN 009 135 264)} [2006] FCA 936 at [107-8].

\textsuperscript{344} See Australian Securities and Investments Commission, \textit{In the Matter of Chemeq Limited (ACN 009 135 264) v Chemeq Limited (ACN 009 135 264)} [2006] FCA 936 at [111].

\textsuperscript{345} See Australian Securities and Investments Commission, \textit{In the Matter of Chemeq Limited (ACN 009 135 264) v Chemeq Limited (ACN 009 135 264)} [2006] FCA 936 at [109-10].
The need for top management to maintain a keen eye on the potential materiality of information and its need for disclosure was noted by the Court in the James Hardie litigation. The decision by the James Hardie board to effect a DOCI of the type it did and fail to disclose to the market constituted one of the major allegations against it. ASIC alleged that through CEO Macdonald and secretary Shaffron’s failure to advise the chairman and CEO respectively as to the potential need for disclosure of the DOCI information, to seek and consider advice relating to the need for disclosure and offer their own to the board, and to determine whether or not to disclose the DOCI information that each failed to discharge their duties to James Hardie, thereby breaching s 180(1). These allegations were made out.  

This was in the context of a serious blight on the company’s existence: ongoing asbestos liabilities. The potential for them to have been removed from the company’s books was of serious importance, a fact management was proved in evidence to have been aware of, and therefore which their continuous disclosure antennae should have been attuned to. Indeed, if a reasonable person could be expected to notice the importance of such information and expect its disclosure, why not the board? 

The findings surrounding disclosure of information relating to aspects of the separation plan also confirm that clusters of information, where parts may access an exemption from disclosure while others do not, constitutes no reason

346 Australian Securities and Investments Commission v Macdonald (No 11) [2009] NSWSC 287 at [1276-7].  
347 Australian Securities and Investments Commission v Macdonald (No 11) [2009] NSWSC 287 at [505-7].  
348 Australian Securities and Investments Commission v Macdonald (No 11) [2009] NSWSC 287 at [507].
for withholding information which is not protected, despite being closely intertwined if they exhibit materiality in a continuous disclosure sense.\textsuperscript{349}

Just as importantly, the fact that the materiality of information is a temporal and therefore relative phenomenon must be appreciated. Take the example of \textit{Jubilee}, where information formerly passing undisclosed only became material when the company was able to make it material, that is, to action it. Prior to this, without the ability to pursue it to make it such, it need not have been disclosed. This means that boards need to be aware of the changing status of information from non-material to material in different circumstances and be alive to the possibility of disclosing information in later periods once it changes character as soon as they become aware of that fact. Should such information continue to be withheld either intentionally or through carelessness, such behaviour may be pursued.

Communication with analysts is an issue which has received a great deal of airplay and it appears, given the lack of any such obvious cases since that the message may have been heard – the only information which analysts should receive is that which is available to all other market participants.\textsuperscript{350} What they do with that information with their skills is another question which is not the

\textsuperscript{349} Australian Securities and Investments Commission v Macdonald (No 11) [2009] NSWSC 287 at [514] and [537].

remit of the continuous disclosure regime. Any such communication should be transparent for the entire market to see through the ASX announcements platform such that should any additional information slip through the cracks, as in the case of Southcorp, that it is digested by the entire market rather than selected pockets of it.

Another issue is the extent to which individuals as opposed to corporations have been pursued for alleged breaches, and the difference in terms of punitive and educative effects they signal to the market. The true bearers of the cost of a company's failure to disclose under the current regime were recognised by French J as he then was in Chemeq:

It may also be relevant to consider the impact, if any, on shareholders when a penalty is sought against a corporation. Penalties imposed on officers of the corporation for their part in such contraventions affect those officers alone. Penalties imposed on the corporation may affect shareholders including those who have become shareholders on a set of assumptions induced by the very non-disclosure complained of. In some cases it is possible also that creditors may be affected. Who then is being deterred when only the corporation is penalised? I am not sure that there is a satisfactory answer to this concern within the present statutory scheme. One might imagine that if a penalty is to be significant to a corporation it will also be significant to its shareholders in its impact on the capital which backs their shares. In a company with capitalisation as high as that of Chemeq, the impact on individual shareholders may be insignificant. The penalties that count most are likely to be those

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351 See Australian Securities Exchange, *ASX Listing Rules: Guidance Note 8*, at [7].
imposed on the responsible individuals. Nevertheless the law as presently framed requires the assumption that the contravening corporation is a person distinct from its shareholders and that it can be deterred by the imposition of appropriate penalties.353

In the case where the value of the company’s securities drops as a result of a contravention, investors have been said to suffer the ‘double whammy’ of a drop in the value of the company’s securities as well as payment of penalties and compensation from the company’s coffers.354 Indeed, it has been said that ‘to punish the corporation and its shareholders is ... like seeking to deter burglary by imposing a penalty on the victim for suffering the burglary’.355

While the deterrence rationale underlying individual liability which has developed in piecemeal fashion is clear, the reality is that evidentiary requirements all but make the success of this remedy quite difficult to establish.356 Other potential hurdles include the availability of defences and

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356 For a technical discussion of defence history and technical aspects of current defences and requirements, as well as the uncertainties surrounding their application, see Merav Bloch, James Weatherhead and Jon Webster, ‘The Development and Enforcement of Australia’s Continuous Disclosure Regime’ (2011) 29 Company and Securities Law Journal 253, 275–9; and Angie Zandstra, Jason Harris and Anil Hargovan, ‘Widening the Net: Accessorial Liability for Continuous Disclosure Contraventions’ (2008) 22 Australian Journal of Corporate Law 51. Bloch et al note that:

The first difficulty that arises when taking action against directors and officers, compared with direct actions against the company, is that there are additional elements that require proof. An action against the company simply involves establishing that s 674(2) has been breached and then seeking a civil penalty order such as a fine or claiming compensation. However, where an action is taken against an individual for being involved in the contravention (and thereby breaching s 674(2A)) the plaintiff must establish not only that s 674(2) has been contravened, but also that the individual defendant was ‘involved in the contravention’ as defined in s 79 (discussed above). As noted earlier, this will obviously require evidence of knowledge of the facts giving rise to the contravention. There is ‘a higher risk of failure in taking action against directors and officers for continuous disclosure contraventions, and ultimately a more complex
payment and insurance issues. Zandstra et al argue that ‘targeting directors and officers as part of a broader enforcement strategy, rather than the current system of merely suing corporations, should encourage more compliant behaviour and more effectively balance compliance, deterrence and compensation’. It is hard to fault this logic and it is hoped that such actions might establish the types of principles for the interpretation and operation of the listing rules and their legislative supplements which missed their cue in the Fortescue litigation.

This raises the related issue as to whether the penalties themselves which have been meted out are sufficient, firstly to cause ASIC to spend considerable sums of its own coffers to chase them down, and secondly, given their quantum, whether they have or will have a preventative effect on such conduct. Indeed, one important feature of the High Court’s majority judgment in Fortescue is its stern didactic character, which will no doubt set the tone for the way in which ASIC will need to pursue allegations of corporate misconduct in future cases, should it even wish to bother given temporal considerations and their effect on perceptions of enforcement activity, and developments in the litigation landscape where class actions and litigation funders have begun to flex their nascent muscle.

Criticism surrounding ASIC’s carriage of its allegations, as well as the very decision to bring them to court, began at the first instance with Gilmour J

taking the opportunity to chastise ASIC for lacking a ‘reasonable evidentiary basis’ for the allegations of dishonesty against FMG, its board and Forrest which his Honour thought should not have been made. Despite deciding in ASIC’s favour, criticism of its case continued at the Full Court, Keane CJ beginning his judgment by noting ASIC’s choice to present a range of alternative arguments was ‘not apt to aid comprehension or coherence of analysis and exposition’ and which might ‘distract attention from the central issues’. Keane CJ waited till the end of his judgment to raise the question as to whether ASIC’s pursuit of FMG and Forrest was ‘a game worth the candle’ in circumstances where ‘there was no evidence that any member of the investing public was misled by, or suffered loss as a result of FMG’s contraventions of the Act’. Emmett J concurred, labelling the ‘vigour’ with which ASIC approached the matter ‘curious’.

Finkelstein J could not agree, setting out in detail the price movements of FMG securities through the relevant period to illustrate the extent to which information releases had an effect on a fully informed, efficient market for FMG securities to demonstrate just how misinformed those trading in FMG securities had supposedly been. Despite the lack of evidence presented relating to any investor’s specific loss, his Honour concluded that ‘more likely than not, many traders lost money and substantial sums of money at that’.

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brethren, he concluded that ‘not only was it was proper for ASIC to have
commenced this action but it would have been subject to just criticism had it
failed to do so’.  

The greatest criticism of ASIC’s case nevertheless came from the High Court,
both during argument – where a cacophony of complex arguments reached
their nadir with the bench being presented with a 108 page statement of claim
– and in its reasons. The combination of two allegations, firstly, ASIC’s base case
that FMG and Forrest in the relevant announcements misled their audience by
claiming the creation of binding contracts due to their allegedly being legally
inaccurate, secondly that these statements also conveyed that FMG had a
‘genuine and reasonable basis’ for making the relevant statements, saw the
admixture of two ‘radically different and distinct ideas: that Fortescue knew
that the statements were false (it had no genuine basis for making them) and
that Fortescue should have known that the statements were false (it had no
reasonable basis for making them)’ with the base claim of misleading or
deceptive disclosure, and appeared too much for the Court to bear throughout
what Gummow J called the ‘odyssey’ of the litigation.

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363 Forrest v Australian Securities and Investments Commission [2012] HCA 39 at [22] (emphasis in
original). The majority continued: ‘At common law the first idea is expressed in the tort of deceit and the
second in liability for negligent misrepresentation. And since at least 1889 and the well-known decision of
the House of Lords in Derry v Peek, it has been firmly established that a false statement, made through
carelessness and without reasonable grounds for believing it to be true, may be evidence of fraud but
does not necessarily amount to fraud’.
Observations during argument at the High Court that ASIC was ‘pursuing the case on an artificial basis’\footnote{Forrest v Australian Securities and Investments Commission; Fortescue Metals Group Inc v Australian Securities and Investments Commission [2012] HCATrans at [48] (Gummow J).} were just the beginning. While Gummow J described as ‘Orwellian’ the idea that the possession of an agreement would or should lead to awareness of the legal effect of the information in it\footnote{Forrest v Australian Securities and Investments Commission; Fortescue Metals Group Inc v Australian Securities and Investments Commission [2012] HCATrans at [49]: GUMMOW J: … I still do not understand this pleading. Paragraph 136(a) says became aware of certain things including legal effect, became aware that the documents had the legal effect and then the particular is became aware of the information that the documents had the legal effect because - - -
MR MYERS (Forrest): Someone should have read them or someone should have - - -
GUMMOW J: Because they ought to have come in possession of it.
MR MYERS : That is right.
GUMMOW J: That is a bit Orwellian really.
See also Heydon J’s questioning here:
HEYDON J: One thing before you do that. It is said “it can reasonably be inferred that he knew”. From what can it be inferred?
MR MYERS: The terms of the agreements. That is all. All the Chief Justice is saying there is one looks at the terms of the agreements, one concludes that they are not, as a lawyer, legally binding and therefore it can be inferred that Forrest must have known that. We contest that.} French CJ also found flaws with the Full Court’s conflation of ‘these two concepts of information constituted by the terms of the contract and information constituted by their legal effect into one’, asking ‘So what is it? Is it an alternative case that is being run on non-disclosure? You should either, as it were, disclose the contracts themselves or their true legal effect’.\footnote{Forrest v Australian Securities and Investments Commission; Fortescue Metals Group Inc v Australian Securities and Investments Commission [2012] HCATrans at [49].} Counsel for ASIC appeared to encounter difficulty explaining the multiple alternative strands of ASIC’s case under questioning from French CJ and Kiefel J.\footnote{Forrest v Australian Securities and Investments Commission; Fortescue Metals Group Inc v Australian Securities and Investments Commission [2012] HCATrans at [49].} Kiefel J called ASIC on the potential distraction of Gilmour J at first instance by issues of dishonesty in lieu of the more central issue relating to the nature of the contract\footnote{Forrest v Australian Securities and Investments Commission; Fortescue Metals Group Inc v Australian Securities and Investments Commission [2012] HCATrans at [49].}, Heydon J confirming with Counsel that Gilmour J did not deal
with ASIC’s primary case because he was engrossed attending to its fallback position which was mounted in case FMG’s statements were seen as opinion, not fact. Kiefel J offered that ‘[w]ith so much emphasis upon the particulars relating to the belief of the first defendant, it may be that the simpler point was lost sight of’. 369

Hayne J heavily criticised ASIC’s choice to proffer a multiplicity of cases, asking how much of the direction taken by the judge at first instance was ‘attributable to the fashion in which ASIC pleaded its case with alternative piled upon alternative piled upon alternative?’ While making a valiant effort to save face370, Counsel for ASIC was in for a bad day, Hayne J continuing ‘[b]ut at bottom, should not the regulator in taking a penalty case nail its colours to a mast? Should not the regulator go forward saying, “This is misleading or deceptive because?”’, Hayne J continuing throughout the day to express distaste with the multiplicity of cases pleaded by ASIC, asking Counsel whether he might be able to inform the Court as to ‘how many permutations and combinations there were in [ASIC’s pleadings]? I suspect they run into the thousands, would they not?’. 371 Criticised further by Hayne J for their lack of

369 Forrest v Australian Securities and Investments Commission; Fortescue Metals Group Inc v Australian Securities and Investments Commission [2012] HCATrans at [49].
370 Forrest v Australian Securities and Investments Commission; Fortescue Metals Group Ltd v Australian Securities and Investments Commission [2012] HCATrans at [84]:
   YOUNG QC (ASIC): If ASIC was to seek relief on the basis that if characterised as opinions, these opinions lacked a basis, ASIC had to make the allegation and set out to prove the absence of the basis, and it had to do so in its statement of claim. It could not do that in a reply. It was seeking relief. It is the consequence, your Honour, of the fact that ASIC bears the onus and it is also the consequence of the fact that the particular misleading character depends on a characterisation of what is conveyed.
371 Forrest v Australian Securities and Investments Commission; Fortescue Metals Group Ltd v Australian Securities and Investments Commission [2012] HCATrans at [84].
precision, Gummow J went so far as to call aspects of the carriage of the case embarrassing.372

Gummow J further demonstrated impatience with ASIC having seemingly missed the point that legal effect is a matter of opinion, and that the idea the contract was not enforceable was itself an opinion which would only become something approaching fact once a court had dealt with it.373 Hayne J also found difficulty with this facet of ASIC’s case.374 Even Chief Justice French exhibited irritation with some of ASIC’s ‘paradoxical’ argumentation surrounding the supposed affirmation that ‘Fortescue was entitled to rely on an absence of legal advice’ at first instance, which French CJ characterised as a ‘forensic flourish’.375 This only continued in the High Court’s unanimous judgment, which variously described ASIC’s case as confused;376 including unnecessary and inappropriate allegations;377 lengthy and complex;378 pre-

372 Forrest v Australian Securities and Investments Commission; Fortescue Metals Group Ltd v Australian Securities and Investments Commission [2012] HCATrans at [84].
373 Forrest v Australian Securities and Investments Commission; Fortescue Metals Group Inc v Australian Securities and Investments Commission [2012] HCATrans at [49]:
MR YOUNG (ASIC): No, your Honour. The character of the agreement is a fact. It is either enforceable or not enforceable.
GUMMOW J: No. That is a debatable question, is it not, which can only be ultimately determined by an exercise of judicial power?
...
GUMMOW J: Whether there is an agreement or not is a conclusion of law. You can translate that into a fact if you like to call it that. It is not an ordinary understanding, I do not think.
374 Forrest v Australian Securities and Investments Commission; Fortescue Metals Group Inc v Australian Securities and Investments Commission [2012] HCATrans at [49].
HAYNE J: When it is said that ... FMG has entered into a binding contract with CREC to build and finance, there are at least, I think, two possible ways in which that statement might be understood. Perhaps there are many more. The parties have made an agreement which FMG and CREC regard as binding; CREC to build and transfer and FMG to pay for, in the manner described – one way – or, I think, which underpins the whole of your argument, the parties have made an agreement which a court, I interpolate which court where, will treat as binding, I interpolate, by granting what relief and how, as binding CREC to build and transfer. Is not your argument founded on the second?
375 Forrest v Australian Securities and Investments Commission; Fortescue Metals Group Inc v Australian Securities and Investments Commission [2012] HCA 39 at [23].
376 Forrest v Australian Securities and Investments Commission [2012] HCA 39 at [23].
377 Forrest v Australian Securities and Investments Commission [2012] HCA 39 at [73].
emptively jumping at the shadows of possible FMG responses to ASIC’s main allegation;\textsuperscript{379} lacking in the clarity and definition necessary for a fair trial;\textsuperscript{380} engaged in the misuse of fraud as a fallback allegation lacking in specificity and particularity;\textsuperscript{381} and, in parts, embarrassing.\textsuperscript{382} The inappropriate piling of alternative allegations one on top of another complained of during argument was said to put at risk the very fairness of the conduct of the trial.\textsuperscript{383}

The majority accepted the need, circumstance dependent, for alternative allegations but were quick to note that this did ‘not extend to planting a forest of forensic contingencies and waiting until final address or perhaps even an appeal hearing to map a path through it. In this case, there were hundreds, if not thousands, of alternative and cumulative combinations of allegations’.\textsuperscript{384} Such cutting criticism of ASIC’s litigation strategy presumably will not be taken lightly by the regulator. It will be interesting to see whether this results in a change of focus in the employment of the enforcement armoury up ASIC’s sleeve in its pursuit of the ideal of market integrity.

The extent to which extenuating circumstances surrounding breaches are to be taken into account in the formulation of a penalty is important to understanding the issues companies might address in their own disclosure behaviour to mitigate any potential failures in disclosure. Such factors were noted in Southcorp and Chemeq, with unintentional disclosure in Southcorp

\textsuperscript{379} Forrest v Australian Securities and Investments Commission [2012] HCA 39 at [24].
\textsuperscript{380} Forrest v Australian Securities and Investments Commission [2012] HCA 39 at [25].
\textsuperscript{381} Forrest v Australian Securities and Investments Commission [2012] HCA 39 at [26].
\textsuperscript{382} Forrest v Australian Securities and Investments Commission [2012] HCA 39 at [26].
\textsuperscript{383} Forrest v Australian Securities and Investments Commission [2012] HCA 39 at [30].
\textsuperscript{384} Forrest v Australian Securities and Investments Commission [2012] HCA 39 at [27].
and changes to the composition of the Chemeq’s board around the time of the contraventions being accorded weight in the calculation of a penalty.\textsuperscript{385} Other factors noted by his Honour in Chemeq for potential consideration in such cases included:

The extent to which the contravention was the result of negligent conduct by the corporation; ... The existence, within the corporation, of compliance systems in relation to its disclosure obligations including provisions for and evidence of education and internal enforcement of such systems... Remedial and disciplinary steps taken after the contravention... The seniority of officers responsible for the non-disclosure and whether they included directors of the company... The degree of the corporation’s cooperation with the regulator including any admission of contravention... The prevalence of the particular class of non-disclosure in the wider corporate community.\textsuperscript{386}

In a similar way the High Court took a commercially contextualised view of the circumstances surrounding the allegations in Fortescue to arrive at its conclusions. Indeed, despite the disappointment the judgment must have caused those expecting a deep consideration of the future application of the continuous disclosure provisions there may have been a sigh of relief when the Court demonstrated through its approach that “[a]t its heart this case is much simpler than it appears to be at first sight.”\textsuperscript{387} During argument and in its

\textsuperscript{385} Australian Securities and Investments Commission, In the Matter of Chemeq Limited (ACN 009 135 264) v Chemeq Limited (ACN 009 135 264) [2006] FCA 936 at [80].

\textsuperscript{386} Australian Securities and Investments Commission, In the Matter of Chemeq Limited (ACN 009 135 264) v Chemeq Limited (ACN 009 135 264) [2006] FCA 936 at [99].

\textsuperscript{387} Forrest v Australian Securities and Investments Commission [2012] HCA 39 at [73].
reasons, the Court demonstrated its capacity for a commercially contextualised apprehension of the events in question which contrasts sharply with the conception of commerciality applied in the Full Court.

During argument Gummow J noted the fact that the entire discussion relating to perceived legal effect took place ‘in the context of statutory provisions dealing with share markets ... About international commerce ... Not some agreement to put up a block of home units somewhere or other’. 388 In circumstances where the Pilbara Infrastructure Project was at an embryonic stage, lacking in the detail and specificity smaller scale projects might possess, and where ‘in the end the description of the work to be done can often be very briefly expressed’, FMG urged a ‘businesslike approach to how people would construe’ the agreements made. 389 Hayne J appeared at one with this proposition, stating during the third day of hearing ‘[i]t is not unknown for parties who have a complete, full, binding, absolute agreement, for at least one of those parties to say, yes, well, that is a good start, now can we have a real debate about further terms?’ 390 While traditional principles of contract law might be of universal application, for Gummow J ‘the proper inference to draw may differ widely according to the facts of the particular case’. 391

388 Forrest v Australian Securities and Investments Commission; Fortescue Metals Group Ltd v Australian Securities and Investments Commission [2012] HCATrans at [48].
389 Forrest v Australian Securities and Investments Commission; Fortescue Metals Group Ltd v Australian Securities and Investments Commission [2012] HCATrans at [48]. Cases raised by FMG at the High Court sought to convince the court that questions of the type to be decided required an objective consideration of ‘what a reasonable honest businessman in the position of the parties would have concluded and that: all the terms which the parties treated as essential were agreed and the parties were performing the contract – That is, all terms which the parties treated as essential’.
390 Forrest v Australian Securities and Investments Commission; Fortescue Metals Group Ltd v Australian Securities and Investments Commission [2012] HCATrans at [84].
391 Forrest v Australian Securities and Investments Commission; Fortescue Metals Group Ltd v Australian Securities and Investments Commission [2012] HCATrans at [48].
During the presentation of ASIC’s case Gummow J noted the reality of contracts being in two languages before opening up to the question as to whether ASIC was arguing that “‘binding’ has all the subtleties involved in the case law under Australian common law. You are really talking about binding on a foreign state-owned corporation, are you not?”, asking further whether the relevant audience would have a ‘rudimentary appreciation’ of that fact.\textsuperscript{392} Hayne J also found the fact the agreements were with state-owned corporations of importance to determining what message might have been conveyed to the audience.

Beginning its judgment with the rejection of ASIC’s additional allegations that FMG’s description of the CREC agreement as a ‘build and finance’ and ‘build and transfer’ agreement were misleading or deceptive due to their appropriate use in the circumstances, along with a confirmation that while further detail required agreement at a future date this did not militate against the description of the CREC agreement as a build and transfer contract, the majority indicated at once that it was to take a businesslike as opposed to an overly legalistic approach in its final reasons as well.\textsuperscript{393}

This perspective was brought to bear on the Full Court’s reasoning which ‘moved from the identification of what the impugned statements conveyed about what had been said and done by the parties (properly described as matters of “historical fact”) to an examination of the legal consequences that

\textsuperscript{392}Forest v Australian Securities and Investments Commission; Fortescue Metals Group Ltd v Australian Securities and Investments Commission [2012] HCATrans at [84].

\textsuperscript{393}Forest v Australian Securities and Investments Commission [2012] HCA 39 at [15-16].
were to be attached to what those parties had said and done. The more commercially minded understanding – that the audience of FMG’s announcements would focus on the intentions of the parties and what they understood the agreement to mean as to future conduct, rather than approaching the situation from a legalistic perspective and asking the additional question as to what might happen if the intention and understanding between the parties broke down – was to be preferred, especially in the absence of evidence that the audience of the announcements would have perceived the latter.

A further legally imprecise and somewhat commercially irreverent assumption, as far as the Chinese counterparties were concerned, was that any judgment as to the enforceability of such contracts would be decided by an Australian court. Emphasising the facts that the work the subject of the agreements referred to in the announcements was to be executed by state-owned entities of a foreign government and were executed at signing ceremonies in Beijing the majority noted that ‘no consideration was given, at any point of the Full Court’s analysis, to what law governed the agreements’.

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394 Forrest v Australian Securities and Investments Commission [2012] HCA 39 at [35].
395 There was no evidence led at trial to show that investors or other members of the business or commercial community (whether in Australia or elsewhere) would have understood the references in the impugned statements to a ‘binding contract’ as conveying not only that the parties had agreed upon what they said was a bargain intended to be binding, but also that a court (whether in Australia or elsewhere) would grant relief of some kind or another to one of the parties if, in the future, the opposite party would not carry out its part of the bargain.
396 Forrest v Australian Securities and Investments Commission [2012] HCA 39 at [46].
Cautioning that it was necessary to ‘bear firmly in mind that the impugned statements were made to the business and commercial community’\textsuperscript{397} and that an appreciation of what such an audience would understand from FMG’s representations was required, employing the language of jurisprudence surrounding misleading or deceptive conduct cases the majority stated ‘it would be extreme or fanciful for the audience to understand the impugned statements as directing their attention to any question of enforcement by an Australian court if the parties later disagreed. Such an extreme or fanciful understanding should not be attributed to the ordinary or reasonable member of the audience receiving the impugned statements’.\textsuperscript{398}

Heydon J’s approach to this issue complemented the realism of the majority and is especially evident in his analysis as to what its audience would have understood FMG’s announcements to have said. This section of the population was ‘not a naive audience. It was not an audience in whom the adjectives “Western Australian”, “mining” and “Chinese” would excite a sudden certainty about the imminent creation of wealth beyond the dreams of avarice’.\textsuperscript{399} Such an audience would have been cognisant of the expense and the difficulties involved in setting mining projects in the ‘harsh’ conditions of WA going. This would only have been heightened by the fact the agreements involved Chinese state-owned entities. His Honour reasoned that ‘[t]he audience was sufficiently tough, shrewd and sceptical to know something of the difficulties of “forcing” a builder to build and finance anything. Whether an agreement can “force” one

\textsuperscript{397} Forrest v Australian Securities and Investments Commission [2012] HCA 39 at [48].
\textsuperscript{398} Forrest v Australian Securities and Investments Commission [2012] HCA 39 at [50] (emphasis in original).
\textsuperscript{399} Forrest v Australian Securities and Investments Commission [2012] HCA 39 at [105].
party to it to do something depends on whether another party can get the state to employ any “force” against that first party to do that thing. The sheer practicalities surrounding the enforcement of such a contract, if anyone would even have thought that far ahead upon reading the impugned announcements, would therefore have seen the impounding of this information into any decision as to whether to become involved with FMG securities or not.

His Honour also noted that the agreement itself was ‘concerned with practical progress through future negotiations which the parties were contractually obliged to undertake with a view to entering future contracts within the intent of the agreement’ rather than ‘mechanisms of legal enforcement like choice of law clauses or choice of jurisdiction clauses’, again giving a sense of what would most likely have been conveyed to an audience reading it fresh upon release as opposed to meditating on individual words over some eight years after the occurrence of the fateful entry into the agreements.

Further demonstrating its commercial conscience, the majority took the opportunity to deal with a particularly important piece of evidence at trial and on appeal, an email sent by Mr Forrest during negotiations which described proposed contractual provisions set out in a draft ‘Advanced Framework Agreement’ as ‘hard asks’. This was seized upon by ASIC as demonstrating that the framework agreement was not a binding contract. For the majority, in the context of the framework agreement providing that the parties ‘recognised a fuller and more detailed agreement not different in intent from this agreement

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400 Forrest v Australian Securities and Investments Commission [2012] HCA 39 at [105], see also [107].
401 Forrest v Australian Securities and Investments Commission [2012] HCA 39 at [107].
will be developed later’, the only conclusion to be drawn from the email was that Forrest was attempting to improve FMG’s position via additional negotiation. 402 Likewise Heydon J stated this conduct on the part of Forrest ‘involved nothing more than attempts to arrive at the “fuller and more detailed” agreement contemplated by Clause 7 – attempts in which each side sought to advance its own interests [and] do not establish dishonesty on the part of Fortescue or Mr Forrest’. 403 Indeed, the attempt to improve terms left for further negotiation did not evidence a lack of “bindingness” in the framework agreements, but rather was a reflection of real corporate negotiation whereby parties who have agreed to be bound by a contract may make attempts to ‘strike a better bargain. And the fact that one or both of the parties tries to strike a better bargain does not, without more, show that the parties are not bound to the bargain that has been made. Nor does it show that the parties did not intend to be bound to that bargain’. 404

Interestingly, the majority referred to a notice of a proposed cross appeal from ASIC which claimed that in spite of a potential finding that no misleading or deceptive conduct was in evidence, that FMG still contravened s 674 in its failure to ‘disclose the terms of the agreements themselves, not just issue statements about what it thought to be the effect of the agreements’. 405 Given

402 ‘Neither the fact that Fortescue sought to negotiate with CREC to achieve new or different terms, nor the fact that the parties differed about what their further agreement should say, sheds any light upon any question about what the framework agreements were or what they provided’: Forrest v Australian Securities and Investments Commission [2012] HCA 39 at [55].

403 Forrest v Australian Securities and Investments Commission [2012] HCA 39 at [98].

404 Forrest v Australian Securities and Investments Commission [2012] HCA 39 at [56]. See also [57]: ‘No doubt there were risks in pursuing that kind of course. But Fortescue’s attempts to better its commercial position do not suggest, let alone demonstrate, that Fortescue did not consider the framework agreements to be binding’.

405 Forrest v Australian Securities and Investments Commission [2012] HCA 39 at [64].
the majority found the statements made by FMG were accurate representations of the agreements entered, there was no requirement to be found in s 674 that Fortescue release the actual text of those agreements for digestion by the market.406 Heydon J concurred, stating that ‘[n]othing in s 674 supported the existence of any such obligation in relation to the facts of the case as postulated by ASIC’ given that the agreements were treated as ‘scraps of paper’407 representing unenforceable agreements to agree meaning they would fail the materiality requirement in the listing rule.408 While their Honours appear to qualify their comments here ‘nonetheless’409 and ‘in relation to the facts of the case as postulated by ASIC’410, comments earlier in the judgment of Heydon J suggest the inordinate nature of applying this reasoning to every contract executed by a company listed on the exchange:

If the law compelled Fortescue to have released the totality of the agreements, it would have compelled other companies making much more bulky agreements to do the same. That would not have assisted the cause of ensuring a speedily informed market. It would often be extremely inconvenient. It could require members of the target audience to procure expert assistance to analyse what particular agreements said.411

Compared with the arguably more traditional or restrictive view of commerciality proffered by the Full Court, the High Court’s reasoning appears to have struck a balance between the modern fluid practice of business people working on massive projects with foreign counterparties, and the likely

406 ‘ASIC should have special leave to cross-appeal but its cross-appeal should be dismissed’.
407 Forrest v Australian Securities and Investments Commission [2012] HCA 39 at [74].
408 Forrest v Australian Securities and Investments Commission [2012] HCA 39 at [114].
409 Forrest v Australian Securities and Investments Commission [2012] HCA 39 at [65].
410 Forrest v Australian Securities and Investments Commission [2012] HCA 39 at [114].
411 Forrest v Australian Securities and Investments Commission [2012] HCA 39 at [77].
perception of those interested in becoming, or staying, involved with FMG at the time. The context surrounding the release of information would no doubt have played a role in their Honours’ assessment of the likely impact of it on the perceptions of ordinary and reasonable investors, given that this was no more than a speculative mining stock, and where the DFS had not yet even been completed.

Recent enforcement activity by the regulator\(^{412}\) has led to a perception amongst the business community that ASIC might be pursuing the continuous disclosure provisions with more vigour than it had previously.\(^{413}\) The CEO of one of Australia’s largest companies recently stated ‘[w]e’ve seen a couple of companies here get involved in continuous disclosure issues – it’s fair to say that the level of awareness of continuous disclosure issues has been elevated’ indicating that issuers appear to be appreciating the importance and negative consequences of contravention of the regime.\(^{414}\) Some financial markets commentators also appear to appreciate the positive side of continuous disclosure, with companies releasing bad news being congratulated for their

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\(^{412}\) Recent infringement notices levied against Leighton Holdings, BC Iron, BioProspect Limited and Navigator Resources within a four-month period between March and June 2012.


honesty and noting ‘[a]t least investors in the stock now know where they stand’.415

Nevertheless the existence of what on the whole has been termed an ‘anxious environment for directors and senior executives striving to ensure that their companies comply with their continuous disclosure obligations while seeking to preserve value for shareholders’ cannot be disputed.416 While ultimately a matter for the legislature, comments from ASIC Chairman Greg Medcraft to the effect that larger penalties would be useful in a continuous disclosure context would do little to allay their concerns.417 Admonitions from the Chartered Institute of Company Secretaries as well as the Australian Institute of Company Directors have flown ASIC’s way, saying the regulator needs to ‘have regard to the realities of running a company’418 and that the enforcement of the regime needs a ‘rethink’.419

On the other hand, evidence of concern amongst market participants as to the integrity of the market in circumstances where price runs frequently occur prior to the release of material information indicates that while directors and other top executives charged with an organisation’s continuous disclosure

419 Leonie Lamont, ‘Directors Voice Liability Worries’, Sydney Morning Herald (online), 4 April 2012.
responsible responsibilities may be feeling the heat, there may still be a fair way to go to ironing out the practical creases in the regime to the extent possible.\textsuperscript{420} Given the expense of running a case over six years, and then having to swallow the bitter order to pay the other party’s costs (estimated at over $30 million in total for all parties to the Fortescue litigation)\textsuperscript{421}, medium level enforcement activity in the form of infringement notices and enforceable undertakings may inevitably become the norm.\textsuperscript{422} Some commentators point to the emergence of class actions in the Australian litigation landscape, with recent actions against companies including \textsuperscript{423} Centro \textsuperscript{424}, Transpacific \textsuperscript{425}, and even market heavyweights like NAB\textsuperscript{426}, as the new weapon of choice for aggrieved parties chasing potential breaches of the continuous disclosure provisions, and as a potentially powerful corporate governance device in ensuring continuous disclosure obligations are in fact adhered to.

\textsuperscript{422} ‘At the end of the day, the important thing about Leighton is we got a timely outcome. We weren’t doing something that might take seven to 10 years to get an outcome’, Medcraft says. ‘And most importantly, in terms of when we take action, we’re able to send a message to other Australian companies about continuous disclosure’: R Urban, ‘Leighton Fine “A Timely Message” from the Corporate Regulator’, The Australian (online), 24 March 2012 available at <http://www.theaustralian.com.au/business/companies/leighton-fine-a-timely-message-from-the-corporate-regulator/story-fn91v9q3-1226308665982>.
\textsuperscript{424} “Centro Settles $200 million Class Action, 100 million Class Action Against GPT” Australian Financial Review (31 May 2012) available at http://www.afr.com/p/business/property/gpt_class_action_may_increase_hSJUKyKcrvXWtXbpbV9sNK.
\textsuperscript{426} It has been alleged that NAB breached continuous disclosure rules by being too slow to reveal it had invested in $1.2 billion of collateralised debt obligations linked to subprime mortgages. Richard Giuyas, ‘Emails Expose NAB’s Credit Risk Analysis Failure’, The Australian (online), 5 September 2012 <http://www.theaustralian.com.au/business/opinion/emails-expose-nabs-credit-risk-analysis-failure/story-e6f9g9wx-1226465063185>.
Whether class actions fill any space left in this sphere remains to be seen, especially in the case of smaller companies, which litigation funders are unlikely to assess as economically viable\textsuperscript{427}, meaning persons aggrieved will have to fund their own way.\textsuperscript{428} ASIC has assured the market that it will continue to take court action when it is warranted.\textsuperscript{429} Current ASIC Chairman Greg Medcraft has nevertheless indicated support for such mechanisms, saying it was ‘very good at equalling up the tables’ and was ‘a good market-driven solution’, but with the proviso that the class actions needed to be ‘done responsibly’.\textsuperscript{430} Practically speaking however, ‘it remains to be seen whether the public is content to be required to use privately run class actions where they are required to give 25-30 per cent of their recovery to a funder plus repay legal costs’.\textsuperscript{431}

Nevertheless, empirical research\textsuperscript{432} and regulation theory suggest that compliance is facilitated by wide ranging enforcement mechanisms and

\textsuperscript{427} ‘But the practical effect of the change in the \textit{Corporations Act} is that the continuous disclosure regime and market protection requirements are not enforceable against companies with small market capitalisations,’ he said. ‘That’s because people like us won’t take the credit risk, when the opportunity to get paid standing at the end of a creditors’ queue is not that high’: Richard Gluyas, ‘Hastie Operating System a Complete Disaster, Chief Says’, \textit{The Australian} (30 May 2012) <http://www.theaustralian.com.au/business/companies/hastie-operating-system-a-complete-disaster-chief-says/story-fn91v9q3-1226373045227>.

\textsuperscript{428} ‘[T]hat leads to a broader point about what can and cannot be pursued through the courts. According to litigation funding company IMF (Australia), it cost about $10 million to run class actions seeking to prove breaches of continuous disclosure or breaches of the misleading or deceptive provisions of the Corporations Act. IMF argues that class actions against companies with net unsecured assets of less than $50 million are not commercially viable’: ‘The EGM Route to Domination’, \textit{Australian Financial Review} (online), 30 May 2012 <http://afr.com/p/blogs/chanticleer/the_egm_route_to_domination_EFL7oCFy9BSKwbMFSkuTkT>


\textsuperscript{430} M Legg, ‘ASIC’s Nod to Class Actions May Backfire’, \textit{The Australian} (online), 12 April 2012 <http://global.factiva.com/ezproxy1.library.usyd.edu.au/aa/?ref=AUSTLN0020120411e84c00094&pp=1&fcpil=en&napc=S&sa_from>

\textsuperscript{431} M Legg, ‘ASIC’s Nod to Class Actions May Backfire’, \textit{The Australian} (online), 12 April 2012 <http://global.factiva.com/ezproxy1.library.usyd.edu.au/aa/?ref=AUSTLN0020120411e84c00094&pp=1&fcpil=en&napc=S&sa_from>

importantly, their actual employment.\textsuperscript{433} This would no doubt extend to other enforcement options which are not directly administered by the regulator such as class actions and their growing prominence in the market, as they demonstrate to management whose disclosure performance is not satisfactory that a willing (aggrieved shareholders) and able (through litigation funding) group other than regulators will pursue poor disclosure behaviour for any loss arising, thus acting as an indirect yet powerful practical corporate governance mechanism, regardless of difficulties in the area.\textsuperscript{434} While previous action taken in the courts by ASIC has been criticised for pursuing companies rather than individuals (with Forrest a notable exception), class actions will likely throw every possible cause of action at a breach, which also will no doubt form a serious reminder of the potential consequences of failing to continuously disclose for individual managers. Nevertheless, as Bloch \textit{et al} have argued, several areas of uncertainty in relation to individual liability exist.\textsuperscript{435} To avoid having such uncertainties hanging around one’s neck while staring down the barrel of an ASIC or class action, officers will want to ensure their disclosure performance itself is not found wanting so as to prevent any personal liability

\begin{footnotesize}
\textsuperscript{433} ‘The literature on regulation theory asserts that regulators are best able to encourage compliance when they are armed with a wide range of sanctions. It has been argued that the enactment of a wide range of sanctions and the use of those sanctions by a regulator should deter future contraventions of the law and lead to greater compliance’: Michelle Welsh, ‘Continuous Disclosure: Testing the Correspondence between State Enforcement and Compliance’ (2009) 23 \textit{Australian Journal of Corporate Law} 206 at 206.


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from even entering the frame. The problem of course, is that a precise, consistent interpretation of the provisions in different or even similar circumstances is not always possible, and erring on the side of caution every time a continuous disclosure question arises may not appear on first take to be the optimal approach as regards the company’s interests.

In these circumstances, it is unfortunate that the decision in *Forrest v Australian Securities and Investments Commission* leaves specialists with slim pickings in the form of any new practical annotations to the regime. While reinstating the orders made at first instance, the majority explicitly stated that it did not endorse Gilmour J’s approach. Further, lest anyone begin to assume that expressing a view as to the quale of an agreement made in the course of business is not territory where the continuous disclosure regime might attach due to some misconception of how awareness under the regime is supposed to operate, the majority stated that its judgment did not establish a general proposition to the effect that ‘any public statement that Company A has made a contract with Company B necessarily conveys to its audience a message only about what the contractual document contains. That proposition is too broad. What message is conveyed to the ordinary or reasonable member of the intended audience cannot be determined without a close and careful analysis of the facts’. As in all important cases with complex factual matrices ‘the facts of and evidence in the particular case are all important’.436

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436 *Forrest v Australian Securities and Investments Commission* [2012] HCA 39 at [69].
The cases analysed above impart serious lessons to all those willing to hear. For listed entities, the type of disclosure behaviour found lacking in those cases where a penalty was handed down illustrate not only particular fact scenarios to be avoided, but also general points of practice which managers might wish to consider if their disclosure performance is to meet judicially and eventually generally expected standards. For the regulator, the choice to take action at such a level is one which is not to be made lightly given the potential financial ramifications from a public funding perspective, and the prospects of success. Given the overlapping nature of remedies and sanctions in this field, sufficient clarity and decisiveness will need to be shown in the hatching of allegations should courts not be offended in future matters. The regulator will also need to view the disclosure obligation from a commercial rather than an overly legalistic perspective given the relevant universe involved in the company’s activities as well as the relevant investing public involved with them.

The pursuit of suspect disclosure behaviour through such higher level enforcement should nevertheless give investors some basis on which to found a basic level of trust in the regime. While the use of such options may not have generated results widely expected or punished those directly responsible to the extent expected – or even arguably been pursued in the best circumstances – the message they do send to listed entities is that the regulator is not afraid to use them. Media coverage and general market discussion around issues including accessorial liability and the potentially very real consequences of such no doubt reiterate the importance accorded to the regime and its enforcement.
Fear of the big sticks involved in such enforcement activity and also the potential effect on the entity no doubt weigh heavily on the minds of boards and disclosure committees every time they sit to decide on the disclosure of any particular piece of information. While failure in the Fortescue litigation may see a drop in such activity, the type of concern it generates amongst boards is no doubt magnified by the nascent pursuit of class actions in this space. The likely effect, which the continued employment of such enforcement options should ensure, is that boards make very careful decisions around information they choose to withhold from release. Without them, boards might otherwise choose to take ‘calculated risk games’ which upon potential exposure do the perception of and belief in market integrity no favours. Nevertheless, given the attendant costs and difficulties involved in pursuing legal action at the highest reaches, it is no surprise the regulator requested different sanctions earlier on in the development of the enforcement of the regime, and has chosen to use them with much higher frequency than court actions. The fact it is effectively the sole arbiter of this decision making process no doubt makes the use of administrative sanctions even more appealing. It is to their effective use, the lessons which might be drawn from them, and the extent to which they add to the basic level of faith which might be anchored by the pursuit of higher level sanctions discussed in this chapter to which the attention of this dissertation now turns.
4. ADMINISTRATIVE SANCTIONS

Two important mechanisms exist at the administrative level of continuous disclosure enforcement, which itself denotes enforcement activity that does not involve court time, but solely regulator attention. While ASIC was granted the power to accept enforceable undertakings in 1998, by far the more contentious and relatively more liberally employed enforcement mechanism since its inception in 2004 has been the infringement notice. Enforceable undertakings represent the making of promises by companies to ASIC with a view to addressing issues of concern identified by ASIC in the running of the company and therefore may be said to have an educative intent. 437 Infringement notices on the other hand have a punitive focus, and whether or not the company learns from what ASIC has deemed to be a mistake is another matter. That said, it would be misleading to give the impression that these two enforcement mechanisms are unrelated – both have been used by ASIC in relation to the same conduct engaged in by the same company in order to exact educative, one might even say reformatory, and punitive outcomes.

While the similarities and differences between these enforcement mechanisms have been well noted 438, an analysis of all administrative enforcement activity to date has not recently been undertaken, with the latest prior to the inception


of this dissertation being published in 2007 by Welsh and Langley in separate papers.\(^{439}\) Given the number of infringement notices issued since then has doubled, and that enforceable undertakings have been employed in tandem with recently issued notices, this is an important task. This chapter analyses the circumstances giving rise to the employment of administrative sanctions with a view to distilling the common circumstances surrounding their issuance, as well as offer an assessment of the employment of the infringement notice mechanism by reference to the aims set out at its inception.

4.1 The delayed release of material information

4.1.1 Leighton Holdings

The most frequent disclosure discretion attending the issuance of infringement notices and enforceable undertakings to date has of course been the simple failure to release material information promptly and without delay once the entity had become aware of it. Perhaps the most publicised in recent history involved Leighton Holdings (LEI), which was issued a cluster of infringement

notices as well as an enforceable undertaking for three separate alleged breaches of the regime.

The impugned conduct related to the announcement of a $907 million write down the company’s forecast profit made 11 April 2011. Information relating to three projects of significance to LEI’s business constituted material information which ASIC alleged was not immediately disclosed once the entity had become aware of it. This information concerned the magnitude of loss on an airport link project (expected to be in the order of $430 million), the increase of forecast costs in the delivery of a certain Victorian Desalination Project and the risk it might incur further cost increases and be delayed (profit expected to fall from $282 to just $6 million), and information relating to the deterioration of the financial position of its 45% owned interest in Al Habtoor Leighton Group (AHLG) Dubai which would require the accelerated advancement of a previously agreed loan as well as the provision of an additional loan facility (a reduction in value of $320 million in the value of LEI’s investment in AHLG).

In its response to an ASX aware letter issued in relation to the 11 April releases, LEI protested its innocence, stating it had earlier identified difficulties involved with its projects in releases dated 14 and 24 February which were being ‘monitored on an ongoing basis as part of the Company’s risk management framework and ultimately led to a review of the Company’s entire operations and asset base’.440

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440 This saw the request for a trading halt pending the urgent completion of the review.
ASIC however appeared to be of the view that the consideration of the various pieces of information at a meeting of senior executives of LEI on 18 March 2011 constituted awareness for the purposes of the listing rule and the Act and issued infringement notices for each count. LEI argued that ‘[i]t was not until the conclusion of the review process at the Board meeting on the morning of 11 April 2011 that there was sufficient certainty regarding the facts and circumstances underpinning the Earnings Downgrade’. LEI management’s preference for certainty in the circumstances was apparently not acceptable disclosure practice given the potential materiality of the information and management’s awareness of it at the time. In relation to the penalties ASIC Chairman Greg Medcraft stated simply that

[c]ompliance with continuous disclosure provisions goes to the heart of ASIC’s priority of promoting fair and efficient markets ... [a]ll listed companies should have procedures in place to ensure that they comply with their continuous disclosure requirements.

Management considering delaying the release of material information would best be advised to assess the materiality of the information possessed, and consider an application for a trading halt if that information requires further confirmation or consideration. At the very least, such circumstances might

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441 LEI Limited response to ASX aware letter dated 18 April, 2011, 1.
require a conversation with the company’s Listings Advisor at the ASX to determine the best disclosure option available to it.

While Leighton’s multi-billion dollar turnover puts the $300,000 penalty extracted from it into perspective, ASIC Chairman Greg Medcraft declared that the enforceable undertaking secured ‘an effective forward-looking regulatory result, representing a commitment from Leighton regarding its continuous disclosure procedures’. As part of its enforceable undertaking, Leighton promised to appoint two external consultants independent of the company to review its policies and procedures for dealing with its continuous disclosure obligations, make recommendations in line with industry best practice for a company of its size and nature, and review the implementation of any recommendations annually for three years.

