Australian Government
Corporations and Markets Advisory Committee

ASPECTS OF MARKET INTEGRITY

Issues Paper

February
2009

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Disclaimer. This document summarises information and makes general statements about the law. However, it has not been prepared for the purpose of providing legal advice. In all cases, you should rely on your own legal advice to determine how the law may apply in particular circumstances.

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Introduction

0.1 Reference to the Committee

In a letter of 19 November 2008 (set out in Appendix A), the Minister for Superannuation and Corporate Law, the Hon Senator Nick Sherry, sought advice from the Corporations and Markets Advisory Committee (CAMAC) by 30 June 2009 on the effect of a number of practices on the integrity of the Australian financial market. The Minister stated:

> As a result of the global financial crisis and the related turbulence in Australian financial markets, the effect on the market of a number of practices has given rise to a significant degree of concern in the business, and broader, community.
>
> I am concerned that the lack of transparency and accountability surrounding some of these practices could mean that there is potential for damage to the integrity of the market and investor confidence.
>
> It is important to ensure that Australia's system of corporate law and regulation is sufficiently robust to provide investors with confidence that they are able to make fully informed decisions. I therefore seek CAMAC's advice on the corporate law aspects of the matters set out in this letter.

The Minister requested advice in relation to the following practices:

- directors entering into margin loans over shares in their company
- trading by company directors in 'blackout' periods
- spreading false or misleading information
- corporate briefing of analysts.

0.2 Purpose of Issues Paper

To facilitate submissions or comments from interested parties, the paper provides background material on the four matters in the terms of reference, analyses the current legal position in Australia, compares approaches in some overseas jurisdictions, and identifies a series of issues for consideration.

While the Committee is not putting forward any proposals at this stage, the paper identifies a number of options for consideration if further action is considered necessary.

Given the time constraints, the issues paper will be published in electronic form only, and submissions are requested by 10 March 2009.

0.3 Request for submissions

CAMAC invites submissions on any aspect of the market integrity matters covered in the terms of reference, including the issues set out in:

- Section 1.8
- Section 2.6
- Section 3.6
- Section 4.7.

The Advisory Committee will continue to review relevant law and practice in overseas jurisdictions and welcomes any information that respondents may wish to provide.

Please email your submission, in Word format, to:

john.kluver@camac.gov.au

If you have any queries, you can call (02) 9911 2950.

Please forward your submissions by **Tuesday 10 March 2009.**

All submissions, unless marked confidential, will be published at www.camac.gov.au

0.4 Advisory Committee

The Advisory Committee is constituted under the *Australian Securities and Investments Commission Act 2001*. Its functions include, on its own initiative or when requested by the Minister, to provide advice to the Minister about corporations and financial services law and practice.

The members of the Advisory Committee are selected by the Minister, following consultation with the States and Territories, in their personal capacity on the basis of their knowledge of, or experience in, business, the administration of companies, financial markets, financial products and financial services, law, economics or accounting.

The current members of the Advisory Committee are:

- Richard St John (Convenor)—Special Counsel, Johnson Winter & Slattery, Melbourne
- Zelinda Bafile—Lawyer, Director and former General Counsel and Company Secretary, Home Building Society Ltd, Perth
- Jeremy Cooper—Deputy Chairman of the Australian Securities and Investments Commission
- Ian Eddie—Professor of Accounting, School of Commerce and Management, Southern Cross University, Tweed Heads
- Alice McCleary—Company Director, Adelaide
- Marian Micalizzi—Chartered Accountant, Brisbane
- Geoffrey Nicoll—Co-Director, National Centre for Corporate Law and Policy Research, University of Canberra, Canberra
- Ian Ramsay—Professor of Law, University of Melbourne
- Robert Seidler—Partner, Blake Dawson, Sydney
- Greg Vickery AM—Chairman and Partner, Deacons, Brisbane
- Nerolie Withnall—Company Director, Brisbane.

The Executive comprises:

- John Kluver—Executive Director
- Vincent Jewell—Deputy Director
- Thaumani Parrino—Office Manager.

1 Margin lending to directors

1.1 The Minister's request

The Minister said in his letter that:

> there may be a significant adverse impact on the market price of a company's shares where a director is required to divest large parcels of shares as a result of a margin call.