4.1.2 QRS Holdings

While a cluster of infringement notices have not been issued to any other company in the way they were to Leighton, the graded penalties available to ASIC can still spell serious consequences for companies at the smaller end of the market.

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QRSciences Holdings complied with a $33,000 infringement notice in 2006 after ASIC alleged it had failed to comply with the regime. The company had engaged investment bank Ord Minett to underwrite any shortfall in the exercise of QRS options up to a total of 9 million shares valued at $1.8 million, subject to QRS placing $852,000 of this amount from sophisticated professional and institutional investors. In an announcement dated 12 January the company stated ‘QRSciences Holdings Limited (ASX: QRS) is pleased to announce that Ord Minnett Limited have committed to underwrite any shortfall of the unexercised options which expire today up to 9,000,000 shares representing $1,800,000. The announcement further stated:

We are pleased to engage Ord Minnett to complete this transaction and are encouraged that an investment bank of their stature has taken an interest in our Company. We expect that this commitment in addition to the options exercised to date will result in the company raising the entire $4,352,000 strengthening our existing cash reserves and balance sheet as we move to formally set-up our operations in North America.445

ASIC alleged that on 31 January, QRS CEO and MD Kevin Russeth became aware of an email sent by Ord Minett stating the investment bank would not proceed with the underwriting agreement as QRS had not introduced the sophisticated investors it had contracted to under the agreement. QRS made an announcement on 7 February stating

Shareholders in Holdings recently converted 11,149,626 options expiring on 12 January 2005 to raise $2,246,925 to increase Holdings' cash position. Holdings and Ord Minnett Limited have determined not to proceed with the underwriting of the shortfall of the exercised options representing a further 9,000,000 shares or $1,800,000.

This was information deemed by ASIC to be of such importance that a reasonable person would expect it to have a material effect on the price or value of QRS’s securities if it were generally available: the underwriting agreement would have been positive news for its ability to improve the company’s cash reserves by $1.8 million and supporting its continued operation, while the withdrawal of Ord Minett would have been adverse news, meaning the information would be likely to influence persons in their decisions to become involved with the company or not. In a market release dated 9 February 2006 the company stated:

QRS contends that due to various matters, in particular uncertainty created by investors who had committed to take-up part of the option shortfall (which was a terminating condition of the Ord Minnett underwriting agreement), that it was not in a position to make an announcement to the market on 31 January 2005.

QRS has received legal advice from Freehills that it did not contravene its continuous disclosure obligations as alleged on 31 January 2005 and that expert evidence adduced on behalf of ASIC was inconsistent with any such finding and that the evidence was to the effect that a reasonable person would have expected the information to have been disclosed to the Australian Stock Exchange (ASX) as soon as possible after 31 January 2005, not on 31 January 2005.
The Infringement Notice gives QRS the option to accept a penalty from ASIC and to pay $33,000 or to ignore the Notice and argue the matter further with ASIC in the courts.

QRS is a growing development company with limited revenue and financial resources. Given that the costs of defending the matter in a court would likely exceed the $33,000 fine and be an ineffective use of company funds, QRS has made a commercial decision to pay the penalty and maintain its focus on growing its business.

Given that potentially material information was not generally available between 31 January and 7 February when prospective investors were considering whether to become involved with the company’s capital raising, and the apparent lack of any valid exception applying in the circumstances, one might wonder upon what basis any legal advice provided to the company rested its claim that QRS had not contravened the regime.

4.1.3 Astron Limited

Astron Limited, a company involved in developing technology for and producing advanced materials and chemicals from mineral sand (for the ceramics, TV glass, refactories and consumer industries) was the first company with a market capitalisation of over $100 million to pay a $66,000 fine. In its 2005 annual report the company announced it had completed an initial drilling program on a small part of the Donald mineral sands deposit, to which it had acquired exploration rights in March 2004 (Murray Basin Victoria) and which indicated a
mineral resource of 187 million tonnes at 6.3% heavy mineral. Further testing yielded resource estimates for the Donald Mineral Sands Project of 693 million tonnes with a heavy minerals content of 5.1%. This represented a 270% increase in mineral resource estimate from that earlier released to the market. The managing director of Astron became aware of the information on 6 January 2006. On 12 January at 6.44pm, the company made an announcement via the ASX containing the new information. Being information a reasonable person would expect if generally available to have a material effect on the value of Astron’s securities it was alleged by ASIC that the information should have been released 6 January and therefore that the company was in breach of its obligations.

In a response to an ASX query of 16 January 2006, the company stated the managing director had ‘received the updated mineral resource estimates on 10 January 2006’ which were then forwarded to other Directors and the company’s PR consultants that day. The company stated further that ‘[t]he proposed ASX release was drafted on 11 January 2006 by our PR consultants. The release was finalised and posted with the ASX on Thursday 12 January 2006’.446

ASIC’s finding that the MD became aware of the information on 6 January makes it clear that if evidence of previous communication of potentially material information exists to the contrary, that simple email communication

and dissemination to other executives at a later date does not constitute the time at which the organisation could be said to have properly become aware of it, with the earlier date being of more importance as far as continuous disclosure is concerned. This also adverts to the importance of acting quickly in such circumstances as it is difficult to appreciate why information such as this would have taken consultants two days to prepare a release for. Indeed, it also highlights the importance of the use of a trading halt in such circumstances, whereby the company could have requested a trading halt once aware, and firmed up an announcement which it could then release to the market as a whole. With the importance of the project to the company’s strategic imperatives in relation to supplies of Zircon and the magnitude of the change in estimates, the decisions of those contemplating transactions in the company’s securities hung in the balance while the company prepared its release. The company expressed its ‘disappointment’ with ASIC’s choice to issue an infringement notice to it, stating that it ‘believed it had acted properly in relation to the disclosure’.  

4.1.4 Avantogen Limited

Biotechnology company Avantogen Ltd, which focused on development of anti-cancer drugs and vaccines, paid an infringement notice of $33,000 when ASIC alleged that the company’s CEO became aware of information concerning

unsuccessful results of an anti-cancer vaccine on 12 April 2006, but that the information as not released to the market until after the publication of an article in Melbourne based newspaper *The Age* which ran a story titled ‘Avantogen fails to reveal adverse findings’. After requesting a trading halt that day, the company released the information relating to Pentrys, one of three anti-cancer products under development at the time. Having previously communicated the importance of successful and then further trials as potentially positioning the company as a leader in its field and the size of this potential market, information to the effect that the Pentrys Trial had not resulted in a successful clinical outcome constituted material information.

In its response to an ASX aware letter dated 7 June 2006, the company stated that it had not released the information at an earlier date as the ‘final sign-off version’ of the clinical study report was not received until 2 May 2006 and that the company was still ‘receiving relevant information from the clinical research organisation’. It also noted the depth of results, the interpretation of which required considerable expertise, judgment and no doubt time. The company argued therefore that accurate information could not be disclosed until ‘the data from the trial had been reviewed and checked by the company’s scientific staff’, without which the risk of incomplete or misleading information being disclosed to the market would have been too great, and that the market would

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have expected this from the company'. While nearly two months had elapsed from the receipt of initial results to disclosure after the newspaper story ran, making this appear an open and shut case, it does raise important issues for companies which receive results in packets and sometimes need to wait until a critical mass of results are in hand before being able to make accurate statements about them.\textsuperscript{450} While early transgressors faced what may have seemed tough penalties, companies facing such informational circumstances must ensure they have a disclosure plan in place to deal with the vagaries of information generation, receipt, and digestion by the company such that the market is not left wondering, and the company is not exposed to actions for breach. Managers in such circumstances should be aware of the potential for trading halts and even voluntary suspensions to help deal with such situations.

\textbf{4.1.5 Sub-Sahara Resources NL}

A mining company facing similar informational circumstances and which ASIC alleged failed to release material information as it became aware of it was Sub-Sahara Resources NL, a junior resources exploration company with interests in Eritrea, Tanzania and Australia. One interest in northern Eritrea known as the Zara Gold Project underwent metallurgical testing, the results of which were

\textsuperscript{450} 'Although the analysis suggests further clinical investigation of the current Pentrys\textsuperscript{TM} formulation does not seem warranted at the present time, the immune and PSA responses observed are intriguing, and additional studies in animal models could lead to clinically useful mechanisms. The company, with its new partner, Hawaii Biotech, Inc., will be considering other clinical trials possibilities': Avantogen Limited press release dated 6 June, 2006.
communicated to the company’s MD progressively from 5 July 2007. Complete attested metallurgical test results confirming the positive results obtained at the Zara project became available to the MD the afternoon of 19 July 2007. While a release to the market was ostensibly in the process of being drafted, nothing had been announced to the market when on 24 July 2007 the ASX queried a price and volume increase in the trading of the company’s securities. A few hours later that day Sub-Sahara made an announcement to the market entitled ‘Excellent Gold Recovery From Koka Metallurgical Test’ containing the relevant information.

Given the results concerned a significant element of Sub-Sahara’s exploration activity and would therefore have a positive effect on Sub-Sahara’s shareholders’ interests, it constituted information fit for immediate disclosure. In its 26 July response to an ASX aware letter issued the previous day, the company stated that prior to the announcement made 24 July the only people to have known the results of the metallurgical tests were the company’s secretary and directors. They may have neglected to mention the geologists who wrote the assay reports. As for why it waited to release the information from 19 to 24 July (over three business days) the company explained that due to the technical nature of the results, internal experts needed to be consulted to ensure the accuracy of any potential announcement to the market to prevent the release of misleading information. The company took a further day (Monday 23 July) to seek the opinion of its joint venture partners, one of whom

451 Not to mention the geologists who prepared the report, including the company’s own, and any subcontractors retained.
replied on Tuesday 24, the company stating in its 26 July response to the ASX aware letter that when ‘the Company received the ASX query on Tuesday 24 July 2007, it was already in the process of finalising the draft ASX announcement for release’.

On 21 April Sub-Sahara informed the ASX that it intended to fully comply with the infringement notice issued by ASIC, reminding investors that compliance was not an admission of liability and could not be regarded as a finding that Sub-Sahara had contravened the Corporations Act. The run-up in the price of the company’s securities apparent between 19 and 24 July indicating that confidentiality may have been lost may have influenced ASIC in making its final decision to issue the infringement notice, for it seems the company’s reasoning would have allowed it the space to argue for the application of the exemption provisions.

4.1.6 Citigold Corporation

Another infringement notice issued to a gold miner, Citigold Corporation, was finalised in September 2010. It was issued by ASIC 19 August 2010 for the company’s failure to inform the market of changes to its gold production targets in December 2009. In an extract from the infringement notice ASIC cited several instances of Citigold’s confirmation of production forecasts during 2009 for the December 2009 quarter and the 2010 calendar year, the latest provided
16 November 2009, where shareholders at the company’s AGM ‘were told that Citigold was on target to achieve its forecast gold production targets’. The relevant forecasts were for 15,000 ounces of gold production in the December quarter 2009 and 85,000 ounces for the 2010 calendar year.

On 16 December Citigold released an announcement providing revised production targets for its operations advising that the expected gold production for the December quarter had dropped to 5000 ounces, and that the company had revised its full year 2010 forecast down to 50,000 ounces. Despite its best efforts to spin these changes into positive sentiments in this announcement, the company received an aware letter from the ASX on 21 December.

In its response to the letter Citigold stated that it had first become aware of the possibility of a drop in production forecasts on 1 December 2009 when the Chief Operating Officer advised directors that production may be lower than forecast for December but that more time was needed to confirm this. ASIC alleged that on 11 December 2009 the CEO and CFO of Citigold were made aware that a review had been completed and that gold production was now expected to be 5,000 ounces for the December 2009 quarter. This represented significant information as the downgrades were substantial – from 15,000 to 5,000 ounces and 85,000 to 50,000 ounces for the December quarter 2009 and the 2010 calendar year respectively. Citigold was therefore found by ASIC to

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have been in breach of its obligations from 11 December to 16 December (4 business days) as none of the exceptions applied and a reasonable person would have expected the information to be released immediately.

While Citigold has not commented on its payment of the fine, in its response to an ASX aware letter dated 23 December 2009 it stated that it thought the drop in December quarter 2009 production ‘has little, if any, impact on the value of the asset and the future growth plans of the company’. The company viewed the revisions as immaterial in view of its planned production targets in future years of more than ten times calendar 2009 output (300,000 vs 25,000 ounces), the life of the mine, and the continuing development and ramp up of the mine.

Investors were ostensibly not of the same opinion, with over 10 million shares being traded the day of the announcement. While Citigold’s arguments make sense if taking a longer term perspective on the company’s prospects it constitutes no less of a breach of the continuous disclosure requirements as the revisions were substantial when compared with previous guidance, which had been reaffirmed several times throughout the year. Materiality is a temporal consideration in many senses, and while management need not concern itself with the expectations of day traders it should realise that there are a great number of investors who while not matching the description of the former, are not necessarily long term value seekers either, and would prefer to be apprised of information which gives them a sense of the value of their investment in the nearer term.
4.1.7 Raw Capital Partners (formerly Trysoft Corporation Limited)

A particularly clean-cut failure to disclose involved IT services company Raw Capital Partners. A significant proportion (approximately 67 per cent) of the company’s revenue at the time of the contravention came from a contract with telecommunications giant Optus for the provision of network, server, desktop and application support services. On 30 October 2006, Raw Capital’s MD Douglas Wong was informed via telephone that Optus would not be extending this contract beyond February 2007. On 31 October, Mr Wong received an email confirming the same. A reasonable person would have considered this constituted material information worthy of an announcement to the market, given that it would affect a revenue stream of such significance to the company’s business. No announcement was forthcoming.

On 22 November ASIC asked the company to produce documents relating to its contract with Optus. Two days later, and nearly a month after its initial advice, Raw released an announcement to the ASX stating that Optus would not be renewing their agreement. This constituted a flagrant breach of the continuous disclosure provisions warranting an infringement notice from ASIC, given that the company was aware of the said information for 25 days (19 business days) before it decided to inform the market, and even then, after an ASIC query.

Nevertheless, in an ASX announcement dated 1 August 2007, the company announced that it had chosen to comply with the infringement notice as it ‘[did] not believe that its interests or those of its shareholders [were] best
served by a protracted legal dispute with ASIC’. This was in view of the fact that the matter may have gone further had ASIC been prepared to use another harder enforcement mechanism to deal with this breach, as it arguably could have. In its release dated 1 August 2007, the company further stated that it had rejected ASIC’s allegation of contravention, and that it carefully considered the information available to it in light of the nature of the discussions, terms of its contract, and the history of previous dealings, with Optus. The Company concluded that, as it was engaged in incomplete discussions with Optus on a range of issues including the nature of its ongoing contract with Optus after 28 February 2007, it was not in a position to make an announcement with a sufficient degree of certainty until an announcement was made on 24 November 2006.

Since payment of the infringement notice is in no way an admission of liability, many companies have used an announcement documenting the payment of the fine to try to absolve themselves of any link to a contravention, as is evident here. However, it would appear that unless there had been a new arrangement with Optus in the pipeline covering most of the shortfall from the termination of the main contract, that the information should have been released regardless.

Indeed, this is in slight conflict with the company’s earlier announcement on 24 November 2006 disclosing the information to the market, which gives the impression of a company in relative crisis trying to deal with the loss of a major revenue stream as quickly as possible:
Trysoft is in negotiations with Optus as to arrangements consequent upon the expected expiry of the Agreement as well as possible alternate support arrangements. However, to date there are no agreed arrangements with respect to commitments beyond the term of the current Agreement and Trysoft will announce any further developments as is appropriate in the circumstances. Trysoft has over recent months been exploring offshore opportunities in China and Asia as a means of accelerating the scale and diversity of its operations. ... Trysoft remains confident that current opportunities being investigated and negotiated will provide it with an enhanced and diversified operating base.

4.1.8 Centrex Mining Limited

In a situation similar to that facing Raw Capital, though involving positive rather than negative news, ASIC decided to fine Centrex Mining Limited $33,000 for its failure to inform the market of a binding Heads of Agreement it had arranged with a Chinese steel and iron company. The Heads of Agreement involved the supply of 1 million tonnes of Hematite (a mineral form of iron oxide) per year for a period of five years. According to an ASIC press release dated 12 March 2008, ‘Centrex needed the Baotou Agreement, as well as other agreements concerning the supply of hematite ore which were later signed, in order to effect long-term contracts with Genesee & Wyoming, ABB Grain Limited and Flinders Ports for the transport and shipping of ... hematite ore’. ASIC alleged that while Centrex became aware of the information 25 May 2007, it sat on it.

over the intervening weekend and three business days before releasing the
information to the market on 30 May 2007. In its response to an ASX aware
letter dated 30 May 2007 which asked when the company became aware of the
information released in the announcement made that day, the company gave a
detailed itinerary of the movements of its Chairman and Managing Director
who had been involved in confidential and incomplete negotiations in China
since 25 May:

Given that there is an inevitable time factor between becoming aware
of information and preparing and checking an announcement and then
submitting that announcement, particularly given the directors were
travelling both from and in China at the relevant times and
communication was difficult. The Company confirms that it is in
compliance with the Listing Rules.

Given the timing of the execution of the agreement (CXM’s response to ASX’s
aware letter confirming that one of the two Heads of Agreement had been
executed the evening of Friday 25 May) and rapid ascension of CXM’s share
price at the time the irresistible inference is that confidentiality had been lost
and the information may have been traded on.454

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454 After listing on the exchange in March 2007, CXM shares never traded above 20 cents. On 17 May
shares closed at 18.5 cents, closing at 26 cents the next day. Shares hovered around the mid-20 cent mark
until 24 May when they closed at 28 cents, closing at the same price the next day. Shares closed on the
29th, the day before CXM’s announcement to the market, at 34 cents. Post announcement the shares
reverted to the low 30 cent mark before rising rapidly in the following days to reach a close of 55 cents on
4.1.9 Crown Limited

While the simple failure to disclose has most often attracted the use of the infringement notice there are at least two instances which have led to the giving of enforceable undertakings to ASIC. The first accepted by ASIC was made prior to the introduction of the infringement notice mechanism by Crown Limited in 1998. The company was alleged by ASIC to have breached its continuous disclosure obligations by failing to release information relating to poor operating results for the four month period between July and October 1997 once becoming aware of them (information released 19 December) and a Notice received from the Victorian Casino and Gaming Authority to the effect that it had breached a debt to equity covenant in its casino license immediately after receiving it on 10 November 1997.

By virtue of the enforceable undertaking, Crown covenanted to issue quarterly reports to the market for three years and implement a detailed internal compliance program to be supervised by a Compliance Committee constituted by staff including some of the company’s non-executive directors. The undertaking also promised to authorise only the Chairman, the Chief Executive Officer and the Chairman of the Compliance Committee to release information to the market. Given ASIC’s investigations yielded evidence of situations where

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material information relating to the company’s performance had been informally released to selected parties prior to release to the market generally the company also promised to maintain accurate records of all releases made.

These measures were geared towards promoting ‘confidence in Crown’s commitment to compliance with the continuous disclosure provisions of the Corporations Law, and lead to both the market and Crown shareholders being better informed…[t]he procedures Crown are required to implement are aimed at ensuring these circumstances do not occur again’ then ASIC Commissioner Mr Cameron said. While ASIC noted in its release that ‘the failure to disclose these matters resulted largely from the absence of an adequate internal system for compliance with the ASX listing rule 3.1 and not from any dishonesty on the part of any officer of Crown’ it is interesting to note that in analogous circumstances involving an unintentional breach through the selective disclosure of material information a few years later, Southcorp was faced with the full force of then newly available civil penalty provisions.

4.1.10 TZ Limited

In 2008, TZ Limited offered an enforceable undertaking to ASIC in circumstances where ASIC alleged it had also failed to disclose price sensitive information to the market. The information related to purchase orders placed with TZ by a global automotive supplier and a global aircraft manufacturer
sometime before 20 September, on which date directors became aware of the information, which was not disclosed until 26 September. While directors of TZ considered making an announcement they did not consider the information to be material, and as such waited to receive its customer’s consent to announcing the orders as it was bound by confidentiality agreements with them which ‘required the customers’ consent before TZ Limited could make a market announcement about the Contracts’. ASIC alleged that [t]he receipt of the purchase orders from the automotive supplier and the aircraft manufacturer represented an important event for TZ Limited. TZ Limited’s business plan is to build shareholder value by developing, licensing and commercialising proprietary technologies and products, including Intevia. The amounts of the purchase orders from the automotive supplier and the aircraft manufacturer were relatively small, but they were important strategic steps in terms of TZ Limited’s business development.\textsuperscript{458}

Price action cited by ASIC potentially demonstrates both this and the chance informed trading may have occurred, ASIC documenting seriously volatile price action at the relevant time.\textsuperscript{459} The fact the company had confidentiality agreements with its customers would not afford TZ exemption from the rule,

\textsuperscript{457} Australian Securities and Investments Commission, ‘ASIC Accepts Enforceable Undertaking from TZ Limited’ (Media Release, 4 July 2008) \texttt{<http://www.asic.gov.au/asic/asic.nsf/byheadline/08-149+ASIC+accepts+enforceable+undertaking+from+TZ+Limited?openDocument>}. \textsuperscript{458} Australian Securities and Investments Commission, \textit{Enforceable Undertaking by TZ Limited}, 2 \texttt{<http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/017029221.pdf/$file/017029221.pdf>}. \textsuperscript{459} Between 17 and 25 September 2007, the average daily volume-weighted price (‘VWAP’) of TZ Limited shares was $3.27 and the average daily volume of trading was 334,134. On 25 September 2007 the closing price of TZ Limited shares was $4.40. Following the Announcement, on 26 September 2007, the price of TZ Limited shares increased from $4.40 and reached a high of $7.20, closing on that day at $5.85. The volume of trading of TZ Limited shares on 26 September 2007 was 1,011,997. Australian Securities and Investments Commission, \textit{Enforceable Undertaking by TZ Limited}. 187
which took primacy. Billed as an ‘alternative to proceeding to a hearing to
determine whether ASIC would issue an infringement notice,’ the company
promised to engage an external consultant to review the company’s (non-
existent) policies and procedures and implement recommendations made. Many other companies in similar circumstances would surely have appreciated
the same treatment.

These instances demonstrate the diverse situations requiring immediate
disclosure as per listing rule 3.1. They highlight the basic premise that once an
organisation is in receipt of information that a serious assessment of its
materiality must be made before making a decision as to whether to release it
or not. An acceptable locus between these two options is the request for a
trading halt, which should afford the company enough time to clarify any
further information which might need to be determined to make the decision
accurately.

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460 Australian Securities and Investments Commission, Enforceable Undertaking by TZ Limited, 4
461 ‘TZ Limited acknowledges ASIC’s concern that TZ Limited does not have formal written policies
regarding disclosure, but TZ Limited have stated to ASIC that TZ Limited and its Directors are aware of the
continuous disclosure requirements under the Listing Rules and Corporations Act 2001 and they operate
in an environment where strong emphasis is placed on full and appropriate disclosure’. Australian
Securities and Investments Commission, Enforceable Undertaking by TZ Limited at [2.4.2]
4.2 The failure to provide sufficient information

While partial information release is not an acceptable option, several companies issued with infringement notices did just that, choosing to engage in selective, and in the circumstances, effectively misleading disclosure, for failing to provide sufficient detail such that the market was left accidentally uninformed or actively misinformed.

4.2.1 Solbec Pharmaceuticals Limited

Solbec Pharmaceuticals Limited, a pharmaceutical drug development company based in Perth was the first listed entity to comply with an infringement notice. ASIC issued the notice on 14 June 2005 after finding that Solbec had breached s 674(2) due to the release of an announcement to the ASX on 23 November 2004 titled ‘Solbec Cancer Drug Induces Total Remission of Mesothelioma in Mice’. In documenting animal trials of a drug developed by Solbec (Coramsine) this announcement stated that the drug ‘brought about total remission of malignant mesothelioma in mice when combined with immunotherapy’ and that cured animals were resistant to attempts to reintroduce the cancer.

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Following the release of this information to the market, shares in Solbec rose 92% from 12.5 to 24 cents, with over 29 million shares being traded on the day before closing at a price of 21 cents. In newspaper write ups between 24 and 26 November additional details providing more in depth information regarding the animal trial of Coramsine which were not communicated in Solbec’s announcement were printed. In this period, shares in Solbec dropped to 17 cents, some 19% off the 21 cent close on the day of the announcement. In a second announcement titled ‘Solbec Confirms Positive Preliminary Study Results for Cancer Drug in Mice’, Solbec was a little more specific about the results of the trial:

Five mice were inoculated with mesothelioma and were treated with the combination of CpG and Coramsine 3 times weekly for 16 days. Two mice, out of the five treated, had greatly reduced tumour growth and extended survival. Another two of the treated mice went into remission, one of which when reinoculated with cancer was immune while the other died of Coramsine overdose due to the lack of cancer because Coramsine will kill normal cells when there is no cancer present. The fifth mouse was a control, treated with Coramsine only.463

ASIC was of the belief that Solbec had breached its continuous disclosure obligations for its failure to disclose information, known to it at the time of the first announcement, which a reasonable person would expect to have a material effect on the price or value of Solbec’s securities. Information relating to the structure of the animal trial including the size of the sample, the specific

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immune response and survivability of the mice within the sample, and the number of mice which were cured and also resistant to the reintroduction of the cancer in the trial were notable absences. This information was seen by ASIC to be likely to influence investors in deciding whether to become involved with the company’s securities. Solbec business development manager Greg Barrington stated the data was left out for simplicity: ‘When you put in too much detail you’re told the market doesn’t understand or that it’s not relevant... We're trying to improve the quality of our announcements’.

After paying the fine, Solbec’s Chairman stated his belief that the company had not breached its continuous disclosure obligations as he felt the bulk of the information in the second announcement was contained in the first: ‘Our view is there was enough in the announcement on the 23rd to comply with the law, we just followed up by way of clarification’. He stated further ‘[w]e're aggrieved, but we're concentrating on day-to-day operation. We're not a big company, there won't be a finding against us, let's pay the fine and move on’, suggesting in combination with comments that the company believed it had not breached its obligations that the entity saw this as a cost of business not worth wasting the time or money fighting.

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4.2.2 Nexbis Limited

Nexbis Limited, a provider of telecommunications products and services paid a $33,000 infringement notice 12 August 2011 for its failure to inform the market about a US$30 million acquisition of rights to supply a customer with one of its offerings.\textsuperscript{467} This was in circumstances where a subsidiary of Nexbis was assigned interests in an agreement to supply the General Administration of Quality Supervision, Inspection and Quarantine of the People’s Republic of China (AQSIQ) with the ‘Nexcode security suite’ for the China National Gas Tank Project on 6 May (pursuant to which it would purchase intangible assets from CITP, the original holder of the rights and the party authorised to carry out the project); where Nexbis had made payments of US$27.5 million of the total $30 million payable to the assignor; and where government approvals had been given for a foreign joint venture roll out of the project in the months leading up to and including 26 August 2010.

While emitting parts through an announcement containing preliminary financial results 31 August 2010 this information was not announced in its entirety until 7 September 2010.\textsuperscript{468} Given the materiality of this information

\textsuperscript{467} ‘Nexbis Limited paid a $33,000 penalty after ASIC issued an infringement notice for an alleged failure to inform the market about an acquisition for US$30 million of all the rights in an agreement to supply the Nexcode security suite to the General Administration of Quality Supervision, Inspection and Quarantine of the People’s Republic of China (AQSIQ) for the China National Gas Tank Project (the Project) in the period 26 August 2010 to 0.07am (EST) on 7 September 2010’: ASIC press release dated 12 August, 2011. Available at <http://www.asic.gov.au/asic/asic.nsf/byheadline/11%E2%80%93168AD+Nexbis+Limited+pays+$33,000+continuous+disclosure+penalty?openDocument>.

\textsuperscript{468} To the effect that ‘[s]ubstantial progress has also been made in restructuring the China National Gas Tank project to facilitate better management of the project. NBS has participated in this restructuring and
ASIC alleged Nexbis had breached the listing rule between 26 August and 7 September when the company responded to an aware letter from the ASX. In that response, the company argued that exceptions in 3.1A applied such that it did not need to disclose the information until it did, however ASIC argued the requirements were not satisfied as a reasonable person would have expected the information to have been disclosed, the fact the information had ceased to be confidential due to approval from Chinese authorities, and where the specific factors allowing retention of the information in the exceptions were in abeyance. The fact the company needed to transfer its capital contribution to a foreign currency bank account pursuant to the arrangement and expected to do so on 7 September, as well as engage in other activities (over and above simply acquiring rights) to participate in the China Gas Tank project did not sway ASIC’s consideration of the issue; this was presumably because all activity necessary from the contractual counterparty to make the contract a reality had been completed, and confidentiality no longer existed, meaning Nexbis should have disclosed the information after obtaining approval from the Foreign Exchange Bureau of China to open a foreign currency bank account, granted 25 August 2010. The company stated that it was

will be in a much stronger position as a partner in the project with direct control over project scope, implementation rollout and long-term management. A release has been settled and secured on a non-circumvention agreement from the previous project partner to contract directly with the customer. Approval has been received from the Chinese authorities for the joint venture to conduct this business with a broadened scope’ and that the company had made a payment of AU$34,481,000: Extract of infringement notice, available at [http://www.asic.gov.au/asic/asic.nsf/byheadline/11-168AD+attachment%3A+Nexbis+Limited+infringement+notice++Extract?openDocument](http://www.asic.gov.au/asic/asic.nsf/byheadline/11-168AD+attachment%3A+Nexbis+Limited+infringement+notice++Extract?openDocument).

469 Including transferring its capital commitment to a foreign currency bank account, undertaking a pilot test implementation of the system, applying and receiving accreditation from AQSIC to offer the Nexbis system to participants in the China Gas Tank Project. See Nexbis Limited response to ASX aware letter dated 7 September, 2010.
of the view that the Acquisition is an incomplete transaction until such
time as AQSIQ confirms or denies that Nexbis (via the Project Entity) has
the right to participate in the China Gas Tank Project, and for this reason
and the reasons set out above, Nexbis was not required to immediately
disclose the Acquisition to the ASX as it satisfied the exception in ASX
Listing Rule 3.1.470

ASIC noted that the information held by Nexbis by 26 August was material in
view of the facts that: the company had made ‘regular statements about the
significance of and revenue from the Project since it was first announced on 17
November 2008’ amongst other reasons.471 It appears from this set of facts that
given confidentiality appears to have been breached during the process of
government approvals and their relay to Nexbis472, and that the information

470 Nexbis Limited response to ASX aware letter dated 7 September, 2010 at 3. See also ‘Nexbis Limited
Infringement Notice – Extract’ available at Australian Securities and Investments Commission, ‘Nexbis
Limited Pays $33,000 Continuous Disclosure Penalty’ (Media Release, 12 August 2011)

On Friday 3 September 2010, ASX sent an Aware Letter to Nexbis. At about 9:07 am, on Tuesday
7 September 2010, Nexbis responded to ASX’s Aware Letter (the Response). The Response
contained the Information. On 3 September 2010, Nexbis opened at a price of 6.95 cents,
reached a high of 7.92 cents and a low of 6.95 cents and closed at 7.72 cents. The total volume
of Nexbis shares traded was 1,394,673.36. On Monday 6 September 2010, Nexbis opened at a
price of 8.21 cents, reached a high of 8.69 cents and a low of 8.21 cents and closed at 8.69 cents.
The total volume of Nexbis shares traded was 2,398,807.32. On Tuesday 7 September 2010,
Nexbis opened at a price of 8.49 cents, reached a high of 8.49 cents and closed at the low price
of 7.53 cents. The total volume of Nexbis shares traded was 1,014,771.71. On Wednesday 8
September 2010, Nexbis opened at a price of 7.53, the high price for the day and closed at
the low price of 7.43 cents. The total volume of Nexbis shares traded was 8,206.85.

471 ‘[T]he purchase of the intangible assets under the Assignment Deed was material to Nexbis’;
‘[t]hroughout 2010, the Project was one of three live projects for Nexbis and was therefore important to
the business of Nexbis’; ‘[i]n the financial year ending 30 June 2010 Nexbis had a normalised cash loss of
AU$10,500,000, a net loss after tax AU$49,600,000 and Nexbis’ revenue had fallen by 96% from the
previous financial year to AU$2,438,000’; and ‘Nexbis’ market capitalisation as at 31 December 2010 was
<http://www.asic.gov.au/asic/asic.nsf/byheadline/11%E2%80%93168AD+Nexbis+Limited+pays+$33,000+
continuous+disclosure+penalty?openDocument>.

472 ‘By 26 August 2010, the Information had ceased to be confidential because the joint venture between
NAL and Mr Yao had been approved by the Chinese authorities and the Chinese authorities had given
approval for BZTHXTD to open a foreign currency bank account’ : See ‘Nexbis Limited Infringement Notice –
Extract’ available at Australian Securities and Investments Commission, ‘Nexbis Limited Pays $33,000
Continuous Disclosure Penalty’ (Media Release, 12 August 2011)

was material in the context of the company and its previous announcements relating to the project, that it required disclosure. Had the information remained confidential, it would have been interesting to see whether ASIC would have issued the notice, given Nexbis’ argumentation that further activities required completion before the recognition of the entry into the project. Arguably, this would mean the information would not need to be disclosed, however, given that the company had spilled some of the beans in its 31 August release, and it might be assumed that given it was to engage in these activities that confidentiality would have been hard to maintain anyway, that it would have needed to have said something sooner rather than later anyway. This speaks to the need for companies to be ready with a pre-drafted release in case release becomes necessary during the course of any negotiations.\(^{473}\) It also speaks of the need for companies to explain steps involved in drawn out contractual processes ahead of their execution so that if confidentiality is breached, investors have some idea of what is going on, and the company does not find itself unknowingly having allowed them to be led astray in the circumstances.

4.2.3 Avastra Limited

Several other companies also made releases which did not disclose the entire panoply of relevant facts available to management at the time for the market

\(^{473}\) See Australian Securities Exchange, *ASX Listing Rules: Guidance Note 8* at [4.9].
to properly digest the information it had released, choosing to release the relevant information at a later date.

An alleged breach by life sciences company Avastra Limited\(^{474}\) concerned clinical trials of the company’s BioWeld Tube for the joining of blood vessels at Concord Hospital in Sydney, results of which were to be used to support an application to the Australian Therapeutic Goods Administration for commercial approval. Knowledge of a delay in the publication of these results and the delay in communication of this fact to the market raised ASIC’s ire.

On April 12, 2005 Avastra announced to the market that the results of the trial were expected to be published by year end after the clinical trial was unable to proceed further after complications/over concerns related to faulty equipment in the first human patient. On 27 April 2005 Avastra published a Newsletter which stated that the company took a ‘big step forward when the Australian clinical trial commenced as scheduled on the BioWeld Tube for sutureless anastomosis last December. Clinical trial results of the 12 patient study are expected at the end of this year’\(^{475}\).

This was despite the fact that a day earlier on April 26 the company had been informed that it had been given permission to continue the clinical trial with the second and subsequent patients, which effectively gave rise to constructive awareness that the results of the Australian clinical trial would not be known by


\(^{475}\) Avastra Limited newsletter dated 27 April, 2006.
the end of 2005, and that instead there would be a significant delay in the publication of the relevant results.

It was not until 13 May that Avastra announced to the ASX a delay in the progress of the Australian clinical trial and that the company did not anticipate publication of the Australian clinical trial results until June 2006 at the earliest ("the Announcement") due to various complications with the progress of the clinical trial.

The company stated in its release after paying the penalty that ‘due to various matters that created uncertainty as to the actual position that Avastra was not in a position to make an announcement to the market any earlier than it did’.476

ASIC stated that given the company had indicated ‘commercialisation of the BioWeld Tube was the primary objective of the company and that commercialisation was dependent upon the completion of the Australian clinical trial and subsequent approval of the BioWeld Tube by the Australian Therapeutic Goods Administration’, the information which the CEO had become aware of ‘meant a delay to the commercialisation of the BioWeld Tube and would be seen by persons who commonly invest in securities as reflecting negatively on Avastra and the commercialisation of the BioWeld Tube’.477 This was therefore information a reasonable person would expect to influence trading decisions involving the company’s securities.

4.2.4 Bioprospect Limited

As with Avastra, BioProspect Limited (BPO) was alleged to have made announcements regarding a 25% interest it had acquired in Frontier Gasfields Pty Ltd implying the following while aware of information to the contrary:

1. Frontier had rights to oil at the Shengli Oilfield in China;
2. Frontier had a 5% interest in the Phillipines petroleum exploration service contract SC55 (SC55), or at the very least, Frontier had an agreement with the operator of SC55 to back-in to 5% upon payment of 5% of the costs; and
3. BHP had exercised its farm-in option in respect of SC55, and as a result Frontier would have a relationship with BHP in respect of SC55.

ASIC alleged that at the time BPO made the impugned announcement on 3 March 2011, that it was aware of information which was not disclosed qualifying the nature of Frontier’s interests. According to ASIC, Frontier’s rights regarding the Shengli Oilfield were limited to a gas recovery project which was still at a pilot stage, Frontier had no interest as such in SC55, rather, an option to acquire, and BHP had not yet exercised its farm-in option. ASIC alleged BPO to have been aware of this and other relevant information.478

ASIC alleged that this was information a reasonable person would expect, if generally available, to have a material effect on the price or value of BioProspect securities:

On 3 March 2011, BioProspect announced the Frontier Investment; Frontier’s portfolio of assets was a significant factor in assessing the merit and value of the Frontier Investment; After the entry into the Agreement and details of Frontier’s assets was announced on 3 March 2011, the market reacted with the share price increasing by 28% from its previous close and volume traded increasing by 3,648%; The 3 March Announcement contained misleading statements in respect of Frontier’s assets; After the 7 March Announcement clarifying Frontier’s assets was made, the share price fell 25% from the previous closing price on 3 March and the volume traded decreased by 73% from the volume traded on 3 March 2011; After the 10 March Announcement further clarifying Frontier’s assets was made, the volume of shares traded decreased by 88% from the volume traded on 3 March 2011.479

This failure to advise of such information in the context of other statements implying what might be considered material information effectively constitutes misleading disclosure through omission.

4.2.5 BC Iron Limited

ASICs pursuit of BC Iron (BCI) also relied on the failure to inform the market of all relevant material information and is notable all the more for the company’s response to its payment of the fine. On 20 January 2011 BCI entered a scheme implementation agreement (SIA) whereby a subsidiary of the counterparty (Regent Pacific Group Limited) would acquire all the fully paid ordinary shares in BCI for $3.30 per share. This information was released to the ASX 21 January setting out a summary of the arrangement. Nearly two months later Regent announced (15 March) that its board had withdrawn support for the SIA and wished to terminate it. This was wholly possible given clauses in the SIA, which were of themselves not disclosed, allowing the Regent Pacific Board to terminate the agreement. ASIC alleged the failure to disclose terms as material as these constituted a breach of the listing rule until a full copy of the SIA was released 22 March 2011.

The matter was the subject of an application to the Takeovers Panel. On 5 April 2011, the Panel declared the circumstances unacceptable as the non-disclosure of the Information had the result that there had not been an efficient, competitive and informed market for the acquisition of control over shares in BCI. The Panel ordered that Regent Pacific could not rely on the Information to terminate the SIA. ASIC alleged that the information was such that a reasonable person would expect if generally available to have a material effect on the price or value of securities and therefore required disclosure. While it might appear
to be more of a case of misleading disclosure than non-disclosure the fact is that what ASIC alleged to be material information was not disclosed when the company was aware of it.480

The company stated in its media release upon payment of the fine 1 March 2012 that it believed the information was not the kind that ‘a reasonable person would expect to have a material effect on the price or value of BCI shares’.481 While this notice and its compliance pre-date the High Court’s decision in FMG discussed above, where the effect of a statement on its audience is the relevant question in such circumstances, should this issue have been taken further into judicial territory it is arguable whether ASIC’s allegations would have stood a chance. However the company’s argumentation that it ‘never anticipated that those provisions would be relied upon in the manner in which Regent Pacific subsequently sought to do so’ was not sufficient for ASIC at the time.

BCI documented its request to ASIC that it withdraw the notice, adducing expert evidence on security prices482 as well as the advice of a Senior Counsel who advised that ‘ASIC’s argument was bound to fail and that the infringement notice issued by ASIC was fatally flawed’.483 BCI therein also stated its belief

480 While BCI made the mistake of disclosing its own right of termination in circumstances where Regent could do the same without mentioning Regent’s right to do so, as well as the fact that these terms were not in ASIC’s opinion ‘standard clauses in SIAs’.
482 Who concluded that ‘it was difficult to conclude the marginal price relevance of the information referred to in ASIC’s notice and that the announcement of the SIA itself was not statistically significant in terms of its impact on price’: BC Iron Limited announcement dated 1 March, 2012.
that the notice should have been withdrawn, and indeed never should have been issued, nevertheless concluding that it did not ‘consider that its interests, or those of its shareholders, would be best served by engaging in a protracted legal dispute with ASIC. Accordingly, given that these matters occurred some time ago; the fact that a dispute with ASIC would divert management time and attention away from BCI’s business; and the size of the penalty when compared to the potential costs associated with defending an action brought by ASIC, BCI has elected to pay the $66,000 penalty to dispense with the issue’.

4.2.6 Navigator Resources

A more recent infringement notice was paid by Navigator Resources in June 2012. ASIC alleged the company made misleading statements in relation to a renounceable rights issue announced by the company 20 June 2011 as it implied Patersons Securities Limited (Patersons) was bound to underwrite its rights issue to the tune of $20 million, subject to standard terms contained in underwriting agreements, which was not the case due to the fact Patersons’ appointment was only to take effect upon entry into a formal underwriting agreement, and after the completion of a due diligence process which had not been completed. ASIC alleged Navigator was aware of this information at the time it made the impugned announcement, which was material due to the company’s dire need for funds at the time to repay a debt facility by 30 June 2011.
The company responded to its payment of the fine with an announcement stating it did not agree statements made gave rise to such implications but chose to pay the $33,000 fine, the board stating ‘management time and the Company’s resources can be more effectively utilised by focusing on the operational performance of the Bronzewing Gold Project’ than contesting the notice.\(^{484}\) Again, while this might be termed ‘misleading disclosure’ it effectively involves the failure to disclose all relevant facts related to a piece of otherwise announced information, meaning its being dealt with via the infringement notice mechanism is to be expected.

### 4.2.7 Commonwealth Bank of Australia

While the failure to release information deemed a material part of a wider story is one way of incurring an infringement notice while releasing some information, releasing information to a select group only is another, as one of Australia’s largest companies recently discovered. A notice issued to the Commonwealth Bank of Australia (CBA) related to changes in the bank’s loan impairment expense as a result of its exposure to organisations caught up in the global financial crisis. On 13 November 2008, CBA released an announcement stating that its exposure to the collapse of Lehman Brothers, Allco Finance Group Limited and ABC Learning Centres Limited would result in

\(^{484}\) Navigator Resources Limited announcement dated 15 June, 2012.
significantly higher first half provisions for loan impairment which was now expected to be between 40 and 50 basis points.

A month later on December 10 CBA announced that it had entered into a placement agreement with Merrill Lynch to raise $750 million of new capital. Just 6 days later CBA announced that it had completed a $2 billion capital raising through a combination of an institutional placement in addition to the existing arrangement with Merrill Lynch. While the initial offer raised $357 million at a price of $28.37 per share, the institutional placement was made at a price of $27 (a 5% discount) and was also initially managed by Merrill Lynch, which confidentially sounded out major CBA shareholders that afternoon to gauge interest in the placement.

ASIC alleged that at 3.00pm that afternoon, CBA became aware of its projected loan impairment expense for 2009, which would equate to about 61 basis points. This information was then passed on to Merrill Lynch an hour later in the form of a draft media release. Once the soundings were completed by Merrill Lynch, CBA released an announcement to the ASX around 7pm that evening in which it announced it had completed a $2 billion capital raising. It also used the opportunity to advise that the full year loan impairment expense was now expected to be around 60 basis points.

On 18 December, after receiving an ASX aware letter, CBA released another announcement in which it spelt out the impact of its impairment expense on its bottom line, comparing the effect of impairment expenses at 60 basis points, and valued at approximately $2.5 billion with its previously advised figures of
40 to 50 basis points, which would approximate a $1.7–$2.1 billion drop in net profit. ASIC noted in its press release that this was capable of adversely affecting CBA’s forecasted net profit by between 5 and 7 per cent, and that in the economic climate at the time, ‘there was a heightened interest in the market regarding impairment of bank loan assets and bank profitability’⁴⁸⁵, especially in the context of conducting a capital raising that day. In view of the fact that this translated into an increase in the order of $600 million over its previously advised (13 November) expected loan impairment expense, the information constituted material information which CBA should have released when it became aware of it.

Despite the fact CBA had forwarded the information to Merrill Lynch, it apparently had not been passed on in the confidential soundings undertaken. The bank’s CEO Ralph Norris stated in the company’s press release dated 14 October 2009 that the bank was disappointed with ASIC’s decision to issue the infringement notice on the basis that impairment expense constitutes ‘a single line item in the Group’s profit and loss statement and should not be considered in isolation’. Norris also stated that the bank was experiencing strong volume and revenue growth which was expected to offset the increase in impairment expense, making the increase immaterial. If this was the case, it would be interesting to hear the bank’s explanation as to why it felt it necessary at the time to release the information to potential institutional subscribers, given that full year profit figures would not change materially on balance from those

projected 13 November? Despite the fact that ‘[t]he new loan loss estimate flowed from work on general provisioning, the least precise element in loan loss estimates ... institutions were angry they had not been told about the increase in the loan loss provisioning’. Furthermore, if this was the case how could CBA explain its termination of the Merrill Lynch placement and the retention of UBS to complete another placement the next day at a significant discount to the completed Merrill Lynch deal? As stated by Frith, ‘CBA’s actions were not consistent with a belief the blowout was not a material issue’.

ASIC was seen by some as taking a tough line, though this does not seem as tough as the line drawn for Rio Tinto Limited (discussed below). It has been said that the underlying issue is that the bank thought it ‘important enough to tell investors about to buy stock in an off-market placement, but not important enough to tell investors buying stock on the market. There was only an hour in it but CBA was trying to manage its continuous disclosure obligations to fit in with the capital raising. Its priorities should have been the other way around’.

Nevertheless, CBA’s Board stood behind its executives, stating they had its full support and that ‘at all times the bank was acting in the interests of shareholders’. This seems to mean existing as opposed to prospective shareholders (including those involved in the initial capital raising which

secured $357 million) who, as Drummond notes above, were not privy to this information when securities were trading at a premium to the $27 priced institutional placement.

4.3 Delayed results change announcements

The remaining infringement notices and enforceable undertakings issued also involved a basic failure to disclose although they centred around two issues in particular: results changes, and the failure to correct developing false markets.

4.3.1 SDI Limited

SDI Limited, a company engaged in manufacturing and marketing dental products and equipment became the third company to pay a $33,000 penalty in April 2006 after ASIC alleged the company had failed to keep the market informed regarding profit forecasts for the 2005 financial year. On 23 February 2005 the company made the following announcement to the market when releasing its half yearly report for the period ended 31 December 2004:

The Company has set itself a challenging second half target of achieving around $29.8m in sales and $9.1m in profit. This target assumes that there will be no further adverse issues and the successful launch of a large number of new products at the International Dental show in
Cologne in April, contributing to a strong final quarter. SDI believes its targets are attainable.

At a meeting on 2 May 2005 the board considered consolidated financial statements for the first three months of the year which were substantially below forecast. On 11 May the company released a company update which stated ‘it is envisaged that the Company will achieve an after tax profit within the range of $4m to $5m for this current financial year’.

ASIC alleged a contravention of the continuous disclosure provisions as at 2 May as the information was such that a reasonable person would expect it, if generally available, to have a material effect on the price or value of SDI securities because earnings forecasts are directly related to the same, and would be likely to influence a choice in deciding whether to become involved with the company. While this might appear a cut and dried case of a failure to disclose material information, SDI argued that

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\text{[t]his report was at no time considered by SDI to be a revised forecast as there was no substantiation of the report’s content [and that to] release such unqualified and unsubstantiated information would have been premature and foolhardy. It was not in a position to release accurate information until the following week (May 11) following the completion of significant analysis and verification of the company's future international sales.} \]

490 The company’s actual loss in January was $0.752m, versus its forecast loss of $0.118m. The company’s actual loss in February was $0.251m, versus a forecast profit of $1.058m. The company’s actual profit in March of $0.291m, versus a forecast profit of $1.514m.


492 SDI Limited announcement dated 20 April, 2006.
In submissions to ASIC to have the penalty notice withdrawn, SDI protested that the information ‘was not and did not pretend to be a revised forecast of net profits’. As such, legal advice provided to it may appear to have had more of a basis than that provided to QRSciences, as such information may not have been certain enough to present to the market, given a downgrade requires a specification of its extent. Nevertheless, and despite the fact the company’s MD ‘genuinely believed that SDI would achieve high sales in the last quarter to allow it to materially meet the forecast’ the fact the downgrade was so large militates against the company’s protestations, and leads to the conclusion that given its potential magnitude the company should have requested a trading halt until such time as it could specify a range for its revised performance.

4.3.2 Nufarm Limited

Australian based global agrichemical company Nufarm Limited (NUF) was alleged to have failed to disclose material information relating to a precipitous

494 ‘SDI has received legal advice that it did not contravene its continuous disclosure obligations as alleged on May 2. The ASIC notice was inconsistent with ASX guidelines on continuous disclosure and was misconceived in that it penalised SDI for failing to disclose information on May 2 that it did not have, SDI sought to obtain this information as soon as possible, resulting in the May 11 announcement’. SDI Limited announcement dated 20 April, 2006.
495 Australian Securities Exchange, ASX Listing Rules: Guidance Note 8, at [7.3].
drop in its financial results for the period ending December 2009. Information presented at a board meeting 11 February 2010 to the effect that the five month period between 1 August and 31 December saw an operating loss of over $55 million translated to serious uncertainty regarding the company’s overall financial performance (for the half year). Evidence raised by ASIC included the fact that NUF had considered the significant possibility of either a small after tax net profit, a break even result, or a small after tax net loss in the circumstances, which meant the best case scenario for the company’s operating profit was placed in the vicinity of $5-7 million for the half year period to January 2010. Such a result would have translated into an 89% fall from the results obtained in the previous corresponding six-month period. While aware of this information and no doubt its magnitude, NUF chose not to divulge it until 2 March 2010.

At the company’s AGM in late December before it was said to have become fully aware of the information, though at a time when it must have been somewhat apparent to the company that operations were not tracking as the market may have expected, the Chairman stated as follows:

From a Nufarm perspective in 2010, glyphosate raw materials are being purchased at market competitive prices and our margins will start to recover over the balance of the 2010 year. As a result of this product margin mix, our profit in the first half of this year will be significantly
down on the previous year, however in line with our internal projections.497

Nothing else was disclosed until 2 March 2010 when the MDs address to an extraordinary general meeting was released via the ASX stating his expectation that the company would report a loss of approximately $40 million for the six month period to January 2010.

In a response to an aware letter from ASX dated 3 March 2010 Nufarm sought to explain its disclosure behaviour, noting that its MD had mentioned the choice not to provide specific guidance for the 2010 operating profit outcome, which may have been expected to send a signal to the market of the uncertainties the company was encountering as a result of the global credit environment, the MD stating ‘[o]ur forecast group result for the six months ending in January 2010 is below that for the same period of last year. It should be remembered that last year’s first half result benefitted from an unusual sales mix of higher margin products in an environment that was quite different from current conditions’.498

While definitely a smooth, clear statement as to the company’s position, it did not provide the level of specificity ASX and ultimately ASIC required. Detailed discussion of a number of factors which would impact upon the half year result


discussed at the EGM the day before effectively came too late, and give a sense of how much the company might already have known. The fact that audit review of results had not yet been completed for results due to be released 30 March was not something ASIC appears to have countenanced in its decision to hand Nufarm a fine. Given the situation, Nufarm argued that the EGM on 2 March was the earliest time a ‘fulsome commentary on the trading performance of the company... could be made, having been appropriately confirmed and reviewed’. The company stated in its chronology of events that as at early February, information regarding the company’s year to date performance began to ‘come in from regional managers as to the impact of climate and competition on trading during the first half’ was ‘still not clear, nor settled’. At a Board meeting 11 February 2010, management and the Board found they were still unable to determine the implications of trading conditions for the Preliminary Estimated Half Year Result, and whether the result would be ‘a profit result, lower than the previous year, or a loss’. Information relating to geographic regions was first available in ‘raw form’ on 24/25 February when regional managers met in Melbourne. The following days saw a compilation and review of the ‘preliminary estimated’ half year result, the finalisation of the review on 1 March by senior management of information gathered from regional managers, and given the possibility of a result worse than that foreshadowed at the AGM, circulated to the Board at 4.35pm 1 March 2010 for approval. This is when the company maintained it had become aware of the magnitude of the expected loss. The company argued:

Nufarm disclosed to ASX the Preliminary Estimated Half Year Result immediately after the information was gathered from Nufarm’s Regional Managers and reviewed by Senior Management, and after the Company was able to have some preliminary discussions relating to accounting treatment with the Company’s auditors. That disclosure was made as soon as that information was available and it should be noted that this estimate was prepared and disclosure made more than four weeks ahead of the scheduled release of the final and audited half year result. We note again that the audit review in respect of these results has not been completed and has in many respects not yet commenced.501

On the basis of ASX Guidance Note 8, ASIC stated that releases prior to the 2 March information release did not ‘provide details, however qualified, of the extent of the variation’ expected.502 Given this was information that a reasonable person would expect to have a material effect on the price or value of Nufarm securities, ASIC issued a $66,000 fine and accepted a raft of enforceable undertakings from the company.503

Amid concerns the company’s financial reporting systems did not produce sufficient up-to-date information about its financial performance and current market conditions to enable the company to have a more precise view of its likely half yearly results at the time of the contravention alleged in the

infringement notice, Nufarm agreed to engage an independent external consultant to review its financial reporting and disclosure systems and recommend changes, as well as refrain from using exemptions from full disclosure for fundraising under ss 708AA and 708A or issue a short form prospectus under s 713 of the Corporations Act. It also agreed to conduct training for its directors, senior managers and regional managers in relation to the company’s disclosure obligations.  

In a release announcing its acceptance of the infringement notice, Nufarm’s MD acknowledged ‘the fundamental importance of accurate and timely disclosure’ while its chairman indicated the company was ‘taking significant steps to improve its performance in the areas of reporting and disclosure’.  

### 4.3.3 Pahth Telecommunications Limited  

Another company to have provided ASIC with an enforceable undertaking in circumstances involving results revisions was Western Australian based company, Pahth Telecommunications Limited, which failed to issue a profit downgrade in circumstances where it had announced that key strategic negotiations relating to its business would not proceed. While projecting
revenues of $19.6 million and a net loss of $5,000 for the financial year ended June 2000 in its September 1999 prospectus, a preliminary financial report issued September 2000 disclosed revenues of just $11.5 million and a loss of some $1.15 million. Path promised to review its internal procedures and have them audited by a senior member of the stockbroking profession to ensure future compliance as well as ‘review, formalise and annually audit its corporate governance practices’.507

4.3.4 Plexus International Limited

Another Western Australian based technology company, Plexus International Limited508, provided an enforceable undertaking to ASIC a few months later in April 2001. This was in circumstances where ASIC alleged the company had failed to communicate material changes in financial performance, with a prospectus projecting revenues of $15.1 million and losses of $1.699 million for the financial year ended June 2000, when its preliminary financial report issued September 2000 disclosed revenue of just over $2.65 million and losses of over $3.9 million. Plexus covenanted to review its internal procedures for dealing with continuous disclosure and have these independently audited by a senior

member of the corporate finance industry as well as ‘review, formalise and annually audit its corporate governance practices’.509

4.3.5 Uecomm Limited

Demonstrating the difficulties ‘young’ companies can have with the disclosure obligation, Uecomm Limited was listed on the ASX in September 2000 after issuing a prospectus that August, and was on ASIC’s radar by early 2001.510 ASIC was concerned by the company’s failure to announce poor trading results in early calendar 2001 immediately on becoming aware of them and may have engaged in misleading and deceptive conduct by projecting a revised forecast revenue of $100 million in circumstances it was alleged not to have reasonable grounds for this forecast. Specifically, on 19 April 2001, Uecomm announced it had revised its 2001 revenue forecast from $146.3 million to $100 million and its 2001 net profit after tax forecast from $33.8 million to $25 million. Some two months later on 25 June 2001 Uecomm again downgraded its 2001 revenue forecast, from $100 million to between $45 to $55 million, and its 2001 net profit after tax from a $25 million profit to a loss of $12.5 million.

In its enforceable undertaking, Uecomm promised to engage a consultant to review its practices, policies and procedures for dealing with continuous

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disclosure and provide a set of compliance procedures in accordance with the
Australian Standard for Compliance Programs to ASIC. 511 The company was also
prevented from issuing a prospectus under s 713.512

4.3.6 Multiplex Limited

The largest company to 2006 to have provided an enforceable undertaking was
Multiplex Limited. It was given in circumstances where, at a 2 February 2005
board meeting, it was decided to adjust a profit forecast for a major project
(Wembley National Stadium project in London) from £35.7 million (projected
September 2004) to zero after senior management had determined after a
preliminary review of forecast costs and recoveries, profit on the Wembley
Project could ‘no longer be reliably estimated’.513 This change was not disclosed
to the market until 24 February 2005, at which time the company’s share price
dropped from $5.57 (Volume Weighted Average Price of 23 February) to $4.76
(VWAP on 24 February) post announcement. The company argued that it was
unable to do so until external auditors had completed a review of this
resolution. ASIC alleged this information should have been released prior to

511 Which was to include reference to the company’s obligations, the consequences of failing to
observe them, procedures whereby senior officers might immediately report any potentially
material information to the CEO or chairman for assessment and disclosure, procedures to
ensure the accuracy of information to be released to the market including financial forecasts or
projections, and procedures to ensure the compliance procedures themselves are updated as
necessitated by changes in the company’s business or the listing rules. Australian Securities and
Investments Commission, *Enforceable Undertaking by Uecomm Limited*
512 Australian Securities and Investments Commission, *Enforceable Undertaking by Uecomm Limited*.
513 Australian Securities and Investments Commission, *Enforceable Undertaking by Multiplex Limited*
market open on 3 February immediately after the resolution was made by the board to adjust forecasts for such material information.

As a result of its investigations ASIC found

[w]hilst the auditors had not signed off the half-yearly results, the auditors were looking at a break-even position as the best case scenario, and that there was nothing at that time preventing disclosure in terms similar to the announcement which was eventually made on 24 February 2005, namely that “Multiplex believes that its claims are sound and ultimately will exceed the level needed to support the break even position”.

Part of the enforceable undertaking involved the company agreeing to set up a $32 million compensation fund for those investors who contracted to purchase and held Multiplex shares between 3 and 24 February 2005. The company promised to engage an external consultant to review its policies and procedures for dealing with the regime and ensure they are consistent with industry best practice for a company of its size, and not rely on s 713 for short form prospectuses until it had completed its review.

Former ASIC Chairman Jeffrey Lucy said delivering some recourse for affected investors was a priority in ASIC’s negotiations with Multiplex. Specifically billed as ‘an alternative to taking a civil penalty proceeding’ ASIC accepted an enforceable undertaking as it was perceived to provide ‘a more appropriate

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regulatory outcome’ by virtue of its swiftness in offering compensation to those suffering loss as a result of the alleged contravention, if ASIC had taken action via the civil penalty provisions the maximum that could be awarded would be $1 million pecuniary penalty against the corporation, and the undertaking provided ‘an ongoing benefit by way of improved Disclosure Policies and Procedures that Multiplex has agreed to put in place, which are to be consistent with industry best practice, monitored by an independent expert’.  

The company also agreed to move its board to having a majority of independent directors within 12 months.

Chairman Lucy reiterated ‘[t]his EU provides a swift and fair result that balances the regulatory imperatives, the interests of investors and acknowledges the willingness of Multiplex to offer a constructive response to the regulator’s concerns’. This represents a novel enforcement effort which may be more useful than the type of legal action taken by the regulator in cases like Fortescue, had any investors presented with a loss.

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4.4 Media attention and the failure to correct or prevent a false market

Three companies have been issued infringement notices specifically for failing to deal with false markets swirling around their securities in circumstances involving takeover bids.

4.4.1 Promina Limited

The first company with a market capitalisation over $1 billion to pay an infringement notice was Promina Insurance Limited. Suncorp Metway Limited had proposed to acquire Promina on 29 September 2006, though the offer price was not one that Promina was willing to accept. On 10 October 2006 the heads of both companies had a telephone conversation where Promina was offered a combination of Suncorp shares and cash for the entire company. The next day, 11 October, articles speculating about the takeover were published through various newswire services. One, a Dow Jones newswire stated ‘Suncorp is looking to buy Promina for A$7.50/share, according to talk circulating amongst hedge funds’. This information was deemed reasonably specific meaning that the information the subject of the telephone call seemed to have lost confidentiality.517

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ASIC alleged that the offer made during the phonecall meant that for the purposes of the listing rule Promina became aware of information which a reasonable person would expect, if it were generally available, to have a material effect on the price or value of securities of Promina. Materiality was grounded in the fact that the acquisition proposal valued Promina shares at a premium to their then current price, and the combination of the two companies’ businesses would create a synergistically stronger entity which investors might be interested in investing in. Ordinarily, such information could access the exemptions from disclosure but for the reasonably specific media commentary regarding the offer, demonstrating confidentiality had likely been lost.

Promina, while paying the fine maintained its innocence, believing that making an announcement as early as the afternoon of 11 October 2006 would have been misleading as ‘confidential and incomplete negotiations were continuing’ between the two companies. The company stated that

[a]t the time of the media speculation, the Promina board had not met to consider the proposal in question and no written proposal had been received. The Promina board did not meet to consider the proposal until 5.00pm on 11 October 2006. The announcement the following morning that the proposal was intended to be implemented via a Promina Board recommended scheme of arrangement could not have been made at any time prior to the Board's consideration and favourable determination. Promina considers that to have made the announcement on the afternoon of 11 October 2006 as suggested by

to an intra-day high of $6.82 before closing at $6.48 (up $0.38 on the previous day’s close) with 10,761,344 of the company’s securities traded on the day.
ASIC would not have been in the interests of shareholders or the market given the uncertainty surrounding the status of the proposal.518

Promina disclosed the Suncorp offer on October 12, the day after media speculation of such a possibility.519 ASIC stated in its media release in relation to the payment of the fine by Promina that the company had been in contravention from 12.03pm 11 October 2006, the time the Dow Jones Newswire was published online. The ASIC note stated:

From 12:03pm on 11 October 2006, ASX Listing Rule 3.1A (the exception to ASX Listing Rule 3.1) no longer applied to the Information because the Information ceased to be confidential and, in view of the media speculation in relation to the proposal the subject of the Information and in the absence of a request by Promina for a trading halt under ASX Listing Rule 16.4.2, a reasonable person would have expected the Information to be disclosed to ASX.520

While this approach – alleging contravention the moment the information appeared in a news piece – may appear harsh, it was replicated in the infringement notice issued to Rio Tinto.

519 Media speculation included ‘a fairly specific article by the Dow Jones newswire which said that hedge funds claimed Suncorp was looking to buy Promina for $7.50 a share. The media reports pushed Promina’s share price up 38c to $6.48, after sales up to $6.82’ which makes the company’s claim to confidentiality dubious. See Bryan Firth, ‘Promina Cops a $100,000 Speeding Fine Over Tardy Disclosure’, The Australian (online), 21 March 2007 <http://www.theguardian.com/australia-news/2007/mar/21/promina.investment>.  
Yet another company with a market capitalisation over $1 billion to pay an infringement notice was Rio Tinto Limited (RIO) in June 2008. The alleged contravention related to the takeover of Canadian aluminium company Alcan. At the final stages of the confidential negotiation process RIO made an offer on 10 July 2007, for which it received unanimous acceptance from the Board of Alcan the morning of 12 July 2007. At 2.30pm that day Dow Jones Newswires published an article entitled ‘Rio Tinto Nears Deal to Acquire Alcan of Canada’ which stated:

Rio Tinto was last night in the closing stages of a deal to purchase Canadian aluminium giant Alcan Inc. to help the Canadian aluminium giant stave off a hostile bid from Alcoa Inc., according to people familiar with the transaction. A final deal should be announced early today, these people said, and was expected to carry an all-cash price tag approaching $100 a share, valuing the deal at about $37 billion.

Two further newswire articles were released soon after the first containing similar information. After a call from the ASX at 3.00pm that afternoon, RIO requested a trading halt at 3.38pm. At about 4.00pm, RIO formally announced its offer and Alcan’s acceptance. The information in the Dow Jones newswire was considered by ASIC to be reasonably specific given the actual terms of the bid agreed upon, meaning that the information had effectively ceased to be confidential, and that any protection offered by the listing rule exceptions had

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521 At 2.41pm on 12 July 2007, Dow Jones Newswires published a second article titled, ‘Rio Tinto Close to US$37b Alcan Deal’, and at 2.46 pm, Reuters published an article titled ‘Rio Tinto Near Deal to Buy Alcan’. Both of these articles contained similar information to the Dow Jones Article.
also ceased. It alleged that RIO was in breach of its obligations from the time of the release of the first newswire by Dow Jones at 2.30pm until it requested the trading halt, stating in a release dated 5 June 2008 that

in view of the speculation about the Offer in the Dow Jones article and in the absence of an immediate request by Rio Tinto for a trading halt under ASX Listing Rule 16.4.2, a reasonable person would have expected the Information to be disclosed to ASX.

ASIC considered the information was of such a nature that it would have a material effect upon the value and/or price of RIO securities if generally available due to the fact that the takeover would be value accretive for shareholders and also that the price offered represented a significant premium on the market price of Alcan shares. This argument to be sure is faultless. A takeover of this magnitude at the price offered would no doubt constitute important information for a reasonable person.\footnote{But I’ll see ASIC’s reasonable person and raise it my more reasonable person* and ask — was the information in the newswire such that a reasonable investor would rely on its veracity and make a serious decision on the basis of it? If so, and the speculation turned out to be incorrect, the investor would have to wear their decision. While it may have seemed clear to ASIC that the continuous disclosure provisions were breached, it is not so clear given that the report itself was speculative that they affected the market in any way more than any other news report in the days or months preceding the event may have. At the very least, despite its leviathan proportions, one can sympathise with RIO’s position at the time in ensuring the deal was effectively complete. *[With thanks for turn of phrase to Alan Kohler, Alan Kohler, ‘Continuous Dysfunction’, Business Spectator (online), 15 February 2008 <http://www.businessspectator.com.au/bs.nsf/Article/Continuous-dysfunction-BU3NF?OpenDocument >.]} In its response to an ASX aware letter dated 12 July RIO emphasised that negotiations were governed by a confidentiality agreement, drew attention to the fact that media speculation at the time revolved around a number of other bidders, and noted that the
target Alcan had ‘confirmed that it was in discussions with a number of possible “white knight” bidders and was conducting an auction process’.

In its explanation in the same release as to why it did not release the information to the market or request a trading halt earlier, RIO stated that although it had been advised it was the preferred bidder the morning of 12 July, that this was ‘subject to final negotiation and agreement on the transaction documents ... Negotiation of terms, including in relation to the financing, continued in Montreal throughout Thursday (Melbourne time) and, because of the competitive nature of the process, there remained the real possibility that a transaction would not proceed’. ASIC’s opinion was that this was irrelevant, as it was in the case of Promina, given that information in the public domain containing reasonably specific and reasonably accurate information was available and might create informed pockets in an otherwise uninformed market.

It appears that after conversations with ASIC that morning, it was decided RIO should not request a trading halt or make an announcement as the deal had not been finalised and confidentiality remained intact. RIO’s release gives an interesting insight into the management of its continuous disclosure obligation – it states that market trading and media reports were monitored during the progress of negotiations in Montreal that day, and that RIO had discussed the issue again with ASIC at 3.20pm that afternoon and at a further internal

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meeting where the takeover and the media reports were discussed. Through these discussions, RIO had

confirmed that there had not been any material change in the price of Rio Tinto Limited securities on the ASX or any abnormal trading volumes throughout the day. This continued to support the conclusion that confidentiality had not been lost, notwithstanding the increased speculation in the media. However, based on further advice received from those involved in the transaction negotiations in Montreal, the view was formed that the transaction had progressed sufficiently so that an announcement of a completed transaction was imminent. Given that, a call was made to you and the trading halt initiated.

It took ASIC close to nine months to issue its infringement notice to RIO, and a further two months for the company to agree to paying the penalty, which a spokesman stated was a decision made with the hope of putting the issue to rest front of mind: ‘We want to put this matter behind us ... The issues raised by this case require a fine judgment and we have nothing further to say’.524

This infringement notice may seem a little on the harsh side of ASIC’s discretion if indeed it considers that RIO was in breach immediately the moment the first article was published at 2.30pm. This is especially the case if the information released in that newswire, as according to RIO it should have been, viewed with other reports released at the time which referred to another bidder for Alcan. And further, if indeed ASX had confirmed that there had been no abnormal price or volume changes in RIO’s securities in response to the media piece. Trading volumes were in line with volumes traded in the preceding weeks and

the highest price for the day was a mere 2.1 per cent higher than the opening price. RIO was left in an interesting position — pay an immaterial $100,000 fine or call in the lawyers to contest it for what would likely amount to much more than that. The decision is a relatively easy one, though compliance alone does not tell the full story as the situation itself lies at the borders of acceptable disclosure practice. This certainly did not have the same element of flagrant abuse of the regime that the Raw Capital situation above demonstrates, though it may be more what ASIC was originally looking at using the infringement notice for: potentially a breach on a very strict interpretation of the exceptions, though on the relatively less serious side. Nevertheless, why RIO waited 38 minutes after a phone call from the ASX advising its concerns relating to confidentiality of the information and its suggestion that it ‘needed to put out an announcement straight away or request a trading halt’ to actually do so is not clear given the exemptions requiring otherwise\textsuperscript{525}, despite negligible trading action given the potential for a false market to develop.

4.4.3 Northern Iron Limited

The most recent infringement notice reviewed for the purposes of this research was paid by Northern Iron Limited on 18 December 2012. In a factual scenario closely resembling that which led to the notice issued to Rio Tinto and Promina, Northern Iron paid a $66,000 fine when it failed to release information relating

\textsuperscript{525} See Australian Securities Exchange, ASX Listing Rules: Guidance Note B at \[4.5\] at footnote 53 for the ASX’s perspective on the situation.
to a takeover offer for the company in circumstances where it appeared confidentiality had been lost.

A subsidiary of Aditya Birla Limited, Essel Mining & Industries Limited, made a non-binding indicative offer to acquire Northern Iron on 1 May 2012. On 10 May at 10.35am reference was made on Australian investor website ‘Hot Copper’ to a news story in the Indian media which discussed the offer. ASIC’s media release in relation to compliance with the infringement notice states:

At 12:31pm (AEST), the ASX contacted Northern Iron in relation to the Economic Times article and an increase in the price and volume of Northern Iron securities since 11:40am. At this time, Northern Iron knew that the confidentiality of the Essel offer to acquire Northern Iron was lost.526

It is unclear from ASIC’s wording above whether it refers to 11.40am, the time trading in the company’s securities began to display abnormal activity, or 12.31pm at the time the ASX contacted the company, as the time the company was alleged to have been aware of the loss of confidentiality. Nevertheless, a price and volume query was sent to the company at 12.54pm, in response to which the company took a further two hours to request a trading halt at 2.55pm.

At least one important difference in the application of the rules appears to have crept into ASIC’s apprehension of this situation. It appears the company was

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not held to have been aware of the loss of confidentiality and therefore the loss of the protection of the exceptions until either 11.40am or 12.31pm, where in the other instances above the company was alleged to have been in breach from the moment the media release was made. Such strict application appears absent from the wording of ASIC’s media release concerning it (the only public evidence relating to the alleged breach). If confidentiality does not vanish immediately the moment a media piece mentions the protected information with requisite specificity, the next important question becomes when subsection 3.1A.2 of listing rule 3.1A (the information is confidential and ASX has not formed the view that the information has ceased to be confidential) fails to be satisfied. Is it when the company becomes (or constructively should have become) aware of the change in trading activity relating to its securities indicating a likely loss of confidentiality, or from when it is made aware of the ASX’s opinion that confidentiality has been lost given the media commentary, or indeed both? Given the use of the term ‘and’ as opposed to the use of ‘or’ in 3.1A.2 it appears both conditions must be satisfied, although the second part, the advice of ASX appears to subsume both effectively making it the more practically important of the two.

While ASX must be of the view confidentiality has been lost for the exceptions to cease application in relation to a piece of information, it is unclear whether (and indeed how) it must communicate this fact and remains such. For its part, the ASX has made statements in its recently re-released Guidance Note 8 to the effect that it is upon the entity becoming advised by the ASX of its view that the
relevant information has ceased to be confidential that the exemptions will no longer apply, and thus requiring an immediate announcement from the entity, although in context they do not appear declarative.\textsuperscript{527} In view of ASIC’s previous statements on the issue in earlier infringement notices the market will have to wait to see what its take on the issue will be, though it is unlikely to differ, if the ASX’s comments are an accurate reflection of its preferred application of the rules. The stricter view in the circumstances is that the relevant time in this case was the point at which trading activity militated against the assumption of confidentiality at 11.40am. Seeking to apply the standard from the release of the media piece with no evidence of its being taken seriously in relation to actual trading decisions would of course be inane.\textsuperscript{528}

Should the company have requested a trading halt immediately upon ASX’s phone call it would have been unlikely, given previous application of the rule that it would have escaped ASIC’s wrath, though it might have helped depending on how we are to understand the passage quoted above from the ASIC media release noting the two potentially relevant times. For now, entities in the midst of clearly material negotiations will need to monitor the trading activity (price and volume) in their securities, as well as media commentary relating to them for indications confidentiality may have been lost. While the more practical understanding may be to wait for the ASX to contact the company this may in effect be too late depending on the exact circumstances of

\textsuperscript{527} Australian Securities Exchange, \textit{ASX Listing Rules: Guidance Note 8}, at \{4.2\}, \{5.8\} and \{6.5\}.

\textsuperscript{528} This case is interesting for the fact that the time trading activity began to change and the time the information was referred to in the media commentary actually differ.
the case. In relation to Northern Iron ASIC Deputy Chairwoman Gibson stated ‘[a] key part of effective continuous disclosure is having the right systems in place and being prepared in the event information ceases to be confidential’. Management teams sitting on potentially material information which is protected by the exceptions will need to be vigilant in the extreme lest they expose their company to such penalty enforcement attention. In an announcement dated 18 December Northern Iron stated that it did not consider that fighting the notice was in the best interests of the company or its shareholders given the time and costs involved in doing so would far outweigh the penalty itself.

4.5 Administrative sanctions and market integrity

At its inception, it was determined that the infringement notice mechanism would be subject to review after two years of operation. While the mechanism has been reviewed by the government, a report is yet to be published. Nevertheless, there have been intimations that ASIC would prefer higher

529 While the relevant piece of media here is the discussion of the original article in the India Times on Hot Copper at 10.35am, why is it not the time of the release of the information through India Times itself? This would present four possible times from which the company may have been held to have been aware of the alleged lack of confidentiality: the time of the release of the India Times article, the time of its discussion on Hot Copper at 10.35am, the time the company’s securities exhibited a noticeable change in trade, and the time of the call from the ASX at 12.31pm.


penalties attached to infringement notices (potentially in the order of $500,000 for each infringement).\footnote{Ben Butler, ‘ASIC Chief Lays Down the Law on Disclosure Lapses’, \textit{Sydney Morning Herald} (online), 21 March 2012 <http://www.smh.com.au/business/asic-chief-lays-down-the-law-on-disclosure-lapses-20120320-1vi2e.html#ixzz2Cj60MmUw>. It is believed ASIC would like the maximum increased to about $500,000 for each infringement.} Professor Baxt has argued that no case exists for such an increase in penalties. ASIC should first establish why the present regime of penalties does not work. Allowing regulators to seek a quick “remedy” by using “lazy” regulation – in effect “bullying” companies into accepting a fine with no liability admitted because ASIC may be unsure of the fate of its investigation (but where despite the safeguards significant publicity will automatically be generated) – is a most unsatisfactory way for our law to be administered.\footnote{Bob Baxt, ‘ASIC Notices in Need of Overhaul’, \textit{Australian Financial Review} (online), 12 April 2012 <http://www.afr.com/p/opinion/asic_notices_in_need_of_overhaul_EkbzCAsuwtFGUHQuHX3jDP>.


The fact the decision to issue an infringement notice is solely the regulator’s leads to valid arguments that the mechanism is ‘an inappropriate form of regulation in complex areas of commercial law’.\footnote{Bob Baxt, ‘ASIC Notices in Need of Overhaul’, \textit{Australian Financial Review} (online), 12 April 2012 <http://www.afr.com/p/opinion/asic_notices_in_need_of_overhaul_EkbzCAsuwtFGUHQuHX3jDP>.


pursuit through the courts. This may be small consolation for those companies where a court may have decided differently.

While the mechanism may not stand up to theoretical scrutiny, what of the practical goals set out for its operation at inception? Collecting each instance of infringement notice issuance together it is possible to conduct simple empirical analyses to gain a more generalised picture of the operation of the mechanism in the Australian market. This also allows the development of tentative (given there are only now 19 companies and 21 notices in the sample) insights into other metrics including company types most usually fined, company size, and whether the breach involved positive or negative news.

An important reason set out at the beginning of the infringement notice journey surrounds the proximity of ASIC’s notice issuance to the alleged breach of the regime. As noted above, the mechanism was designed to avail ASIC of a speedier tool through which to educate the market and effectively process and police contraventions as soon as possible in a bid to assuage any loss in confidence in the integrity of the market. While ASIC’s stated goal was to issue infringement notices within three months of the alleged breach (though it has a maximum period of 12 months in which to do so (s 1317DAC(5))536, Langley found that ‘the average time for ASIC to issue an infringement notice from the

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536 Australian Securities and Investments Commission, Regulatory Guide 73, [5].
The date of the alleged breach is between seven and eight months, but the time period appears to be improving'.

The evidence from the 19 companies issued infringement notices to 2013 illustrates that this average has begun to slide with the addition of the most recent infringement notices issued, with an average of nearly nine months from the date the company was alleged to have become aware and the date the infringement notice was issued. While there was a period of improvement when Promina was fined, the most recent notices have been issued some 11 months after the alleged contravention. Given the kind and amount of information ASIC sometimes must sift through this is somewhat understandable in spite of early expectations. To date, the longest amount of time taken to issue an infringement notice has been 11 months and 23 days in relation to Avastra, while the shortest has been four months and 11 days (Promina).

A total of $1,227,000 has been paid to ASIC in satisfaction of infringement notices to date. Of this figure, $363,000 has been paid by eleven of the smaller

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538 Not including SDI Limited, CBA Limited, Bioprospect Limited, LEI Limited and NTU Limited for which no dates are available.
539 See Richard Gluyas, ‘ASIC Probed 250 Leighton Projects’, The Australian (online), 21 March 2012 <http://www.theaustralian.com.au/business/property/asic-probed-250-leighton-projects/story-fn9656lz-1226305642152>: The corporate watchdog examined 250 Leighton Holdings projects before dismissing the construction giant’s defence to a breach of its continuous disclosure obligations. Australian Securities & Investments Commission chairman Greg Medcraft said yesterday Leighton had argued there were potential offsets to $907 million of shock writedowns on three projects announced last April. "There was an argument about 'netting' which we didn’t accept, but we had to look at the 250 projects, which was a massive amount of information," he said after an Australian Institute of Company Directors lunch in Melbourne. The investigation lasted a year but this contrasted with a likely seven to 10 years if ASIC had taken the case through the court system. It was ASIC’s policy, though, to issue infringement notices, as it did in the Leighton case, only if it was prepared to take the matter to court. “No one is beyond the law, and we have the resources to take on the big cases” Mr Medcraft said.
companies in the enforcement penalty hierarchy with a market capitalisation below $100 million, while there have only been four $66,000 fines for mid-tier companies with a market cap above $100 million. The remaining $600,000 has been paid by four of Australia’s largest organisations with market capitalisations exceeding $1 billion, with Leighton’s alleged breaches making up half that amount. While in absolute terms the larger companies have handed over more in infringement notice penalties due to the higher quantum of penalty, smaller companies might at first seem somewhat disproportionately represented with 11 of the 21 total infringements (52 per cent) being paid by Tier 3 companies with a market capitalisation under $100 million.

Langley originally found that smaller companies had a greater propensity for non-disclosure – 71 per cent of companies in the seven-company sample available at the time had a market capitalisation below $100 million when fined.\textsuperscript{540} The reason posited for this was that ‘effective implementation of continuous disclosure programs [at smaller companies] would seem to be less successful than in large publicly-listed companies’.\textsuperscript{541} Despite ASIC having built a reputation early on for chasing the minnows rather than the big guns, a closer look at the Australian market shows this may not be the case. Of the 1924 securities listed on the ASX at the time of writing, only 166 have a market capitalisation in excess of $1000 million, 368 fall between $100 and $1000

\textsuperscript{540} It is perhaps more accurate to say such companies had a higher incidence of the allegation of such with a fine attached rather than a propensity for non-disclosure given the claims have not been tested in a court.

million, while the overwhelming majority, 1390 or 72 per cent, of companies have a market cap below $100 million. While the infringement notice data set is extremely small at present, at this stage ASIC’s fining of smaller companies seems consistent with market capitalisation. Indeed, due to recent infringement activity, it seems the opposite might be said – that ASIC is chasing the big guns since 6 out of 21 fines have been issued to companies with market capitalisations over $100 million despite the fact they only represent 8 per cent of the market. Again, the available data set is not really conducive to any reliable generalisation on this question, especially given the fact Leighton’s breaches were anomalous in their clustering, but it is interesting nonetheless given previous conjectures concerning ASIC’s fining tendencies. In relation to Langley’s hypothesis that smaller companies might not have established the systems around effective continuous disclosure compliance leading to their having poor disclosure performance and being fined, which practically speaking may be no less true, the breakdown of companies constituting the Australian market suggests this may simply be due to the fact there are just more smaller companies around to be inadequately dealing with their continuous disclosure obligations.

On the basis of ASIC’s identification of speculative sectors as ‘being most at risk of non-disclosure’ Langley found supporting evidence in the fact that ‘[d]isclosure issues have generally arisen from entities operating in speculative
industries, like mining, energy, pharmaceuticals and biotechnology. As at March 2013, of the 19 companies issued infringement notices ASIC’s prediction concerning ‘speculative sectors’ has explained 12, with eight issued to mining and four to biotechnology companies. Despite this, however, not all of those companies could readily be classed as ‘speculative’ securities as such (think Rio Tinto within mining). Further, the presence of institutions from sectors not usually regarded as being speculative including insurance and banking is cause for concern, especially in view of the fact they were also amongst the largest companies to have received an infringement notice, who presumably have the resources to deal with such issues.

At the time of Langley’s analysis ‘[a]lmost all of the infringement notices related to the failure to disclose material information that would reflect negatively on share price’, the only clear exception at that stage for Langley being Astron Limited. In the sample of 19 above, several more companies failed to release information that would ordinarily be viewed positively by the market. Astron should be joined by Promina, whose contravention surrounded its being the subject of a takeover bid, Sub-Sahara Resources which failed to inform the market of revised upward estimates of gold quantities at its Eritrean mines, Nexbis for the new contract it had secured and Northern Iron for the potential takeover by Aditya Birla. The lesson from this data is that while many instances resulting in the issuance of an infringement notice involve circumstances where

companies might prefer not to release negative information, or at least choose to delay its release for a while before releasing it, that the practice of withholding positive information is effectively of the same nature as far as the provisions are concerned. This indicates also the difficulties of turning management from a ‘compliance’ to a ‘disclosure’ centric information management approach.

Given these results it appears that the infringement notice regime is functioning as it ever was, not necessarily as it was intended to. ASIC response times have recently been rather slow and have never come close to the three months expected when the mechanism was introduced. This may steal away some of the force held by this administrative mechanism in protecting the integrity of Australian financial markets, driving the development of solid corporate governance practices, and encouraging accountability to organisational stakeholders. Nevertheless, ASIC has shaken off an early reputation for pursuing smaller companies by recently issuing infringement notices to four of Australia’s largest companies, with three being amongst the top 10 companies in terms of capitalisation in the Australian market, potentially providing important educative examples to the rest of the market. It is noteworthy that positive news events continue to be a cause of infringement notice issuance.

Nevertheless, analysis of recent instances above demonstrates both the lower boundaries of the enforcement of the rule and those circumstances where harsher enforcement action should perhaps have been taken. This use of the
infringement notice instead of softer (enforceable undertakings) or harsher (civil penalty provisions or criminal penalties) enforcement action as the case may be is a tendency which should be monitored. ASIC’s fining activity at the very least does send out the message that information management is of serious importance and that companies must discharge their duties with continuous disclosure obligations front of mind. Whether this message is being heard by other listed entities given its failure to make front page news except in the cases of giants like Leighton, and whether this is sufficient to justify the mechanism given the issues noted above by commentators including Professor Baxt is another matter.

Nevertheless, infringement notices are unlikely to make an early exit from the enforcement landscape, given recent comments by ASIC Chairman Greg Medcraf that ASIC will entertain the more frequent use of the measure after the Fortescue decision. What then are directors and other officers left with in circumstances where the regulator is likely in the mood to demonstrate that while its bark has been called into question, it still has the ability to bite; and

544 There remains uncertainty surrounding the types of conduct ASIC might validly pursue via the use of the infringement notice – while it has been designed with relatively minor contraventions in mind, there exist no real restrictions as to which situations ASIC might choose to issue an infringement notice. As noted by Welsh:

There is no provision in the Act stating that the regime is to be used to enforce minor contraventions exclusively, nor is there a definition of or any guidance as to what a minor contravention actually is. As there is no provision in the Act limiting the use of the regime to non-serious contraventions of the continuous disclosure provisions and no guidance as to what a non-serious contravention actually is, there is a risk that ASIC may in fact use these provisions to enforce serious contraventions of the continuous disclosure provisions. This could lead to inadequate enforcement of contraventions of the continuous disclosure provisions.


545 Have some companies then been treated too leniently? While it might seem so, we must appreciate the reality of the situation confronting a cash strapped regulator and the best way to send warnings to specific companies and the market generally, especially in circumstances where anyone suffering loss can begin or join a class action if it has any real chance of success.
where after nearly two decades of operation with statutory support directors of major listed organisations are still getting it wrong in amateurish fashion on matters which \textit{prima facie} appear settled?\footnote{The David Jones ‘takeover bid’ in June and FMG’s prudent renegotiation of debt covenants and related rumours in September are two high-profile examples but the list goes on. See E Greenblat, ‘Disappearing DJs Bid Leaves Egg on Faces’, \textit{Sydney Morning Herald} (Sydney), 3 July 2012 and A Ferguson, ‘Miner Has to Come Clean with Shareholders’, \textit{The Age} (Melbourne), 14 September 2012.} Outside of relatively unremarkable cut-and-dried fact scenarios (at least from a disclosure perspective), have previous instances involving enforcement action provided officers with any insight they might use to avoid the dark cloud of legal action or other enforcement activity taken by aggrieved financial markets participants, ASIC, or the ASX?

For the basic failure to disclose material information promptly and without delay after becoming aware of it, managers will simply need to get used to assessing the materiality of new information quickly. If information appears to have or approach the quale of materiality, management will need to be on alert to immediately decide what to do with that information. Waiting to see what happens is not an option. Neither is simply taking time to assess the situation before making some form of disclosure about it to the market, as in the case of Leighton. The proper response in such circumstances (assuming no exception applies) is to disclose what is known at the time or discuss a trading halt or other such measure with the company’s listings advisor. While the former option is not something management would prefer given the hysteria which can sometimes attend the release of information the import of which is not fully explained, and which might possibly lead to a false market, managers...
might also just have to get used to considering trading halts more often to give the entity enough time to assess and properly address the information.

Another option of course when such information relates to important aspects of the company’s business, is to have information management systems in place to allow the organisation’s managers the ability to assess and accurately quantify the effect of any potential material information on the company’s trajectory. This has been an area where corporate performance, even amongst larger established companies has been wanting. While this is understandable at some level, say where a company has a geographical spread of operations which are not easily tracked and monitored, the simple reality is that such information should be able to be generated within a short space of time if a company wishes to avoid the inconvenience of requesting trading halts or even voluntary suspensions as well as running the risk of engaging in potentially wanting disclosure behaviour which might attract disciplinary attention. The fact the standards include constructive awareness also militates against management taking their time to assess whether information is actually material or not – if it appears it might be, the standards expect management to make further inquiries until satisfied either way, and indeed, this is the best way for managers to defend themselves in such circumstances.⁵⁴⁷ LEI’s professed preference for certainty was not rewarded by ASIC. It appears that

⁵⁴⁷ As also evidenced by LEI where consideration of the information at a meeting of senior executives of LEI on 18 March 2011 constituted awareness for the purposes of the listing rule and the Act and issued the infringement notices for each count. LEI stated that “[i]t was not until the conclusion of the review process at the Board meeting on the morning of 11 April 2011 that there was sufficient certainty regarding the facts and circumstances underpinning the Earnings Downgrade’.
two days, the maximum period for a trading halt, is effectively all the time managers have to assess the true materiality of information coming to light which may have the characteristic of materiality unless they wish to request a voluntary suspension.\footnote{Australian Securities Exchange, \textit{ASX Listing Rules: Guidance Note 8} at [4.6]: ‘A trading halt or voluntary suspension will not be suitable in every case. In particular, since a trading halt can only last for a maximum of two trading days, a trading halt will not be appropriate or of assistance for those more complex or protracted disclosure issues which are unlikely to be resolved within two trading days (although, in an exceptional case, a voluntary suspension might be)’. See also Australian Securities Exchange, \textit{ASX Listing Rules: Guidance Note 8} at [4.6], footnote 59.} The fact that enforceable undertakings are usually geared towards helping the entity build the capability for such systems is further evidence of their importance in such circumstances.

Some information is so obviously material that the failure to release it immediately is effectively unforgivable and a straight breach of the regime. The infringements issued to QRS Limited, Astron Limited, Raw Capital Partners, Centrex Mining, Crown Limited and TZ Limited (notwithstanding excuses involving director travel, confidentiality agreements and the approval of PR managers and differing assessments of materiality\footnote{See Citigold response to ASX aware letter dated 23 December 2009.}) represent clear failures to appreciate the materiality of information and disclose it without delay. The apparent receipt of information in stages, as seen in the cases of Avantogen and Sub-Sahara is an issue of particular concern for biotechnology and mining companies which are in receipt of such information on a regular basis. The simple conclusion for any company in receipt of information in this way is that it must ensure it has a disclosure plan in place to accommodate the confidential receipt, digestion, assessment and use of communicative channels to deal with such information for the market’s benefit. The use of trading halts and even
voluntary suspensions should also be seen as viable options by management facing such circumstances.

As managers should arguably have learnt from the actions involving Citrofresh, James Hardie and Fortescue, the release of information which fails to present a full and fair picture of the organisation’s situation and therefore involves the withholding of material information that changes the complexion of the information offered can be chased either through the continuous disclosure regime or the misleading or deceptive disclosure provisions. Despite the protestation that ‘information overload’ is counterproductive, neglecting to mention key elements of the information without which a misleading, unrepresentative, plainly untrue picture would be received is not information which would contribute to information overload, but rather ensure the quality of the disclosure made. Clear matters here include Solbec, Nexbis, Avastra, Bioprospect, Navigator Resources which were all aware of information which would change the complexion and basic meaning and import of announcements which were made notwithstanding. This is clearly unacceptable disclosure behaviour and serves as a reminder of the general precept expounded in Fortescue at the High Court and in jurisprudence concerning misleading or deceptive conduct, that the effect of a release on the mind of the reader must be front of mind for the issuer. Selective disclosure in the other sense, relating to audience as opposed to the information itself, is another area which entities need to have regard to as demonstrated by CBA. Given the seriousness and wanton nature of this kind of poor disclosure behaviour, it is

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550 See discussion concerning Solbec Limited above at [4.2.1].
unlikely that it would be dealt with through an enforceable undertaking, as indeed none yet have.

The failure to advise of material results and forecast changes however, which figure just as seriously, have been dealt with via the use of both administrative enforcement mechanisms, with the enforceable undertaking being of use given the recurring character of such information events. As with the basic failure to release material information without delay discussed above, such information is of obvious importance to the market for an entity’s securities and will need to have a decision on its potential for release made post-haste. As most obviously illustrated in the matter of Nufarm, the best way to avoid such situations where delays appear inevitable is to ensure appropriate information generating systems and internal reporting mechanisms are able to keep a tight rein on the company’s entire suite of operations to enable fast and accurate generation of information to enable decisions to be made about disclosure to the market. While this may be easier said than done, the only other option – subjecting the company to regulator attention and possibly enforcement action – is arguably not something worth exposing oneself or the company to.

As noted above, although a preference for certainty might appeal it appears dangerous if previous fining activity is anything to go by. Consider SDI Limited, which argued the information alleged by ASIC to have required release was not a proper revised forecast and actually required substantiation and qualification. Or Nufarm, which argued in a similar fashion that the information it was alleged to have failed to disclose had not been appropriately confirmed or reviewed.
Despite the fact it had information from regional managers in hand it maintained that its position was neither ‘clear nor settled’ and that the board was unable to make the disclosure at the time ASIC alleged it should have. In circumstances where managers have ostensibly pursued a prudent course of action by questioning the veracity of reports predicting the impending doom of the entity, what is the relevant lesson to be learnt? The common mistake each entity seems to have made is the simple failure to advise of the possible changes given their potential materiality. While verified information and reliable estimations are important, in the context of the best case scenarios being material changes in themselves both entities seem to have been obliged to disclose this potentiality to the market, and then work to flesh out the details, given that such further information is necessary to keep the market as well informed in the circumstances as possible. According to ASX’s recently re-released Guidance Note 8, so long as there is ‘a reasonable degree of certainty that there will be such a difference’ there will be a duty to disclose. ASIC’s wisdom on such issues is contained in its comments on the enforceable undertaking offered by Multiplex where it said in similar circumstances where a board preferred to wait until audit clearance before making a material release that there was nothing preventing the company from issuing an announcement

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551 On the basis of ASX Guidance Note 8, ASIC stated that releases prior to the 2 March information release did not ‘provide details, however qualified, of the extent of the variation’ expected. See ASIC Details of infringement notice issued to Nufarm at 2. Available at <http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/Nufarm-EU-attachment.pdf/$file/Nufarm-EU-attachment.pdf>.