In an accompanying press release, the Minister noted that:

> Concerns have been expressed about the adequacy of disclosure to the market of directors' margin lending arrangements and uncertainty remains as to the nature of directors' obligations to disclose both to their boards and to the market – we need to clear this up once and for all.[1]

The Minister's letter also states:

> Better disclosure to the market will improve the ability of market participants to assess the risk of divestiture of material shareholdings by directors. However, some commentators have suggested that the provision of specific details of loan arrangements, such as trigger prices, may encourage market manipulation by short sellers of the company's stock.
>
> The frequency, nature and extent of any mandatory disclosures may also impact on the regulatory burden imposed on companies. Generally, greater disclosure increases the costs and complexity of compliance. Improving the clarity and certainty of the test to be applied in determining whether disclosure is required may reduce complexity, the costs of compliance, and costs resulting from erroneous non-compliance.
>
> The current regime should also be assessed in terms of the effect on directors as well as on the company itself. Rules that impose costs upon directors may act as a disincentive to directors acquiring a material shareholding in companies which employ them. The extent to which any rules require the disclosure of the personal affairs of directors or their associates may have a similar effect.

The Minister asked the Advisory Committee to:

- compare overseas regulation of the disclosure of directors' shareholdings subject to margin loans or similar funding arrangements with that of Australia
- advise whether any, and if so what, changes are required to Australia's regulatory framework.

1.2 Background

The Minister's letter referred to the practice of margin lending as follows:

> Margin lending refers to the practice of providing loans that are secured over an asset held by the borrower, with a condition that if the ratio of the asset's market value to the amount of the loan falls below an agreed level, the borrower may become subject to a 'margin call'. If this occurs the borrower must reduce the level of indebtedness or increase the value of the security pledged, commonly by selling part of the security to pay down the loan. Margin loans are commonly utilised to enable investors to acquire financial products which are then used as the collateral.

Further details of margin lending were provided in an earlier Treasury Green Paper:

> Margin lending describes an arrangement under which investors borrow money to buy financial products (such as listed shares, fixed interest securities and units in managed funds). The underlying financial products are then used to secure the loan for those products. As with most other loans, investors must pay interest on the amount borrowed under a margin loan. Margin

1 *Press Release*, 19 November 2008.

> loan facilities are based on contractual arrangements between the lender and the client. Primary disclosure of the terms and conditions governing the loan occurs through the lending agreement signed between the two parties.
>
> Repayments for the loan may be required if the investment is subject to a 'margin call'. This occurs where the market value of the investment falls below the level agreed under the contract. This could be caused by a fall in the value of the investment or if there is a significant fall in the market. A margin call requires the investor to increase the level of assets securing the loan to return the portfolio to the agreed limits stated under the contract. This can be done by paying extra cash, selling some of the assets or giving the lender additional security. The lender is under no obligation to contact the investor when a margin call is made. The responsibility falls on the investor to increase the asset level as security in accordance with the time line set out in the margin loan agreement.
>
> The amount an investor can borrow depends on the loan-to-valuation ratio (LVRs) offered by a lender for each stock. This can vary from as low as 30 per cent to as high as 90 per cent. Stocks that are deemed to be low risk will have higher LVRs, and the investor is able to borrow more.[2]

In response to the Minister's request, this chapter focuses on margin lending to directors. It is noted that similar issues to those involved with margin lending can also arise in relation to any arrangement under which shares or other equity-linked interests in a company are acquired by directors in circumstances where those shares or interests are not owned outright or a third party has an interest in or rights in relation to them.

While the reference deals with margin lending to directors, the Committee notes that similar issues can arise where executives have shares in the company affected by margin lending arrangements.

The issues in relation to margin lending are part of a broader question about the appropriate disclosure by directors and other officers of their interests in their company.

1.3 The issues

It is generally seen as beneficial for the directors of a public company to hold shares in that company. A personal financial involvement may be an inducement to good performance and a means of aligning the interests of directors with those of other shareholders.