552 Australian Securities Exchange, ASX Listing Rules: Guidance Note 8 at [7.3].
in similar form to the one it eventually did to the effect that a downgrade would eventuate at the time it became aware of it.553

The question which then arises is how long companies have to get such further information straight if they cannot provide clear guidelines immediately. It is obviously in their interests to get it out as soon as possible and depending on the company’s business this may take time, but the important point is that they have informed the market which will not be left in the lurch in circumstances where material information might lose confidentiality and lead to abnormal trading activity around its securities. ASX has acknowledged the difficulties involved in disclosing such issues and has stated 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 take time and will need to be properly vetted and signed off at a senior level and most likely approved by the board before it is released. ...The matters ASX refers to ASIC usually involve a very material difference in earnings compared to the relevant base used to measure market expectations... and where the announcement of the entity’s results triggers a material change in the market price of its securities.554

The simple use of the enforceable undertaking in matters involving Path Telecommunications Limited, Plexus International Limited and Uecomm Limited appear due to their occurrence prior to the inception of the infringement notice mechanism. The enforcement action accepted from


554 Australian Securities Exchange, ASX Listing Rules: Guidance Note 8 at [7.3].
Multiplex on the other hand illustrates a novel approach to dealing with failures in disclosure that have obvious ‘financial victims’. The establishment of a compensation foundation for those investors who contracted to purchase and held Multiplex shares between 3 and 24 February 2005\textsuperscript{555}, the period when the market was not reasonably informed, represents an interesting and rational method for dealing with such a breach. It of course requires the entity’s consent and admission in effect that the market was not reasonably informed, though it does save the indignity and expense of long drawn out court battles and the financial and reputational damage they can cause. Dealing with the potential generation of false markets when the ASX has informed the organisation of its concerns might appear to be nothing short of a ‘free kick’ as far as avoidance of more serious enforcement action is concerned. As noted above however, concerns surrounding the exact time a company will be held to have become aware the information has lost confidentiality remain. That said, premature disclosure, as seen in the recent matter involving David Jones should also be avoided for the potential fuel it might add to any developing false markets. Again, the key here may be the enlightened use of trading halts and possibly even voluntary suspensions.

So much for the lessons to be learnt from the issuance of infringement notices and acceptance of enforceable undertakings for listed entities. What of the

\textsuperscript{555} Which represented ‘the maximum amount payable is 80.98 cents for each Eligible Security, which is the difference between the VWAP on 23 February 2005 and the VWAP on 24 February 2005. The final amount payable per Eligible Security under this formula cannot be calculated with certainty until all claims submitted to Multiplex have been assessed.
likely effect of the use of this enforcement tool on the wider market’s actual choice to immediately disclose material information and investor confidence in it? The instances above illustrate the difficulties, both real and imagined, faced by listed entities in the observance of the standard. While some may appear to have clearly required disclosure in the circumstances, the fact management in the cut and thrust of the situation decided to second guess the rules is cause for concern. While some, but not all, of this concern might be allayed by their very pursuit by ASIC, the question must arise as to how many other managers decide on the same course of conduct with no noticeable impact on trading activity in their entity’s securities which might otherwise excite regulator attention? Further, given the types of companies in receipt of such notices, it might be difficult to accept that if well established management teams are simply getting it wrong on so many levels that the rest of the market is not also struggling to understand what the rules require.

Such unanswered questions, along with the fact that company announcements and media releases following the payment of a fine to the effect that the company did not believe it had contravened the regime must also concern investors who may be confused as to who and what to believe. Nevertheless, given it is unlikely that the majority of investors would seek to understand the depth of ASIC, the ASX and the company’s positions and might focus instead on the fact that a fine of certain quantum has been issued, it might be thought that that the regime is actively being policed, that there was some ‘guilt’

556 Indeed, every infringement notice and ASIC comment about it comes with the explicit statement that a finalised notice only effectively amounts to a pile of ASIC allegations with no admission of liability by the company through their payment.
involved. This dissertation is not concerned to evaluate any potentially simplistic market considerations of this kind. It is concerned however to determine whether a proper understanding of the actual enforcement of the regime would give a reasonable investor cause for faith in the rules and their enforcement such that one might be confident that material information is released as and when an entity becomes aware of it. Given the issues noted above and the fact that it is not clear how such information might come to have an educative impact on the rest of the market in a way ‘big-stick’ mechanisms may (not to mention the reminder of penalties involved such that this type of enforcement activity actually has an effect on disclosure behaviour more widely), it is not clear why the use of infringement notices should add much to the basic level of confidence a reasonable investor should have in the enforcement of the regime., that pursuit through the courts say might.

They do however, as do court cases, paint a picture of a regulatory agency which is not afraid to shoot first and ask real questions later, which might just constitute a market ‘scare tactic’ that does cause disclosure amongst other fearful management teams. Given the relatively minimal penalties involved when compared with court action however such considerations are unlikely to add much additional force. While infringement notices are much quicker in delivery than court decisions it is important to question just how much faith in corporate disclosure they generate, all issues above considered, especially including the ‘business decision’ logic usually cited upon their payment. Enforceable undertakings on the other hand, apart from their negligible
punishment features, simply seek to improve a company’s reporting practices so they do not make mistakes in the future. Again, it is unclear how much of this otherwise valuable information relating to what ASIC thinks are appropriate reporting practices gets through the market to other companies which may lack same. While these enforcement mechanisms are employed more frequently and may in some way encourage the right type of disclosure behaviour – their relatively trifling nature, their general lack of media coverage (except in the bigger cases, eg Leighton Holdings) through which to inspire better reporting practices, and the absence of a clear position as to whether a wrong has actually been committed – their real effect on a reasonable investor’s perception of the integrity of the market must certainly pale in any reasoned comparison to judicially finalised cases or the threat of such by ASIC or aggrieved investors.

Two further sources of enforcement activity which may add further cause for belief in the integrity of the market, and from which companies might actively learn how to improve their own disclosure performance day to day to avoid the ‘more serious’ enforcement options discussed in the preceding two chapters, are price queries and aware letters. The monitoring of unusual price and volume movements on a daily basis may have the potential to add to investor faith in the reporting of material information immediately as required by the regime to the extent it is able to request explanations of what would otherwise simply seem to be examples of poor disclosure behaviour. These enforcement
mechanisms comprising the lower level enforcement of the regime are analysed in the following two chapters.
5. PRICE QUERIES

5.1 Introduction

Section 792A of the Corporations Act 2001 (Cth) requires the ASX as a licensed market operator to ‘monitor and enforce compliance with its Listing Rules’. Accordingly, ASX Compliance uses human and computerised monitoring and detection methods to scan for situations potentially involving breaches of listing rule 3.1. The role of ASX Compliance was most recently described in the ASX’s updated Guidance Note 8, and involves the review of all company announcements, all major state and national newspapers prior to market open to identify any media attention which might draw attention to or create a potential continuous disclosure issue, and the use of ‘sophisticated’ computer technology to monitor trading on a real time basis to identify any ‘abnormal’ trading indicating same. Should such trading be identified ASX Compliance will contact the relevant member of staff appointed to deal with such issues, who will be asked by the ASX whether they are aware of information which might explain recent trading in the company’s securities whether protected by the exemptions or not. Guidance Note 8 explains that

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557 Section 792A(c)(ii).
559 Australian Securities Exchange, ASX Listing Rules: Guidance Note 8, at [8.2]:

When asked this question, that person is expected to answer it frankly and honestly and, if there is any such information, to tell ASX of the general nature of the information, even if he or she considers the information to be confidential and not something that otherwise requires formal disclosure to ASX under Listing Rule 3.1A. A failure to do so will deny ASX the opportunity to assist the entity with its disclosure obligations when that could be of benefit to the entity and to the market. Refusing to answer the question will also constitute a breach of Listing Rules 18.7
[t]ypically, these discussions will have one of two conclusions – the entity will tell ASX that:

- it is not aware of any such information – in which case, depending on the circumstances, ASX may issue a price query letter asking the entity to confirm that fact in writing; or
- it is aware of such information – in which case, this will generally lead to a discussion about whether there are any reasons, apart from a possible leakage of that information, which might explain the abnormal trading.

In the latter case, if ASX is satisfied in that discussion that the information remains confidential and is otherwise protected from disclosure by Listing Rule 3.1A, ASX will not release, or require the entity to release, the information to the market.

It will often be the case, however, that the entity is not able to identify any reason to explain the abnormal trading in its securities other than a possible leakage of market sensitive information. As explained above, in such a case, ASX has no choice but to assume that the information in question is no longer confidential and to require an immediate announcement about the information under Listing Rule 3.1 and/or 3.1B.560

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It appears that the second dot point above may also involve the issuance of a price or volume query (hereafter generally referred to as ‘price queries’) which the company will usually respond to with hitherto unreleased information\textsuperscript{561}, or alternatively, by explaining the need for a trading halt.\textsuperscript{562} The ASX has stated that the ‘purpose of a price query letter is to enable ASX to be satisfied that the entity is in compliance with its continuous disclosure obligations under the Listing Rules.’\textsuperscript{563} The issuance of price queries therefore constitutes an important instance at which the ASX might signal its active monitoring and enforcement of the regime. It can also form the first public step in the investigation of disclosure behaviour which merits further attention through the issuance of an aware letter and the escalation of suspect disclosure behaviour to ASIC for further investigation. The price and volume queries the subject of this chapter explain the basis of the ASX’s concerns and pose four standard questions to the company as follows:

\textsuperscript{561} Evidenced by rare ‘yes’ answers to Question 1 of a price query (see below), as well as other responses disclosing ostensibly material information (which is not referred to within the query as having been previously released) and which might explain the price movement queried without providing a straight ‘yes’ answer.

\textsuperscript{562} It is not clear whether a price query is issued in every instance resembling the latter case above, or whether companies are encouraged to make a release immediately without further ASX interjection in the form of a price query.

\textsuperscript{563} Australian Securities Exchange, ASX Listing Rules: Guidance Note 8, at [8.3].
In light of the price and volume change, please respond to each of the following questions.

1. Is the Company aware of any information concerning it that has not been announced which, if known, could be an explanation for recent trading in the securities of the Company?

Please note that as recent trading in the Company’s securities could indicate that information has ceased to be confidential, the Company is unable to rely on the exceptions to listing rule 3.1 contained in listing rule 3.1A when answering this question.

2. If the answer to question 1 is yes, can an announcement be made immediately? If not, why not and when is it expected that an announcement will be made?

Please note, if the answer to question 1 is yes and an announcement cannot be made immediately, you need to contact us to discuss this and you need to consider a trading halt (see below).

3. Is there any other explanation that the Company may have for the price and volume change in the securities of the Company?

4. Please confirm that the Company is in compliance with the listing rules and, in particular, listing rule 3.1.⁵⁶⁴

Price queries are effectively issued on the assumption of the rationality of markets, and that where there is smoke (a rapidly appreciating or depreciating

⁵⁶⁴ Note that these are the standard questions asked during the period under investigation, and that ASX has made some amendments to the questions it now asks, see Australian Securities Exchange, ASX Listing Rules: Guidance Note 8, at [8.3]. While these represent the four standard questions asked in a price query, additional questions are also asked in certain circumstances, which are rather specific to the company concerned. Analysis of responses to these questions during the query period can be found at 5.12 below.
share price for example that cannot otherwise be explained by extant information) there may be fire (perhaps a loss of confidentiality leading to informational advantage and the lack of a level playing field), and therefore ask the company to explain the change as best they can. That said, myriad factors might have fed into the price or volume movement triggering a price query so it is important to keep an open mind when reading responses to such queries. Company responses to ASX price queries are made available, along with the original query, through the announcements platform on the ASX website.

This chapter examines price queries issued by the ASX for the period January 2009 to December 2010. The Australian Company Announcements database hosted by the Securities Industry Research Centre of Asia-Pacific (SIRCA) was the primary source of data for this analysis. One initial problem with data collection was that there appears to be no uniform naming protocol in relation to responses to different types of queries. A simple search for ‘price’ and ‘volume’ queries would not suffice as such a search may have missed a generalised response titled ‘Response to ASX Query’, which may have been a price and/or volume query. A search was therefore conducted for all announcements with a headline including the word ‘query’ and a copy of the company’s response was thus obtained.565

565 For the period under consideration there is effectively no practical way of knowing, without access to ASX records (and short of trawling through every listed company’s announcements) whether a company has been issued with a query and responded to it if the word ‘query’ was not included in the headline to differentiate it from the mass of other announcements made to the market on a daily basis. To ensure all possible queries were detected, another search using ASX internal categorisations which explicitly place queries into specific classes and sub-classes of announcements and which are maintained by SIRCA when converting company disclosure forms into machine readable text files was conducted in tandem with the arguably broader search detailed above. These categories account for structured information releases (company half yearly / yearly reports), administrative releases (director information)
This analysis began with over 2000 ‘query’ responses between January 2009 and December 2010. Many of the responses thus found which included the word ‘query’ in the headline but were not strictly price queries because they lacked the four essential questions noted above were removed. From this process a total of 1388 company responses to ASX queries formed the sample, 1209 being price queries and the remaining 179 being aware letters. Responses to each price query question noted above were analysed for each price query in the sample and categorised in a spreadsheet.

The majority of the answers to questions one, two and four were usually either a “yes”, “no” or “n/a”. However, the entity’s amanuenses in the form of its senior management team or even directors themselves can provide a wide range of reasons for any abnormal trading activity occasioning the issuance of a query, as is open to them in question three. In doing so, their responses to price queries can be useful at best, opaque and confounding at worst. Indeed, some responses did not even answer the base question (question one) as to whether the company had any new information which could explain recent trading with a clear “yes” or “no” answer. Other responses were at least clear in their unhelpfulness in assisting the market understand the reasons behind the price movements occasioning a query, answering the price query with straight “no” answers to questions one through three, and a “yes” to question four. Such

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as well as ad hoc informational releases (merger announcements). All ASX announcements under the headings ‘ASX Query’, ‘ASX Announcement – Other’, and ‘Response to ASX Query’ were cross checked against the first search to ensure no queries were overlooked.

566 These included Appendix 4C and 5B queries (relating to quarterly reporting by organisations including mining companies), queries relating to annual reports, directors’ interest notices and responses to listing rule 15.7 queries (which require an entity to receive confirmation from the ASX that information has been released to the market before the organisation can release it to anyone else separately).
answers are at best, simply being honest, or at worst (assuming no dishonesty), not complicating the situation and the investment community’s understanding of the situation through the provision of irrelevant attempts at explanation. 341 responses in the sample did this.

Many organisations chose to provide answers or discussion outside of their formal numbered responses to price query questions, for example under the wrong question title (discussing a range of factors in response to question one which should properly have been discussed in response to question three, or providing a “no” answer to question one while engaging in a full discussion as part of their formal answer to question three of a factor which appeared material) or providing discussion outside of formal question response parameters altogether (for example either prior to or post their response to the questions themselves). Given the lack of uniformity in answers provided and the choice or inability of many respondents to answer clear questions with transparency and clarity, any additional information potentially explaining the movement queried was categorised effectively as a response to the underlying point of the query, which was to obtain the company’s advice as to what was causing trading price or volume changes in the company’s securities. Any suggested reason for the price or volume movement queried regardless of where it was found in the response was therefore categorised as an answer to the most general question asked, question three.\footnote{Fifteen companies in the sample answered question 1 with a clear “yes”. These are addressed in the categories their affirmative answer relates to below. Many more responses chose not to provide a clear “yes” or “no” answer to question 1 of a price query, or answered “no” yet included what appeared to be new information elsewhere in their response, whether it be in response to question 3, question 2,}
This approach was favoured to an overly tight setup which might only have appraised and categorised answers to formal questions as many companies either chose not to offer the right information in response to the right questions, or did not offer it under the question parameters at all. This reflects the purpose of this dissertation which is concerned to understand the efficacy of enforcement tools and related disclosure practice, as opposed to simply counting it. A rigid approach in such circumstances would restrict a deeper understanding of the responses and their explanatory force.

This chapter analyses the types of reasons most commonly provided by companies as explanations for the price and volume movements in the company’s securities detected by ASX Compliance. The categories discussed below emerged as the most frequently recurring as regards information cited as potentially causative of a change in security prices or trading volumes. They represent information which is generated both by the entity (for example, roadshows and negotiations), and sources external to it and over which it may have very little control (for example media and general industry attention, and commodity prices).568

question 1, or outside of designated question parameters. So while “yes” responses might appear to be the first deserving of analysis (and some may well turn out to be), it is important to note that this is but the surface of a deeper layer of responses which appear to have had material information which was gouged by a price query, yet where the company chose not to answer directly in the affirmative. This lack of clarity is itself problematic, though understandable from the perspective of companies which do not wish to provide any grounds for self-incrimination, or attract the negative reputational damage or regulatory enforcement they expect such an admission might occasion.

568 The category receiving the most hits – the reference to recently released announcements as having had some effect upon trading activity – is not analysed beyond any interaction with the other categories as recent announcements are not properly seen as a continuous disclosure issue; the information the company claims in such a response which may have had an effect on trading had already been released, meaning no breach of the regime or improvement in reporting practices might be suggested.
While many categories and instances within them admit of no wrongdoing or potential preventability by the company due to their dissemination by entities outside the organisation, others demonstrate disclosure behaviour of dubious merit. The point of this section however is not to qualitatively unearth instances of potential enforcement behaviour that should have gone further: such a project is a Sisyphean task given the dearth of publicly available information relating to these circumstances. Most categories nevertheless do suggest both avenues for the simple improvement of current modes of corporate reporting pursuant to the regime, as well as points of reflection for lay investors in areas the regime appears unable to tap, or where its reach is strictly unnecessary to what it seeks to achieve. This chapter therefore both seeks to temper expectations of what a continuous disclosure regime is able to achieve while also seeking to get the most out of it as far as corporate reporting is concerned. The analysis of recurring explanations might also condition lay investor expectations regarding corporate reporting pursuant to the regime in certain circumstances, given the very real pressures faced by management in complying with it. As noted at the outset, perceptions of corporate reporting and enforcement activity encouraging better species of it are crucial to the establishment and maintenance of market integrity.
5.2 Commodity prices

Commodity prices were offered as an explanation for the change in trading activity in a queried company’s securities in 102 ASX price query responses, with all but one involving a price increase. Commodities involved in such explanations included gold, silver, nickel, copper, molybdenum, zinc, lead, bauxite, alumina, manganese, platinum, palladium, rhodium, uranium, zircon, tungsten, thermal coal, rare earths, gas and oil.

References to the actual prices of these commodities and the change said to have affected security prices were usually of a general nature, ‘the high market price’ or ‘positive market sentiment’ in a particular commodity market often being cited. Of those which made reference to a time period over which the change was observed, several provided a date range (the last day, week, month) while the majority referred only to ‘recent’ movements. The vast majority of responses referred to past movements in commodity prices, although a handful of responses cited the future outlook or predictions of commodity price movements as possibly being responsible for the movement in security prices.569 The validity of any such response is difficult to gauge, especially in the absence of any explanation as to where such positive ‘sentiment’ emerged from.

Of those responses which specified the commodity thought to have impacted security prices, gold was the most frequently mentioned. Comparatively few

responses made their reference to commodity types in general, stating movements in commodity markets in general, or in those markets in which the company had a presence, could explain the change in security price queried by the ASX. While this might be the best a diversified company dealing in various mineral markets\textsuperscript{570} or a mining services company\textsuperscript{571} can offer, more focussed operations with more definite exposure to particular commodity price movements should aim to provide more detail in their responses, as the majority currently appear to.

The degree to which a company’s share price is exposed to movements in commodity prices depends, among myriad other factors, upon the company’s operations and the markets in which it operates. While a price spike in the spot tin market may be of relevance (possibly limited even at that depending on the circumstances) to a pure tin producer, it would \textit{ceteris paribus} have less explanatory effect upon a company which was involved with other minerals in addition to tin. For example Consolidated Tin Mines Limited cited an increase in the price of tin per tonne as the reason for the company’s substantial rise in share price over a 24 hour period.\textsuperscript{572} Given that the majority of the company’s tenements are engaged in tin production this explanation appears valid. The reliance on a specific commodity as an explanation however may not satisfy the ASX’s concerns regarding share price changes for companies with diversified production across different commodities as the change in any one commodity

\textsuperscript{570} WES Limited price query response dated 14 January, 2009.
\textsuperscript{571} SWK Limited price query response dated 8 April, 2009.
\textsuperscript{572} CSD Limited price query response dated 24 September, 2010. This is in line with two companies which received queries on the same day and both explained that the spot price of tin had risen to US$23,000 per tonne in ‘recent weeks’. 
price should have had a proportionately lower effect on the share price of these companies.\textsuperscript{573}

In the same way complete exposure to one commodity might influence a company’s share price, a company’s position as a market leader in an industry group might also be an influencing factor in light of commodity price changes. Metals X Limited explained that share price volatility experienced by the company could be explained by the rising price of tin, which would be expected to affect its share price given it is the largest producer of tin in the world, contributing 2.5\% of the world’s supply.\textsuperscript{574} Although Metals X was exposed to price changes in a range of other metal commodities including nickel, gold, copper, zinc, phosphate, uranium, lead and tungsten, the company’s dominant position in the tin sector could make the company’s share price highly sensitive to changes in the outlook for tin.

Given security prices are, at least theoretically, a reflection of the present value of a company’s future prospects, commodity price changes which determine the price a company can receive for its inventories can affect the valuation of the company’s assets or revenue streams, and therefore the price of its securities. While historical studies discern only a weak link between commodity and share prices, Heaton \textit{et al} have recently argued that international

\textsuperscript{573} While most companies explained that the price rise of a specific commodity was responsible for the rise in share price, four responses cited a ‘positive outlook’ or ‘recovery’ in all commodity prices generally as an explanation. This type of answer is rather ambiguous and may fail to adequately explain the type of commodity which effected the company’s share price unless the company’s business was exposed to all commodities. This makes explanations relating to movements in commodities markets in general of less explanatory value unless the company was a diversified miner exposed to several elements of the commodities market through its operations.

\textsuperscript{574} MLX Limited price query response dated 20 April, 2009.
commodity prices can and do have a significant impact on the ASX materials index.575

Nevertheless, a further question which must be asked is the extent of the explanatory power of a commodity price movement: Could a change in commodity price of 7% overnight justify a company’s citation of such a change for a 23% movement in the price of its securities? The average price change queried for companies which used commodity prices as a potential reason saw an increase of 39% over an average query period of not more than a few days. Commodity prices exhibited nowhere near this much movement in such a short period of time.576 While it is not suggested that a one-to-one correlation should be in evidence to make the commodity prices explanation valid, especially since it might be one of a number of various reasons employed by companies to explain the movement in the price of their securities, it leaves the question as to the extent of its explanatory power open.

The use of commodity price changes as a reason for a change in security prices possesses demonstrable explanatory power. Nevertheless, investors should be wary of companies using commodity price movements in isolation as explanations for the type of share price volatility often occasioning a price query. On the other hand, companies seeking to avail themselves of all the


576 A review of data from the London Metals Exchange illustrates that at no point during the query period did commodity prices change this abruptly. See London Metals Exchange Limited http://www.lme.com/non-ferrous/index.asp, of course other factors could have combined with commodity price changes to push the company’s security price higher, though the question remains.
possible explanatory power a change in commodity prices might give them would do better to explain in detail the link between the particular commodity being cited and the company’s security price. This would ordinarily begin with a specific reference to the commodity price movement to which they refer, and the time period over which the movement is thought to have affected the price of the companies’ securities. 577 Given this information is ostensibly ready to hand for company management, even if it is not claimed to be the sole explanatory factor, this will provide optimal conditions for investors to make up their own minds as to the validity of the explanation proposed without having to find the information themselves.

5.3 Roadshows

Forty six responses in the sample explained the price movement queried by the ASX as being referable to presentations conducted by executive management to explain the company’s position and prospects and improve investor sentiment, otherwise known as company roadshows. Such investor relations endeavours spanned both international and domestic settings and sometimes involved teleconferencing rather than physical face to face meetings. 578 Attendees included brokers, fund managers or other potential investors and

577 While this information need not be provided to the market in the general course of trading as explained in Australian Securities Exchange, ASX Listing Rules: Guidance Note 8, at [4.1], given its generally available character, should it be employed as an explanation for recent trading such information could be deployed to explain more clearly and fully the basis for the company’s claims.

578 Conference presentations were also included as part of this category, for example the Diggers & Dealers forum in Western Australia, [http://www.diggersandealers.com.au/](http://www.diggersandealers.com.au/).
their advisors either in boardrooms or on site at the organisation’s premises, wherever their operations were located.

Management regularly assured readers of their price query responses that the subject matter of such presentations was limited to previously released information about the company. The reasoning underlying their inclusion as an explanation for a price change queried by the ASX was effectively that the representation of such information by management personally to groups of potential investors had the effect of causing members of the relevant audience to trade in the company’s securities.

While such presentations might enthuse attendees and cause elevated interest in the company’s operations, whether they are capable of causing the sometimes large changes in security prices observed on their own is another matter. While some responses referred to evidence from brokers stating the buying interest arose as a direct result of management efforts at roadshows, others appealed to the physical reality of ‘first hand observation of the mine and associated infrastructure’ as being causative of an upsurge in buying interest. While this is wholly understandable, it is a fair question to ask whether this is all that may have been responsible for any upsurge in price of

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579 PLV Limited price query response dated 30 September, 2009 made a clear link: ‘The Company understands from contact with brokers yesterday that the strong buying interest in Pluton’s securities is as a result of the briefings and presentations’.

580 NMG Limited price query response dated 14 October 2010. ‘The Company notes... that its roadshow presentation released to the market on 3 September 2010 was presented to a number of brokers and financial advisors on site at the Bibiani Gold Mine in Ghana yesterday. Appreciation of the significance of the acquisition to the Company and the exciting opportunities that lie ahead is enhanced through first-hand observation of the Mine and associated infrastructure’. 
the magnitude found in certain instances involving the employment of this explanation.

It might be postulated that diligent investors considering major investments in such entities would have done their homework on the organisation prior to having the same material reportedly being presented to them. Even if management were asked questions, any information volunteered would have to be publicly available for it to be included in any response, so the difference in information content pre and post roadshow should in an ideal continuous disclosure universe be nil. There is always the chance that some investors may have waited until seeing a presentation by management personally before committing to large volume trades which can move the market. An important factor to consider in such circumstances therefore is the only ostensible additional information which might be gleaned from such meetings: body language. While most companies assure no additional information is ever relayed at such meetings, it would be hard if not impossible to prevent the subconscious release of non-verbal information that might be gleaned by astute attendees.\textsuperscript{581}

This is simply an aspect of corporate existence that investors will have to accept and adjust for – requiring a webcast of all roadshow presentations in an

\textsuperscript{581} Navarro, J 'What Every BODY is Saying: An Ex-FBI Agent’s Guide to Speed Reading People (2008) William Morrow Publishers. A confident tone, a glance to the upper right of one’s field of vision, a stammering answer to a seemingly easy question or a variation on any of these themes can all be processed as information (of course in completely differing ways by different observers) which lay investors do not have access to. Whether this is problematic or even the proper domain of the regime or not is of course, an entirely different question.
attempt to obviate the possibility for the development of an uneven playing field in such circumstances is excessively onerous given the sheer number of such meetings and would not necessarily of itself assist investors, instead more likely creating information overload. Yet such meetings are an essential part of corporate existence and continued success. Is there any role disclosure might play in dealing with the supposed impact upon security prices that roadshows can have to ensure perceptions of the market’s integrity do not waver in such circumstances?

While the companies discussed above only released information relating to roadshows following a price query, others made announcements to the effect that senior management would be undertaking roadshow presentations before they began. Indeed, several companies lodged their presentation slides with the ASX prior to the commencement of roadshow presentations, and also detailed when and where such presentations would be taking place. Practice might be improved if all companies engaging in roadshow presentations or events approximating them made an announcement (non-price sensitive) that alerted the market to the fact that such presentations would be taking place and releasing the presentation slides through the ASX or the company’s own website ahead of the event.

Best practice here was observed in the ‘recent announcements’ category (see footnote 567 above), whereby companies referred to recent roadshows as a reason for a change in security prices and were able to reference a previous
information release documenting this fact such that the market was not unaware of the situation. The best responses explained the context for the roadshow, attached the slides which were to be presented at such meetings, explained who the meetings were expected to be conducted with, and specified a geographic location before they occurred. Given its frequency as a reason offered for increased rates of change in security prices, notification of this information ahead of the fact could be of assistance to investors who can be on guard for any marked price changes.

5.4 Speculation

Thirty-five responses cited speculation on the part of investors as a possible reason for the change in price queried by ASX. While some companies referred to speculation generally, often this speculation was said to have had a basis in something the company had said or done indicating a future development whose time had come. Speculation surrounding equity raising, debt refinancing and the success thereof, and even possible future capital raisings in a particular sector to fund organisational expansion or acquisitions.

582 Some companies had released advice the company would be undertaking roadshow activities, or released a presentation to the ASX but did not explain whether, when or where it had been presented. Others released some of the above information but not all of it.
583 All too often companies only released slides in response to a query, or did not release slides at all which does nothing for transparency and the goals of the regime, especially if roadshows actually have the kind of effect they are said to have. General statements to the effect that the company is continuing its extensive promotional endeavours are, effectively, useless.
584 This is to be differentiated from speculation in the media which is addressed as part of the ‘media attention’ category below.
were cited as potentially causing speculation amongst investors.\textsuperscript{589} Other varied reasons included periodic performance reports and dividend capacity\textsuperscript{590}, applications to government bodies for approval of business plans\textsuperscript{591} and the outcome of shareholder votes upon them\textsuperscript{592}, the outcome of the company’s proposed sell off of assets\textsuperscript{593} or other strategic review processes\textsuperscript{594}, the possible awarding of a contract mooted by the company some months earlier\textsuperscript{595}, potential joint venture or farm-in agreements becoming real\textsuperscript{596}, possible acquisition of the company itself by other listed entities based on their acquisitions to date\textsuperscript{597} or general speculation regarding the potential for consolidation in a sector were also mentioned.\textsuperscript{598} Resource based companies cited anticipation surrounding the results of resource calculation\textsuperscript{599}, the commencement of drilling, initial assay\textsuperscript{600} and pit optimisation results\textsuperscript{601}, imminent spudding of wells in the case of oil producers\textsuperscript{602} and drill results\textsuperscript{603} as factors productive of speculative attention on behalf of investors in their sector.\textsuperscript{604}

\textsuperscript{589} See also discussion of placements in Chapter 6 below.
\textsuperscript{590} WES Limited price query response dated 14 January, 2009.
\textsuperscript{591} ACL Limited price query response dated 18 January, 2010
\textsuperscript{592} PEM Limited price query response dated 3 February, 2009
\textsuperscript{594} ENE Limited price query response dated 9 February, 2009.
\textsuperscript{595} ASB Limited price query response dated 20 April, 2009.
\textsuperscript{596} MEO Limited 17 January, 2010.
\textsuperscript{598} SUN Limited price query response dated 7 August, 2009.
\textsuperscript{599} FTE Limited price query response dated 1 April, 2009.
\textsuperscript{600} PIO Limited price query response dated 1 September, 2009.
\textsuperscript{601} PRU Limited price query response dated 17 April, 2009.
\textsuperscript{602} TSV Limited price query response dated 16 January, 2009.
\textsuperscript{603} ADX Limited price query response dated 27 August, 2010
\textsuperscript{604} Discussed further at S.11 and in Chapter Six below.
Such speculation, especially in the context of a previously mooted potentially material issue which had yet to eventuate could be a reason with definite explanatory power and investors should not discount the effect any particular previous release might have on any particular investor at a later date. As far as disclosure performance is concerned however, the reality of speculative behaviour on behalf of investors is not an issue companies can really deal with – investors are free to buy and sell at whatever price they choose. Accordingly, this is not an issue which continuous disclosure can or should need to regulate. That said, best practice for companies citing this reason would include specific reference to a particular issue of speculation rather than state it in the general so that readers of the company’s releases can make some sense of the reason offered, and decide for themselves how much weight to accord it in view of the materiality of the change queried by the ASX.

5.5 Independent research reports

Sixty-three responses in the sample explained the price movement queried by the ASX as being due in some part to the release of an independent analyst or broker report to its clients. Merrill Lynch, ABN Amro Morgans, Royal Bank of Scotland, Argonaut Securities, Fat Prophets, Macquarie Equities Research, UBS Investment Research, Citigroup, Southern Cross Equities, Bell Potter Securities, Shaw Stockbroking, Australian Small Cap Investigator and Patterson’s Securities were some of the better known research providers mentioned. Some responses
were not specific, simply stating a ‘subscription based independent research note’ had been released, or an ‘independent research analyst’ or ‘Perth based broking house’ had issued same in relation to the company.

The simple issuance of a report, which usually contains an updated target price, was the reason most often cited for the report causing trading activity. Less often it was an actual change in the research provider’s recommendation status from a ‘hold’ to a ‘buy’ or other variant which was said to be causative of the price movement.\textsuperscript{605} The initiation of coverage itself was also said to be influential.\textsuperscript{606}

There does not appear to have been a real pattern to the issuance of reports which were said to be so causative, though some were released after the reporting of the company’s results for a particular period\textsuperscript{607} while others were issued after on-site visits to the company’s operations by analysts.\textsuperscript{608} Some simply appeared to be spurred by announcements recently made by the company which must have caught a particular analyst’s attention.\textsuperscript{609} On one occasion, a broker’s report was cited as a reason for a price drop, which was due to analyst error.\textsuperscript{610}

\textsuperscript{605} ACR Limited price query response dated 12 May, 2009.
\textsuperscript{606} BND Limited price query response dated 9 April, 2010.
\textsuperscript{607} NWH Limited price query response dated 12 March, 2009.
\textsuperscript{609} NVT Limited price query response dated 14 January, 2010.
\textsuperscript{610} TOL Limited price query response dated 27 April, 2009.
Many responses citing this reason were specific as to the firm/s behind the report/s, and the pertinent elements therein which were said to have influenced the price of the company’s securities\(^{611}\), for example the ‘re-rating by analysts of the company’s producing mine’, or the recalculation of the company’s market share for a particular product affecting analyst valuation models.\(^{612}\) One response even made it clear to investors that all that had changed were the analysts’ valuation models as opposed to the company’s actual performance or anything the company was responsible for.\(^{613}\) Some felt compelled to provide detailed insight to non-subscribers of the particular research service of the 12 month price targets included in such reports, with others making copies of the research reports available on their websites.\(^{614}\) On the other hand several responses were also unhelpful in stating simply that the company had been the subject of a ‘favourable broker report’ without further detail as to when the report was released and by whom.\(^{615}\) The amplifying effect of the media discussing such reports was also mentioned by several responses as fanning the flames begun by such reports.\(^{616}\)

It is indubitable that the voice of a reputable research house could have an effect upon the trajectory of a company’s securities. Simply the increased awareness created concerning the company’s position, let alone more specific

\(^{611}\) OGC Limited price query response dated 23 January, 2009. OGC Limited offered the same reason as part of its explanation one month later in its price query response dated 20 February, 2009. The time horizon on such influence is entirely a matter of conjecture, given it is dependent upon each individual investor-reader’s decision making.

\(^{612}\) ACR Limited price query response dated 2 June, 2009.


\(^{616}\) SWK Limited price query response dated 8 April, 2009. See also AZM Limited price query response dated 20 October, 2009.
information which most lay investors would not be able to or interested in
digging up on their own is brought to light and can influence buying and selling
decisions, leading to potentially volatile changes in prices and volumes. From a
disclosure perspective, executive management are most likely to hear about
the release of research notes after the fact as they have no real role in their
publication, although they may get a sense of the impending release of one if a
particular analyst consistently pesters management for deeper insights. In
some instances however, it seems management had been informed of the
release of reports and went on to inform the market of the fact.617

While the issuance of research reports on a company can have a marked effect
on the price of its securities, the question as to whether there exists a need to
attempt to mitigate this eventuality is a live one. Requiring any such report to
be released to the market is overkill and unfair for those who pay for such
service: the fact such research providers exist confirms an underlying tenet of
the market (and regulatory intent surrounding it) that some will be better
equipped to trade than others, either through natural ability or the capacity to
pay someone of such talent to perform such analyses on their behalf. ASX has
noted its views on the provision of such reports pursuant to compliance with
the regime in its latest Guidance Note 8.618 Given research analysts are

618 ...an entity generally should not submit a broker research report about it, or any extract from or
hyperlink to such a report, for publication on the ASX Market Announcements Platform under
Listing Rule 3.1. Any market sensitive fact-based material in such a report should already have
been released by the entity under that rule beforehand and so it can reasonably be inferred that
the entity is seeking to publish the report for its opinion-based material (such as the broker’s
buy recommendation or price target). This will raise an issue about whether the report is really
supposedly working off the same information the rest of the market possesses, this does not constitute unfair advantage (any deviation from this of course takes us into the territory of breach by the company for divulging material information selectively as well as insider trading). Directing disclosure attention to the information included in the research report may therefore be missing the point.

The very fact a report is being released is itself however a factor which might impel those aware of it to pre-emptively trade in the knowledge that its issuance will attract a certain amount of attention and possibly a price change in the direction expected. While requiring every research house to advise each company they are about to release a report on would be onerous without necessarily admitting of any gain as far as maintaining a level playing field goes, it could allow the market constituted by those who do not subscribe to that particular service to know that a report will be coming out soon which might attract attention to the company. While this might be courteous and effectively optimal in the circumstances of a market which is structured the way it is, it itself might be overkill and may not necessarily improve disclosure outcomes that much; though should research houses choose to do so and the company mentions the fact in a non-price sensitive release then the employment of this

being published for promotional rather than informational reasons. It may also raise concerns about whether the entity is effectively endorsing any price target, earnings estimate or other forward looking statement in the report. ASX may require an entity which does happen to publish a broker research report about it, or any extract from or hyperlink to such a report, on the ASX Market Announcements Platform to make a further announcement addressing these concerns.

reason as a cause of share price change (outside of a reference to a previous announcement) may become extinct. Whether that makes such practice “worth it” from a cost-benefit perspective is another question altogether. Short of this happening, investors need to be aware that such reports can and do have effects on security prices and that there is nothing necessarily untoward occurring in such circumstances, nor anything they can do to avoid any trading turbulence resulting from same.

5.6 Anomalous trading behaviour

A number of responses, 69 in total, cited what might be grouped under the term ‘anomalous trading behaviour’ as being causative of the rapid change in trading price or volume queried by the ASX. While the ubiquitous generalised answer implying irregular trading behaviour in the general sense was raised and officially amounted to a shrug of the managerial shoulder, most responses fitting into this category explained specific phenomena impacting upon the price of securities. Broad categories encountered in the sample are discussed below.

Arbitrage opportunities may present themselves to investors in circumstances where companies are listed across several markets, and the appreciation of a company’s securities on an international market was cited as a reason for their

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appreciation in the Australian market the following trading day. MPS spelt out the situation confronting its securities clearly:

A possible explanation in relation to the price change and increase in volume of units in MPS could be arbitrage trading. MPS units are also listed on the Singapore exchange. In the past month, there has been a price differential between the Australian and Singapore prices and trading volumes on both exchanges have been higher than average. We have also witnessed an increase in the number of applications for units to be transferred between the Australian and Singapore registries which appears to be connected to the increase in trading volumes.

Similarly, the movement of one company’s securities listed on an international market to a higher tier of it was also cited as a reason for the appreciation of its price on the ASX immediately after.

Some responses appealed to the fact that while there may have been a material price change, there was such little volume involved that it was impossible to explain its origin, others explaining that given the low liquidity of the company’s securities, trades at minute volumes could impact the price without any other reason or cause. The opposite was also the case, with bigger trade volumes involving substantial shareholders being raised as

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explanations in the context of hitherto low liquidity. Five responses cited crossed trades, where a broker executes both a buy and sell order for their clients, both on and off-market, as a reason for the change in the price of securities. Tightness in liquidity, where there may have been an abundance of demand and a reticence of supply was also cited as a potential reason for abrupt price movements. Several other responses flagged the opposite phenomenon, an overhang of supply in the market as being responsible for downward pressure on prices, as well as the reason for a rebound once removed.

Usually a temporary state of affairs, it was common during the GFC and the period immediately following it for certain securities to trade at below the value of Net Tangible Assets (NTA) for extended periods of time. When cited in a response this was categorised with other anomalous trading behaviour. Such explanations expressed management’s disillusionment at the traded value of securities and effectively illustrate management at a loss to explain the volatility in the price of securities. Trading at a discount to NTA was also cited as a reason for price appreciation, once the market’s view changed.

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Three responses noted that the practice of ‘shorting’ in the market had potentially been having an effect on the price of its securities. On the other side, in the wake of an increase in the price of a security, some responses pointed to ‘profit taking’ as being responsible for sell downs and the eventual retracement in share prices they bring with them. The availability and expiry of options also had unexpected effects on security prices in two cases.

Less frequently cited reasons included corporate governance chicanery (whereby buying and selling activity undertaken by investors was not engaged in by reference to price but calculated to influence management in a particular way, either by bidding down the price or by buying up as many shares as possible and thereby increasing prices), a change in investor base leading to more volatility and volumes being traded, a share consolidation, algorithmic trading, and keying errors by market participants where buy prices were entered incorrectly (where for example, a security valued at around $1.47 at the time shot up to $1.74).

As indicated by the character of responses constituting the anomalous trading explanation described above, most instances of anomalous trading behaviour...
are not able to be influenced by the company. Issues which can be controlled for already are, such as the acquisition or divestment of major parcels requiring substantial shareholder notices to be lodged. Should management perceive other factors involving anomalous trading are responsible for the change in price referred to in a price query, so long as an attempt is made to describe the factors thought to have led to such trading (as opposed to generalised responses which do not assist anyone understand the movement in price) the market will be none the poorer in the situation. On the other hand, investors will also need to accept that such factors can come to play out in certain types of securities as a function of the types of investors drawn to them.

5.7 Negotiations

Eighty-five responses referred to the company’s engagement in negotiations in their responses to ASX price queries. While most disavowed this particular piece of information as having had an effect on the price of the company’s securities, management appeared to think it would be best to divulge what was usually up to that point regarded confidential in view of the ASX’s prodding. Indeed the note to question one makes the protections in the exceptions to listing rule 3.1, which might have hitherto protected the information, strictly

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unavailable upon the issuance of the price query, in spite of several companies’ protestations to the contrary.641

The content of negotiations spanned the full gamut of business activities, with structural changes642, debt renegotiations643, funding discussions644, new contractual arrangements relating to different aspects of the entity’s business645, changes in strategy646, new investments647, asset sales648 and government dealings649 featuring amongst the sample. Counterparties to negotiations commonly mentioned were banks, other financial institutions and shareholders, ‘cornerstone investors’, ‘a potential strategic investor’, ‘a number of parties’, ‘various neighbouring operators’, the government and ‘potential overseas… vendors’.

Different terms were used to describe the progress of negotiations, making it exceedingly difficult to plot descriptions of the exact state of negotiations across the subset as there is no real way of checking whether one entity’s ‘very

641 Price query question 1 asks:
Is the Company aware of any information concerning it that has not been announced which, if known, could be an explanation for recent trading in the securities of the Company?
Please note that as recent trading in the Company’s securities could indicate that information has ceased to be confidential, the Company is unable to rely on the exceptions to listing rule 3.1 contained in listing rule 3.1A when answering this question.

642 Including internalisation, the potential acquisition of part of a business, non-binding indicative proposals relating to change of control and/or recapitalisation, and the fact the company was at that time participating in the second stage of due diligence, among other factors.

643 For example the renewal of debt facility, or an interim funding arrangement.

644 Share sale agreements and private placements were among factors mentioned.

645 To investigate financial and technical feasibility of a direct railway link, the farmout of various interests, potential partners in new markets in the form of joint ventures and strategic alliances, discussions with receivers, and offtake arrangements for example.

646 Development and potential growth opportunities for instance.

647 Involving the expansion of operations, meetings and site visits to explore investment opportunities, tenders and potential acquisition opportunities.

648 Including entire business units, specific mineral rights on the company’s tenements, and other ‘monetisation’ strategies.

649 For example the grant of exploration licenses and project plan approval.
preliminary discussions’ were another’s ‘advanced discussions’. 650 Other responses were more coy with their advice, stating simply that the company was involved in a ‘potential corporate transaction’ with ‘a number of parties with respect to a variety of transactions’. 651 A handful of responses mentioned the assessment of new investment opportunities which the company was simply considering. 652 While these sometimes involved preliminary discussions 653, others were simply ideas on the drawing board which were in the process of being assessed according to internal investment criteria 654 which the entities the subject of the internal due diligence as yet had no idea about. 655

What are investors to make of such responses? Why did these entities, in the context of a price change of enough magnitude to catch the ASX’s attention, only choose to advise of negotiations after being issued a price query? Should the very fact a negotiation is mentioned in such a response set off alarm bells that a company may have been withholding material information from the market in an inappropriate way? This is likely not the case in most situations, despite the existence of prima facie questionable explanations in some responses which found a home in this category.

650 Different descriptions for negotiations underfoot included: Commencing discussions; early stage discussions; mature stage discussions; engaged in talks; renewed talks; presently negotiating; finalising negotiations; discussions which have been positive and are being advanced; ongoing discussions; confidential, incomplete and insufficiently definite negotiations; accelerated negotiations process; concluded due diligence with new terms now offered. The list goes on.
The fact of the matter is that any negotiations underway will remain such until a final agreement is actually reached and validated by both parties. Until that point, there can be no real certainty that any transaction will actually take place. Informing the market of every step of negotiations can be burdensome and will not necessarily add to the quality of information which might be used by investors to make their decisions, which is no doubt one of the reasons companies are afforded protections in the form of the exceptions in listing rule 3.1A relating to incomplete proposals or negotiations. On the other hand, companies advising of completed negotiations giving rise to fully determined contracts are harder to justify as per the exceptions, and are discussed in more detail below at 5.11.4 and further in Chapter 6.

One simple reason for the number of companies disclosing negotiations after the issuance of an ASX query is the fact that most organisations are involved in negotiations relating to one transaction or another most of the time as part and parcel of the ordinary course of business, and which in the case of smaller companies will likely be material. If word of any such negotiation advanced or nascent makes its way outside of the circle of trust, something the company is not always able to control for, it can affect perceptions of the potential value of the company’s securities. That said, abnormal trading activity arising for any reason at all may dislodge information relating to negotiations which were up until that point protected by the exceptions, and might even have remained

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confidential. Indeed, regardless of the actual status of confidentiality, the very perception of the possibility of its loss in the context of abnormal trading is damaging to estimations of the integrity of the market. It is in its interests that such information is disclosed. Once the ASX advises the company it believes confidentiality has been lost or issues a price query which effectively removes the protection of the exceptions, the company will need to disclose what was up until then potentially protected information.

This is why many companies which respond with information relating to a negotiation in progress will in most circumstances not have fallen afoul of the requirements as one of the exceptions will have justified any earlier preference for non-disclosure. Given that the exceptions state that the ASX has to be of a mind that matters the subject of negotiation have lost confidentiality, the company is likely within its rights in most cases to hold on to the information it has until prodded by an ASX phonecall and/or query. Nevertheless, should such evidence of a leak come to exist which the ASX makes the entity aware of, the company would ordinarily need to disclose the information as soon as possible to give itself the best chance of avoiding further enforcement attention. In what might be seen as a bad timing or coincidence, should a price run occur when a company has potentially material negotiations underfoot which the company is of the strict belief have not lost confidentiality, preventing less shrewd investors from being drawn into the vortex of a rapidly

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658 Australian Securities Exchange, *ASX Listing Rules: Guidance Note 8*, at [5.8] notes circumstances when ASX ‘may’ consider confidentiality to have been lost.
changing security price makes disclosure a priority for the protection of wider market integrity.

What then of the abnormal trading occasioning the query in circumstances where such information was formerly protected by the exemptions, and the company insists on its unbesmirched quale of confidentiality? Other than the myriad of possible explanations depending on the precise trading activity involved, the potential for the negotiations to have been leaked without the knowledge of management is a very real possibility. While many people can be set to work on a confidential transaction, it would be expected that those within the company engaging in negotiations would have the dangers of leaking or using such information which could lead to the company’s detriment made abundantly clear. Not that that would stop everyone from engaging in such behaviour if possible returns are perceived to outweigh the risks. Advisers, while also aware of the dangers, may not have the cultural controls of the staff at the negotiating organisation keeping them from doing the same. Other times the counterparty is based overseas where different cultures may treat the use of such information differently. Regardless, evidence of any such leaking would be difficult to find and prosecute, and so companies holding potentially material discussions should keep a close eye on the price of their securities at

the very least in case a false (or ‘true-yet-unbeknownst’ for that matter) market develops.\[660\]

Any response involving the mention of negotiations should seek to provide as much information as necessary for investors to make informed decisions as to the potential materiality of same. Investors on the other hand should not see such responses as abnormal or be taken as an indication of any sort of guilt on behalf of the disclosing entity. While some instances relating to the disclosure of negotiations present difficult cases to assess from an outsider’s perspective given the dearth of publically available information, the majority appear to be part and parcel of the operation of modern businesses and do not represent, on available evidence, contraventions of the regime. As noted above, under normal circumstances it is perfectly valid for a company to withhold information regarding negotiations as it may prejudice the company’s options and bargaining position, and this has been deemed acceptable as evidenced by the existence of the exemption.

This is not to say that such circumstantial evidence of leaking, seen in the number of pronounced price changes preceding the issuance of a price query and the divulging of the fact negotiations are in progress, is not damaging to individual assessments of market integrity. Indeed it is cause for concern, not for a company’s breach of the disclosure provisions but the potential for insider

\[660\] As in the case of Rio Tinto, see discussion above at 4.4.2. Also see Australian Securities Exchange, ASX Listing Rules: Guidance Note 8, at [5.8] for additional factors managers should stay abreast of in such circumstances.
trading to be taking place in spite of the disclosure provisions being satisfied. Observe: If the regime is designed to minimise opportunities for insider trading by requiring the release of material information to the entire market; the company is in compliance given its belief in the confidentiality of any material information; yet price movements are representative of the potential leaking of such information and potential insider trades before ASX informs the company of its belief confidentiality has been lost (or indeed the company releases the material information of its own volition), then it seems not all such instances can be prevented by existing rules. Expectations for what the regime can achieve may therefore need to be slightly revised.

Any downward revision will obviously have a negative impact on perceptions of market integrity and the force of the disclosure regime, despite its not being able to help such situations. To summarise the problem: The practical operation of the exceptions, which under normal circumstances offer fair protection for organisations and investors, can result in the withholding of information on valid grounds, which is nonetheless potentially being used for the purpose of insider trading, and resulting in the abnormal trading exciting the ASX query. The longer this ‘captive information’ is allowed to remain undisclosed in circumstances involving abnormal trading, the greater the potential opportunity for insider traders to make better gains. While the request for a trading halt prior to the likely finalisation of a deal – the time which has the highest likelihood of material information escaping ranks and being traded upon – is one option for a disclosing entity to maintain investor faith in its
disclosure abilities, its handling of confidential information and the market for its shares, there may be other ways of minimising the effect of such situations on perceptions of market integrity.

As discussed in chapter four, the practical approach of the ASX as far as the second limb of the exceptions is concerned appears to be that it will advise an entity of its belief in the likely loss of confidentiality of material information. Given the fact that allowing this type of issue to reach such a stage means the potential damage to perceptions of the integrity of the market may have already been done\(^661\), the question arises as to whether the onus of deciding whether information has likely lost confidentiality should be located squarely on the entity’s shoulders alone. This might at least speed up the disclosure process in such circumstances and keep the market informed before completely unjustifiable price movements and trading volumes come to impact the market for an entity’s securities. Of course the ASX can still contact the entity as it currently does if the company is not fast enough in dealing with such a change in trading behaviour. The difficult question which arises on this potential option concerns the quantum of the price or volume movement (and over what period of time) which might justify such an assessment.

If guidelines are established on this issue, giving the company the power to assess the issue for itself and take its fate into its own hands this might give it the right type of freedom as regards disclosure, and also make the assessment

\(^{661}\) The simple issuance of a query in such circumstances can draw potentially unwarranted negative attention to the company.
of potential breach easier for investors and the regulatory agencies, while also potentially dealing with the issue faster than currently appears to be the case. It would also give the captive information less time to fester and therefore minimise the gains which insiders might make at the expense of uninformed investors before the information is released if such trading is involved. Indeed, whether such trading is involved or not this might at the very least arrest the quantum change in security prices in such circumstances and thus perceptions that such trading may have been involved.

Having the ASX notify a company earlier in the piece regarding suspect trading activity without the issuance of a price query (but advising on the likelihood of one being issued if such trading continues), or requiring a mandatory automatic trading halt for security price rises which change by more than a particular percentage over a specified time frame as is the case in Malaysia  

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might otherwise allow the practice to exist, it is understandable that otherwise valid reasons allowing for the non-disclosure of certain information create a chink in the armour the regime is supposed to provide. Improving perceptions of market integrity however may require more from the regime and compliance with it in such circumstances. The options outlined above may limit the gains to be made from any such trades by requiring companies in such circumstances to inform the market sooner or halt trade until the market can be so informed when close to finalising a deal. This might also improve the assessment of the market’s ability to deal with less scrupulous elements of it and thereby improve perceptions of its integrity.

5.8 Market reassessments

While most responses simply referred to a particular phenomenon, be it a recent announcement, a roadshow, or a group of them as being a potential cause of the trading activity in the company’s securities, others intermediated this through a reference to the perceived mindstates of investors. This was described in different ways, with responses referring to the market as exhibiting: a change in sentiment; reinvigorated or renewed interest\(^{663}\); a recognition of the inherent value of the company\(^{664}\); an understanding of the company’s position\(^{665}\); a delayed response or reaction\(^{666}\) to the significance of

\(^{663}\) SSM Limited price query response dated 14 September, 2010.
\(^{666}\) CAP Limited price query response dated 7 December, 2010.
prior releases\textsuperscript{667}, a growing awareness or new appreciation of the company’s developments\textsuperscript{668}, a recognition of the undervalued nature/status of the company’s securities\textsuperscript{669}; and a propensity to review the company or simply an increased interest in it.\textsuperscript{670} This also worked in the negative, with companies explaining that several factors may have caused investors to discount the value of the company due to particular information previously released.\textsuperscript{671} Wherever such language was used, the response was categorised as expressing a market reassessment as a reason for the change for further investigation.\textsuperscript{672}

Of the responses using such language to explain price movements the majority were caused by or referable to other causes which have been categorised in and of themselves. This meant the description of subjective mindstates of investors was of limited explanatory value as any response discussing the underlying reasons (as per the categories discussed elsewhere in this chapter) already had implicit within it the idea that the reason itself was causative of a movement in investors’ minds (which caused them to trade in the company’s securities), making the market reassessment category a ‘false positive’ reading in the majority of cases.

The remainder, which did not anchor their explanation or expression of the change in sentiment held by the market by reference to another phenomenon

\textsuperscript{667} BCC Limited price query response dated 12 November, 2009.
\textsuperscript{669} RHM Limited price query response dated 20 April, 2010.
\textsuperscript{670} FMS Limited price query response dated 6 October, 2009.
\textsuperscript{671} LNC Limited price query response dated 27 January, 2009.
\textsuperscript{672} IAU Limited price query response dated 1 November, 2010.
in the response were essentially ‘pure’ market reassessments. These responses cited general interest in the company and the undervalued nature of its business which astute investors were becoming aware of and effectively re-rating or reassessing the fair value of the company on.\textsuperscript{673} This marks the existence of the simple positing of the state of mind of investors as a reason employed by companies to explain security price changes. Such conjectures without the appeal to any substance should generally be avoided unless able to be substantiated, for example, by reference to increased shareholder numbers of a particular kind\textsuperscript{674} or some other concrete factor, unless clearly caveated as conjectures.

Three other groups of responses, originally categorised separately, fit well within the general timbre of the market reassessment group. One group involved developments in entities, usually listed, which the company responding to the price query had an ownership interest in. For example, ‘[a]s FairStar Resources Limited is the largest shareholder in Golden West Resources Ltd, with a 17\% holding currently, the effects of the announcement made by GWR this morning may have had an effect on our securities’.\textsuperscript{675} This also worked in the opposite direction for a depreciation in the case of bad news affecting interests owned by the company.\textsuperscript{676} Some companies also explained exactly how the change in value of the investment might come to play into the

\textsuperscript{673} PBD Limited price query response dated 16 April, 2009.
\textsuperscript{674} CNP Limited price query response dated 14 August, 2009.
\textsuperscript{675} FAS Limited price query response dated 13 November, 2009.
\textsuperscript{676} SGT Limited price query response dated 7 October, 2009.
hands of the company. As such the company expressing this type of market reassessment explained it had effectively been re-rated by the market due to information relating to one of its investments. Information relating to the development involved and the size of the ownership interest was provided by some but not all companies referring to such reasons for the movement in security price of its securities, and would be advisable in future.

Another group referred to general economic conditions in the abstract to explain price movements. Statements referring generally to ‘current market volatility and general economic uncertainty’, ‘international economic events’, ‘general improvement in global equity markets’, ‘deteriorating market conditions’, with one response making the connection that such events may have impacted upon investment decisions:

current volatility of the global markets in recent months and the uncertain economic conditions it is perhaps not surprising that investors have taken some time before making a decision to invest based on these announcements.

Yet another factor originally categorised separately but which admits of a distinct reason for a market reassessment, is the impact of a company’s

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membership within or removal from an index. While a change in index value was mentioned in a general sense, more often the recent inclusion of a company’s securities in a particular index (for example the ASX300, ASX200, ASX100) was mentioned as a factor ‘increasing awareness of the Company’s projects and prospects’. Entry into and change within the ranks of international indices was also mentioned. Removal from an index was cited by one company, but by this stage one would have thought other factors would have come into play explaining the change in its security price.

The latter types of market reassessment all carry weight as explanatory factors, although the appeal to general economic conditions is of such a general nature that investors might be wary of such responses attempting to explain large and abrupt changes in trading behaviour. As ever, the more information provided in relation to each the better investors are able to make their own assessment as to the likelihood of the explanation’s applicability in the circumstances.

5.9 Media attention

A relatively significant proportion of the sample with raised media attention as a possible reason for the change in security price queried by the ASX. One-hundred and seventy-four responses cited various sources including print

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(major and regional newspapers\textsuperscript{689}), radio (standard and internet)\textsuperscript{690}, television (free to air and pay tv)\textsuperscript{691}, websites (news agencies\textsuperscript{692}, subscriber services\textsuperscript{693}, and even blogs\textsuperscript{694}), research reports\textsuperscript{695} and magazines\textsuperscript{696} as potentially having induced trading of the company’s securities.

Many responses were quick to claim that references in media were derived from generally available previously announced information\textsuperscript{697}, while others expressly disavowed statements made by media sources, labelling claims made therein unsubstantiated rumour and speculation.\textsuperscript{698}

In some queries the ASX included reference to a particular piece of media attention as part of question one. This was not always the case however, and many responses did not include a specific reference to the piece of media claimed to have had an impact upon security prices, often stating in the general that ‘some press reports’, ‘market commentary not specific to the company’, ‘general press speculation’, ‘recent press articles’, ‘the Philippine press’\textsuperscript{699},

\textsuperscript{689} BCI Limited price query response dated 17 February, 2009.
\textsuperscript{690} BDR Limited price query response dated 16 December, 2009. See also ADO Limited price query response dated 7 December, 2010.
\textsuperscript{691} SEN Limited price query response dated 8 September, 2009. See also KAM Limited price query response dated 10 November, 2009.
\textsuperscript{692} TAH Limited price query response dated 26 May, 2009.
\textsuperscript{694} NRT Limited price query response dated 19 May, 2009.
\textsuperscript{695} Press coverage of such: SWK Limited price query response dated 8 April, 2009.
\textsuperscript{696} CXY Limited price query response dated 31 March, 2009.
\textsuperscript{697} For example BCN Limited price query response dated 21 October, 2010 ‘all information in this article has been previously released to the market’.
\textsuperscript{698} PRU Limited price query response dated 2 February, 2009.
‘prominent investment magazine’\textsuperscript{700}, ‘third parties’\textsuperscript{701} or ‘ongoing market discussion and analysis’\textsuperscript{702} had mentioned the company and that this was causative of the queried price movement.

The publication of certain articles with seemingly definite content highlights the need for speed in disclosure, or alternatively, the need for the company to be aware that a potentially immaterial factor might be perceived otherwise due to the effect of information passing through the grapevine and requiring the company to respond to prevent a false market. Companies disclosing their loss of certain customers or contracts and explaining the effect on the business in future periods after news articles discussing same highlight this potentiality well:\textsuperscript{703}

Brambles became aware today of market reports concerning the loss of a pallet pooling contract with the Quaker Tropicana and Gatorade (QTG) business units of PepsiCo in the United States. Brambles confirms that, as part of the ordinary course of business, QTG has informed its customers that it will commence converting to a new pallet provider from 1 April 2009. QTG’s decision does not impact CHEP’s other business with PepsiCo in the United States or elsewhere around the world. This contract represents less than 0.7% of Brambles’ annual sales revenue and is immaterial, particularly as Brambles continues to win new business that far exceeds any contract losses.\textsuperscript{704}

\textsuperscript{700} AZS Limited price query response dated 9 September, 2010.
\textsuperscript{701} SUN Limited price query response dated 7 August, 2009.
\textsuperscript{702} For further vagueness see BBP Limited price query response dated 28 April, 2009.
\textsuperscript{703} BBI Limited price query response dated 11 May, 2009.
\textsuperscript{704} BXB Limited price query response dated 26 March, 2009
While the company ostensibly acted properly by drawing attention to the media attention in the circumstances, it must be noted that it is strictly impossible in all cases to predict with certainty the reaction of the market to a particular piece of information (if indeed this was one of them). If investors heard of the information and assumed PepsiCo as a whole had cancelled its contracts with Brambles this may have influenced any the price change. If this was the case, this type of movement is not something management need to concern themselves with as far as their obligations are concerned, and invites investors to reflect on the fact that predicting market reactions to certain pieces of information is not a precise science. While it might be said that an organisation should control for this when there exists the potential for a misapprehension on the part of investors, this involves way too much meta-analysis of the potential mindstates of investors for management to fairly be required to monitor – after all, they do have businesses to run. Where a link might be made by investors to issues of wider organisational import management might do well to consider the potential for a false market to come to exist in its securities and to be ready to deal with such, as Brambles seems to have done above. Investors should be warned this is a normal potentiality of the digestion of information by an investing population with diverse skill sets and ways of processing information705 and is not to be seen as problematic, more likely the market simply oscillating between fear and greed.

Attention provided via any of the media formats mentioned in such responses can validly be expected to cause a movement in the price of a company’s securities. Variability in explanatory power would revolve around what was conveyed and the reach of the particular format. The sheer number of people to which information about the company might be communicated via such formats however and their collective trading around whatever information was conveyed could be causative of serious change in the price of the company’s securities making this one of the \textit{prima facie} more valid explanations offered by respondents.\footnote{M Ormos and M Vazsonyi ‘Impacts of Public News on Stock Market Prices: Evidence from S&P500’ (2011) \textit{Interdisciplinary Journal of Research in Business} 1. See also <http://venturebeat.com/2011/03/17/study-social-media-popularity-can-predict-stock-prices/>.}

Better responses specified the source of the media claimed to have pushed the security price, the date of its publication or release, and its author if it had one. If the ASX’s attention was raised by a particular piece of news it would be best for it to specify the exact source so that readers would know exactly what the ASX was referring to.\footnote{ALS Limited price query response dated 6 February, 2009.} Some companies found themselves correcting media reports, as with the independent research category discussed above\footnote{GMG Limited price query response dated 24 February, 2009.}, or directly countering the materiality of media commentary. Again, as with negotiations, should a price query be issued in circumstances where a media piece has fed into the creation of a false market in circumstances where a company holds undisclosed potentially material information, it will need to overcome the serendipitous nature of the situation and properly disclose.
As noted by the ASX in Guidance Note 8,

ASX understands that many listed entities have a stated policy position of not commenting on media speculation or market rumours. Absent a false market, that is a perfectly reasonable stance for them to take. However, that policy must give way where there is, or is likely to be, a false market and ASX requires the matter to be commented upon under Listing Rule 3.1B.709

Information leaks and wild guesses which impact upon security prices will always play a role in markets and investors will simply need to accept they exist, with the former hopefully in some insignificantly small degree. Nevertheless, the quicker their effects are dampened through official information release the less people can be caught unawares in their trading activity and the higher the perception of integrity will be.

5.10 Industry attention

The appeal to non-company specific attention, which was directed at a particular sector, industry or business practice as a reason for security price movements was made by almost as many responses as media attention, with one hundred and fifty one observations. ‘Industry attention’ effectively figures as a non-company specific form of the market reassessment tag discussed

709 Australian Securities Exchange, ASX Listing Rules: Guidance Note 8, at [6.4].
above, which is categorised such for specific references to a company occasioning a change in sentiment. Any response exhibiting traits relating to a reconsideration by the market of the industry, sector, or type of operations the company was engaged in or involved with were categorised exhibiting an element of industry attention.

The majority of responses categorised thus referred to general factors, using language such as recent or renewed interest in the market sector of the company, positive sentiment in a particular resource or increasingly positive general sentiment and growing support for certain stocks in particular or a sector of the market such as a ‘rebound in sentiment towards the property sector’ or a segment of it, for example small cap stocks or geographical area.

Others referred to general price changes in the securities of peer companies, or a change in sentiment towards a particular sector and therefore those industries supporting it. Public awareness of the significance and importance of the company’s main products was also cited as a general reason for security price appreciation. Similar to the (much smaller) group of general

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713 SLX Limited price query response dated 29 April, 2009.
718 SWK Limited price query response dated 8 April, 2009.
market reassessment reasons, these explanations do not really offer much to investors, as they simply express management’s esoteric conjectures without any solid evidence offered, except for those indicating share price rises across the board, which themselves might be fortuitous.

Companies offering a little more evidence for their suspicion that general interest in a sector had changed either positively or negatively revolved around developments in the corporate existences of competitors, the impact of government decisions surrounding the operations of the industry the company was a part of, changes in commodity prices and media attention, as well as roadshows and broker reports. While the majority of these are dealt with in their respective sections above, there are some points of interest and differentiation which makes these responses part of the industry attention group.

Changes in the lay of the land in a company’s sector, involving capital raisings by other companies within it for example, significant announcements by competitor companies or announcements involving joint ventures by other companies, write downs announced by other companies in the sector, takeover offers and the potential given a larger companies’ asset buying

activities for the respondent companies to be a potential takeover \textsuperscript{725}, ‘other recent activity in the biotechnology sector of the market domestically and in the USA’\textsuperscript{726} or corporate activity generally involving companies with assets in a certain geographical location\textsuperscript{727} also factored as explanations which held more water than the general type of industry attention appealed to above.

The acquisition of major resources by another producer\textsuperscript{728}, and most commonly in relation to mining companies at least, the release of information relating to positive developments on interests adjacent to the company’s own tenements formed a large part of this group, with several responses stating along the lines of the following that:

\begin{quote}
the company believes the recent increase in share price and trading volume of the company’s listed shares and options has been caused by increased market interest in companies exposed to the mineral province surrounding Sandfire Resource Limited’s [another listed company’s tenements] Degrussa discovery.\textsuperscript{729}
\end{quote}

The company’s position within an industry was also cited, for example by Gunson Resources, which noted its project in the context of ‘in an environment of supply shortages, ... and a total absence of new greenfields mines under

\textsuperscript{726} LCT Limited price query response dated 17 March, 2010.
\textsuperscript{727} SDL Limited price query response dated 13 September, 2010
\textsuperscript{728} ICN Limited price query response dated 5 May, 2009.
\textsuperscript{729} AUC Limited price query response dated 2 August, 2010. See also SRI Limited price query response dated 28 September, 2009.
construction’ signalling a lack of competitive activity allowing the opportunity for monopolistic rents to be extracted. Such reasoning behind the change in attention towards a particular industry posited by respondents gives readers a little more to hang on to and offers some explanatory power for the change in the organisations’ security prices.

Several responses referred to media attention, and where this was specific to the company itself this was addressed within the media attention category analysed above. Where the media attention was said to have referred to the industry or sector of the business in question or other companies within it (solely, or in addition to the company specifically) this was categorised as industry attention proper, and for the same reasons offered above, may validly be considered due to their reach and detail, to be able to move security prices and thus form a *prima facie* solid explanation for price movements.

Some companies referred to ‘general market commentary’ or ‘recent press articles’ which is somewhat unhelpful in gauging the breadth of coverage of said commentary, unlike others which were specific, for example, ‘recent media releases in the New York Times and other international press have further highlighted the strategic importance of Rare Earths which lie at the core of modern technologies such as energy efficient lighting, hybrid vehicle

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732 That is, it referred to the company specifically by name.
manufacture, magnets for wind turbines and plasma panels, which allow investors to get a handle on how significant the effect of the particular media exposure might be. Certain advertising material of competitors was also singled out as a potential price moving factor, with GoConnect stating ‘in the past week, however, Australian TV consumers have been deluged with advertising messages from a number of new entrants into the IPTV market...these messages have now produced a surge of interest in and awareness of the emerging IPTV industry and the potential significant value of IPTV operators such as GoConnect’.

Similar to media attention of a general industry kind, broker research ‘in relation to the West African gold sector’ for example which did not seem to single out the respondents was referred to by two companies, while another stated it was ‘aware of recently published reports which relate to the worldwide demand for Nickel and are general in nature. Whilst we have no basis for forming an opinion on the impact of these reports, such reports may be viewed favourably by readers’. A smaller number of companies referenced information released by government agencies relevant to their sector or industry as having an impact upon investor sentiment. Cool or Cosy Limited noted that ‘the share price movement is a consequence of the recent

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Federal Government stimulus package announcement regarding rebates on installation of insulation. Cool or Cosy is a participant in this industry.

All of the above explanations speak to the diverse sources of such non-company specific attention. Considerations here, given the company is not in control of such factors, are similar to those involving media attention, market reassessment and independent research report categories, with the more information being provided the better. Citation of a source for the creation of the attention focus on the industry is useful, as is some explanation however basic or brief of the connection between the information and the company’s operations for investors to make their own assessment of the explanatory power of the issues mentioned. Generalised answers are generally unhelpful.

5.11 Operational updates

Important developments occur frequently in the daily lives of listed entities. This is especially the case for smaller companies where transactions and contracts need not be large in an absolute sense to qualify as potentially being material in a continuous disclosure sense. Many respondents took the opportunity afforded by the issuance of a price query to update the market regarding the company’s latest progress with the most recent information ostensibly available to it, or discuss recent announcements in the context of the price change. As noted earlier, reference to previous announcements with no

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additional new information concerning their progress is not of any real concern as far as compliance with the regime goes. If the information had been properly disclosed in a previous announcement and there was no suspicious movement in the price or volumes of the company’s traded securities the organisation cannot be said to have done anything but abided by the regime’s requirements on available evidence.\textsuperscript{741}

Often however, the information released or discussion offered appeared to contain new information. This information was offered both with and without reference to previously released information, and therefore figured either as an entirely new piece of information or alternatively an updating of an issue previously mooted or discussed. Such responses were categorised as ‘operational updates’ whether material or not, for the fact they appeared to contain new information.\textsuperscript{742}

Such updates were sometimes innocuous, with the company confirming that it had continued doing what it said it would in previous announcements\textsuperscript{743}, others detailing specific points of progress (which were expected given previous disclosures)\textsuperscript{744}, yet always saying something which appeared in the immediate context of the response to the price query to be something new, thus earning their place in the group. Companies also used the opportunity to present a

\textsuperscript{741} See footnote 567 above.
\textsuperscript{742} This category facilitated analysis of those disclosures which appeared new, did not fit clearly into any other category already established, and where the establishment of a new category would have led to the creation of too many categories with too few readings which would complicate exegesis without adding to the depth of analysis.
\textsuperscript{743} SEA Limited price query response dated 15 June, 2010.
\textsuperscript{744} RED Limited price query response dated 18 September, 2009.
comprehensive update of company projects or inform the market with the status of negotiations which had been completed with a fully determined contract taking their place\textsuperscript{745} and made the choice when information was of a more detailed nature to attach a separate release or promise one later in the day or at some future date.

While reference to a previous announcement figures as a ‘recent announcement’ in the coding of responses, companies which released information earlier on the day of their price query response\textsuperscript{746} or which promised to release information shortly\textsuperscript{747} were also included in this category as advising the market of future announcements was considered to be an update in itself. A broad range of information was released in this fashion\textsuperscript{748}, although at least four types, relating to structural initiatives, financial reports,

\textsuperscript{745} While discussion of negotiations underfoot in a response could also be characterised as an operational update, their frequency and importance from a continuous disclosure perspective necessitated their separate analysis. Completed negotiations however are no longer ‘negotiations’ as such and so are categorised within the operational updates group as completed, definite information being released to the market through a response to a price query.


\textsuperscript{747} WCB Limited price query response dated 18 February, 2009. Other companies promised an announcement in the following week of trading, the next day, or later that day, sometimes explaining what the release would be about (BTA Limited price query response dated 22 April, 2009), other times not (AAK Limited price query response dated 25 November, 2009).

\textsuperscript{748} The lodgement of patents (RER Limited price query response dated 20 August, 2009), the acquisition of properties (PSA Limited price query response dated 19 March, 2010), the launch of the company’s product (CFU Limited price query response dated 12 May, 2009), or that the company was considering listing on a foreign exchange (PTS Limited price query response dated 5 May, 2010) featured. Other companies used the opportunity to provide general broad ranging update of activities including management’s participation at conferences, awards won by it, and updates on interstate and overseas operations (CNN Limited price query response dated 11 May, 2009); lodge a ‘routine’ operational update prior to their response to the query (ADI Limited price query response dated 6 October, 2009); explain the company’s improved operating environment Improved operating conditions (WCB Limited price query response dated 8 December, 2009) or what seemed to be recent developments without reference to any previous announcements relating to them (SSI Limited price query response dated 18 December, 2009). Other responses noted the fact the company had engaged a reputable investor relations group to assist with company’s future promotion (SSS Limited price query response dated 9 October, 2009), that it proposed conducting investor presentations in the future to outline the current and planned exploration activities for this excellent portfolio (HNR Limited price query response dated 8 September, 2009), and that it had intended to provide an update regarding the results of CEO’s roadshow in the USA (ERJ Limited price query response dated 13 October, 2009) prior to the issuance of the query.
completed negotiations and certain information released by miners raised interesting issues relating to compliance with the regime and possible perceptions of it.

5.11.1 Structural issues

Some of the more detailed instances of operational update by way of price query response involved companies advising the market of structural or operational developments which appeared material, yet which most likely met the incomplete management information exception prior to the issuance of the query.

Examples included noting the company was considering different options regarding ownership and the need to secure capital\textsuperscript{749}, structural initiatives underfoot and the various options management had been considering and thus updating the market as to the potential options the market should prepare itself for\textsuperscript{750}, the company’s successful refinancing of debt\textsuperscript{751}, capital management initiatives\textsuperscript{752}, and the review of the company’s capital structure\textsuperscript{753}, as well as the confirmation of the fact the company had no plans to raise additional capital\textsuperscript{754}, or indeed the opposite that it was considering all

\textsuperscript{749} VCR Limited price query response dated 2 January, 2009.
\textsuperscript{750} MMG Limited price query response dated 13 October, 2009.
\textsuperscript{751} AWB Limited price query response dated 27 February, 2009.
\textsuperscript{752} QAN Limited price query response dated 3 February, 2009.
\textsuperscript{753} TPI Limited price query response dated 16 February, 2009.
its funding options in the face of potential future corporate activity.\textsuperscript{755} Responses also offered information updating the market on the maturation of debt and the impact on its debt covenants\textsuperscript{756}, as well as the exploration of alternatives surrounding the potential restructure of certain liabilities\textsuperscript{757} and that management was reassessing the company’s position when they received the query and requested a trading halt until such time as this update could be expedited so as to inform the market of the company’s updated business plans. (Placements are further discussed at 6.1 below).\textsuperscript{758}

Given the abnormal trading observed in this category it is worrying that such information may have lost confidentiality and rifled through portions of the market driving the price either direction before being released to all participants, and only then pursuant to compliance with a price query. There is not much management can do in such situations except request a trading halt, expedite planning or strategising, and inform the entire market of its plans as soon as is practicable should there be information which, given the price change or any reasonably specific rumour, could have lost confidentiality.\textsuperscript{759} Management would be best advised, as it has been by the ASX in Guidance Note 8, to have a draft release ready for dissemination in the case it receives a call from the ASX which might advise of its fear that confidentiality has been breached, requiring the release of some information. That said, any fully

\textsuperscript{755} AMC Limited price query response dated 6 February, 2009. 
\textsuperscript{756} MDT Limited price query response dated 2 June, 2009. 
\textsuperscript{757} VPG Limited price query response dated 13 August, 2009. 
\textsuperscript{758} GLM Limited price query response dated 27 April, 2010. 
determined information, for example a successful refinancing of debt, should be released immediately as it is unlikely to continue to satisfy the exemptions.

5.11.2 Financial reports

Some responses disclosed the company was in the process of completing financial reports for release within the next few days\textsuperscript{760} and that a full update\textsuperscript{761} would be given at that time. Price movements therefore might be attributed to investor anticipation of the release of results, or on the other potentially more sinister hand, to the leaking of information and insider trading on projected results. An interesting practice which also raises the spectre of a loss of confidentiality and possibly even insider trading is when responses let the proverbial cat out of the bag before their results presentations. One response stated that it would be releasing its half year results the next day, and that

\[\text{subject to audit review and approval by the Board of Directors, those results will show a continuation of the strong performance for the first four months of the year reported at the Company's Annual General Meeting on 11 November 2008, with EBITDA and NPAT tracking ahead of the guidance issued on 14 August 2008.}\textsuperscript{762}\]

Should such information have leaked it could explain the price rise given its positive nature. Again, the company could do nothing more in the

\textsuperscript{760} PEK Limited price query response dated 12 October, 2009.
\textsuperscript{762} CCP Limited price query response dated 16 February, 2009.
circumstances, though it is a concern, in the absence of any other relevant information, that this might occur in the Australian market. That said, this could be pure coincidence, and some investors might have reviewed their portfolios at the same time, and using only public information, bid up the price of the stock serendipitously. It is impossible to determine what might have caused such price changes, though it seems hard to believe that the magnitude of change evidenced in this case (15%) would stalk a security price without new information being released in some way.

In a similar vein the ASX, issuing a query to itself, chose to update the market in relation to the period between the release of the annual financial report and the AGM the following day. Again, there is no way of telling whether the appreciation prior to the AGM occurred because of a potential leak, or because conscientious traders did their homework and bid up the price prior to the company’s AGM.763 One company responded with more information than ostensibly necessary given the internal management information exception:

the only information of which the company is aware, which may fall into this category, concerns financial performance for the first half of the financial year. The company has received information from its divisions, but the information is not yet definite or in reportable form. Preliminary indications from the information received so far are that overall, underlying performance will be close to market expectations. However, in view of the price change and your query, the company will accelerate its work on analysis and collation of the preliminary financial

information and make an announcement before Wednesday 14 January 2009.\textsuperscript{764}

Given the way Nufarm Limited was treated by ASIC a short time later\textsuperscript{765}, the company was prudent to release this information and accelerate its forthcoming review.

Other companies advised that due to prevailing economic conditions that they were engaged in a review of their forecasts, any changes in which were promised to be released to the market in due course, or then and there in the case of Lend Lease which was in the process of preparing its accounts and reviewing the value of its assets when it received a query.\textsuperscript{766} The company decided to offer detailed preliminary guidance to avoid the possibility of ‘this response letter creating uninformed speculation’ which it considered premature and would not otherwise have done, but for the query. This represents prudent disclosure on the part of the company in the circumstances of the price change preceding it. Some companies argued that the information they had updated the market with was not material and that the price move had predated the information\textsuperscript{767}, while others provided largely indecipherable answers.\textsuperscript{768}

\textsuperscript{764} WES Limited price query response dated 13 January, 2009.
\textsuperscript{765} See discussion above at 4.3.2.
\textsuperscript{766} LLC Limited price query response dated 29 January, 2009.
\textsuperscript{767} RER Limited price query response dated 20 August, 2009.
\textsuperscript{768} AAK Limited price query response dated 26 November, 2009.
One response saw a company responding to an independent analyst’s report which had been brought to the company’s attention only through the issuance of the query.\textsuperscript{769} The analyst’s downgrade necessitated the company’s update of previous guidance for full year results. Given this constituted a borderline material downgrade, it must be asked whether there may have been a leak or whether the analyst was doing an excellent job in modelling and predicting the company’s result before it was able to inform the market. This instance highlights the importance of companies staying ahead of the curve and ensuring material information – in this case the effect of a delay in the execution of certain projects which was to have an effect on its operating result – is released to the whole market before conjectures start arising from amongst those with some power to sway the market. While the rules do not state this needs to be done specifically, it can help in preventing the development of false markets, and ensure a level playing field for the company’s securities.

While such instances may generally figure as forgivable, there may be circumstances where the weight of any presumption may be against the company’s disclosure practice and result in it having enforcement action levelled against it for its failure to keep the market updated immediately the time material information might be expected to have lost the protections afforded it by listing rule 3.1A, or when it might be apparent that dots might be joined together and a picture formed around material information which the company has not taken the opportunity to release itself.

\textsuperscript{769} IFM Limited price query response dated 11 December, 2009.
That said, and while relatively low from an entire market perspective, the rate of occurrence of such results updates being released through price query responses is nevertheless concerning given that the organisation was in possession of seemingly material information, and that there was a price movement consistent with the type of information (either up or down for good or bad news respectively).

5.11.3 Miners

Several different types of operational updates were in existence in relation to mining companies and their operations. The granting of prospecting licenses\textsuperscript{770}, impending availability of an extended pre feasibility study for shareholder review promised ‘shortly’\textsuperscript{771}, the continuation of a DFS ‘at a promising rate and [where] all critical aspects of this process are in good shape’\textsuperscript{772}, the commencement of a metallurgical study as a precursor to a scoping study and further resource definition drilling\textsuperscript{773}, field mapping\textsuperscript{774}, the progress of mine infrastructure construction\textsuperscript{775}, weather delays\textsuperscript{776} and the commencement\textsuperscript{777} or recommencement of drilling\textsuperscript{778} were among many other valuable pieces of

\textsuperscript{770} PEK Limited price query response dated 12 October, 2009.
\textsuperscript{771} IRN Limited price query response dated 6 April, 2009.
\textsuperscript{772} CDU Limited price query response dated 1 May, 2009.
\textsuperscript{773} LML Limited price query response dated 14 August, 2009.
\textsuperscript{774} ALY Limited price query response dated 25 September, 2009.
\textsuperscript{776} GDY Limited price query response dated 12 March, 2010.
\textsuperscript{777} ATN Limited price query response dated 13 April, 2010.
\textsuperscript{778} NDO Limited price query response dated 10 February, 2009.
information which appeared to be new and which were conveyed through price query responses.779

While divulging what appeared to be new and important information, not all of the responses in this category contained what one would necessarily consider material.780 The remainder, involving information which appeared to be new and material, were of more concern. Some responses actually included, or promised in the near term, material information relating to actual resource discoveries or changes in the magnitude of resources previously disclosed. Such updates traversed the full gamut of resource discovery, definition and their announcement to the market though points of interest from a continuous disclosure perspective jump out in the context of a price change immediately preceding or concurrent with the company’s activities. Examples include abnormal trading in circumstances where drilling had commenced, samples had been dispatched to a lab, though where analyses had reportedly yet to be undertaken781; where management had been ‘verbally informed’ of ‘material elements’ of a study782; where the company was ‘in ongoing receipt of draft information from its consultants in relation to finalisation of a scoping study on its Pilbara iron ore project in WA...remains incomplete [and] when finalised will be released’783; where the company had received results to the effect that it released an update confirming the upgrade and modest expansion of JORC

780 See again, ATN Limited price query response dated 13 April, 2010.
resources\textsuperscript{784}; where the company had in its possession a draft of a pre-feasibility study which had not been reviewed by the board\textsuperscript{785}; statements in relation to maiden resource estimates which required review by geologists retained by the company\textsuperscript{786}; and where geologists were in the process of mapping untested soil with a view to checking whether recent finds in neighbouring tenements traversed the company’s own and where information would be available by the end of the week and which the board would assess.\textsuperscript{787}

Each of these instances invites the casting of negative inferences in view of the price change preceding or coming into existence during the conduct of said activities or receipt of information relating to them for the fact the information seems to have lost confidentiality. Further examples which the ASX thought worth pursuing through the issuance of an aware letter, though which we have no idea whether were referred up the enforcement hierarchy to ASIC, are discussed further in chapter 6.\textsuperscript{788}

Such information, as with other categories offering operational updates discussed above, require extremely tight confidentiality systems to ensure their maintenance of this quale. The loss of confidentiality can lead to the potential

\textsuperscript{784} DYL Limited price query response dated 28 July, 2010
\textsuperscript{785} GGG Limited price query response dated 6 January, 2010.
\textsuperscript{786} DRA Limited price query response dated 14 September, 2009.
\textsuperscript{787} ALY Limited price query response dated 15 September, 2009
contravention of the regime if any false market is not addressed. Worse still however, is the drop in perceptions of the fairness of the market for a company’s securities specifically, and the integrity of the market more generally, which such situations can allow to develop. As noted above, the exceptions, which permit valid retention of information can – if that is indeed the cause of the trading behaviour productive of the query – be abused by those with any control over it.

5.11.4 Completed negotiations

From a disclosure perspective, negotiations underfoot such as those discussed above at 5.7 are best distinguished from completed negotiations giving rise to full contracts. While they effectively constitute ‘operational updates’ as the term is used here, as argued above they usually retain the protection of the exceptions from disclosure (as incomplete and insufficiently definite depending on the circumstances), unlike the latter. Completed discussions with a contract taking the place of negotiations may be classed as fully determined pieces of information with enough detail and certainty to require release or such that a reasonable person would expect same.

Several companies in the sample had completed negotiations, resulting in a full contract, yet confirmed this for what appeared to be the first time in their response to a price query. Others were seemingly so close to completion to
have requested a trading halt which was only to be removed upon completion of negotiations and the announcement of the confirmed contract which had been the subject of negotiations.\textsuperscript{789} Should such phenomena have remained truly confidential, and in the absence of any other material information affecting trading activity, they arguably would not have admitted price rises of the order seen in this sample. The fact the inference is open at the very least is cause for concern. This is a worrying trend, especially in view of price changes observed in certain securities amongst this subset, given the fact the protection of the exceptions would have expired once a deal was done.\textsuperscript{790}

Despite the likely loss of protection of the exemptions there were several instances involving companies disclosing such completed negotiations. Informing the market that the company was to make an announcement concerning a significant corporate transaction\textsuperscript{791}, that it had signed a letter of intent or entered an MOU\textsuperscript{792}, had reached an agreement in principle to purchase tenements\textsuperscript{793}, renegotiated its working capital facilities\textsuperscript{794}, secured rights to negotiate\textsuperscript{795}, or that it had arranged a formal signing ceremony for negotiations not yet concluded, but expected to become so\textsuperscript{796} rang through the sample. While some of these pieces of information are more significant than

\textsuperscript{790} NEU Limited price query response dated 17 April, 2009. See also IVA Limited price query response dated 8 September, 2009.
\textsuperscript{791} AWB Limited price query response dated 30 June, 2010.
\textsuperscript{792} SDL Limited price query response dated 13 September, 2010.
\textsuperscript{793} RSL Limited price query response dated 16 September, 2010.
\textsuperscript{794} ABY Limited price query response dated 5 January, 2009.
\textsuperscript{795} SSC Limited price query response dated 18 January, 2010.
\textsuperscript{796} BAU Limited price query response dated 21 September, 2010.
others, if leaked they may have been causative of price movements beyond their true import due to the distorted whispers which might cause a rumour – about a signing ceremony or a contract containing a right to negotiate for example – to be heard as fully completed and material contracts which can lead investors to purchase shares and bid up the price of the company’s securities.

This is concerning given the fact that organisations such as Rio Tinto and Northern Iron have been issued infringement notices for like failures and therefore that the message should well and truly have been heard by now. It is not clear why companies engaging in such conduct were not pursued further in the circumstances. While the false markets rule is designed to deal with such and like instances, requiring the ASX to discuss the situation with the company and then issue a query, while waiting for the company to decide whether to request a trading halt or disclose immediately appears to take too long, allowing abnormal trading to continue in the meantime, and thereby failing to pre-emptively control for the negative inferences which can arise in such circumstances. Could the option outlined above in relation to incomplete negotiations – relocating the assessment of a loss of confidentiality into the entity’s court – provide a solution? It is likely so, as it might with all subsets within the operational updates category.

Overall, the diversity of the kinds of information offered as operational updates effectively speak to the breadth of circumstances fairly protected by the exceptions and should not be of major concern to investors in most cases.
Nevertheless in some, it hints at the chance more material information may have been leaked and its potentially profitable yet unfair use. In circumstances where this information is already fully determined and therefore unable to meet the description of incomplete information for the purposes of the exceptions, it will likely require release even if it otherwise meets the definition of internal management information if a reasonable person would expect its release, especially in circumstances where a false market may appear to be developing. Such failures to advise do nothing to increase faith in the disclosure obligation as it appears on available evidence to have been ignored. The only redeeming factor here is the fact these were but a fraction of overall market disclosures over the two year period under consideration.

Companies holding any such information, or even information which is on the cusp of becoming fully determined, at the very least should be prepared to request and enter a trading halt when information hitherto protected by the exception is about to pass from incomplete to complete, and therefore become disclosable. Such practice may beat any chance of confidentiality leaks actually affecting the price of securities, or alternatively, creating a false market where the entire market is not apprised of the same information relevant to their trading behaviour. Placing the onus squarely in the reporting entity’s court as discussed in relation to incomplete negotiations above may speed up disclosure, make it easier for investors and regulators to assess potential breaches, and encourage managers to keep a vigilant eye on trading their entity’s securities when material information which may seem to have lost
confidentiality is in its midst. This might allow the disclosure obligation to have an even more pronounced effect in shutting down the space within which insider trading might operate by encouraging companies to deal with such situations sooner.

5.12 Non-standard price queries

In addition to asking the four standard query questions, 343 price queries asked one or more further questions relating to profit projections and/or the potential for material abnormal items to be included in a company’s financial accounts for a particular period.

Of the 45 queries which asked only one additional question, the most common was whether the company was expecting to report any material abnormal or extraordinary profit (or loss) for the period (28), with the remainder (17) asking in a similar vein regarding results, whether the company expected to see a change in operating results which would vary from the previous financial year or alternatively a change in earnings guidance by more than 15%.

Of the 298 queries which asked more than one additional question, while the broader aims of the questions were similar, they were expressed in different ways, some referring to ‘earnings before interest, depreciation and amortisation’ (EBITDA), others to ‘net profit, operating loss/profit or results’ depending on the company’s business and prior performance. The second additional question asked was whether the company had any reason to think it
might record any material abnormal or extraordinary items or material abnormal or extraordinary profit for the period referred to.

5.12.1 Responses advising of no material change

247 responses to non-standard price queries answered that they were not aware of any reason to expect a change in either operating results or abnormal or extraordinary items when compared to the previous corresponding period or previous guidance issued by the company. The majority answered in the negative simply with a ‘no’, with the remainder confirming previous statements made, often stating that current expectations within the organisation remained within a guidance range previously provided.797 Others provided detail relating to previously announced information which made the company’s trajectory and possible results clear to investors without necessarily stating a range within which results would fall. Such responses are generally unproblematic as far as compliance with the regime is concerned as investors had already apparently been informed of either a relevant range or material factors which could come to impact results.

Given that the crystal ball on the boardroom table is susceptible to the vagaries of business and economic conditions with the result that a sidewind might come to impact upon forecasts, some companies placed a caveat on their responses stating that while they did not expect to be outside of previous

guidance or the previous corresponding period that other factors might come to impact those expectations:

The Company does not expect that its operating results before abnormal items and income tax will vary by more than 15% as compared to the previous corresponding period. However, fluctuations in the AUD:USD exchange rate and the potential generation of performance fees from funds managed by the Group may have an impact on the Company's actual operating result.798

Changes in accounting policies employed by respondents also figured as caveats on such responses799, as did the potential effects of hedging facilities used by the company.800 The timing of the issuance of the query also played a role in tempering a company's claims not to expect any material variations, with some stating no change was expected but that a clearer picture would emerge once accounts for a particular sub-period had been finalised.801 Such responses have been treated as unproblematic as such sidewinds are not factors over which management have any real control and so their underlying projection or expectation that the company would not report any material change should fairly be accepted.

Despite not expecting to see a change in results of a material magnitude, one company was quite specific in its response:

799 There is no reason to think that there may be a change in the operating loss before abnormal items and income tax so that financial year ending 30 June 2009 would vary from the previous corresponding period by more than 15% other than those amounts arising from changes to accounting policies that the Company has instituted for the current financial year.
It is expected that the first half result pre tax will be approximately 8% over the December 09 comparative period. Profit after tax is expected to be between $6.7 million and $7 million for the full year, up from $5.5 million in 2010 (an increase of between 21.8% and 27.3%). The effective tax rate for 2011 is expected to return to 30% up from 26% in 2010 following the benefit received from the Federal Government Investment tax allowance which was finalised in December 2009.802

It is understandable that not all companies can provide this sort of detailed guidance within a few days of receiving an ASX query, though the clearer the guidance in a “no” answer the better prepared investors can be regardless.

Certain organisations reported operational results from month to month, in effect regularly disclosing the organisation’s progress:

Based on the announcements made to market on a monthly basis in relation to funds under management and performance of the investment funds there is a likelihood that operating results will vary from the December 2008 period. The extent of this variation is unknown due to it being largely dependent on future movements in funds under management and performance of the investment funds. Funds under management and performance continue to be disclosed on a monthly basis to ASX.803

While it is important for certain organisations to continue updating the market in piecemeal fashion regarding operations and their impact on period to period results, should the cumulative effect of a group of these announcements, which may not be material in themselves, tip the scales and send the company into

territory where a material change is likely on the cards, it makes sense to summarise these changes and explain their import as a group on the accounts likely to be lodged.  