In practice, directors fund the acquisition of shares in various ways. Some companies adopt a practice by which part of the fees drawn by directors are allocated to the acquisition of shares. Directors have also financed their share acquisitions through various lending arrangements, including margin lending. Margin lending has allowed directors to use their shares as security to support the loan, subject to conditions under which the lender is entitled to make a call on the loan if the value of the shares declines or to sell the shares in circumstances of default.

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2 *Financial Services and Credit Reform: Improving, Simplifying and Standardising Financial Services and Credit Regulation* (June 2008) at 27.

The use of margin loans by directors raises a series of issues:

- possible conflicts between their self-interest and their fiduciary duties to act in the best interests of the company (Section 1.4)
- whether directors may put themselves in an untenable position under the insider trading laws (Section 1.4)
- the adequacy of disclosure to the company (Section 1.5) and to the market (Section 1.6) of directors' shareholdings where those shares are subject to margin loan arrangements.

The terms of reference do not cover the obligations of lenders in making margin loans. In this area, the Australian Government Financial Services Working Group has commenced consultation with industry on a national margin lending regulatory regime, which will cover product disclosure obligations of lenders.[3]

1.4 Regulation of margin loans to directors

While there is no express prohibition on directors entering into margin loans as such, consideration needs to be given to the compatibility of such loans with the duties of directors to their companies and to the implications of the insider trading laws if directors were forced to sell their shares at a time not of their choosing.

1.4.1 Current position

Duties of directors

Directors with margin loans secured by shares that they hold in the company may face conflicts of interest between their personal exposure under the lending arrangements and their common law and statutory duties to the company.[4] A director may feel under undue pressure to support the share price in the short term, having regard to the exigencies of personal margin loan arrangements. A director with a margin loan may also be concerned that the disclosure of negative corporate information by the company could reduce the market price of the shares and thereby trigger a margin call.

Insider trading laws

The insider trading laws place constraints on the timing of share sales and purchases by directors. These constraints may be in force when a director is under pressure, or is obliged, to sell shares of the company in response to a margin call under a margin loan arrangement.

A director in possession of price-sensitive information[5] is prohibited from dealing in the company's shares, whether or not to satisfy a margin call, so long as that information remains confidential.[6] The entry by a director into a margin loan arrangement that may lead to a forced sale of those shares may place the director in an untenable position under the insider trading laws. A director with inside information has no defence that the trading was triggered by a margin call, that the trading was in response to a pressing financial need, that the director decided to trade for reasons other than reliance on the inside information or that the

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3 See also the Treasury Green Paper *Financial Services and Credit Reform: Improving, Simplifying and Standardising Financial Services and Credit Regulation* (June 2008). Cf United States SEC Rule 10b-16 -- Disclosure of Credit Terms in Margin Transactions of the General Rules and Regulations promulgated under the Securities Exchange Act of 1934.

4 These duties are summarised in the Advisory Committee report *The social responsibility of corporations* (December 2006) Sections 3.2 and 3.3.

5 The concept of 'inside information' is defined in s 1042A.

6 s 1043A(1)(c).

trading was contrary to the inside information (for instance, where the information indicated that the shares were underpriced).[7]

Directors who hold inside information are also prohibited from 'procuring' anyone else to transact in those securities.[8] Procuring would include a director consenting to a lender selling shares to satisfy a margin call. Margin lending arrangements may also provide for a lender to transfer or sell securities without the consent of the borrower if a margin call is not honoured. Arguably, a director with inside information who fails to honour a margin call could be said to be 'procuring' a transaction in the shares by the lender (given that procure 'includes cause'[9]) where the director could have taken steps to prevent the transfer or sale, such as providing additional or substitute collateral or repaying all or part of the loan (funded, if necessary, by the sale of other assets). The lender would not be in breach in effecting the transaction unless aware of inside information.

The US Securities and Exchange Commission (SEC) Rule 10b5-1[10] (which has no equivalent in the Australian insider trading laws, but which the Advisory Committee has recommended be introduced[11]) permits persons with inside information to buy or sell financial products under non-discretionary trading plans, provided they devised these plans before becoming aware of the current inside information and they have no discretion to alter those plans, other than to terminate them.[12] The SEC has indicated that transactions entered into in consequence of loan arrangements for the purchase of shares generally do not qualify for exemption under Rule 10b5-1 from the insider trading provisions as:

- the borrower can usually exercise a discretion not to pay the loan, resulting in default and transfer or sale of the securities
- the borrower often has a discretion to substitute collateral or provide additional collateral or cash to prevent foreclosure and sale of the stock.

The SEC has also indicated that, where, in response to a margin call, a person retains any discretion to substitute or provide additional collateral, or to repay the loan before the

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7 See the Advisory Committee *Insider Trading Discussion Paper* (2001) paras 2.142-2.158 and the Advisory Committee *Insider Trading Report* (2003) paras 3.8–3.9.

8 s 1043A(1)(d).

9 Definition of 'procure' in s 9.

10 SEC Rule 10b5-1 was introduced in October 2000.

11 *Insider trading Report* rec 16.

12 As indicated in the Advisory Committee *Insider Trading Discussion Paper* (2001) Appendix 6, US Rule 10b5-1 does not require registration of the plan or regulate its period of operation or level of detail. However, to protect against possible abuse, the exemption from the insider trading provisions only applies where:

- the trading took place in accordance with a plan entered into when the person was not aware of any inside information
- there are no discretions under the plan, other than to terminate it (given that under US law, as under Australian law, any person with inside information may lawfully decide not to trade). A person could not activate a trading plan, or change its terms, during that time
- the plan was entered into in good faith and not as part of a scheme to evade the insider trading prohibitions. This would overcome the possibility of a person entering into a number of concurrent plans that have an overall neutral effect and subsequently terminating those plans that would not be profitable given later obtained inside information.

Issuers generally require a cooling-off period to make sure that transactions under the plan are not based on information held by the insider at the time the plan was adopted or amended.

pledged securities may be sold, Rule 10b5-1 does not provide a defence to any charge of insider trading.[13]

1.4.2 Possible further initiatives

There are various possible approaches that could be adopted in any move to regulate further the process of entering into margin loans. None of these suggested approaches affects the application of the insider trading laws.

Option 1: Voluntary approach

Under this approach, companies would be left to determine whether or in what circumstances restrictions should be placed on their directors entering into margin loan arrangements.

The Investment and Financial Services Association (IFSA) and the Australian Council of Superannuation Investors (ACSI) have said that companies should have defined policies on directors and senior executives trading and exposures in their company's securities.[14] Commentators have suggested various matters that companies might cover in their policy on margin loans, including whether or in what circumstances to restrict or prohibit these loans. For instance, a company might decide to:

- restrict the pledging of the company's securities as collateral for a loan unless certain conditions are satisfied, or
- permit the pledge of stock on a case by case basis if the director can clearly demonstrate the financial capacity to repay the loan without resort to a sale of the pledged securities or can satisfy some other prerequisite, or
- prohibit the holding of the company's shares in a margin account.[15]

Option 2: Prior company approval as a prerequisite to margin loans

Directors could be required to obtain clearance from the company before granting security over shares that they hold in the company.

This option is based on an approach in the Model Code issued by the UK Financial Services Authority and applicable to all UK listed entities. Under the Model Code (which is an Annex to the Listing Rules), a director intending to use shares of the company as security must obtain clearance from the company before doing so.[16] This would include the situation where a director has taken out a margin loan for the purchase of the company's shares.

A person who is given clearance must proceed with the transaction as soon as possible and in any event within two business days of clearance being received.[17]

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13 Securities and Exchange Commission, *Division of Corporation Finance: Manual of Publicly Available Telephone Interpretations Fourth Supplement*.

14 Joint statement 28 March 2008, reaffirmed by IFSA in its response to the Treasury Green Paper *Financial Services and Credit Reform: Improving, Simplifying and Standardising Financial Services and Credit Regulation* (June 2008).

15 Stinson Morrison Hecker LLP, 'Corporate Finance e-Alert: Recent Events Highlight the Need to Review and Update Insider Trading Policies' (20 November 2008).

16 Model Code paras 3-4.
The prohibition in the Code applies to 'dealing' and the Code expressly states that 'dealing' includes 'using as security, or otherwise granting a charge, lien or other encumbrance over the securities of the company' (paragraph 1(c)(v)).
This requirement also applies to a senior executive. The Model Code requirement applies to 'persons discharging managerial responsibilities'. This term covers directors and senior executives: see *Financial Services and Markets Act 2000* (UK) s 96B(1).