If they are not and only become released by virtue of a price query there is likely no need for alarm as all relevant information had effectively been released to the market for all to see up to that point in time. Nevertheless, it would be better practice for companies with cumulative changes to advise once they have piqued the relevant threshold to spell out the organisation’s circumstances clearly.

The reference to previous announcements generally as indicators of the company’s forthcoming results was frequent, and included actual releases through the ASX platform as well as references to disclosures about future periods through previously released financial reports which indicated that results would vary by a material amount as well as discussion mooted at the preceding annual general meeting, whereby the information became public. Again, such responses which were ostensibly consistent with previous announcements or actual guidance indicating a material change were treated as unproblematic as they were ostensibly in compliance with the requirements of the regime.

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806 IDT Limited price query response dated 1 April, 2010.
Some companies did not offer guidance for the particular period ASX requested in a query, for example, a company which provided full year but not half year guidance. One such response referred to its full year guidance and analyst consensus with it, before providing a figure with which the market might compare to the previous corresponding period:

We have not provided specific guidance on a half-year basis. The analyst projections indicate that they are forecasting profit for full year 2009 within the range of the guidance we have given. Consistent with this full year guidance, the first half operating profit before abnormal items and income tax will be in the order of 50% above last year.\(^{809}\)

Given this disclosed nothing new and was consistent with previous guidance provided by the company such responses were classed as providing answers consistent with previous guidance and \textit{prima facie} unproblematic.\(^{810}\) This \textit{prima facie} fair reference to analyst forecasts to paint a picture for the market is in stark contrast to responses which tried to gild the lily or feather their descriptions with interaction with broker estimates:

On 13 February the Company noted that the then current range of market expectations for underlying profit to shareholders was concentrated in the range of $39 million to $45 million and that the Company was comfortable with that range subject to the customary qualifications concerning seasonal conditions, mark to market and MIS sales. It is relevant to note that the range of market expectations for underlying profit to shareholders is now understood to fall between $19 million to $41 million with most projections falling within the range of


\(^{810}\) However see Australian Securities Exchange, Australian Securities Exchange, \textit{ASX Listing Rules: Guidance Note 8} at \{7.2-7.4\} regarding analyst consensus forecasts.
$26 million to $40 million. The Company remains comfortable with these earnings expectations and is unaware of reasons other than the qualifications previously noted why this position should change.\textsuperscript{811}

Quantifying this attempt at a response as far as the 10-15% range is concerned admits of a material change, but the company’s feathering of its response makes it almost indecipherable upon first glance. Indeed it represents a failure as far as submitting a clear précis of the company’s position in response to the ASXs questions in the absence of any previous guidance which might have assisted analysts at arriving to their valuations, which should have been referred to if in existence.

\section*{5.12.2 Responses advising of a material change}

Any responses to a non-standard price query which did not provide a clear “no” answer placing it in the group discussed above were set aside for further analysis. Forty-four of these responses answered “yes” or explained a material change without referring to previous announcements, or otherwise rendered previous guidance irrelevant.

Of those which clearly notified of a change, many provided some exegesis of its genesis, and then attempted to downplay the importance of the changes:

- Yes, the Company expects to report a significant reduction in its net loss for the half year to 31 December 2008 compared to the corresponding

\textsuperscript{811} FCL Limited price query response dated 7 April, 2009.
half year to 31 December 2007, predominantly due to a reduction in operating costs associated with reduced expenditure in order to preserve cash. The Company is not able to accurately quantify the improved loss position until the December result is finalised. However, as previously announced to the market, the main issue confronting the Company at this time is cash liquidity and the need to obtain additional funding in order to continue operations. As such, it is considered that the cash position is more relevant at present than a reduction in net losses.812

Offering the caveat that numbers were still subject to audit and review813, many responses answering “yes” were keen to explain that this would occur because of ‘non-operational’ issues including non-cash items814 and write-offs815, foreign exchange and depreciation and amortisation816, unexpected non-recurring items817 and impacts upon the company’s assets.818

This meant in effect that the reasons for the changes included issues not relevant to the prior period, making comparisons with such of limited use. Companies on the reverse side of that phenomenon, where such changes occurred in previous periods and were not likely to happen in the current period leading to a material difference in potential results also explained that

815 MEO Limited price query response dated 27 April, 2009.
such periods were not comparable\textsuperscript{819}, yet often did not provide an exact number, simply saying that results would vary by more than 15%.

Some accordingly did a good job of explaining the context within which a change of results should be interpreted, albeit only in response to a query and not of their own volition, detailing the reasons for past performance and explaining why this was not the best base to offer a comparison with current performance:

Yes. UXC had a poor first half in the previous corresponding period, and this has been analysed and explained in the financial reports. UXC had a strong second half of financial year 2009, and reported operating results before abnormal items and income tax that were nearly three times as much as the first half. It is expected that operating results for the half year ending 31 December 2009 will be significantly improved from the previous corresponding period and more similar to long term trends reported by UXC.\textsuperscript{820}

Others explained that while management thought it possible that results might vary from the previous corresponding period by more than 15% that ‘the Company believes that the operating loss compared with the corresponding period is not material to share trading at this stage of the Company’s development’\textsuperscript{821}, or that ‘due to the Company’s activities as an exploration company the amount of any variation is unlikely to be material’.\textsuperscript{822}

\textsuperscript{820} UXC Limited price query response dated 22 September, 2009.
\textsuperscript{821} ACR Limited price query response dated 12 May, 2009.
\textsuperscript{822} BOW Limited price query response dated 10 June, 2009.
This was an interesting feature of many smaller companies’ responses to non-standard price queries. The resulting question is whether companies in their nascent phases, and when operating results are thought to be immaterial to investors, should be absolved from providing up to date projections on performance? The prudent answer is likely a friendly “no”. While investors in such ventures would likely have taken the company’s potential for producing such surprises into account given their type and therefore should not come as any shock, this does not figure as a reason for failing to give due regard to reporting standards given the 10-15% threshold. Indeed, the company should still make a habit of conveying such information to the market so as to regulate expectations and not allow misapprehensions to come to exist, say where investors might misinterpret a change in trend as being due to new organic growth – although practically the chance of such misapprehensions arising and their being pursued by the regulator is unlikely, given the fact the regulator appears to have more significant priorities to deal with. Giving the market a clear grasp of the entity’s current situation in the current period vis a vis previous and future projections, and an understanding of why performance is likely to be materially different, is important in maintaining investor faith in the market and should be encouraged as a matter of habit.823

Better responses also explained why they were unable at that time to give any further detailed information on the magnitude of the variation.824 They also quantified the expected magnitude of the variation in an absolute figure or a

range in similar terms\textsuperscript{825} and included the comparative figure for the previous corresponding period in their response before describing the individual factors which were expected to affect performance.\textsuperscript{825}

One response, though having previously advised its earnings would be more than 15% below the previous corresponding period, added in response to a price query two months later that ‘it is expected that it will be approximately 40% below the previous corresponding period’.\textsuperscript{827} Such responses were also categorised as advising of a change for the new information released in response to the price query. Another example of such information being brought to light by a non-standard price query is evident in the following response, where the company ostensibly had the information ready to hand yet had not thought it necessary to inform the market:

At this time, the Group expects that there will be a change in its operating results before abnormal items (defined as asset revaluations, impairments, mark to market and settlement of derivatives, foreign exchange impact and restructuring costs) and income tax so that the figure for the financial year to 30 June 2010 would vary from the previous corresponding period by more than 15%. The figure is currently expected to be 25-35% lower.

It should be noted, however, that in its release of 12 November 2009, the Group advised that it expected that operating results for the financial year ending 30 June 2010 would be approximately 45% lower than for the financial year ended 30 June 2009. For the purposes of

\textsuperscript{826} IAT Limited price query response dated 28 July, 2009. See also BSR Limited price query response dated 17 August, 2009.
\textsuperscript{827} PPX Limited price query response dated 12 February, 2009.
responding to this price query and in the time available, the Group has conducted a limited review of financial information and expectations for the balance of the current financial year and, as noted in the paragraph above, currently expects its operating results to be 25-35% below the prior year. The expected favourable variance to the 12 November 2009 announcement is primarily due to actual and projected interest rates in the US being lower than previously forecast.828

Companies in these situations, whether the variation moves either in a positive or negative fashion need to realise that continuous disclosure requires just that, so long as the information is material, regardless of the type of change. Just because the company had already noted its results would be 45% lower and had informed the market according to the 10-15% rule, this does not stop it from being required to continue to update the market of an material changes to that figure, likewise the other direction. Given investors would have priced in the previous advice of a 45% drop, information that the drop would not be as bad as anticipated of the magnitude mentioned (from 45% to 25-35% lower) could be expected to be material.

Responses stating that it was ‘possible’829 that results ‘may’830 or ‘could’831 vary by material amount were also counted as affirmative answers. If unsure, the company would do well to make the contingent factors which might cause any such variation clear in their responses. Only a handful of responses outlined contingencies which might push results over the advisable threshold of 10-15%,

and effectively communicated to the market the state of knowledge of the company and the matters potentially affecting its performance.\textsuperscript{832} While there was no real clarity around whether this would happen or not from the company’s actual response, this is the best that could be hoped for in the circumstances and is to be commended.

Despite the fact only a small number of companies divulged a material change in results in response to a non-standard query, the question which must be asked is, if this is such a serious obligation, why none of the companies which did so appear to have been pursued for their failure to disclose, especially in the case where some companies failed to provide any reason for a potential material variation?\textsuperscript{833} Such information is obviously at some point going to be protected by the internal management information exception but once it has the requisite ‘reasonable degree of certainty’ that such a difference will come to exist it must be disclosed. The ASX has stated that

\begin{quote}
the matters ASX refers to ASIC usually involve a very material difference in earnings compared to the relevant base used to measure market expectations... and where the announcement of the entity’s results triggers a material change in the market price of its securities.\textsuperscript{834}
\end{quote}

Whether this means these apparent breaches were not on the serious end of the spectrum when the company’s circumstances and potential investor losses

\textsuperscript{832} GOA Limited price query response dated 18 October, 2010. See also DGR Limited price query response dated 6 October, 2009.
\textsuperscript{833} RSN Limited price query response dated 24 September, 2009. See also HRL Limited price query response dated 28 September, 2009.
\textsuperscript{834} Australian Securities Exchange, \textit{ASX Listing Rules: Guidance Note 8}, at [7.3.5].
are taken into account will not ever be known, given the fact the market is not privy to matters referred upwards by ASX to ASIC.

5.12.3 Responses relating to abnormal or extraordinary items

The second question usually asked of companies in receipt of a non-standard query with more than one additional question was whether the company had any reason to think it might record any material abnormal or extraordinary items or material abnormal or extraordinary profit for the period referred to.

A number of responses answered in the affirmative to such recognition of abnormal items for a particular period in circumstances where it seemed this was the first time the market was being made aware of the change.\textsuperscript{835} As with the main sample, a number of companies had previously mooted the potential recording of material abnormal or extraordinary items or had announced phenomena which would lead to same\textsuperscript{836} and made this apparent in their responses.\textsuperscript{837} These were of no real concern, compared to instances where this was not the case. Companies noted a fall in the value of the company’s investments\textsuperscript{838}, writedowns in the value of inventory\textsuperscript{839}, the recognition of tax losses from previous periods to reduce tax payable the current period\textsuperscript{840},

\textsuperscript{835} Given the lack of reference to any previous announcements in the response.
\textsuperscript{836} NEU Limited price query response dated 20 January, 2009.
\textsuperscript{837} AWB Limited price query response dated 18 September, 2009. See also FXJ Limited price query response dated 4 February, 2009.
\textsuperscript{838} TPI Limited price query response dated 16 February, 2009.
\textsuperscript{839} NUF Limited price query response dated 27 August, 2009.
\textsuperscript{840} ANN Limited price query response dated 5 February, 2009.
restructuring\textsuperscript{841} and further restructuring costs\textsuperscript{842} as causes for the likely recognition of such items.

While the prodding and prompting of the release of this information is valuable, the question must be asked again, as to why the company had not advised the market earlier in the piece. This is especially in the context of the trading activity which may have occasioned the query. While the exceptions relating to incomplete information and internal management information may have protected against disclosure, there is nowhere near enough public information to make a concrete judgment as to whether the information met these exceptions or failed on the reasonable person test, and whether company was actually in breach of the requirements of the regime in these instances (with the exception of Nufarm Limited). Nor does the market have any sense of whether such disclosure behaviour was taken further up the enforcement hierarchy for ASIC attention.

The question must be asked as to when companies become aware of such information: is it only in response to the query that the relevant investigations were performed or were they known earlier?\textsuperscript{843} The answer to this question reincarnates the discussion first broached in relation to negotiations-in-progress above. Two companies expressed the idea that material abnormal items of the kind expected to affect results were simply within the nature of the company’s business, and the market was expected to know these as ‘[t]he existence and nature of these abnormal items are consistent with those

\textsuperscript{841} CRG Limited price query response dated 11 February, 2009.
\textsuperscript{842} AIO Limited price query response dated 4 March, 2009.
\textsuperscript{843} CXH Limited price query response dated 10 February, 2009.
disclosed in prior periods’. While this might be the case, it is still useful for investors and therefore and good practice for such organisations to provide up to date accounts of how such changes are expected to flow through to results and whether they will have a material effect.  Respondents also used the opportunity to note potentially new impairment charges which might be incurred and which were under review or being tested and could not yet be quantified.

5.12.4 Accounts not yet finalised

31 responses in the sample offered neither a confirmation nor a denial regarding the primary question asked of them, nor a reference to previous guidance as regards material variations, stating simply that accounts were not finalised and that they were unable to say whether there would be a change of the magnitude requiring disclosure.

This kind of response was also offered for the abnormal material items question, with Pacifica Limited stating that it was ‘currently finalising its business plan for 2009-2011 which will determine whether or not an impairment loss will be booked (amount, if any, cannot be quantified at this

844 CNP Limited price query response dated 14 August, 2009. See also CER Limited price query response of the same date and 27 April, 2010.
stage). One response stated that the company was in the process of preparing its accounts and that there might be a need to ‘announce an impairment to the carrying values of its assets. While the review is not yet finalised, by way of preliminary guidance, Pacific Brands Limited estimates that the potential impairment would be of the order of $200 million’. A contextualisation of such a review of the values of tangible and intangible assets would have been preferable and better disclosure practice.

While some responses mentioned above stated they expected no change but that a clearer picture would emerge after a certain period or compilation of results, others stated that they were simply unable to offer a clear answer to the questions asked at that point in time due to a lack of certainty around performance. Some responses offered detail as to why, and explained that several factors generated uncertainty around the company’s results and that a number of transactions which might affect final results were in progress. Seasonality in business models was also cited as a reason in such responses. Commodity price fluctuations also precluded the provision of clear guidance for companies highly exposed to movements in say one commodity price:

The Company released its First Quarter results on 30 April 2009. In that release, the Company confirmed its full year production guidance for

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the year ending 31 December 2009 of 280,000 - 300,000 ounces of gold; at a forecast cash cost of US$365 - $405 per ounce. Notwithstanding this guidance, movements in gold prices and foreign exchange rates can materially impact on the Company's financial results in any given period. Accordingly, it is difficult to provide earnings guidance for the financial half year ending 30 June 2009 with a degree of certainty prior to the completion of such period.  

Accounting rules also caused some companies uncertainty, as did the company’s own budgeting and modelling, with one company stating that:

Management is undertaking a review of year to date financials and assessing the reasonableness of the assumptions that underlie the Company’s budget for the current financial year. This work is expected to be completed in the next two weeks. Should this result in an assessment by the directors that the Company’s profit will vary from the previous corresponding period by more than 15%, the Company will immediately make an announcement to ASX.

It is not immediately clear why this should be considered an acceptable response, given the circumstances surrounding the infringement notice issued to Nufarm. Nor is the following:

As the accounts for the period ended 31 December 2008 have not yet been finalised, the Company is not in a position to confirm definitively whether or not there may be a change in the operating profit before abnormal items and income tax from the previous corresponding period by more than 15%.

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It might not be particularly easy for some businesses to put together reliable forecasts immediately upon an ASX query, with some stating that they would not be able to determine a definitive answer to the questions posed by ASX until audit and Board review. While these responses make sense from a quality over quantity perspective, should investors expect ‘definitive’ answers to such questions? It may be the case that while investors are used to having information otherwise regularly cast in their direction, that their expectations may need to be tempered as such information is not necessarily easy to generate depending on the company’s circumstances.

On the other hand, given the rules require organisations to keep enough of a tab on their operations such that it can inform the market if it becomes aware of a material change in projected results, ignorance will be no excuse, and companies will need to institute internal reporting systems which allow management to assess the organisation’s position at any given time and respond to any ASX query or in the absence of one simply inform the market when it becomes aware of a change requiring disclosure. There would need to be a corresponding tolerance for error amongst market participants, although keeping one’s finger on the pulse appears more important than ever in rapidly transforming markets and investors should be privy to any information which could affect their decision to buy, sell or hold the relevant securities. Indeed, this goes to the heart of the purpose of the regime. Smaller companies should not find this difficult except for a general lack of resources and the fact their projections and comparisons from year to year and further projections may not

\[\text{AMC Limited price query response dated 10 July, 2009.}\]
be clear as preferred; larger ones will have had the time to understand their disclosure obligations and institute appropriate mechanisms for the reporting of material changes, though problems arise when companies either grow too rapidly and do not have the internal systems to keep up with disclosure obligations, or if the company’s operations are spread across multiple geographic locations where it is difficult to obtain up to the minute information and assimilate it into the rest of the organisation’s numeric readings to provide a clear picture of its operational status.

So while it is understandable for this many responses to have had no effective answer at the time for the range of reasons noted above, companies will need to consider how they might continuously adapt reporting and analysis systems to enable quick readings on the company’s performance to the date of the query in order to provide a reliable estimate to the market. The reason for this is simple: Nufarm Limited. Despite exhibiting similar difficulties in getting across its accounts, the leeway given by ASIC once all relevant facts were established for coming to a view as to the company’s financial position was not wide, and resulted in significant negative publicity for the company as well as the levelling of fines and entry into an enforceable undertaking. If it is not possible to obtain a complete picture at the time, the company should explain why, and give the most up to date review of its position at that time, with a promise to update the market in due course as soon as the indeterminate results reveal themselves. This is ‘continuous’ disclosure in its true sense and should not be shied away from. Management undoubtedly make cost benefit calls on such
disclosure behaviour, in ignorance of the advice of French J (as he then was) in *Chemeq* relating to playing ‘calculated risk games’⁸⁶⁰, although it is unlikely the commercial mindset will ever shy away from such thought. Accordingly, any company which has a suspicion, or even a lack of definite knowledge about forthcoming results, should second guess any decision to refrain from disclosure.

While explaining it was not in possession of finalised accounts for the period requested by ASX and was not able to confirm definitively whether there was a material change from the previous corresponding period, one company stated:

> Due to the timing of the letter from the ASX and as the accounts for the period ended 31 December 2008 have not yet been finalised, the Group is not in a position to confirm definitively whether or not there may be a change in the operating loss before abnormal items and income tax for the period ended 31 December 2008 from the previous corresponding period by more than 15%. However, based on management accounts prepared for the 5 month period ended on 30 November 2008 when compared with the corresponding calendar period in 2007, there is a material favourable variance in the operating position of the Group. This variance is primarily due to unrealised (i.e non-cash) net foreign currency and derivative gains resulting from significant period on period movements in foreign exchange rates. Based on the Group's hedge accounting policies and accounting treatment of intra-group loans, foreign currency and derivative gains and losses are recorded in the income statement. If the net unrealised (i.e. non-cash) foreign currency exchange and derivative gains are ignored, then the underlying

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⁸⁶⁰ See discussion at 3.2 above.
operating result for the 5 month period ended on 30 November 2008 is an 18% improvement on the corresponding calendar period in 2007. Providing such a response instead of the ubiquitous ‘accounts are not yet finalised and there is no definitive answer for the period referred to’, the company above disclosed where it was at that time, which is ostensibly what the regime requires and is to be commended. The only question is why the company did not advise of this earlier and had to wait for a query to do so if the potential change had the character of materiality?

5.12.5 Unclear responses

A small group of responses failed to provide a clear answer of any sort, and therefore fell into similar territory in terms of disclosure performance to answers which stated accounts were not yet complete and provided no information at all. In a way their offering was worse as they appeared to obfuscate issues thereby distracting from a clear understanding of the company’s situation.

Statements to the effect that profits would simply be higher or lower than the previous period do nothing to answer the questions posed by the ASX. Nor do the provision of numbers with no contextualisation, or musings around profit projections based on current valuations of investments which would wipe...
out year to date profits, which themselves have not been disclosed.\footnote{CVC Limited price query response dated 28 January, 2009.} The lack of an attempt to answer the question, as the company deemed it irrelevant to the company’s share price was also unhelpful.\footnote{ESI Limited price query response dated 26 March, 2010. See also SLX Limited price query response dated 29 April, 2009.}

Some responses, while failing to provide a clear answer did provide more detail than others, mentioning the reasons for the prior period’s results and covering important variables expected to have an effect on the period under review.\footnote{NGF Limited price query response dated 4 May, 2009.}

One company had the decency to provide such a response and append a rundown of preliminary expected results.\footnote{SUN Limited price query response dated 7 August, 2009.}

General statements that the company’s results may simply vary or improve\footnote{BDG Limited price query response dated 15 May, 2009.} from the previous corresponding period do not provide the requisite detail for a satisfactory answer to this question. This is understandable for companies which have moved from one phase of their existence to the next\footnote{BDG Limited price query response dated 15 May, 2009.}, and the fact the company is unable to answer definitively should tell the market something, although it is regrettable that companies cannot do better than this upon questioning from the ASX in the context of a price change begetting of a price query. Indeed, they do not positively add to perceptions of market integrity amongst those involved with them as abnormal trading behaviour goes unexplained in a context where the company does not know its financial position.
5.13 Price queries and market integrity

Given the reality of frequent abnormal trading behaviour in the market evidenced by the issuance of price queries, and its potential to unsettle investors who may see no rhyme or reason in it, it becomes necessary to find a way to make sense of such phenomena in circumstances where other enforcement tools are simply unable to respond with the requisite speed. The issuance of price queries fulfils part of this function by signalling to the market that such activity has not gone unnoticed. The explanatory value of corporate responses on the other hand, which can give investors an understanding of what the company thinks might be responsible for the abnormal trading activity in its securities is found in their potential to allay negative revisions in assessments of market integrity. In their absence, widespread concern would see trust in markets vanish, as it did following the lack of transparency around certain business practices engaged in during the late 1980s, which was the driving force behind the establishment of the current regime. As such, company responses constitute an important part of the matrix of integrity surrounding the market for their own, and other entities’ securities.\textsuperscript{870} It is imperative therefore that such responses provide quality explanations if they are to positively impact perceptions of market integrity.

As stated at the outset, myriad reasons could potentially explain why any investor (or group of them) might decide to bid securities up or down on any

\textsuperscript{870} By the simple association of existing on the same market.
particular day. A simple “no” response should therefore not necessarily be taken as problematic as management may in fact have no idea as to why the abnormal trade of its securities has begun. That said, investors would do well to monitor any subsequent price sensitive disclosures within a short time horizon which might explain the earlier price change. While not conclusive, such circumstances provide enough information to form the circumstantial judgment (in the absence of any other demonstrable reason for the abnormal trading activity) that the company had a problem maintaining the confidentiality of that information. Should this happen too often, an investor may decide this is not the type of company they wish to be involved with, or alternatively, that there are more important reasons to maintain their investment regardless.

Likewise, straight “yes” answers should not immediately be taken as problematic either, as the information released may have been hitherto protected by the exceptions. Such responses might be likened with responses providing a “no” answer to question one only to go on to provide detail of potentially material information that had not yet been released. This means that in the context of a response which provides more than a simple “no” to price query questions, that a simple “yes” or “no” response to the first question is effectively unimportant in an assessment of the company’s disclosure performance. One company’s “no” may be another’s “yes” and therefore should not form the kernel of analysis. Instead the actual explanation given, regardless of where it falls in the response, should be the point of focus.
Responses which did contain some attempt at providing an explanation for the abnormal trading activity in their securities can effectively be divided into two groups, according to whether the phenomenon expressed to constitute an explanatory factor was generated or released by outsiders, or by the company itself. Controllability should be considered a defining element in assessing a company’s disclosure performance here – if the company cannot be said to be in control of the factor which may be thought to be explanatory of abnormal trading in the company’s securities then it might have been difficult if not impossible for it to inform the market before the information was made public, and therefore unfair and uninformative to judge its disclosure performance by it. Of course once information the company has no control over has been released, it can be judged on its behaviour if it fails to halt the development of any false markets as required by listing rule 3.1B.

For example, changes in commodity prices, broker reports, speculative trading behaviour, abnormal trading behaviour, market reassessments, media and industry attention as factors which can influence trading are effectively uncontrollable by the company as they are given effect by other parties, either specific (media agencies and research houses for example) or abstract (i.e. the market in general determining commodity prices and driving speculative activity).

To be sure, the information content of responses providing such explanations can be improved as discussed in the relevant sections above with a view to improving the market’s appreciation of their explanatory value. Generally
speaking however, their potential role in influencing trading activity in a company’s securities appears part and parcel of the operation of the market as currently constituted and are not necessarily a cause for concern over the company’s disclosure performance. Whether they adequately explain the abnormal trading activity to any individual investors’ satisfaction is another matter entirely.

Information or phenomena provided as possible explanations which the company actually is in control of however, may appear to indicate questionable disclosure behaviour if released in response to a price query in the context of the abnormal trading activity preceding it. While roadshows provide a relatively banal example of information that, should they have the effect some companies seem to believe they do, is controllable by the company and should be released in advance of their occurrence so that investors know that a potentially price moving event is about to occur – the stakes get much more serious when negotiations, operational updates and non-standard queries are involved. Although the exceptions embrace such species of information depending on the circumstances – both to prevent the company’s interests being prejudiced, as well as protect investors from incomplete or insufficiently definite information – inferences can nevertheless be drawn, whether rightly or wrongly, when abnormal trading behaviour precedes the gouging of such information by a price query. What of an unexplained abrupt price change in a particular direction, which comes to be explained, by a response to a query no less, and includes information the company was aware of and had been
withholding from release? In such circumstances the logic is simple, the inference often irresistible, that informed or insider trading may have taken place. Regardless of their truth content and lack of direct evidence, the effect of such assessments is to damage perceptions of the integrity of the market for the potential that an unfair playing field may appear to have existed in the market.

Such negative sentiment might attach to a particular company itself and its disclosure practices, despite the fact it may have been in complete compliance with the regime while withholding the relevant information. The potential for such assessments points to the need for investor education as to what the limits of what continuous disclosure as currently understood and practically managed actually are. Yet it also exposes a more problematic chink in the armour which the disclosure regime is designed to provide, and through which market integrity may be pierced, for the valid retention of information protected by the exceptions can still potentially be used for illicit trading behaviour resulting in abnormal trading activity. Indeed, allowing this information to maintain protection from disclosure, until say advice from the ASX that in its opinion confidentiality has been lost, can make the situation worse by maintaining an environment which might allow for the unfair use of such information. What is the proper method for dealing with the negative potentialities for market integrity of such otherwise legitimately captive information?
Listing rule 3.1A.2 states that loss of the protection of the exemptions occurs once information has ceased to be confidential and the ASX is of the same opinion. However, there appears no clear explanation in the listing rules, the legislation, or the ASX guidance note as to whether the ASX’s belief requires communication to the company concerned. Current enforcement practice appears to paint a relatively soft handed approach by ASX, which seems to interpret the rule as requiring the communication of its belief to a company in such circumstances before the company seems to be expected to realise it has lost the protection of the exceptions. While there may be a practical basis for a preference for this approach, it does result in further delay in such circumstances and allows conditions for abnormal trading activity, potentially involving insider trading, to continue until such time as ASX has informed the company of its belief, and further until the company actually responds to it. The potential additional damage this can cause to assessments of the integrity of the market may justify placing the responsibility for determining whether confidentiality has likely been lost entirely on the entity: With appropriate guidelines for when ASX might be of the same belief (a belief which need not be communicated as per current practice but certainly can be) companies may feel it necessary to respond to such situations sooner, and also allow investors and regulators to determine much more easily whether it appears the entity’s disclosure practices pass muster. Another solution in addition to investor education or changing current practice is imposing a mandatory trading halt for large price or volume changes. This is unlikely to be preferred by listed entities.
Regardless of whether or not such changes occur, companies will need to improve their understanding and appropriate use of trading halts in the case of information which is close to becoming disclosable, while also learning to correctly assess whether the protections of the regime have been lost based on the reasonable person test and the loss of confidentiality limbs of the exceptions, discussion of which is offered in the latest re-release of Guidance Note 8. Indeed, investors may just have to accept, if they haven’t already, that a perfect world does not exist in man-made markets and the potential for a loss of confidentiality can always stalk the market for a particular company’s securities. While tweaking with the application of the current rules as discussed above might be able to help, given the costs versus the benefits involved in such a move the idea that ‘near enough is good enough’ may suffice here, as the companies involved represent a small subset of the market, and already likely attract more speculative investors who might not accord transparency and adequate disclosure a high value in any case.

While investors might therefore feel confident that the immediate release of material information relevant to their trading decisions is frequently policed via the issuance of price queries to companies, the vagaries of the current application of the rules can allow breathing room for further potentially abnormal trading. This can allow damage to perceptions of the integrity of the market to be sustained. While a proper understanding demonstrates that the regime itself is simply not able to control for all such eventualities, and that there is no problem with many instances of company disclosure in such
instances, the reality of the potential for insider trading to have occurred can come to affect assessments of market integrity which the disclosure rules are touted to protect. While the rules can be applied differently the potential benefits of doing so are unlikely to outweigh the perceived costs of such a move to requiring companies to take their own assessments of the potential loss of confidentiality and release material information accordingly. In short, the adage ‘if it ain’t broke don’t fix it’ likely applies here, as the vast majority of securities in the market do not seem to admit of the volatile abnormal trading activity the securities in this sample do.
6. AWARE LETTERS

6.1 Introduction

Aware letters are usually issued by the ASX when the actual release of material information by a company is framed by an abrupt change in security price. In this way aware letters may be seen to represent the other side of the lower level day to day enforcement of the regime involving the actual disclosure of material information (late as it may be), compared with price queries dealing with situations which *prima facie* appear to involve a lack of it. It is important to appreciate at least one important link between the two tools, as responses to price queries themselves might see the release of potentially material information which then leads to the issuance of an aware letter as a follow up mechanism. By no means however must the issuance of a price query precede that of an aware letter.

The sample period of 2009-2010 yielded 179 aware letter responses, usually identifiable by the file naming protocol of the ASX at the bottom of each query page but most evidently confirmed by the style of questioning therein. Aware letters begin by alerting the company to pieces of information, either supplied by the company through previous releases or by external parties regarding the company’s operations, before drawing the company’s attention to the definition of ‘aware’ in Chapter 19 of the listing rules:

> an entity becomes aware of information if a director... has or ought reasonably to have, come into possession of the information in the
course of the performance of their duties as a director or executive officer of that entity.871

Upon doing so, the ASX refers to the exceptions under LR 3.1A and any other relevant definitions (for example the ASX’s understanding of the term ‘confidentiality’) 872 before moving on to ask questions concerning the materiality and confidentiality of the information referred to in the aware letter. Further specific questions relating to the specific information causing the ASX concern follow before concluding with the ubiquitous request for the company to confirm it was in compliance with the listing rule.873

Due to the diverse types of information released by companies around abnormal trading activity which can become the subject of an aware letter, it would be fruitless for the ASX to ask standard form questions as is done with price queries as they are unlikely to extract the exact information required in the circumstances. This makes coding and analysis of the raw data of ASX aware letter questions and corporate responses to them quite an involved process. Given the relatively smaller numbers of aware letters when compared with price queries, aware letter responses were individually analysed and grouped according to common issues to enable analysis of those most frequently recurring. This allowed for the more detailed analysis of circumstances leading to the issuance of aware letters in the sample and the price changes surrounding them.

873 The ASX’s description of aware letters in its recently re-released ASX Guidance Note: Australian Securities Exchange, ASX Listing Rules: Guidance Note 8, at [8.4].
Significant issues in the continued existence of any company, including capital raising through placements, internal governance issues, the company’s interaction with regulatory agencies, entry into pre-contractual arrangements, takeovers and mining specific issues all figured as situations which frequently drew the ASX’s aware letter issuing attention. This chapter analyses multiple examples of seemingly wanting disclosure behaviour by respondents in each of these groups with a view to offering guidance as to how entities might best address such situations from a disclosure perspective in future. Such analysis can also give a sense as to whether these explanations might add to or detract from perceptions of the integrity of the market in the same way responses to price queries do.

6.2 Placements

Companies raise capital to fund operations in various ways: selling equity positions in the organisation through the issue of shares on the market; binding the company to covenants to raise debt; having key management personnel buy into the company to contribute to its ledger should it need additional injections of capital; or even using retained earnings from previous periods. Should a company desire to raise a certain amount of capital, perhaps in a short timeframe or for some other reason it may also opt for a placement, which involves approaching (or having an advisor approach on behalf of the company) professional or sophisticated investors to make large contributions to the
The injection of substantial amounts of capital can figure as important positive news for a company, spelling the faith a large investor has in the company’s operations as well as providing it with the capital to tackle more ambitious projects or obtain the breathing space necessary for some companies in more dire circumstances to get themselves out of trouble. If a company is able to maintain confidentiality and no abnormal trading in its securities is evident until a placement is made, the company will have the full backing of the exception relating to incomplete negotiations and insufficient certainty to justify its non-disclosure. Should a price change flank the other side of the announcement of a placement however, suspicions that confidentiality was lost and worse, that informed trading took place prior to the release of information to the entire market, may arise.

Originally issued a price query for a price rise of 20% over six days, platinum producer Aquarius Platinum Limited (AQP) explained the price rise in its securities as being due to a rise in commodity prices of 7% and 15% for two of the company’s products (platinum and rhodium respectively).874 Five days later, the company announced the launch of a convertible bond through which it intended to raise US$250 million, which was confirmed as complete the next

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day. The capital was described as having been raised through ‘an accelerated book build placement with institutional investors conducted by Goldman Sachs International acting as sole bookrunner in connection with the offering’.\footnote{AQP Limited aware letter response dated 30 November, 2009, see original ASX aware letter at 3, appended to AQP response.}

In its response to an aware letter sent by the ASX the following day, AQP explained that while it thought the information concerning the launch of the bond was material at the time, that it would not account for the trading in the company’s securities leading to the 20% price change originally the subject of the price query. AQP stated that

\[\text{[t]he Company considers that any announcement or action in relation to the proposed issue of the Convertible Bonds prior to 24 November 2009 would have been premature and potentially misleading as negotiations were at a very preliminary stage, the terms of the Convertible Bonds had not yet been finalised and the Company had not resolved to proceed with the issue.}\footnote{AQP Limited aware letter response dated 30 November, 2009, at 2.}

The company explained that it had first entered discussions about the possibility of a capital raising with Goldman Sachs from 16 November that were confidential and in circumstances where there ‘was no certainty that the company would proceed with a convertible bond issue’, and that ‘pre-marketing’ only commenced 23 November 2009.\footnote{AQP Limited aware letter response dated 30 November, 2009, at 2, also stating “This is customary in a convertible bond market and takes place the day before any potential launch and only a limited number of investors are “wall crossed” on the basis that they agree to be made insiders. The convertible bond issue would not have proceeded had pre-marketing not been successful.”} While approval in principle was given to the issue at a meeting of the board on the 23\textsuperscript{rd}, the launch was still subject to a ‘go/no go’ call early on the next day, the morning of the 24\textsuperscript{th}. At

\footnote{AQP Limited aware letter response dated 30 November, 2009, see original ASX aware letter at 3, appended to AQP response.}
this time and after final discussions with Sachs, the company decided to proceed with the launch. While the price movement queried was contemporaneous with the capital raising going on behind the scenes, AQP protested its innocence and drew attention to other information which was said to have spurred the price movement:

AQP had under-performed its peer group prior to 13 November and given its recent positive news flow on Everest and the increased commodity prices in that period, the brokers were not surprised that its share price out-performed its peer group during the period 13-19 November 2009. Due to its previous underperformance and for the reasons stated above at question 1, the Company has no reason to believe that there was any connection between the potential convertible bond issue and the trading in the Company's securities from 13-19 November.

In addition, the Company has no reason to believe that confidentiality had been lost in relation to the potential convertible bond issue and no-one at the Company had any reason to think a premature announcement might have been needed.\(^{878}\)

In response to a question in the aware letter as to why the company did not disclose this information in its response to the original price query issued to it, the company stated that this would have been ‘premature and potentially misleading’ as the company had not yet decided to proceed with the issue, appealing to the protection afforded in exceptions to the listing rules.\(^{879}\) While the exceptions cease application on the issuance of a price query courtesy of the second paragraph of question one, if the placement was simply a nascent

musing of the board at the time there would have been no need to disclose it, or any other potential corporate activity which had simply crossed the board’s mind. The fact that it had entered discussions with its corporate advisor a few days earlier however give the sense that it may have been of more import and potential than intimated in the company’s response.  

What does this episode teach us about the regime? Firstly, the company likely should have disclosed its consideration of a capital raising upon receipt of the price query at the very least – would this have hurt its chances or otherwise prejudiced its interests? Potentially. Would it have accurately responded to the questions of the earlier price query? Likely so. While it would be difficult if not impossible to determine whether the price rise was due to the information it claimed – commodity price rises of significant size and previous positive announcements – a pall of doubt must hover over such an explanation when the change in price from 16-19 November is considered. What should companies in like situations do? Given the price query was released after discussions with Sachs had begun, it should have at the very least disclosed the very fact that preliminary discussions had taken place and that the company was considering such a move. Interestingly, the company raised its multiple listings as a reason for its disclosure behaviour, raising yet another factor which can complicate disclosure in such circumstances.

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881 As you are aware, the Company not only has a listing on ASX but also has secondary listings on the LSE and the JSE. In relation to the LSE and JSE, no query of the type you have sent us was sent to the Company by the UKLA or the JSE. Furthermore, in relation to your queries about why the Company did not request a trading halt, the Company also needs to take into account its two secondary listings. In the UK and South Africa a trading halt or suspension is very rare and
Further, and generally speaking, any claim by management that ‘confidentiality has not been breached in relation to this issue’ must be taken with several grains of salt – how could management ever verify this beyond doubt, especially when external parties are involved in such transactions? Nevertheless, whether confidentiality is breached or not, it appears management simply need to get used to the idea that a price rise might serendipitously coincide with movement on a company’s business plans, and that the disclosure obligation exists regardless.

The announcement of a successful placement raised the ASX’s aware letter-issuing attention on ten other occasions in the query period. All of the responses in this group considered the information they had released relating to a placement to have been material to the company bar one, which explained why it was not so in the following terms:

capital raisings are not isolated and occasional and therefore not material. The placements are a continuing known feature of the Company to maintain a going concern during the risk period of technology development.\footnote{AQP Limited aware letter response dated 30 November, 2009, at 4.}

\footnote{Although the Rules permit a suspension, you will not find many examples at all and the Rules are there to ensure the smooth operation of the market where there are draconian events happening which might impact the company, such as impending financial irregularity or very accurate speculation about a takeover when the company is not yet in a position to release its takeover documents. In addition, the LSE Rules also state that even if a company’s shares are suspended on an overseas exchange the FSA will not automatically suspend the listing in London and would want to consider the facts before deciding what to do. Lastly, in the UK and in South Africa the way companies deal with rumours is to put out cautionary announcements rather than suspension. For the reasons set out in this letter, putting out an announcement because of a rising share price did not seem appropriate and there were no rumours. APG Limited aware letter response dated 29 October, 2010.}
While different companies in different industries may have differing views on the importance attached to a capital raising, the fact of the matter is that in the context of abnormal trading behaviour, whether it involves insiders trading on confidential information or simply arises coincidentally, the company will ordinarily have a duty to disclose. Given the loss of the protections afforded by the exemptions should a price query be issued and the potential for a placement to constitute material information, such information demands release especially if discussions with a counterparty or advisor have been entered into, confidentiality possibly lost, and rumour mongering begun, creating a false market.883 In the absence of such factors and the ASX’s advice of its belief confidentiality has likely been lost, the company is within its rights to withhold disclosure.884 One company’s reasoning was clear:

The Company is of the belief that until the Placement was completed and cleared funds were available to the Company, the Placement falls under the exceptions in Listing Rule 3.1A where the information concerns an incomplete proposal or negotiation and contains matters of supposition or is insufficiently definite to warrant disclosure. The disclosure of the Placement prior to the closing time and the acknowledgement of cleared funds would have been potentially misleading to shareholders.885

Such reasoning appears acceptable, although whether it carries through to when the company actually received the money is another matter. Placements

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883 See also GLM Limited aware letter response dated 30 April, 2010.
885 See APG Limited aware letter response dated 29 October, 2010 which stated: The placement was not released to the market at an early time, because as a matter of corporate procedure, placements are not announced until completed and banked. This has been the Company's conservative approach for twenty five years as a listed public company. A placement of 14,876,429 fully paid ordinary shares at 3.5 cents each to raise $520,675 was made on 30 September 2010.
of this type more likely become advisable pieces of information if material and complete as to terms, whether or not they have yet to be funded. The fact monies remain to be received should be noted within any announcement. Another interesting situation raising ASX’s ire was that involving CuDeco Mining Limited (CDU), which announced 30 August 2010 that ‘the Company will not be entertaining or considering any issue of new shares in CuDeco near the current share price [$2.14 – ed]. The Company has approximately $34 million cash with zero debt’. Not three weeks later, the company announced on 23 September 2010 that it had raised $20 million through a placement at $2.00 per share.886

In response to the ASX’s concerns, the company stated:

The Company’s corporate adviser, Azure Capital Limited (Azure), identified a need for the Company to address the imbalance in its share register by considering increasing the institutional weighting. The rationale for the Company adding a substantial sophisticated institutional investor was to stabilise the share register and reduce recent share price volatility. The new capital will also strengthen the Company’s position to negotiate project finance upon the completion of the DFS at the Rocklands Copper Project.

A suitable institution was only identified by Azure on Wednesday, 22 September and a firm commitment received late in the evening on that same day. A mandate was subsequently signed with the lead manager on Thursday, 23 September and an announcement immediately released to the ASX.887

While this is understandable, in the context of previously emphatic statements companies and managers should be better versed in managing the market’s digestion of information concerning it. Situations involving placements require a delicate balancing act by disclosure relevant officers to ensure the entity’s interests are not compromised, but also that investors are not left without information which pockets of the market may be aware of and use to trade to their own benefit and others’ detriment. The tightrope is made even more treacherous when ASX and possible ASIC attention is added to the mix. Obviously the most important concern is to maintain confidentiality, for if the relevant information remains such no problems are likely to come to exist from a disclosure perspective.

If ASX has first issued a price query in relation to abnormal trading activity, whether this has arisen serendipitously or because parts of the market have discovered the company’s intentions, the company will have an obligation to disclose its position as far as any information which may have had the support of the exemptions up until that time. The best option here may be to request a trading halt in an attempt to ensure all is not lost as far as the work which has been done to that point in securing the placement. It will then have a time pressured environment in which to finalise its negotiations which may not be ideal depending on how much the potential investor/s entertaining the placement are willing to push the company which they know must finalise a deal within the two days allowed by a trading halt888; but such is life on the market underneath a continuous disclosure sky. Unless the company can

888 See footnote 547 above.
demonstrate it had no firm intention to raise capital through a placement at the
time it received an earlier price query it may be judged by the investing public
to have breached its disclosure responsibilities if such information is
subsequently revealed. Indeed it may be so judged anyway, and managers are
likely uninterested in having that type of sentiment following them or their
company.889 Regardless, upon the issuance of a price query damage control
requires managers make peace with this potentiality and disclose in the event
of abnormal trading behaviour to ensure both the company’s and their
reputations are not irrepairably besmirched. In the absence of a price query
and the simple issuance of an aware letter instead, the company will usually be
innocent of any disclosure failure in such circumstances, although the abnormal
trading occasioning the letter will ostensibly go unexplained. The judgments
investors can make in such circumstances can impact assessments of market
integrity.

889 The aware letter response of PEK Limited dated 8 October, 2010 provides a case in point – the
company’s securities appreciated from 38 to 63 cents in 3 days. In response to a price query the company
explained that recent announcements conveying better operating results were responsible for the price
movement. In its response to the aware letter the company explained it had requested a trading halt upon
becoming aware of material information – the determination of directors to undertake a share placement
to sophisticated investors – in view of the near 70% appreciation in the company’s share price, however it
may appear to investors that something else may have been happening here. From the company’s
perspective, it is hard to disclose information which has not yet come into existence – the mere thought of
potentially making a placement is not material information which needs disclosure, not until a decision is
actually made to proceed with one. In the circumstances investors might validly doubt the company’s
word that the placement was only being considered at the time.
6.3 Internal governance issues

The internal governance of an organisation, and the tug-of-war over the balance of power both between and within the company’s organs (members in general meeting and the board of directors) which can come to play out within it can develop into disclosable events as far as the regime is concerned. Only a handful of responses in the sample exhibited such circumstances.

One involved Extract Resources Limited (EXT), which made an announcement dated 27 May 2009 concerning changes to the board and an agreement with Kalahari Minerals PLC made earlier that year (dated 25 February 2009) whereby Kalahari agreed to refrain from calling further shareholder meetings with a view to removing members of the Board. This was in the context of an announcement dated 9 March which disclosed an agreement whereby Extract’s board agreed to a number of changes being implemented and whereby Kalahari agreed to ‘seek dismissal of a legal action pertaining the appointment of a Director and the withdrawal of a request to call a meeting seeking removal of 2 Directors of the Company’. In response to whether the company knew the relevant information prior to the announcement of 9 March (as it seemed to have admitted to by mentioning the 25 February date in the 27 May announcement) and whether this constituted material information for the purposes of listing rule 3.1 which should have been lodged at the earlier date, EXT responded:

Although the agreement was set out on letterhead dated 25 February 2009, the information was not released earlier than 9 March 2009 as
numerous matters needed to be completed, including written confirmations from the various parties in relation to the matters referred to in the 9 March 2009 announcement, prior to the agreement being valid or in effect. (The last of the material matters to be satisfied was not completed until Friday 6 March 2009, at which juncture a release was prepared and circulated to the board for approval and ultimately released on Monday 9 March 2009.) The Company believes that due to the uncertainty of completion of the arrangements it was not able to release the information any earlier and that at all times it has complied with Listing Rule 3.1.890

With a price improvement in the order of 20% from 25 February to 9 March it appears the relevant information may have lost confidentiality, as the knowledge that battles surrounding management processes had been resolved one way or the other may have figured as material positive news in the circumstances. This situation adverts to the need for companies to avoid simple errors by using the correct dates on all documents and considering whether internal governance issues give rise to concerns over materiality and the possible need to advise the market in the context of abnormal trading behaviour. As it stands however it appears the company did no wrong given the ASX’s failure or choice not to flag the significant movement in the price of the company’s securities at the time such that the company would have been aware the ASX thought the information had lost confidentiality.

An instance at the edge of the spectrum in this area concerns the Brisconnections saga, where the ASX asked the company whether it thought the number of proxy votes received in opposition to resolutions proposed for a

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meeting of unitholders might be an item of information which listing rule 3.1 required the release of. The company stated emphatically,

The Trusts do not consider that the total number of votes for or against Resolutions 1 to 7 in respect of which the Trusts had received proxy forms by the cut off time of 10.00am on 12 April was an item of information which was material to the Trusts in that it may have a material effect on the price or value of the Trusts’ securities and which should have been disclosed to the market under listing rule 3.1 prior to the Meeting, as

a. Announced proxy position may not reflect the final vote of unitholders as:

   i. Additional members who have not executed a proxy may attend the meeting personally or by corporate representative in the case of bodies corporate;

   ii. Proxy holders may elect not to attend (and the member may not have included a default holder);

   iii. Members may attend and repudiate effectively their original intention.

This makes the announcement of any proxy position hazardous and of very limited information value to members. 891

This belief in the immateriality of this information is understandable as proxies can be withdrawn, however any announcement might easily draw a distinction between voting intentions and the potential for actual votes made on the day

891 BCS Limited aware letter response dated 16 April, 2009 at 2.
to change this position so that investors aren’t misled. From a practical perspective however, is it really worth informing members of this information? Those who have decided to attend or vote via proxy would have done so, those who had not most likely do not care of voting intentions, only actual decisions. However, once proxy information has been sent to the company that information, potentially material to investors generally who might make a decision either way based on that information, may need to be released to keep the playing field equal as between those who know of attending members’ intentions and those who do not.

Another related issue is the expression of shareholder activism through the calling of meetings of members by members via Part 2G.2 of the Corporations Act 2001 (Cth). While such requests might be defective in certain respects for not following protocol set out in the Act, the question arises as to whether companies should be required to release information relating to any such requisitions and resolutions proposed within them regardless of their purported legal effect.

Two companies faced this situation, and decided against disclosure on the grounds the information was not material due to the potential lack of validity of the notices involved.\textsuperscript{892} In the case of at least one the proposed resolution was of potentially serious import – the removal of the company as the responsible entity (manager) of a particular mortgage fund. Nevertheless, the company had

a fair reason for not disclosing the information, stating it had been internally reviewed and was undergoing ‘a full legal review’ to determine its validity. Given the requisition may have been valid, and given the idea behind the resolution was material, should the board have disclosed this information with a caveat that it was undergoing legal review due to its potential defects? Given the information was effectively selectively public, with only a certain pocket of investors being aware of it, should the company have equalised the informational playing field for all investors? Arguably so, although it is not hard to see the issue for management here – disclose a ‘half-baked’ issue like this and all that is achieved is negative publicity and energy towards the board. Yet, all investors have a right to know.

A more direct route to control of the organisation by members is available to substantial shareholders, who with their voting power can simply use their majority (real or effective) to push for the removal and appointment of directors. In the context of two new substantial shareholders entering the register a week earlier to acquire a joint total of 14.5% of the company’s shares, the price of Newland Resources Limited securities rose from 2.5 to 4 cents over a 7 day period. In its response to a price query, dated 30 September 2009, the company referred to recent announcements and the entry of the new substantial shareholders and nothing more. A few days later on 2 October 2009, the company announced the retirement of two board members and the appointment of their replacements. On 5 October 2009, the company also

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announced the commencement of a strategic review. When asked when it became aware of the board changes, which the company conceded might constitute material information, the company responded that it only became aware of them at a meeting held on 2 October by ‘telephone hook-up’ which had itself been called the previous evening (1 October). Further, ‘the Secretary was presented with nominations and consents to act from both nominees only immediately prior to the meeting.’ The company’s response to the aware letter stated:

The announcement concerning the change to the composition of the Board was released immediately after the board meeting at which the decision was resolved, once the board members agreed on the wording. The Company does not believe it can make an announcement on a subject regarding a decision of the Board until the Board actually makes that decision. It would be presumptuous to try and predict the decision of any Board. To call a trading halt in anticipation of a possible Board decision on this occasion was not possible due to the timing restrictions, the fact that the Board members were scattered around the globe and it was not assured that the Board could actually meet at that time and date until well after close of business on the evening prior to the meeting being held.

As for the strategic review, the company did not consider this information material as ‘[t]he announcement regarding the strategic review was not considered material as it is consistent with the strategy of asset liquidation that had been disclosed previously in the March 2009 and June 2009 quarterly

895 NRL Limited aware letter response dated 5 October, 2009 at 1.
activities reports and the Directors’ Report to the 2009 annual financial statements. While this response appears justified, it means investors should be aware that once a substantial investor becomes involved with a company that nothing is sacred, and material changes in management may be on the cards without a chance for the company to inform the market before they occur. Further, while most investors are used to instantaneous communication the realities of board meetings and international time zones must be borne in mind when expecting a company to comply with the regime. Calling, organising, and carrying out a board meeting except in the most perilous (takeovers) or advantageous (significant contract) of circumstances is not an event that happens without careful thought – boards in Australia meet on average 11 times a year and while we have come a long way since the Marquis of Bute’s case in terms of directorial responsibility, directors are not robots who are able to process information about decisions which may have serious consequences for the company at the click of a button.

Overall, internal governance issues should be treated as tricky territory by disclosure relevant officers who should maintain a keen eye on trade in the company’s securities when such information may be material. The existence of parties outside the organisation who are aware of the information (proxy votes, ...
proposals to wind up the company) and who are not under any obligation of confidentiality should point to the potential need for what might otherwise be considered premature disclosure to prevent informed pockets of the market having a potential benefit over the uninformed.

6.4 Interaction with regulatory agencies

Most listed organisations come into contact with regulatory agencies of some sort, some more than others depending upon their business model and position in the market. An important question arises when a regulatory body, for example the Australian Competition and Consumer Commission (ACCC) or the Environmental Protection Agency (EPA), is in possession of information which if known amongst market participants might cause investors to transact in the securities in question, therefore constituting material information. Examples in the sample include mining approvals, the initiation of legal proceedings against a company, the awarding of substantial government grants, or a banning order from the continuation of operations involving underground coal burning. Such information can move the market and if released via any channel other than the ASX announcements platform can lead to informational advantage for some parts of the market.

One example concerns Gindalbie Metals Limited, which was awaiting the approval of the EPA for the mining of ore in an area of Western Australia for its
subsidiary Karara Mining. This approval came, although not through the regular ASX channel, being released instead on the EPA’s own website the morning of 28 April 2009. While the company did not consider this information material due to the fact it is but one of many stages in a process for the assessment of approvals, and there was barely a movement of security prices at the time, what if it was? Given that “[t]he EPA Recommendation was extensive in detail and comprised two reports totalling 150 pages” which required the Company and its consultants to undertake a review before it was able to provide an update to the market, should such information not be released contemporaneously through the company as well as the relevant agency? This might necessitate the alerting of the company after the close of the market with enough time to review the relevant information and either decide to request a trading halt, or write an announcement.

A case exhibiting a price change where material information was involved concerned the ACCC’s decision to initiate legal proceedings against Cabcharge (CAB) in relation to alleged breaches of the Trade Practices Act 1974 (Cth). While sending the notice to the company on 26 June 2009 and announcing it on the ACCC’s website that day, the relevant officers of the company were not alerted to the information until after the price of securities had already commenced its run, leading to a call from an ASX advisor being placed to CAB’s Company Secretary in relation to a price drop. By the time the served documents had found their way from the mail room to the ‘proper officer’

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addressee it was late in the afternoon (3.30pm), at which time CAB made an announcement to the market relating to the ACCC’s advice. The ACCC then updated the market itself, directly, stating that it had served the initiating proceedings at the registered address of the company at 12:18pm, 26 June 2009. CAB’s response: ‘After investigation, Cabcharge advises that the service of the initiating proceedings by the ACCC consisted of a courier attending the registered premises and delivering an envelope addressed to the 'Proper Officer' of Cabcharge containing the initiating proceedings’. This was potentially material information which could have been dealt with in a more professional fashion by the agency involved.

Situations involving government agencies become more complicated when the entity operates in foreign jurisdictions. In the case of First Australian Resources Limited which was awaiting the grant of an extension to a license, the company needed to translate the relevant document from French and requested a trading halt immediately when the advice was received regardless. RAM Resources Limited faced a similar issue, though it had to translate from Danish to English to determine the importance of a general governmental policy change which might affect its operations in Greenland.

In its response to an aware letter RED 5 Limited explained it was awaiting permission from the Phillipines mining and environmental regulatory authorities to proceed with its proposed operations in that country. While price activity in the company’s securities did not evidence a loss of confidentiality,

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the drawn out nature of the process raises an important question. The company advised in its response to the ASX’s aware letter that

Earlier on 20 November 2009, the Company’s environmental consultant had lodged a comprehensive nine page reply (dated 19 November 2008) to a series of questions raised by the Contingent Liability and Rehabilitation Fund Steering Committee with regard to the EPEP and FMRDP. As late as 5.00 pm in Manila (8.00 pm AEST) on 20 November 2009, the Company was still answering final questions with regard to matters arising from the Bureau’s internal technical review committee analysis of the Feasibility Study.

Given that some such processes would only be enlivened if the company was very close to being awarded the permission it sought, had such an agency been in Australia, there might be an opportunity for such inside information to be traded upon. Should companies in the final stages of such processes have to release information to the effect that a decision is imminent?903

Overall, best practice here relating to domestic agencies should be to inform the company of the relevant information whether material or not outside of trading hours with enough time for the company to assess the information to make a decision as to whether to request a trading halt, or alternatively to write an announcement up for release to the market depending on the decision in question. Placing the relevant information on the ASX and the agency’s own website contemporaneously would ensure that all investors have a fair chance of becoming aware and obtaining access to the information. 904 While release via the government agency is effectively making the information generally

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904 Australian Securities Exchange, ASX Listing Rules: Guidance Note 8, at [4.16] and [4.18].
available, given investors are accustomed to hearing news about organisations they have an interest in directly from them this might be a strictly unnecessary, yet welcome tweak to existing practice in this area.

As for Australian corporate interaction with foreign agencies, the best Australian investors can hope for is that the company concerned keeps a tight eye on its security price around the advising of material information from such bodies and requests a trading halt if necessary when it is able. Given the temptation for anyone in such a foreign agency to trade on potentially material information before it becomes manifest to the Australian company, if there is an opportunity, Australian investors should feign no surprise as it is an obvious risk of buying shares with international operations requiring government support in countries where transparency standards (in the case of miners at least) are not as high as our own.

6.5 Pre-contractual arrangements

Engagement in pre-contractual arrangements of various kinds drew aware letter attention from the ASX on multiple occasions. Memoranda of understanding, letters of intent, entry into subcontracts and other prolegomena to the complete contracts which were their goal represent agreements in themselves and are interesting phenomena confronting the application and operation of the regime.
The most frequently mentioned pre-contractual agreement to feature in the sample was the memorandum of understanding. The question which must be asked at the outset is whether any such arrangement is to be considered material as an MOU usually simply expresses a common intention to attempt to fashion discrete contractual terms acceptable to both parties to frame whatever underlying common intention they have. Kangaroo Metals Limited, questioned by the ASX in relation to the execution and announcement of a ‘non-binding MOU’ relating to the potential sale of some of the company’s assets, stated:

The Company does believe that the potential transaction contemplated by the MOU is "material". However, given that the MOU is non-binding, effectively incomplete in terms and a highly speculative transaction, the materiality of the MOU itself is questionable.\(^{905}\)

Management declared that it would not have released any information relating to the MOU under normal circumstances and only actually did so because it had a live prospectus in the market, thinking it would be prudent to keep investors in the loop in the circumstances.\(^{906}\) Why this should be seen any differently to a situation not involving the issuance of a prospectus is not entirely clear. Managers at Bauxite Resources Limited (BAU) made it clear they did not consider MOUs as material enough to even bother the board about:

The Company did not wait for Board approval and in fact none was sought on the basis the MOU was non-binding. As a matter of courtesy a copy was circulated to the Board after the announcement’s release.\footnote{BAU Limited aware letter response dated 14 August, 2009}

The price change in BAU’s securities from 45 to 68 cents from 6 August up to the date of a release concerning entry into the MOU on 14 August does however raise cause for concern. The fact that this was an arrangement with a party in need of a long term supply contract may have spurred the market if it had indeed lost confidentiality, with the market rallying further after the release of the information. If the market thought the news was material, were management clear that the relevant question is not whether they thought the information was material to them, but whether the market might consider it so? That said the company had apparently been engaged in roadshow activity the preceding week and had this information itself been previously released this might explain the jump in security prices, with investors expecting a deal of some description to take place. Had they not, then the fact the MOU had been signed 11 August but only reported to the company 13 August and released to the market 14 August may indicate circumstances ripe for an insider trader – aware of the information and assuming it might impress the market – to take action.

How is one to judge the materiality or otherwise of such pre-contractual agreements? While it is difficult to lay down rules of general application to what represent ever-variant cases in ever-changing circumstances at the beginning of negotiations, it seems the best approach is to begin by asking
whether the contract envisaged by the pre contractual agreement is itself likely to be material. If it is not, then it is unlikely an agreement to obtain a non-material further agreement will be. On the other hand, if the contract expected to emerge from structured negotiations would be considered material, a live disclosure question exists in relation to which several issues emerge. While unlikely to match the insufficiently definite or internal management information exemptions in the first limb (given they are fully determined in themselves), whether they ‘concern an incomplete proposal or negotiation’ is a question which entities may be willing to pin their hopes on. The argument against is that the agreements themselves concern a complete proposal – the proposal to negotiate a further contract. Of course embedded within that is the seed of incompleteness of the contracts to which they refer which should afford access to the first limb. If the ASX has not advised of a belief as to the loss of confidentiality as per the practical application of limb two, would a reasonable person expect the information to be disclosed on the third limb? This is a difficult question to answer. The better view is not, as a reasonable investor would not want to cause the organisation prejudice and would likely prefer the negotiations to be completed such that the entity’s value is enhanced, all other things being equal. 908

Such a view sees pre-contractual arrangements of this sort as just another stage in negotiations which should properly be kept confidential. If however a
company which believes in the potential materiality of the contract to be is
issued a price query thus stripping any protection offered by the exemptions
away, or if it is otherwise informed of the ASX’s belief in the loss of
confidentiality around any negotiations, the company should then release the
information given its potential materiality, just as normal negotiations
discussed above in relation to price queries are. A further reason for this is that
rumours around ‘agreements to agree’ may lose the epithet ‘to agree’ and just
skid around the market as ‘agreements’, thus leading to false markets which
the ASX will not be able to holler ‘false market’ at as they would usually be
none the wiser. Given that the company is the only party which is aware in the
relevant sense it should prudently disclose. To be clear, such disclosure is not
encouraged to protect investors acting on such information as they take the
risk of doing so into their own hands. Rather, it is designed to offer some
protection to those investors who only have the price signals of the securities in
question and other formally released information to make trading decisions as
they may be drawn into the vortex of a false market unknowingly. Often
companies will foreshadow to the market that a transaction might be in the
process of being inquired into which puts it on notice that an MOU may
eventuate. Marengo Mining Limited had done so with a release on 13 October
2010 and earlier announcements from the previous month, stating the
Company had been in discussions with ‘various persons with respect to
potential funding solutions and partnerships’ and as such did not consider the
entry to the MOU which was advised to the market on 18 October and
described as a ‘key MOU with a leading Chinese construction and engineering
group’ as material

until such time as it became aware that there would be a counterparty
to the MOU. The Company only became aware of China Nonferrous
Metals Industry’s Foreign Engineering and Construction Co. Ltd’s
committed intention to sign the MOU at the time the Company
requested its trading halt on 13 October 2010 at approximately 1 pm
(4pm EDST).

The company’s securities appreciated in value in the preceding days, and were
placed in a trading halt once it became aware of its counterparty’s ‘committed
intention to sign the MOU’. This appears on available evidence to constitute
acceptable disclosure performance. The pre-disclosure may have contributed in
some way to trading activity before the release proper and the company was
correct to request a halt so as to inform the market of finalised MOU
negotiations given they had already been mooted.

Prudent disclosure was also evidenced by Padbury Mining Limited (PDY) in
circumstances involving an MOU, which was executed 15 April, though released
to the market 26 May.909 In circumstances where it appeared that the
counterparty was serious about making a deal, as evidenced by its decision to
send a delegation to WA in June 2010 it decided to advise the market of the
MOU:

When these arrangements were confirmed Padbury had increased
confidence that a binding agreement would be entered into and that
this information could have a material effect on the price of Padbury’s

shares. For this reason, and to comply with its obligations under Listing Rule 3.1, Padbury considered that the transaction contemplated in the MOU ought be announced to the market. It was on this basis that Padbury issued the announcement on 26 May 2010.\textsuperscript{910}

This demonstrates how an MOU not previously disclosed may potentially become material when new information comes to light, making the retention of information relating to the MOU a continuing disclosure time bomb for the organisation which it must monitor. Indeed the practicalities of signing an MOU should be borne in mind by investors when assessing an entity’s ostensible disclosure performance, often across international timezones:

A draft of the MOU was forwarded to the other party on 16 January 2009. The MOU was amended by the other party and returned to the company’s legal counsel on 20 January 2009. The MOU was amended, finalised and signed by the Board on 20 January 2009, at which time it was forwarded to the other party. It was signed and returned by the other party on 21 January 2009. The Directors came into possession of the signed MOU after the General Meeting.\textsuperscript{911}

The ‘back and forth’ of settling on an MOU adds to the difficulty of managing the situation from a continuous disclosure perspective, as does the need for sensitivity to contractual discussions between companies which require trust and mutual understanding, as noted by Sundance Resources Limited (SDL):

The Company could not have made an announcement earlier than the afternoon of Monday, 13 September 2010. To have done so in advance

\textsuperscript{910} PDY Limited aware letter response dated 17 June, 2010.

\textsuperscript{911} KML Limited aware letter response dated 24 February, 2009.
of the conclusion of negotiations would have been improper as between
the parties and misleading and/or speculative as to the completeness of
the negotiations. 912

Like MOUs, the entry into ‘heads of agreement’ 913 or the use of a ‘terms
sheet’ 914 during negotiations are no guarantee of a successful outcome, usually
requiring further negotiation, financier approvals, and due diligence activities,
which themselves are subject to many conditions and potential stumbling
blocks. 915 Pre-contractual arrangements can also involve a number of
multifaceted and interrelated steps which must be taken to actually secure a
fully determined contract. An interesting example concerned Ashburton
Minerals Limited which was a party to a ‘heads of agreement’ stipulating an
option agreement was conditional upon payment by the company of $100,000
in cleared funds within 3 business days. Until that time, no final contract
existed. The company stated that the Heads of Agreement ‘prohibited
Ashburton from making any public announcements until the payment of the
$100,000 (by way of cleared funds)... and Ashburton was of the view that an
earlier announcement would have prejudiced Ashburton’s rights under the
Heads of Agreement’. 916

While a full contract was not finalised, an agreement for getting there was, and
had a price query been issued prior to the company’s announcement to the
market this information would ordinarily have required release given its
materiality. Given one wasn’t, the company was within its rights to hold on to

912 SDL Limited aware letter response dated 15 September, 2010 at 3.
914 PTB Limited aware letter response dated 18 May, 2009
the information, not for the fact the heads of agreement contained a confidentiality clause as this will not satisfy the first limb of the exceptions, but because the ASX had not advised of its concerns around abnormal trading behaviour early enough in the piece. For its part ASX may not have been able to advise of its belief in any potential loss of confidentiality as there was nothing for it to be aware of which might have been confidential at that stage. Saying that the ASX could have reacted with the issuance of a price query sooner is unrealistic at best, as prices can shoot up in short spaces of time. This again points to the potential need for a consideration as to whether companies should be the arbiters of whether confidentiality may have been breached solely on the evidence of abnormal trading behaviour. While this means any reason for abnormal trading may gouge otherwise protected information, this is the role of price queries and the view of ASX regardless, so why should the company not be required to monitor the same factors and self-diagnose the potential loss of confidentiality, and be reprimanded in cases where it fails to do so?:

ASX occasionally finds a listed entity or its advisors wanting to debate whether a sudden and significant movement in the market price or traded volumes of its securities can fairly be attributed to information about a particular matter ceasing to be confidential. ASX considers any such debate to be misplaced. If an entity advises ASX that there is market sensitive information that has not been disclosed in reliance on Listing Rule 3.1A (as it must when it is asked that question by ASX) and it is not able to point to any other event or circumstance which explains the movement in the market price or traded volumes of its securities, ASX has no choice but to assume that the information in question has
become known to some of those trading in the market and therefore is no longer confidential. Upon the entity being advised by ASX that it is of the view that the information has ceased to be confidential, Listing Rule 3.1A will no longer apply and the entity will then be obliged to make an immediate announcement about the information under Listing Rule 3.1.  

Should companies have the correct sense of materiality, this should all other things being equal, lead to speedier disclosure of such issues.

Other contracts involve periods including time for due diligence activities to take place. Brazilian Metals Group Limited demonstrated the point at which disclosure should be entertained is the point at which such arrangements actually become material, which involves a high degree of professional industry judgment.

The Company does not consider the conditional agreement to acquire the Granduvale Project (which provides for an exclusive evaluation period and for the parties to enter into a formal acquisition agreement) to be material to the Company *per se*. The Company has determined in relation to the Granduvale Project to carry out due diligence on the project, including initial exploratory drilling. If the Company is satisfied with the results of its initial exploration and with the other legal and technical due diligence the Company has reasonable basis for being confident its Brazilian subsidiary will in early 2011 be able to enter into a formal agreement to acquire the project by stage payments on the terms set out in the Company's announcement of 13 December 2010. The material aspect of Granduvale project that led to the announcement made 13 December was the decision made on 11

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917 Australian Securities Exchange, *ASX Listing Rules: Guidance Note 8*, at [5.8].
December 2010 to commence exploration on the project and carry out legal due diligence.\textsuperscript{918}

Given such arrangements are simply precursors to full contracts, their disclosure is arguably not imperative, compared to the more foundational issues which in this case were announced prior to the issue of the aware letter.\textsuperscript{919}

What of other pre-contractual understandings such as letters of intent? NRW Holdings Limited (NRW) announced on 16 March that it had received from FMG a “Letter of Intent to Award” a contract for ‘overburden mining and ore rehandling at FMG’s Christmas Creek site’. While NRW believed this was material, it stated it received the confirmation the day it made its own announcement to the ASX, and that while confidential negotiations had been taking place since 10 December 2008 that draft letters of intent were only generated during the course of discussions in the week preceding the release of the announcement (i.e from 9 March 2009). A demonstrable appreciation in the price of the company’s securities is noticeable from 12 March onwards. This upward trajectory continued after the release of the announcement on 16 March, reaching over 40 cents a week later, compared to the price range prior to the spike around 12 March of 24.5 cents. With no other significant information being released around that time, it seems there may have been a breach of confidentiality and informed trading may have taken place on the promise of the potential awarding of the contract. Given the company was

\textsuperscript{918} BZM Limited aware letter response dated 15 December, 2010.
\textsuperscript{919} BZM Limited aware letter response dated 15 December, 2010
aware of the drafting of the letter of intent and its self-assessed materiality, it would have been prudent to have requested a trading halt when it noticed the spike of 12 March until the letter of intent was finalised for it would appear the information may have lost confidentiality. Although it was strictly speaking (on current applications of the rules) within its rights not to do so in the absence of the ASX communicating its belief of a lack of confidentiality\textsuperscript{920} such prudent disclosure behaviour might have seen the release of some information and this could have pre-emptively controlled for any possible perceptions the company may not have been in compliance due to the nature of the information and the price change surrounding its release afterwards.\textsuperscript{921} Such prudent disclosure behaviour is not impossible to find in the sample as seen in the example of Brierty Limited (BYL).

Similar questions as those facing companies in handling the disclosure of letters of intent arise in circumstances involving the submission of tenders and the selection of a preferred contractor, which then requires the contractor to actually decide whether to accept the contract offered. Should the company advise the market when applying, when it receives preferred contractor status, or when it finalises negotiations and agrees to the actual contract? BYL did not release information concerning its selection as a preferred contractor to the market once it became aware of this fact because ‘the contract had not yet been signed. The terms and conditions of the contract are yet to be signed and it is not yet known whether agreement will be reached and a contract signed at

\textsuperscript{920} Although it must be asked how ASX was to do so in the absence of a clear rumour?

\textsuperscript{921} For another aware letter involving a letter of intent see SRK Limited aware letter response dated 12 August, 2009.
all’. Given the company had agreed with the counterparty that confidentiality was to be maintained and that it was an incomplete proposal/negotiation with finalisation of terms expected to take ‘up to a month’ the company did not release this information until 15 December when it ‘became concerned that ...confidentiality ... may have been lost’. In the absence of a price query the company exhibited prudent disclosure behaviour and released the information. While it might appear the company should have disclosed this information earlier, in its defence there are no real guidelines as to what sort of a price movement will indicate that the ASX will assume confidentiality has been lost in the absence of a clear confession or other evidence demonstrating the same for the company, and so it would have had the protection of the exemptions prior to its advising the market. Such behaviour, while it might not seem so in the circumstances of a price rise preceding the release of potentially material information, is actually generative of faith in the market and its ability to release such information according to the spirit of the rules.

Disclosure difficulties may be encountered in circumstances involving full contracts which may not be material in themselves but may be such for what they might mean to the organisation as regards future contracts with the same counterparties, or for the potential rumours which might come to exist around them. Such arrangements should be treated cautiously. A warning for investors at the very least comes in the form of an aware letter issued to Quickstep

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Holdings Limited dated 24 March 2009, which announced on 20 March that the company had been awarded a subcontract for a small business innovation research contract from the US department of defense. While this was an actual contract and not an MOU, the company explained in its response to the ASX’s aware letter that the amount of money involved was trivial after expenses relating to the project were taken into account, and that any real lasting and likely material contract would require success with the first contract, and the submission of a phase II proposal which might then see a contract in the value of US$3-4 million over two years. In the words of the company, ‘unless and until the technical objectives are achieved, Quickstep does not consider the Subcontract itself to be material. The Subcontract is, though, a strategic step towards pursuing long-term opportunities in the US defence sector’.924

Nevertheless, the price of QHL securities demonstrated what could only be termed a wild spike from 17 to 20 March, the date of the lodgement of the announcement by QHL, appreciating from 16 cents to an intraday high of over 28 cents on 20 March, close to a 100% appreciation over three days. The warning for investors is, if you hear a rumour, for example, that a company is about to receive a contract from the US department of defence, sit tight, it could just be a ‘foot-in-the-door’ type contract, which rumours may have distorted into something much more promising. Not that such information might not be material in itself, but a movement of such magnitude, which reversed in the following month leaving QHL securities at 20 cents, indicates the rapid surge post-announcement had already been priced in by the

abnormal trading in evidence pre-announcement. Should companies then be required to release information of the fact negotiations are taking place or that potentially material tenders have been submitted and are awaiting further development? This would pre-empt the creation of false markets, although this is effectively protecting those who choose to act on sketchy speculative information, which is probably not the most pertinent of goals for the regime, and at any rate, would not justify the extra information overload without properly material information being released. The company does not seem to have engaged in any untoward conduct in the circumstances, and disclosed the information when a wild spike had gripped its securities. Companies in similar circumstances should consider the earlier release of such information however to prevent any false markets developing further than desired. Guidelines for the types of price or movements they should be attuned to would be helpful.925

Even once entered this does not mean a contract will necessarily be completed. An instance involving Kangaroo Minerals Limited (KML) illustrates the perils of advising the market too quickly. KML was issued with an aware letter by the ASX upon its release of announcements which indicated its withdrawal from two major contracts to purchase two alluvial tin mines, one on 13 November (South Mount Cameron - SMC), the other 25 November (California Creek - CC). The company explained that it was unable to obtain finance and therefore complete the transaction in relation to the SMC project ‘around 6 November. The company entered into an agreement with the vendor at that time. This

925 See generally ECU Limited aware letter response dated 16 September, 2009 re the outsourcing of contractual negotiations.
agreement has not settled at this time. On 13 November 2008 the company announced that it had “reached agreement with the vendor to wind back the contract”. In relation to the California Creek transaction the company announced on 14 August 2008 that the final sum payable in relation to the California Creek Acquisition was payable before 31 November 2008. The company was actively seeking the necessary finance to complete the acquisition throughout this period. However, due to the limited availability of funding at this time, the company thought it prudent to announce on 25 November 2008 in its Directors Report that ‘finance was not obtained and accordingly the transaction did not proceed.’

When asked why the company had not advised the market earlier, if it had become aware of its inability to proceed with either transaction before the dates the pieces of information were released, the company responded nonsensically ‘at the time of releasing the South Mount Cameron Announcement and the California Creek announcement, the Company was not aware that it would not be able to complete [or obtain finance for] [either] acquisition’. That’s just obvious – it wouldn’t have entered the arrangements if that was the case. The question effectively asked why the company did not advise the market earlier had it known earlier than the release dates, which it apparently seemed to: prior to 25 November when it noticed difficulty in obtaining funding for the California Creek acquisition (even though a precise date is not specified) and 6 November, a full week prior to its release on 13

November that it had been unable to execute the acquisition. While concluding such arrangements is by no means an easy task, it would not have been onerous or difficult for the company to have stated that the contracts were not yet finalised as the funds were not secured, but that the market would be advised when this became a reality, sealing the contracts, or otherwise.929

Exit from a pre-contractual arrangement, by the company itself or its counterparty also arose as an issue worthy of the issuance of aware letters in two further instances. One involving Zambezi Resources Limited (ZRL) saw the withdrawal by Rio Tinto (RIO) from an MOU with the company. While ZRL acknowledged the significance of RIO aligning itself with ZRL was of importance, the company stated ‘the project was in itself not material given progress that had been made. Withdrawal took place prior to any drilling taking place and no drill results had been announced’.930 On the other hand, Royal Resources Limited itself decided to terminate an MOU which it considered to be material, immediately advising the market the moment the decision was made after the parties failed to agree on a joint venture agreement. Again, the price changes preceding these arrangements go unexplained.


As demonstrated above, pre-contractual arrangements pose particular difficulties from a disclosure perspective. It appears, as ever, that commonly important clauses (exit/performance) and parts of agreements (financing) which may come to be relied upon before entry into full contractual relations actually begin require disclosure so investors are aware of the actual status of whatever deal has been spruiked in an announcement. Otherwise, so long as managers have a tight grip on the concept of materiality in making their decision to disclose or not they are unlikely to fall foul of the rules. Should they wish to disclose in exemplary fashion, they might consider monitoring their securities for any abnormal trading behaviour and disclose the information prior to receiving a query if any is in abeyance. This might thwart negative judgments being made about the company’s disclosure performance in the context of abnormal trading behaviour and the valid retention of material information. Even then, while the company and all it directly controls might be saved from such prejudice, what of advisers?

6.6 Late results change announcements

Over twenty companies were sent aware letters in the period under consideration with regards to earnings surprises which deviated from the previous corresponding period or intervening guidance by more than 10-15%
and had not been previously advised. 931 A common theme which arises in responses to these aware letters is the difficulty some companies have in getting across all their operations in the required timeframe and making a call, usually on incomplete and unverified (by auditors) information, as to the likely percentage deviation of a profit figure, abnormal item or write down. Some companies were better able to justify this than others, although as seen in ASIC’s pursuit of Nufarm Limited there is really no acceptable excuse in such circumstances if a company has ‘a reasonable degree of certainty that there will be such a difference’. 932

Company processes surrounding the release of such information exhibit the difficulties involved in adequately advising the market of such deviations at a time well ahead of the actual release of results. Indeed, several organisations queried explained that they were simply unable to give information of expected variations because they only became aware of material variations the day before the actual release of results or the day itself. This was usually due to the need for board, board committee 933, and auditor sign-off 934 of final results. While this might appear convenient, it appears to be standard practice for a

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931 See generally Australian Securities Exchange, ASX Listing Rules: Guidance Note 8, at [7.3.2]. Paragraph 93 of the Guidance Note regarding continuous disclosure in force at the time these aware letters are drawn from stated:

“Listing rule 3.1 provides examples of information that, if material, would require disclosure. One of those examples is a change in the entity’s previously released financial forecast or expectation. As a general policy, a variation in excess of 10% to 15% may be considered material, and should be announced by the entity as soon as the entity becomes aware of the variation. If the entity has not made a forecast, a similar variation from the previous corresponding period will need to be disclosed. In certain circumstances a smaller variation will be disclosable”.


932 Australian Securities Exchange, ASX Listing Rules: Guidance Note 8, at [7.3(3)].


board to schedule its final meeting with the company’s auditors and agree to 
any important changes to accounts at such times.

ChongHerr Investments Limited explained in relation to the release of its 
annual report on 1 March disclosing a marked drop in losses in comparison to 
the previous corresponding period that it only became aware of the 
information early that very morning after the auditor’s resolution of material 
issues.935 Likewise Pacifica Limited which released its full year results for the 
year ending December 2008 disclosing a drop in net loss of 329%, and a raft of 
significant items totalling 181 million comprised of write downs and 
impairment losses:

The Company first became aware of these matters on 17 February 2009 
when certain fundamental decisions were agreed between 
management and the directors (in consultation with the auditors) which 
were critical to the asset valuations. While this was the culmination of a 
review process leading up to finalisation of the financial results, the 
Company was still in the process of determining certain key strategic 
business plan initiatives which were only resolved in the evening of 17 
February, hence the decision to immediately release the results before 
the opening of trading on 18 February.936

In the same situation was Terramin Australia Limited which became aware of 
losses 444% greater than the previous corresponding period on 12 March which

was the date of an audit committee meeting, the day before releasing the information on 13 March.937

Given the need for listed organisations to report in accordance with AASB140 “Investment Property” which requires gains or losses arising from a changes in the ‘fair value’ of investment properties to be recognised as part of the company’s profit or loss for the period in which those gains or losses arise, many of these instances involve companies which reported significant changes as a result of material revaluations of investments held by the entity. While there are attendant difficulties in ensuring valuations come together and are available for reporting to the market in a timely fashion938, the response of Ariadne Limited, which explained it had only become aware of significant changes to its profit the day before releasing results939 raises the question as to whether a variation rule should apply to companies of facing this type of revaluation effect on its profit and loss figures at all:

...the Director’s are of the view that this range does not give rise to a material profit variance for Ariadne. ... Ariadne is principally a property and investment company and as such profits generally fluctuate from period to period, based on the realisation of underlying assets and investments. These fluctuations can be significant and are the result of the current accounting rules applicable to property and investment assets.

939 Going from a NPAT of $2,344,000 for the half year ended December 2007 to a net loss of $405,000 for the half ended December 2008.
The Director’s do not believe that investors look at discreet reporting period profits to determine the underlying value of Ariadne. Changes in the value of Ariadne’s asset base, including types of property assets and investments, is a more appropriate measure of the company’s value. A comparison of profit against the previous corresponding period does not provide an investor with a meaningful understanding of the company’s intrinsic value.\textsuperscript{940}

While Ariadne’s argument appears sound, and given its disclosure of relevant matters in earlier announcements that any pursuit of it would likely be destined to fail, there are factors militating against selective application of the 10-15% variation guideline, chief amongst them being the idea that any company with the potential for the impairment of assets as part of its business model will be inclined to use the same justification to avoid disclosing such information. Better is the approach of requiring such disclosure and allowing investors to make up their own minds as to likely import. This is assuming the company has not been making constant updates of its situation such that its position is practically clear – indeed if it had the abnormal trading activity would not have been likely to have arisen. If Ariadne is correct the information required would not scare investors who know they need to look at the EBITDA figure for a meaningful comparison to previous periods’ performance, and indeed will be able to assess the information relevance of what is released, especially if the company itself makes its own circumstances vis à vis the 10-15% rule clear in its discussion, what is the problem? While it might annoy the company to

\textsuperscript{940} ARA Limited aware letter response dated 10 March, 2009 at 4.
continually have to justify its ‘non-material in a real sense’ yet ‘material in a regime sense’ changes allowing a double standard to creep in could be problematic.

The ASX’s recently re-released Guidance Note 8 is relevant here for its suggestions. While stating it was not of a mind to lay down strict percentage guidelines for when an entity should consider it necessary to disclose such information, preferring the entity to ask itself two important questions referred to earlier\(^{941}\), it suggested that the assessment of materiality might be done with Australian Accounting and International Financial Reporting Standards guidance in mind:

ASX would therefore recommend that an entity consider updating its published earnings guidance for the current reporting period if and when it expects its earnings for the period to differ materially from that guidance. For these purposes, ASX would suggest that entities apply the guidance on materiality in Australian Accounting and International Financial Reporting Standards, that is:

- treat an expected variation in earnings compared to its published guidance equal to or greater than 10% as material and presume that its guidance needs updating; and
- treat an expected variation in earnings compared to its published guidance equal to or less than 5% as not being

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\(^{941}\) *Australian Securities Exchange, ASX Listing Rules: Guidance Note 8, at [4.2]:*

1. “Would this information influence my decision to buy or sell securities in the entity at their current market price?”
2. “Would I feel exposed to an action for insider trading if I were to buy or sell securities in the entity at their current market price, knowing this information had not been disclosed to the market?”
material and presume that its guidance therefore does not need updating,

unless, in either case, there is evidence or convincing argument to the contrary. Where the expected variation in earnings compared to its published earnings guidance is between 5% and 10%, the entity needs to form a judgment as to whether or not it is material. Smaller listed entities or those that have relatively variable earnings may consider that a materiality threshold of 10% or close to it is appropriate. Very large listed entities or those that normally have very stable or predictable earnings may consider that a materiality threshold that is closer to 5% than to 10% is appropriate.

This recommendation is purely a suggestion to assist listed entities in determining if and when they should be updating their published earnings guidance. The mere fact that an entity may expect its earnings to differ from its published guidance by more (or less) than a particular percentage will not necessarily mean that its guidance is (or is not) misleading.942

Another situation where internal accounting and management and controls for financial information generation and enactment were in issue concerned Thomas Bryson International Limited (TBI).943 The company was sent an aware letter after releasing its preliminary financial report on 31 August in which it stated that its loss was to be in the order of $16 million and provision for impairment of receivables was in the order of $10 million. A month later on 30 September the company released its loss at $80 million and the provision for impairment

942 Australian Securities Exchange, *ASX Listing Rules: Guidance Note 8*, at [7.3(2)].
of receivables as $75 million. The company argued that the audit in relation to the accounts had not taken place until 30 September:

During September the Company had a number of discussions with the Company's auditors, Grant Thornton. As disclosed in the Company's release dated 3 September, the audit was complex and lengthy due to the Company's operations being based in China, and the fact that the Company was engaged in a number of international transactions.944

This, along with operations up to that point led to the company making ‘unexpected’ ‘prudent’ impairment provisions related to the collectability of receivables. This raises the question as to the grounds upon which the company made the earlier announcement it did, and also adverts to the difficulty companies with non-standard operations have in adequately getting across all of their operations and providing an accurate snapshot of potential results. This also raises the question of whether forecasts should be provided in such circumstances. Problems can arise in this context from business models, overseas operations and their exposure to external broader economic factors, or internal measures which cannot reliably and accurately be quantified. Safety Med Products Limited, which had lodged financial reports with the ASX 26 February 2009 received an aware letter querying a loss from ordinary activities which was up 105% on the previous corresponding period. The company protested that it only became aware of a decision regarding impairment charges to be included in the results for the period 31 December 2008 the night before release, on 25 February 2009:

944 TBI Limited aware letter response dated 27 October 2010 at 1.
The Company had not yet been able to determine the impact of the cost cutting steps it had taken in respect of ProControl Systems and did not have the necessary cash flow forecasts available to it. This remained the case in the context of the Company's two audit committee meetings on 21 November 2008 and 31 January 2009. It was only at its audit committee meeting on 25 February 2009, when updated cash flow forecasts and a revised impairment report were tabled, which included the impact of the Company's cost-cutting measures in respect of ProControl Systems, that the Company believed its information regarding impairment was not based on incomplete information, was no longer merely a matter of supposition, but was sufficiently definite to warrant disclosure. The Company made its decision regarding impairment late that same day, and the information was released to ASX the following day (26 February 2009).

According to the company:

The write-off of goodwill was not a result of a specific event. As mentioned above, the information required by the Company to make a decision regarding impairment did not become available until the meeting of the Company's audit committee late on 25 February 2009. The market was notified at the next earliest opportunity.945

Most of these responses express the company’s lack of awareness of potential material changes due to their receipt of advice from auditors (as opposed to their waiting for confirmation, which as noted above was unacceptable in the case of Multiplex Limited and others), or final board/committee approval just before the release of results and appear compliant from a disclosure perspective in the absence of any other evidence. What of management which is aware of the difficulties faced by their company yet choose not to fully

disclose them before results from trading from further periods are received? Saferoads Holdings Limited released its half yearly report for the period to 31 December 2008, disclosing a 63% decrease in profit compared with the previous corresponding period (the half to 31 December 2007). The price of the company’s securities dropped from 78 to 38.5 cents by the close of trading that day. When explaining its situation, the company stated that, while it released the results 29 January, that it was aware in November that there was a possibility that it might not achieve NPAT figures materially the same as at the corresponding 6 month period ended 31 December 2007. However, historical sales figures indicated that one or two good months of sales could have reversed the NPAT situation as had occurred in May/June 2008. Given the forward sales expectations for November and December, it was considered that a downgrade in profit forecast would have been premature and misleading to the market if those sales prospects had materialised. The magnitude of movement in comparable NPAT was not evident until the management accounts for the period ended 31 December 2008 had been prepared (which was not until late January 2009).946

The company did admit of the fact that it did not advise the market results would be significantly different to the previous corresponding period, stating however that the company had been aware that ‘profitability would be a challenge and such information was provided to the market in the following announcement’.947

Such reasoning appears to be relying on a hope that a few good months of trading would reverse poor or volatile performance which is simply not acceptable from a continuous disclosure perspective, in the same way it is not from an insolvent trading perspective.  

In the company’s defence, it did inform investors in October of 2008 that its profit margins would be ‘under pressure’ and that while sales growth was not expected to pose a problem, profit growth would ‘be a greater challenge in the current environment’. In the context however, the company’s shareholders could be forgiven for expecting more of a detailed ‘heads up’ from management. Taking all these circumstances into account, was the company’s disclosure behaviour fair in the context of a 63% decrease in profit? Arguably not. Market surprise at the release of the results appears to indicate that the full extent of the issues faced by the company were not contained in previous information releases by it. Again, explanations that the company’s business model and large orders which could come to affect it either positively or negatively, given the experience of Nufarm Limited, will not necessarily pose a fair explanation to allegations of a breach of the provisions.

Good practice as far as communicating material results changes to the market ahead of their release is likely to involve constant communication to the market. Two responses in the sample exhibited such, with Toll Holdings Limited and OMH Limited listing the various updates through multiple fora (standard ASX announcements, annual general meetings, preliminary reports, ...

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948 On the dangers of relying on blind hope see ASIC v Plymin, Elliott & Harrison [2003] VSC 123 at [560].
quarterly updates) which had been issued before the final result was released, and should have allowed investors to brace themselves for what was to come. Advising the day before results are due, as opposed to any other day during the period, of changes to forecasts is not really a problem from a continuous disclosure perspective, so long as the information is disclosed when the company becomes aware of it.\textsuperscript{952} If investors understand the pressures around reporting including audit and board decision making on such matters and their effect upon awareness of management of material items they might develop a more realistic set of expectations around the particular company they are invested in. The problem is the price change occasioning the query, usually in the same direction of the new advice, and whether information of a material character had lost confidentiality before being advised to the entire market such that a knowing buyer could not profit from an unknowing seller in such circumstances. Or even a situation where such information might be gleaned by the perceptive analyst or investor from other releases or the non-release of what may have been expected up to a particular point, as may have occurred in the Infomedia example in chapter five above. The fact such advices fall so close to result release dates makes it even harder to tell as astute investors may have already consulted their models and made the call to begin buying or selling on anticipation of negative or positive results which the rest of the market, notably algorithmic traders, will follow and build and potentially snowball into a material price change. It is therefore important for investors to have the right

\textsuperscript{952} Australian Securities Exchange, \textit{ASX Listing Rules: Guidance Note 8}, at [7.3].
expectations around such events, as well as entities and their advisors to find better ways to manage confidentiality and expectations in such circumstances.

6.7 Mining specific issues

Given their representation in the entire sample, disclosure issues surrounding the existence and operations of mining companies also warranted a disproportionate amount of the ASX’s attention in its issuance of aware letters. The disclosure of resource estimates, analysis of drilling results and their potential materiality, the commencement of drilling, and even the very decision to drill arose as issues eliciting aware letter attention.

As discussed in chapter five, the decision to begin drilling projects can be met with significant investor interest and expectation. Flinders Mines Limited received an aware letter after releasing an announcement detailing its board’s approval of the commencement of a pre-feasibility study (which was based on an earlier positive scoping study) with an increase of inferred resources expected.953 The price of the company’s securities rose from 8.1 to 9.9 cents the day preceding the release of an announcement to the market. The company stated its belief in the confidentiality of the information, as well as its belief that the price increase did not indicate a loss of confidentiality.

The commencement of drilling is also an event which investors might deem material. Vital Metals Limited was asked in an aware letter issued to it whether it thought its announcement regarding the commencement of a drilling program on one of its tenements in West Africa was material. The company’s response indicates some of the factors making disclosure of such information difficult. It argued firstly that ‘in the absence of the results of the assay resulting from the Drill Program... the Drill Program itself is not material... The Company believes that the commencement of the Drill Programme in itself has no effect on the price of the Company's securities’.\textsuperscript{954} Obviously the company was not drilling aimlessly, expecting to find resources which it might exploit, as it candidly stated: ‘The company further believes that the results of the assay from the Drill Programme will, however, have that effect and will call a trading halt immediately prior to the release of those results as soon as the Company receives the same’.\textsuperscript{955} Given this fact, does it not mean that while the company might not think the information is material yet, that this will not stop investors from moving the price based on the information? That said, the company had ‘flagged to the market as early as 19 November 2010 and in subsequent announcements leading up to the Company's announcement to the market on 14 April 2010 of the commencement of the Drilling Programme’. In addition, management was not aware of the commencement of drilling due to the operational decisions of a subcontractor until ‘after the beginning of drilling

\textsuperscript{954} VML Limited aware letter response dated 28 April, 2010.
\textsuperscript{955} VML Limited aware letter response dated 28 April, 2010.
This represents a tricky array of factors requiring consideration before the disclosure decision is made, and much depends on the precise circumstances faced by the company and what had disclosed about them up to that point which may have gone to moulding investor expectations. News of the commencement of production also figured as potentially material in at least one instance.957

Situations involving resource discoveries and the positive news stories following them can obviously have important ramifications for security prices. In the case of Echo Resources Limited, which released an announcement which confirmed and enhanced the potential of existing discoveries, the Company’s securities rose from a closing price on 25 November 2010 of $0.13 to an intra-day high of $0.28 on 26 November 2010 prior to the Company entering a Trading Halt.958 Management explained in its response to an ASX aware letter that it had decided to enter a trading halt after a call from the ASX in view of the price appreciation in its securities, and on advice from its managing director that the company was expecting assay results, which it did late Friday 26 November

956 VML Limited aware letter response dated 28 April, 2010. Organisations also need to ensure their lines of communication as between themselves and contractors or partners who might convey material information are correct as the aware letter response of BCN Limited dated 19 May, 2009 at 2 demonstrates:

There was an administration shortfall in that the email containing results u151510.csv was:
» Sent by Ultratrace on Tuesday 12th May at 5.16 pm to our geologist’s obsolete Beacon email address.
» The secretary found the email and sent it on to myself Wednesday 13th May at 10.09 am.
» Due to work commitments I never opened the email until Thursday 14th May at 5.51 pm and made the assumption that the geologist had also received a copy and was commencing a geological interpretation.
» Discussions with Directors and the geologist on the weekend identified this email had not been sent by the secretary to the geologist and this was passed immediately onto the geologist for review on Sunday 17th May.