17 Model Code para 7.

The company must not give clearance when there is inside information about the company or in the period before the release of financial information[18] or 'on considerations of a short term nature'.[19]

A person, who is not in possession of inside information about the company, may be given clearance to sell (but not purchase) if he or she is in severe financial difficulty or there are other exceptional circumstances.[20]

Compliance with the Model Code is mandatory,[21] though a listed company may impose more rigorous dealing obligations than those required by the Model Code.[22]

The Model Code is set out in Appendix B.

Option 3: Impose limitations on margin loans to directors

Directors could be required by law to satisfy certain conditions before they can enter into margin loans concerning the company's shares, for instance:

- the loan does not represent more than a specified percentage of the value of the relevant securities
- the director can demonstrate the financial capacity to repay the loan without resort to sale of the pledged securities.

Any such prerequisites could be reinforced by a further requirement that the company certify that the margin loan satisfies the stipulated conditions before the director enters into it.

Option 4: Prohibit margin loans to directors

The legislation could prohibit directors from entering into margin loan arrangements related to their shares in the company.

This option would overcome the potential conflict of interest between the personal interest of a director who has a margin loan and that person's duty to act in the best interests of the company. It would also remove the risk of a forced sale in breach of the insider trading laws. At the same time, it would limit the means by which directors could finance the acquisition of the company's shares.

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18 Model Code para 8, definition of 'prohibited period' in para 1(e), definition of 'close period' in para 1(a).

19 Model Code para 8. An investment with a maturity of one year or less will always be considered to be of a short term nature.

20 Model Code para 9. A person may be in severe financial difficulty if he has a pressing financial commitment that cannot be satisfied otherwise than by selling the relevant securities of the company: Model Code para 10. A circumstance will be considered exceptional if the person in question is required by a court order to transfer or sell the securities of the company or there is some other overriding legal requirement for him to do so: Model Code para 10.

21 LR 9.2.7 ('No dealings in any securities may be effected by or on behalf of a listed company or any other member in its group at a time when, under the provisions of the Model Code, a director of the company would be prohibited from dealing in its securities, unless such dealings are entered into (1) in the ordinary course of business by a securities dealing business; or (2) on behalf of third parties by the company or any other member of its group.'), LR 9.2.8 ('A listed company must require every person discharging managerial responsibilities, including directors to comply with the Model Code and to take all proper and reasonable steps to secure their compliance.').

22 LR 9.2.9.

1.5 Disclosure by directors to the company

1.5.1 Current requirement

There is no specific legislative requirement for directors to disclose their margin loan arrangements to the company. However, under s 191, directors must disclose to the board any material personal interest they have in a matter that relates to the affairs of the company. The disclosure notice must give details of:

- the nature and extent of the interest, and
- the relation of the interest to the affairs of the company.[23]

ASIC considers that, pursuant to this general provision, directors should disclose all material information concerning a margin loan to their companies:

> Directors have a duty under the Corporations Act to disclose to the company material personal interests on a matter relating to the company. Accordingly, ASIC would expect all directors to have provided the company with all relevant information when a margin loan is entered into over securities in the company.[24]

However, there may be a question whether a director's personal arrangements for a margin loan over shares in the company are matters that relate to the affairs of a company.[25]

1.5.2 Possible further approaches

There are other possible approaches if further disclosure of directors' margin loans is considered necessary.

One approach is to leave it to each company to determine the matter. Another approach is to expand s 191, or introduce a separate provision, to require directors to provide greater disclosure in relation to their shareholdings including in relation to margin loans

Option 1: Voluntary approach

Under this approach, it would be a matter for companies to develop a policy on whether directors should disclose margin loan arrangements to the company or what details of those loans should be disclosed, over and above the s 191 disclosure requirements.

For instance, a company could require directors to disclose to the board all relevant information about funding arrangements for a 'material' holding in the company's shares. That information could include the number of shares covered by a margin loan arrangement, the circumstances in which a call can be made and how shares can be sold if a call is not satisfied. The determination of whether a holding is material could include the size of the parcel of shares subject to a funding arrangement and whether selling those shares might be expected to affect market trading patterns.