Coupled with previously received RC results the combined results were considered material and therefore the Announcement was released on Monday 18th May.

While the company offered ‘speculative comments on market chat forums in relation to the company’ as a factor that may have contributed to the increase in price and volume it stated it was not aware of ‘any breach of confidentiality on the part of its directors, officers, employees and consultants. Measures taken to maintain confidentiality include provisions under contracts of employment and confidentiality agreements’. Of course, the only logical conclusion, given the market valued the information and the price appreciation was maintained after the information became public, is that the information ceased to be confidential and that the information may have been traded on by those close to such valuable information.

In the course of their operations mining companies will engage geologists, both within and outside of the firm, to provide estimates of extractable resources. The potential for such information to move the market is obvious, with the fortunes of any mining company based upon what it can actually extract from the ground on which its tenements are located. Any such announcements flanked by abrupt price movements may appear at first instance as worthy of further investigation. While in some cases disclosure issues are apparent, one illustrates the difficulty of cutting through confounding factors to determine whether there was indeed a likely breach of continuous disclosure responsibilities or not.

In the two days prior to releasing an announcement on 12 February 2009 regarding a resource upgrade to its Etango project the price of Bannerman Resources Limited securities rose from 64 to 78 cents. Considering the
information might possibly be material, the company explained the process behind the generation of the estimate:

The Company engaged independent consultants, Coffey Mining Pty Ltd, to prepare and provide sign-off pursuant to applicable Australian and Canadian regulations of an updated resource estimate for the Etango Project. The Company was provided with confidential working draft mineral resource estimates (Including initial resource categorisations) on Wednesday 4 February 2009. This information was confidential, draft, incomplete and insufficiently definite to warrant disclosure at that time. In particular, the information was yet to undergo extensive internal reviews and verification, as well as external confirmation by the Company's geological consultants.959

The Company worked to complete its analysis and critique of the resource modelling inputs and estimates in the period from 4 to 11 February 2009 and finally completed this work late in the evening after the market closed on Wednesday 11 February 2009. At that point, external sign-off was obtained from the Company's geological consultants. The Company made the Announcement to the ASX approximately 45 minutes prior to the market opening on Thursday 12 February 2009.960

At first glance this might seem like a case of geologists getting rich on information they had yet to report to the company, but which they may have anticipated being material. Two confounding factors however prohibit such a

reading in this case at least. Often, miners will moot the fact that a resource 
estimate is waiting in the wings and will be announced shortly – in this case, the 
company had previously disclosed the potential for an upgraded resource 
estimate in a recent December 2008 Quarterly Activities Report.961

If this wasn’t enough to explain the price run in the days immediately preceding 
the release of the upgrade, then the fact that in the relevant period (the date 
from which the company received draft information relating to the resource 
upgrade) research analysts from two banking institutions in the US published 
‘positive initiation research reports on the company... this coverage resulted in 
increased interest in the Company's shares on the Toronto Stock Exchange and 
on the ASX’ may have.962 Both these factors, the pre-emptive announcement of 
a forthcoming resource estimate change and the fact analyst reports had been 
issued, could possibly explain and thus interfere with the drawing of any 
conclusion that any insider trading was engaged in in the circumstances, 
illustrating the difficulties in enforcing the regime faced by ASX and ASIC.963

Another insight into the processes involved when more than one organisation is 
involved in resource estimate changes, and where confounding factors 
interfere with any clear conclusion as to disclosure breaches, is provided by 
Blackham Resources Limited. Queried for the appreciation of the company’s 
securities in the order of 90% (from 8 to 15 cents) in the two days prior to an 
announcement detailing a scoping study on the production potential of one of

963 See CYS Limited aware letter response dated 6 September, 2010 and DMA Limited aware letter 
response dated 29 October, 2010 for more of an insight into the process of the communication of 
resource assessments.
its urea and Methanol projects, the company explained that while it had been provided with an incomplete and insufficiently definite ‘confidential working draft on 9 March 2009’ that this report had yet to undergo ‘internal and joint venture partner reviews and verification’. Having received the final version of the scoping study the morning of 18 March,

the Company prepared the Announcement and forwarded it to its joint venture partner for review and comment. The Scaddan Urea and Methanol Announcement was lodged with the ASX on Thursday 19 March 2009 at 8.50am (WST)… The Scaddan Urea and Methanol Announcement could not be released until receipt of the final Scoping Study. The Announcement took place approximately 24 hours after the receipt of the Announcement. In relation to the specific application of listing rules 3.1 and 3.1 A, we consider that a reasonable person would not expect draft, incomplete and an unchecked report, which was confidential, to be disclosed until such information was appropriately reviewed and confirmed and issued in final form… The Company is aware of its obligations under listing rule 3.1 and was in compliance therewith. The Company is satisfied that the Scoping Study was confidential until the Announcement was made.964

Preventing the formation of the conclusion that insider trading was definitely involved is the fact that the company had made a positive announcement 16 March entitled “Blackham sells to Wesfarmers Premier Coal a 30% interest in additional Scaddan tenements”, stating ‘[i]t is plausible that the movement in the Company's share price may have been due to this announcement, and not the later announcement which the Company believes was confidential until it

was released on 19 March 2009. Should companies in receipt of potentially material results pre-emptively request a trading halt in order to digest the information and compose an announcement?

The multi-step process involved in drill results analysis featured in the responses of several companies in receipt of results around the time of significant security price changes. Issued an aware letter after releasing an announcement titled ‘High-Grade Iron Ore Confirmed at Weeli Wolli’ and in the context of significant appreciation in the price of its securities in the days preceding the announcement on 12 January 2009, Iron Ore Holdings explained the delays in the processing of material information over the Christmas break:

The raw drill result data for the drill holes announced on 12 January 2009 was received by the Company on 24 December 2008 after the Company's office had closed for the Christmas/New Year period. Detailed review, validation and interpretation of the raw drill result data and an analysis of these results in the context of previously received results, including the preparation of formal diagrams of the sectional interpretations, commenced when the Company's staff returned on 5 January 2009. This work continued until the afternoon of Thursday, 8 January 2009 when the final sectional interpretation diagrams were received until which time the information was not sufficiently definite for disclosure.

The current drilling results remained confidential until their announcement and were announced as soon as the available information regarding the drilling results was sufficiently definite. Releasing the raw drill result data without the interpretation, including

the formal diagrams of the sectional interpretation taking into account new and existing drill results, has the potential to be misleading. 966

While the latter part of the final paragraph above makes sense, the assertion in the sentence preceding it is a little more difficult to appreciate in the context of the 100% price rise in the preceding days. That said, the price retraced after the announcement yet still traded in a range representing a 50% appreciation for the next two months, indicating the market believed the information to have been material (in the absence of any other information doing the same).

Other instances involving the release of drill results also evidenced unexplained price movements. Securities in Kings Minerals Limited saw a rapid price increase from 17.5 cents on 24 November 2009 to an intra-day high of 26 cents two days later on 26 November 2009 before its release of an announcement on 27 November concerning optimised pit results. While the company maintained its receipt of results the afternoon of 25 November required a ‘detailed review’ to ‘warrant the accuracy and completeness of the draft information’, which is completely understandable, this does nothing to explain the preceding share price appreciation, nor do any other contemporaneous releases made by the company.967

As noted above, with mineral projects often involving teams of companies, the disclosure obligation becomes even more complicated. Baraka Petroleum Limited released material information relating to potential oil resource estimates on 6 December 2010 having effectively replied in the negative to a
price query the preceding week which questioned a price rise of 50% from 0.006 to 0.009 cents.\textsuperscript{968} Explaining that it had become aware of the estimate 14 November through an email from one of its partners in the relevant venture which ‘contained unsubstantiated numbers without supporting evidence that the numbers were provided by Ryder Scott, or indeed, part of the final report and suggesting that we should wait until we receive the final report before an announcement to the market’.\textsuperscript{969} While being able to document an email trail which apparently demonstrated the company’s efforts at getting a clear, confirmed reading on the report by the contractor, the company’s efforts to accurately inform the market fell in a heap when its partner ‘included the unsubstantiated Estimates in a presentation that they had placed on their website’ on 1 December. Baraka subsequently requested a trading halt on 3 December, and was in receipt of the results the next day with an apology from the contractor. Baraka confirmed in its response to the aware letter that ‘[f]rom the 14 November 2010 to 4 December 2010 the Company only had unsubstantiated numbers on the Estimates. There was no supporting evidence that the numbers were provided by Ryder Scott, or indeed, part of the final report. Once the Company received the Estimates from Ryder Scott, an announcement was made to the ASX and announced pre market Monday 6 December 2010’.\textsuperscript{970}

Again, the process of reporting a resource estimate to market can, as is the case with negotiations, militate against picture perfect disclosure performance.

\textsuperscript{968} BKP Limited aware letter response dated 7 December, 2010.
\textsuperscript{969} BKP Limited aware letter response dated 7 December, 2010.
\textsuperscript{970} BKP Limited aware letter response dated 7 December, 2010.
The length of time geological samples have been under analysis, the re-
sampling and analysis of new information by geologists, the confidential receipt
of the external geologist’s ‘draft report’ containing ‘preliminary data’, which
requires ‘further analysis to determine its significance’, ‘[f]or example, while
the estimated tonnage had increased, this was due to a reduction of the cut-off
grade, which required further analysis to determine the impact on the
economics of the project. Without understanding the meaning or significance
of the Preliminary Data at that time, it was not possible for the Company to
make an accurate and not misleading announcement at that time (or indeed, to
determine whether the information was material at all).971 The further analysis
undertaken by ‘internal and external exploration management’ preceded a
report from external exploration management of an updated resource estimate
which was ‘then reviewed by the internal exploration management and a
determination was made at approximately 3:00pm that the meaning and
significance of the updated estimate was sufficiently definite to warrant
disclosure as potentially material to investors’.972 All this in the context of an
upgrade in the order of 307% to inferred resource estimates and a 25% price
rise from 12.5 to 15.5 cents over two days in the week preceding the release of
the relevant information.973

Companies professed difficulty in deciding when to release drill results which
were made available to the company as and when they were completed as part

973 See also BTV Limited aware letter response dated 15 September, 2010.
of a larger drilling programme, thereby raising uncertainty concerning materiality of the results in the circumstances:

The Company does not believe that the Drill Results as released, are individually material to the Company pursuant to listing rule 3.1. The Company is currently unsure as to whether collectively each set of results, as and when prepared, ought to be considered as material and for this reason has, as a matter of course, periodically released batches of drill results as and when they are prepared ready for release to the market.974

Extract Resources Limited (EXT) Limited arguably found the best answer to its rhetorical question above when it stated ‘the size and scale of results and resources published thus far indicate sufficient data to determine that unless individual drill results are well outside the normal results encountered to date, none should be considered material in isolation’.975

Some responses also seemed to confuse the type of materiality the concern of the regime. Perseus Mining Limited released an announcement titled ‘significant drill results Tengrela Gold project’ which raised ASX’s aware letter flag given the appreciation in the company’s security price the preceding week.976 The company stated that the results did not relate to the company’s ‘lead project’ which was its ‘major focus’ at the time, and that the drill results, despite being touted/described in the title of the release as ‘significant’, did not

976 PRU Limited aware letter response dated 16 September, 2009. A 10% appreciation over two trading days.
‘materially change the Company’s understanding of the economic potential of the Tengrela Project, or constitute a material change in the total value of the Company’s portfolio of mineral assets’.\(^{977}\)

This however did not answer the question asked by the regime, rather, would the information influence an investor to trade upon it? The use of the word ‘significant’ does nothing to help the company’s case that the information released would not do so. Nevertheless, there was a confounding factor at work here, with reports the company might be a takeover target the week preceding the release of the results.\(^{978}\)

Again, partial results may cause or be surrounded by significant price movements occasioning a query or aware letter, however the results are only part of a bigger picture, and if investors choose to react to them there is effectively nothing the entity can do. One example involves Enterprise Metals Limited, which released analytical results concerning 4 holes which had been drilled and which revealed ‘no outstanding (i.e ore grade) results which may have been material’.\(^{979}\) With the share price dropping to 30 from 39 cents the day of the release, it appears investors may have jumped the gun when the company’s response to the aware letter is understood:

*The Company does not consider the analytical results contained in the Announcement to be material for the following reasons:

\(^{977}\) PRU Limited aware letter response dated 16 September, 2009.
\(^{978}\) PRU Limited aware letter response dated 16 September, 2009.
a. the assays were incomplete results from the drill testing of the Golden King and No.2 Bore targets, and represented only 6 holes of the 29 holes drilled to date;

b. as of the 13 November 2009, the Company has received no further analytical results, although it is awaiting results from In excess of 15 holes, including holes at Golden King and No, 2 Bore; and

c. on the basis of the results received to date it is not possible for the Company to make a complete interpretation and determination of the significance of the mineralisation intersected.\textsuperscript{980}

This highlights another important informational vicissitude which relates to the fact that results themselves are by no means necessarily fixed. While the Joint Ore Reserves Committee Code\textsuperscript{981} institutes relatively strict standards regarding the reporting of mineral resources, situations can change, and reassessments can be made which might frustrate the market, but which are not necessarily indicative of a breach of the regime, nor necessarily actionable by way of misleading and deceptive conduct provisions.

A1 Minerals Limited for example announced a ‘potential Resource/Reserve upgrade at Delta’ which was preceded by a price rise from 15.5 to 22 cents from 4 September.\textsuperscript{982} The company explained that while it thought the information was material, that it had ‘completed the drilling program some time ago but had not released the results previously as it did not believe that

\textsuperscript{980} ENT Limited aware letter response dated 13 November, 2009.

\textsuperscript{981} Available at <http://www.jorc.org/>.

\textsuperscript{982} AAM Limited aware letter response dated 11 September, 2009.
they significantly added to the existing resource base’. With the employment of a resource geologist after a capital raising a review of data was begun, and results previously assumed to be insignificant were re-interpreted, with the result that the company believed that ‘the ongoing re interpretation being carried out may result in an increase in resources and reserves and this was the purpose of the announcement. In addition and as disclosed in the announcement the reinterpretation has identified this area as a target for further planned drilling to take place’ \(^{983}\) The company went on to acknowledge that its announcement ‘should have clearly noted that it was the re-interpretation of the results which was believed significant’ before offering other reasons for the contemporaneous share price increase, which a more cynical reader of such an announcement might think were fluffery.

In some instances, it can be investors who misread or misunderstand releases before committing their funds to an announcing company’s securities.\(^{984}\) This is an eventuality no regulation can control for. Likewise, insider trading conspiracy theories aside, volatile price movements can flank the release of completely immaterial information, as in the case of Carrick Gold Limited. A movement of nearly 30% from 71 to 90 cents over 11 days preceding a release entitled “Drilling Update Resource increase” on 22 September 2009 which announced an increase in resources at the Brilliant Project and continued drilling to extend strike at the Brilliant Project saw the company respond flatly


\(^{984}\) ATN Limited aware letter response dated 31 March, 2010: ‘Prior reference was only to visual estimates of chalcopyrite in the drill chips. It may be the case that some investors at the time also confused percentage of copper with percentage of chalcopyrite, the copper bearing mineral’.
to an aware letter as follows: ‘The announcement referred to an increase of 35,800 ounces in the context of a total resource of 4.19 MILLION ounces - an increase of 0.86 per centum’. In the absence of any other information potentially causing this price change which was subsequently maintained and did not reverse we might appreciate the market’s potential irrationality.

It appears that most companies have a clear story as to when they became aware of material information requiring disclosure, which usually appears on publically available evidence to check out. Nonetheless, it does not explain the price activity preceding this awareness. It has to be said that the common factor in most of these circumstances of a lack of awareness by the company of draft information is the geologists contracted to provide what becomes material information. In the absence of any other factor pushing the price at that time that the company could pin its explanatory hopes on, what else other than informed trading by those in possession of potentially material information could explain such pronounced price changes? This appears to be too often a recurring theme to ignore. Again, this is not necessarily a reflection of weakness in the company’s reporting practices (though it can be evidence of such if systems and processes for the maintenance of confidentiality are not up to standard), but rather outside forces which impact security prices in ways which defy explanation, and which can lead to negative assessments, whether correct or not, of the integrity surrounding the market for a particular

986 PRE Limited aware letter response dated 17 June, 2009...
company’s securities, pockets or entire sectors of the market, or the market itself.987

6.8 Takeovers

From a continuous disclosure perspective at the very least, takeover offers are no doubt causative of much consternation at board level, given the pressures surrounding them on all sides in such circumstances, with the high profile takeover offer for David Jones providing a recent example.988 Immediate disclosure may cast the bid into doubt or scare the bidder away, while the longer the information is held the greater the chance rumours might spread through the market causing anomalous trading activity and the potential creation of false markets. Emeco Holdings Limited (EHL) faced a price rise from 66 to 84 cents from 10 to 12 August before responding to a price query with information that it had received an unsolicited, indicative non-binding proposal to acquire 100% of the Company from a financial investment firm.989 Having become aware of the offer after market close on Monday 10 August, which was arguably properly considered material despite the fact EHL had not engaged with the relevant investment firm, the company argued that it ‘did not have a basis to determine any kind of likelihood that the Indicative Proposal would or


would not proceed in the form provided to the Company', noting other reasons for the price change.\textsuperscript{990} Arguing further that the company was protected by the exceptions to the rules, management figured a trading halt was not the best option

because it would have been inappropriate to do so. At that time, all of the exceptions set out in listing rule 3.1A applied to the Indicative Proposal and the Company was therefore under no obligation under listing rule 3.1 to disclose the Indicative Proposal. As noted above, the Company had not engaged with the investment firm, and so there was no reason to expect that an announcement would be imminent, or that there was some event that would have put an end to a trading halt if requested. In these circumstances...it would not have been appropriate to request a trading halt on Tuesday 11 August 2009.\textsuperscript{991}

Price movements in the company’s securities however say otherwise. The fact the price movement may be considered coincidental doesn’t make a difference to the correct answer to the disclosure question. In the interests of full disclosure and the potential for there to have been a loss of confidentiality, possibly even from the other side, the best option would have been to tentatively disclose the fact that the company had received a takeover bid. Given there was no way of knowing whether the bid would have progressed further, whether an exclamation mark would be necessary delineating this as material information and possibly misrepresenting the status of the bid is a matter of conjecture.

\textsuperscript{990} EHL Limited aware letter response dated 14 August, 2009.
\textsuperscript{991} EHL Limited aware letter response dated 14 August, 2009.
Shares in Warrnambool Cheese & Butter Factory Company Holdings Limited (WCB) rose from $1.96 at close on 1 December to a high of $2.23 on 7 December 2009 when a price and volume query was issued by ASX. In its response on 8 December the company stated

The Company has received an unsolicited confidential non binding indicative proposal from a third party involving a possible change of control transaction. To date it has not been considered by the Board as worthy of progression. The Company is aware of no evidence that this approach is connected to the recent trading in the Company’s securities. The Company is strongly of the view that the trades at small volume in relatively illiquid shares means that there could be many other explanations than that the Proposal ceased to be confidential.992

The company also explained that there may have been other potential reasons for the appreciation in share price of nearly 14%:

The Company has no explanation for the change in price and increase in volume in the securities of the Company. The Company notes that increased investor interest is likely to result from the improved operating environment for the Company. This includes increased milk volumes in South West Victoria, higher plant utilisation rates and associated efficiencies, improved global dairy prices and the commissioning of the Company’s new investment, Great Ocean Ingredients.993
In response to an aware letter from the ASX demanding particulars in relation to the situation, the company explained that it had first received the ‘unsolicited confidential non binding conditional indicative proposal’ in regards to a possible change of control transaction on 20 October 2009. The company advised that it believed it was entitled to the protections afforded by the exceptions at the time, and subsequent to its release 8 December advising shareholders not to take any action in respect of their holdings meant the issue ceased to be material.

While the company’s reason for believing the proposal was not material to the price and value of the company’s securities was that ‘the Company considers the Proposal to be inadequate and is not progressing it’, it must be appreciated that the very fact the company was a takeover target is information which can move a price, and potentially cause the development of false markets if confidentiality is lost.

The share price closed at $2.64 and $2.76 on 8 and 9 December respectively once the potential takeover transaction had been publicly acknowledged by the company in its response to the ASX price query, before ascending to a high of $4.50 early March 2010 as the potential deal progressed. Ultimately the deal did not go ahead, although it appears that the somewhat sudden jump of nearly 14% over a five day period in early December 2009, which was at odds with the trading range of the stock for the previous four months, might be difficult to explain as the result of a generally ‘improved operating environment
for the company’. While the company’s reasoning that small trades in an illiquid market for the company’s securities could have many explanations is fair, one of them could be the potential takeover deal. At the very least it could look that way to lay investors, and as such the best option would have been for the company to release the information, as it did.

While one might question the company’s timing, it did have the protection of the exceptions – the practice of the ASX communicating its belief that confidentiality has been lost means that every limb of the exceptions was met until that belief was communicated. Similar situations faced other companies which disclosed the information on ASX’s prodding994, and this was in their best interests, for this is where companies like Rio Tinto and Northern Mining Limited fell afoul of the regime and paid their infringement notice penalties. Disclosure relevant officers do need to realise however that reasoning to the effect that disclosure of any such offer would breach its terms of non-disclosure will not access the first limb of the exemptions and should seek to rely on other bases for their non-disclosure.

Another situation which gives an insight into some of the trickier aspects of disclosing takeover offers involves Andean Resources Limited (AND) and a bid from El Dorado Mining.995 In the context of its high-grade discovery successes the company had received numerous unsolicited proposals which it had ‘no intention of considering or pursuing...as it believed there was greater value to

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be created for shareholders by continuing to explore and develop’ its
tenements on its own. It stated its belief that

since 12 August 2010 and up to the Eldorado Announcement, at which
time the Company immediately requested a trading halt, the trading
activity in its shares was not indicative of the market trading on the
basis of any anticipated transaction, let alone on the basis of an
expected transaction price. The Company is also not aware of any
analyst report, press report or market speculation regarding any
transaction involving the Company during this period. The Company
believes that since 12 August 2010 and up to the Eldorado
Announcement the trading activity in its shares can be explained by a
number of factors, including the fact that its shares were trading in line
with its peer group. 996

While the company’s securities were trading in a fashion volatile enough to
attract two price queries, the timing of the company’s receipt (after an initial
price query) and rejection (before a second price query) of the El Dorado offer
meant it was not, and correctly at that as a decision had been made on the
proposal, mentioned in its response to the price query. 997 The company then
became aware of two new bids, one from Gold Corp and another from El
Dorado (a second offer) after the second price query was responded to by the
company. Now this is where the situation becomes tricky – the company
stated:

997 AND Limited aware letter response dated 7 September, 2010 at 3.
AND considered its continuous disclosure obligations in light of the Second Eldorado Proposal and the Goldcorp Proposal, and concluded that it did not need to disclose either at that time. The Company did not consider the Second Eldorado proposal to be material as it intended to reject it and pursue the Goldcorp proposal. The fact the company had no intention of pursuing a proposal was relevant to the assessment of whether the information was material. The company concluded that in any case it could rely on the exceptions to Listing Rule 3.1, including in particular the fact that both proposals remained confidential and incomplete and that a reasonable person would not expect them to be disclosed. AND continued to monitor trading in its securities and concluded that both proposals remained confidential.998

The issue is that even if the company intended to reject it, the fact it hadn’t meant it was still live for El Dorado, which decided to release an announcement to the market without informing Andean, to which Andean responded by requesting a trading halt to inform the market of its discussions with an as yet unidentified third party (GoldCorp). The company was well within the protections offered however, especially if it was keeping an eye on the price to see whether confidentiality had been breached.999 Nevertheless a sub-optimal disclosure result was obtained, for how would Andean shareholders know they should be watching for announcements from El Dorado about a takeover they wished to make for Andean? Should Andean have advised of the rejection of the El Dorado bid earlier then? It is not clear whether this was necessary although given that ‘all’s fair in mergers and acquisitions’ and that such

998 AND Limited aware letter response dated 7 September, 2010 at 3.
disclosure behaviour by El Dorado might occur, advising of its rejection might have been prudent, especially in the context of another live bid.

For its part, El Dorado stated its belief that ‘a trading halt was not considered appropriate as the information was not material and the announcement merely related to a pre-conditional possible transaction only.’\textsuperscript{1000} Whether this is acceptable conduct in the context of takeover offers on behalf of the bidder is a question beyond the scope of this dissertation, though it does lead to sub-optimal continuous disclosure outcomes.

A takeover offer involving Anchor Resources indicates that investors need to appreciate that not all information is communicated as optimally as one might expect. The company announced after market close on Monday, 20 December 2010 that it had received a takeover proposal from China Shandong Jinshunda Group Co Ltd, yet the fax informing of the takeover indicated a delivery time of 11:15 am that day, well before its advice to the market, and more importantly, over an hour before it requested a trading halt in its securities. In response to an aware letter, the company explained that the notice ‘containing the Takeover Proposal was found on an unattended fax machine by the Company’s Managing Director... at approximately 12 midday on Monday 20 December 2010’.\textsuperscript{1001} The fact the company had a rights issue in the market was also causative of consternation as to what to do with the information contained in the offer, again illustrating the difficulties involved with dealing with such price

\textsuperscript{1000} EAU Limited aware letter response dated 7 September, 2010.
\textsuperscript{1001} AHR Limited aware letter response dated 23 December, 2010.
sensitive information in a timely fashion. Takeovers represent difficult disclosure situations and as discussed in chapter four have resulted in the issuance of three infringement notices. While a trifling figure when the amount of takeover activity in the Australian market over that space of time if an organisation wishes to avoid such negative repercussions it must maintain constant awareness of the state of confidentiality surrounding its precise situation.

6.9 Aware letters and market integrity

The core phenomena attracting the issuance of aware letters analysed above appear to possess an important common feature: the existence of potentially material information which is not solely within the entity’s locus of control. Potential placement partners, shareholders planning governance activity, government agencies, contractual counterparties, auditors, geologists, entities proposing takeover offers, and in all cases, the advisors working behind the scenes to make such events occur, are apprised of information which does not appear to enter the milieu on cue given abnormal trading behaviour exciting the ASX’s pursuit. Whether this is because of poor channel management in the case of government agencies, the lack of any confidentiality requirement in the case of shareholder activism or poor confidentiality mechanisms in all cases generally, the result is that while companies are seemingly able to explain their own disclosure behaviour acceptably well in most cases, that a price change of
serious magnitude, and in the same direction of the yet to emerge material announcement, goes unexplained. It is unlikely this does perceptions of market integrity any favours given the inference available on the circumstantial evidence to hand. While the market is provided with numerical figures highlighting the number of companies exhibiting suspect disclosure behaviour referred to ASIC in any particular period through the ASX’s market enforcement reports\textsuperscript{1002}, the fact that the next stage of investigatory enforcement takes place behind a curtain in the form of an MOU between ASIC and ASX to the effect that the ASX’s referrals remain confidential does not improve the situation, as very few instances of seemingly poor disclosure result in higher level enforcement activity. Nor a recounting of any lessons which might be learned from previous disclosure behaviour which has been referred higher, except in the form of hypothetical examples in the ASX’s Guidance Note 8.

To what extent then do aware letters justify faith in the regime and the integrity of the market it is supposed to engender and protect? The ASX’s pursuit of explanations for abnormal trading behaviour and seemingly aberrant disclosure practices through its issuance of aware letters is of serious importance for the signal it sends that such trading activity does not go unquestioned. What happens after that is anybody’s guess, for assuming an acceptable or even borderline answer which does not warrant further direct regulatory attention, the information then falls to individual investors to make


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a final judgment upon in terms of whether they are willing to trust the company’s explanations or not.

It should be apparent by this stage that the extent of protection able to be offered by the regime is, somewhat limited. There are certain situations which the regime cannot protect against given current practical interpretations of its operation by ASX. If investors understand this, then at the very least they might appreciate the overwhelmingly positive disclosure conduct of Australian companies, given that only very few instances make it to the aware letter stage, and even then only very few actually exhibit wanting disclosure behaviour as far as current applications of the rules are concerned.

A reasoned assessment in view of available evidence might therefore augur well for perceptions of the operation of the regime itself, although there is a disconnect here between its successful operation, and the integrity it was born to protect. This is because that integrity is influenced by factors which the regime cannot control for, and which therefore go unexplained. To be sure, as noted the limited number of such situations gives cause for faith in the integrity of the market, and given the statistics above relating to which types of companies seem to attract the most frequent disclosure attention may assist in delineating areas not fit for the attention of some investors, as the overwhelming majority of companies do not ordinarily need to deal with such queries. Nevertheless, the fact any questions arise regarding the potential for insider trading to exist in the Australian market is not positive for assessments
of the operation of the integrity of the market as a whole, and raises further questions about the extent of the practice as it is fundamentally unclear as to what else might explain such abnormal trading activity.
7. CONCLUSION

No system is perfect. Let alone one which requires constant and consistent human attention and decision making in everchanging conditions. The very fact Australia has a system focused specifically on the continuous disclosure of material information is a great testament to its intent to keep markets fair, democratise participation in them, and thereby encourage higher market liquidity.

Given the grandiosity of the regime’s aims on paper, and the fact it is unable to control for all variables in the disclosure equation, it is easy to throw stones at the transparent façade of market integrity. This has not been the purpose of the analysis in the preceding pages. Rather, this dissertation has been concerned to appreciate the practical limits of the regime from company, regulatory and investor perspectives such that realistic assessments of enforcement activity pursuant to it can be made, that corporate practice might thereby be improved, and that investor perceptions of the integrity of Australian markets might rest on reasonable foundations. Any conclusion as to the efficacy of enforcement mechanisms in the continuous disclosure space must therefore be prefaced by the statement that the very fact a continuous disclosure regime even exists and is taken as seriously as it is in Australia speaks volumes for the importance of market integrity in the Australian context.

Nevertheless, in the interests of its practical development and evaluation, the question as to the extent to which different enforcement efforts surrounding
the regime might justify any faith placed in the integrity of the market by lay investors remains an important one. So, should investors feel confident that the immediate release of material information relevant to their trading decisions is well policed, with the effect that there are likely to be few deviations from this ideal standard, and that the market can be trusted to provide information necessary to maintain a level playing field?

The answer remains the tentative “yes” adverted to at the beginning of this dissertation, with certain sectors, companies and management teams providing caveats investors should be aware of. Of course even this tentative “yes” in no way guarantees against entities outside these groups failing to discharge their disclosure responsibilities and thereby potentially cause loss to be suffered by investors. No system could do that. While the enforcement mechanisms analysed above admit of issues in their practical employment, in sum they provide a range of nets which, having been cast, can be drawn in to deal with suspect disclosure behaviour should the situation warrant it. In this way it appears that the wide range of enforcement mechanisms available to the regulator allows certain mechanisms to supplement weaknesses in others.

Indeed, the proximity of regulatory pursuit to any alleged contravention is of significant importance to any assessment of the integrity of the market; should suspect disclosure behaviour show no sign of being pursued, negative assessments of the importance of the regime to regulators may come to be made by investors and managers, with corresponding negative revisions of the
market’s integrity following closely. Given that the enforcement mechanisms analysed in this dissertation admit of different effective time horizons, the proximity of the issuance of price queries and aware letters project a constant, active interest in adherence to the regime which administrative and higher level mechanisms are unable to signal in the same way.

Conversely, administrative and higher level enforcement mechanisms are able to punish in ways lower level enforcement activity cannot. Despite the reality that higher level enforcement activity may not have generated results expected, or punished those managers directly responsible for poor disclosure behaviour (with the notable exception of the James Hardie litigation), the fact they are pursued at this level sends the message that the regulator is intent on chasing conduct it deems below par. Two limiting factors here are the size of ASIC’s purse, and its opinion as to what constitutes a truly worthy case to pursue. Although each does not seem to have affected ASIC’s decision to pursue FMG, as a result of the fallout from that matter these factors will act to constrain the regulator’s future litigiousness.

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Indeed, the very fact this type of enforcement activity is open to ASIC – and arguably more importantly, the fact that investors themselves have been willing to take similar action with the support of litigation funders – must weigh heavily on the minds of boards and disclosure committees when making disclosure decisions. While previous action taken in the courts by ASIC has been criticised for pursuing companies rather than individuals (with FMG providing an unsuccessful exception), the likelihood of class actions throwing every possible cause of action at a potential breach will form a serious reminder of the potential consequences of failing to continuously disclose for individual managers. The rising prominence of class actions raises the stakes in any decision to play ‘calculated risk games’ in a way lower level enforcement activity such as administrative sanctions cannot.

That is not to say that administrative sanctions do not have a place in the enforcement of the regime, although their practical application may force a reconsideration of their exact role if they are to maintain the business community’s confidence, as well as that of investors. The fact companies appear to simply pay their infringement notices to avoid further costs smacks of regulatory bullying and crude cost-benefit decision making, neither of which give a clear indication of guilt or lack thereof in disclosure matters.

The perennial critique of the use of infringement notices – second only to ASIC’s role as judge, jury and executioner – relates to ASIC’s response times. Originally designated as the speedy, educative offsider to higher level court activity, the depth of information ASIC has found itself sifting through to cover...
its bases before issuing an infringement notice has seen it fall well short of its initially ambitious timing target of three months from the date of any alleged contravening conduct. In the absence of any indication of pursuit while ASIC investigates a matter, assessments of market integrity may initially be damaged due to a perceived lack of interest from the regulator. While market participants must, and likely do, understand the work which must go into making such allegations stick this fact may nonetheless work to steal some of the force of the mechanism away at the time it is actually employed. Indeed, by the time any infringement is issued, investors’ minds have likely moved on.

Further difficulties with actual instances of infringement notice issuance involve seemingly shifting standards, with some egregious cases of non-disclosure being pursued with infringement notices rather than higher level mechanisms, again conflicting with the aims set out at the inception of the mechanism. Given the fact it is unclear how such information might come to have an educative impact on the rest of the market in a way more certainly determined ‘big-stick’ mechanisms may (not to mention the reminder of penalties involved such that this type of enforcement activity actually has an effect on disclosure behaviour more widely), it is not clear why the use of infringement notices should add much to the basic level of confidence a reasonable investor should have in the enforcement of the regime, that pursuit through the courts say might.

In combination with the potential use of other mechanisms however, for example class actions by aggrieved investors which may follow the issuance of an infringement notice, the mechanism continues to form part of a net woven
by the regulator which may have a synergistic effect on the likelihood of compliance. Likewise the use of enforceable undertakings in the continuous disclosure space, although their power as a factor influencing managers to release information pursuant to the regime must be less than that of infringement notices given their largely educative intent. The chance of specific enforceable undertakings actually translating to broader interest from other companies in compliance with the regime and thereby adding to investor perceptions of market integrity must by virtue of the orientation of the mechanism be of less value in this sense than infringement notices.

Given their lack of proximity to events in question it seems that higher level and administrative enforcement mechanisms may act in a more ‘round-a-bout’ way to influence perceptions of market integrity. While they may encourage a belief in the importance of the regime in investors’ minds directly through their high profile pursuit and punitive outcomes, due to their timing their more likely impact is on disclosure responsible managers who might be dissuaded from poor disclosure behaviour when punitive outcomes are meted out to other companies and executives. The lack of contemporaneity of such measures might therefore steal some strength away from their impact in investors’ minds at least, especially in the case of infringement notices, given their relatively mellow punitive outcomes. In view of these limiting factors, the idea that the infringement notice mechanism needs a ‘rethink’ holds significant merit.

Indeed, the failure to release the review of the mechanism two years after its inception has led to growing criticism of its inappropriateness in a complex
regulatory area. Any future decision as to its position in the enforcement matrix will need consider the above factors carefully if it is to have an optimal effect on assessments of market integrity.

Given the temporal factors at play in assessments of market integrity, if investors are left solely with the court of public opinion to guide them on potentially poor disclosure behaviour surrounding volatility in trading prices and volumes while waiting for either higher level or administrative regulatory action, the resulting perceptions of market integrity could suffer precipitous reassessments. The issuance of price queries and aware letters therefore constitute an important measure in assuring investors that such activity has not gone unnoticed, and is indeed being pursued. Corporate responses on the other hand, can prove a weak link in this chain of accountability should they fail to clearly respond to questions posed by the ASX. Organisations have just as important a role to play in maintaining faith in the market to which they belong as do the enforcement mechanisms applied to them. It is imperative therefore that such responses provide quality explanations if the issuance of queries and aware letters is to be of any positive value in the quest for market integrity.

While clarity is optimal, weakness in responses can at least give investors a basis on which to contemporaneously believe in or distrust the company in a way protracted legal pursuit or the judge-jury-executioner model of the infringement notice cannot. The fact mechanisms exist in the form of price queries and aware letters which can force the issue and require companies to engage in dialogue with the market demonstrates their importance in pushing
explanations and thereby giving investors something to base their assessments on: The adage that “no news is good news” is unlikely to be comforting to an investor who has no explanation of wild changes in the value of their share portfolio, meaning their very pursuit by a body with regulatory function in the space (as opposed to a simple media report), as well as the explanation forced out of the company can provide proximate attention to the matter which can assist investors to make their own minds up as to whether to trust the company in question or not. Given the difficulties involved in more serious forms of pursuit, this is the best any market participant can hope for, and all other things being equal, should add to investors’ faith in the integrity of the market as a whole for its ability to compel a company to account for the trajectory of its security prices and trading volumes.

That said, there is likely a need for investors to exercise caution when interpreting responses to queries. Given countless reasons could potentially explain any price or volume movement, both straight “no” and “yes” answers alike should not be automatically seen as either positive or negative, rather the actual content of the response (in any part of it), and any subsequent announcements proximate to the change occasioning the query or aware letter should form the locus of observation. Beginning with the presumption of innocence is also likely the best place to start in any assessment of disclosure behaviour given the range of phenomena which management may simply be unaware of at the time of their response.
Controllability of any reasons cited should then form the defining element in assessing a company’s disclosure performance. If the company cannot be said to be in control of the factor which may be thought to be explanatory of abnormal trading in the company’s securities then it might have been difficult if not impossible for it to inform the market before the information was made public, and therefore unfair to judge its disclosure performance by it. The role of such factors in influencing trading activity in a company’s securities appears part and parcel of the operation of the market as currently constituted and are not necessarily a cause for concern over the company’s disclosure performance. They can nevertheless affect assessments of the market surrounding it.

Indeed, the phenomena attracting the issuance of aware letters often appear to involve information which is not within the organisation’s locus of control. So while entities can explain their disclosure position well, others who may be in possession of the same information yet who are outside the company itself may not be able to provide such explanations, if they were even asked to provide an account, which is beyond the remit of the disclosure regime in many such instances. This means significant price and volume movements may persist unexplained. With the next stage of investigatory activity taking place behind closed doors, any referrals by the ASX to ASIC then disappear into something akin to a regulatory Bermuda triangle. ¹⁰⁰⁴ This does not assist positive determinations of the integrity of the market. In view of the

circumstantial evidence on hand investors may choose to re-evaluate their judgments concerning the integrity of the market within which the company resides, and then simply draw the shortest line of accountability in the face of causal uncertainty back to the company, and also choose to distrust it.

Information released as possible explanations in response to a price query in the context of abnormal trading activity which the company actually is in control of however, may give rise to inferences of questionable disclosure behaviour by the company itself, immediately and directly. In such circumstances, the inference that informed trading has taken place may again seem irresistible in a stronger sense than that of the case where factors cited were outside of the company’s direct control, regardless of a lack of direct evidence given the company’s direct controllability and therefore responsibility over the information in question. This speaks to the importance of simplistic assessments of information, which may cause damage to perceptions of the integrity of the market, and therefore the importance of the need for transparent company responses.

While investors might do well to understand the practical limits of the regime, the potential for such perceptions to arise in circumstances where a company might be in compliance, employing a valid exception for instance, yet where protected information is seemingly used for illicit purposes (given judgments made about price or volume movements around the release of such information in response to a query) exposes a limit to what the regime can achieve. Given the further fact that such information might retain protection
from release until the ASX forms the view that confidentiality may have been lost can lead to further damage to assessments of the integrity of the market. Waiting for investors to understand the depth of such chinks in the armour the regime is designed to provide, in order for their assessments of the integrity of the market to be adjusted accordingly, might not be as sound an approach as simply requiring organisations to maintain greater vigilance over movements in trading volumes and security prices and make their own judgment call as to whether any relevant information should be released. While any such tweak to the operation of the regime may align investor assessments with the reality of the situation without the technicality of current modes of application by the ASX getting in the way, given the likely uproar from listed entities versus the benefits involved (especially in view of the fact the overwhelming majority of companies appear on available evidence to be in compliance) any such tweak may not be worth the effort.

So while the use of aware letters and price queries lends a degree of immediacy to the pursuit of potentially suspect disclosure behaviour which other mechanisms cannot hope to offer, and thereby contribute significant value as a signalling and accountability seeking devices, they are also beset by at least two limiting factors: The content of responses, and the lack of any idea for investors as to where such instances progress to once responses have been provided until any action is actually taken by ASIC. Indeed, very few instances which have received a response to an aware letter or price query have progressed to higher enforcement attention in the form of an infringement notice, enforceable
undertaking, or higher level sanction, with only a handful of the 1389 queries analysed in this dissertation progressing to higher rungs in the enforcement pyramid.

While it may be argued that the very provision of information by the company in question should be enough for investors to make a decision as to what they wish to do in the particular circumstances they find themselves in, the poor quality of some such disclosures can make this difficult. As such, while the use of such lower level mechanisms is essential given the importance of proximity of regulatory attention to assessments of market integrity, what happens after a response has been provided is anybody’s guess, with the information provided falling to the individual investor for contemplation and action which will be based on whether they are willing to trust the company and its management in the circumstances or not.

Given the vagaries of the operation of the provisions and what they can and cannot attach to, it should be apparent that the extent of protection able to be offered by the regime is somewhat limited. Appreciation of this fact is important, and may allow investors to acknowledge the overwhelmingly positive disclosure conduct of the majority of Australian companies. Nevertheless, unexplained price and volume movements which sneak under the accountability radar can only lead to negative revisions of market integrity: Whether it is worth pursuing these in order to minimise them is a cost-benefit decision, and given the small number of companies involved, along with the position in the market they hold, these instances may not affect assessments of
integrity to the point where the majority of investors begin to question their faith in the market overall.

An important determinant then in assessments of market integrity is what investors are left with in the everyday absence of administrative and higher level enforcement mechanisms: Corporate responses to price queries and aware letters. While situations involving court time and the issuance of infringement notices denote specific situations which managers should be aware of and able to apply to their own circumstances when making disclosure relevant decisions, the key take-away from higher level enforcement activity to date is simply that managers need to appreciate that the relativity within which they make disclosure decisions is not the same as the reasonable investor’s. This fact necessitates, as the latest ASX Guidance Note on continuous disclosure urges, the assessment of any situation from the position of an outsider, to determine whether information would influence a manager’s decision, as a member of the ordinary investing public, to trade in the company’s securities. Consideration of this simple axiom alone will assist managers serious about their disclosure responsibilities to make the right decisions as far as material information is concerned. This is as important a lesson for corporate management as it is for investors for its potential to temper the latter’s expectations as to the practical limits of a system of continuous disclosure.

Likewise this is the type of thought process which should emerge when management must deal with price queries and aware letters. More effective
use of trading halts when material information is on foot and potentially moving outside of the protection offered by the exemptions might give the organisation more effective time to comply with the regime, and potentially even avoid the need to deal with any lower level enforcement activity. On a related note, the establishment of systems which can help an entity know where it stands with particular phenomena in the event they are questioned about them, such as financial results or even the status of negotiations (practice encouraged by enforceable undertakings in this space), may also be of assistance. Nevertheless at the point of actually dealing with aware letters and price queries, while information which is not under the control of the entity requires constant vigilance in order to prevent and deal with false markets, as noted above of more importance to assessments of market integrity is information which the entity is actually in control of.

Responses in the case of the former could be improved with the provision of more relevant information which might help investors understand the situation confronting their investments better. Responses to factors within the control of the entity however might explain the movements queried in a way which throws suspicion on the entity itself, and thereby causes damage to assessments of market integrity in a way uncontrollable information ordinarily should not. Given the negative assessments which can result when phenomena under the entity’s control are involved – and which may come to exist in spite of any protection afforded by the exemptions which may apply up to a certain point to shield the release of otherwise material information – treatment of
such situations by entities should be approached carefully, with the best overriding logic likely being the hackneyed “err on the side of caution”. Indeed, if they are thought to apply, constant reassessment of the applicability of the exemptions is simply a necessary pitfall of life under a continuous disclosure sky. If companies were cognisant of the likely effect of such difficulties with the regime from an investor’s perspective and what the likely effect would be on assessments of market integrity – including a potential loss of confidence in company management, the market, and a resulting reticence to invest – they might be tempted to offer better explanations, or find ways to avoid such situations to begin with. Management with an eye on sustainable success in investor engagement would therefore do well to consider the role of investors as the ultimate arbiters of corporate responses when making disclosure decisions. This is fundamentally what will determine whether an investor will trust the company enough to place their cash with it, or leave it there after a continuous disclosure scare in the form of a query or aware letter from the ASX.

As noted at the outset, whether a ‘pure’ state of continuous disclosure exists amongst listed entities is in effect impossible to determine. Are instances involving what appear to warrant further attention pursued with enough vigour, with all possible enforcement mechanisms available, to an extent which should make investors comfortable placing their money in the Australian market? Given that ASIC does not possess unlimited resources, investors must appreciate that while the rules might aspire to the zenith of market integrity,
resulting in a market which can be trusted, that perfect enforcement of whatever information is actually released across every listed entity is also effectively impossible. While several instances involving price queries or aware letters discussed above *prima facie* indicate a need for further investigation, by and large these involve companies operating in conditions which investors should be wary of regardless.

So while providing some cause for faith over and above that which investors might place in other markets depending on the regulatory infrastructure dedicated to keeping their markets fair, the continuous disclosure rules are not a substitute for astute investor decision making and realistic assessments of the chances for redress if things do go wrong. The potential for investor loss by virtue of a failure to continuously disclose is not an eventuality covered by the rules and their enforcement, especially in instances where management has jumped a sinking ship with little left for investors to pick at, as occurred in the Media World Communications debacle.  

The Sons of Gwalia litigation imparts a similar lesson.  

Nevertheless, the fact the regulator does pursue enforcement action across the whole spectrum of enforcement mechanisms (criminal actions excepted), along with the growing threat of litigation funded class actions, mean disclosure relevant officers of listed entities are likely to be on guard against the most flagrant breaches or lapses in judgment as far as the regime is concerned, most

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of the time. Investors may just have to accept, if they haven’t already, that a perfect world will likely never come to exist in man-made markets, but that the regime can help them make informed decisions as to whether to keep playing the game for capital or not before it might otherwise be too late.