It may also be best practice for details of the company policy regarding internal disclosure of margin loans to be publicly disclosed, say, on the corporate website.

Option 2: Disclosure of entry into a margin loan

Another approach, based on a UK Financial Services Authority (FSA) model, would require directors entering into any financial instrument granting a security over shares in the

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23 s 191(3)(a).

24 Joint ASIC/ASX Media Release accompanying Companies Update 02/08 (29 February 2008).

25 Blake Dawson *Company Law & Governance Update* 28 March 2008.

company held by them to inform the company of this within a short period (four business days in the UK) of execution of the instrument.[26]

The FSA also requires that the company disclose this information (together with the date on which the notification was made to the company) to the market as soon as possible, and in any event by no later than the end of the business day following the receipt of the information.[27]

Option 3: Disclosure of details of a margin loan

There could be a specific obligation on directors to disclose to the company that they have entered into a margin loan and to provide all material details concerning the operation of that margin loan.

1.6 Disclosure to the market

1.6.1 Current position

Obligations of directors

Section 205G requires directors of a public listed company to notify the exchange of:

- relevant interests in securities of the company, and
- contracts that confer a right to call for or deliver shares in, debentures of, or interests in a managed investment scheme made available by, the company or a related body corporate

within 14 days after their appointment or the listing of the company.[28] A director must also notify the exchange of any changes in those interests within 14 days.[29]

A director is obliged under s 205G to disclose any transactions in shares of the company that he or she holds, including transactions pursuant to margin lending arrangements. However, it

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26 FSA, 'Disclosure and Model Code obligations in respect of the use of shareholdings as security', Statement, 9 January 2009, FSA/PN/005/2009 (9 January 2009). The FSA states that: 'Grants of security over shareholdings also fall within the Disclosure and Transparency Rules (DTR).'
This obligation arises out of a more general disclosure requirement in the Disclosure and Transparency Rules (DTR), introduced in compliance with the EU Market Abuse Directive (Directive 2003/6/EC), implemented by Directive 2004/72/EC. Under the more general requirement, directors of a company and other persons discharging managerial responsibilities in the company (as well as their connected persons) must 'notify the issuer in writing of the occurrence of all transactions conducted on their own account in the shares of the issuer, or derivatives or any other financial instruments relating to those shares within four business days of the day on which the transaction occurred': Disclosure and Transparency Rules (DTR) 3.1.2, based on Article 6(4) of the European Union Market Abuse Directive (Directive 2003/6/EC) and Article 6(1) of Directive 2004/72/EC.
The DTR (like the EU Directives) do not define what is meant by 'transaction' in this context. However, the FSA, in a statement in January 2009, confirmed that grants of security over shares (by the creation of a security interest such as a pledge, mortgage or charge) are covered by this disclosure requirement.
The FSA recognised that there are differing approaches in some other EU Member States. The FSA is therefore seeking to reach a common understanding with the European Commission and its counterparts in the Committee of European Securities Regulators on the detail of the requirements of the EU Directive in this area.

27 DTR 3.1.4, DTR 3.1.5, DTR 3.1.6. Article 6(4) of the Market Abuse Directive (Directive 2003/6/EC) states that 'Member States shall ensure that public access to information concerning such transactions, on at least an individual basis, is readily available as soon as possible'.

28 The Advisory Committee in its *Insider Trading Report* (2003) recommended that the disclosure period should be reduced from 14 days to 2 business days (except for changes arising under dividend re-investment plans, where the period should remain at 14 days): rec 1.

29 s 205G(4).

is less clear whether the directors must also disclose under s 205G when they have entered into margin loans and the details of those loans. On one view, s 205G has this extended effect where margin loan arrangements are contracts 'to which the director is a party'[30] and 'that confer [on the lender] a right to call for … shares in' the company if the conditions of the margin loan are breached.[31] Another view is that 'information about financing arrangements for a director's shares would not generally be captured' by the s 205G and listing rule disclosure requirements.[32]

Obligations of the company

Supplement to s 205G. The Australian Securities Exchange (ASX) listing rule 3.19A supplements the statutory obligation of directors under s 205G[33] by imposing on listed companies the same type of disclosure obligations as s 205G imposes on directors, though:

- the time limit for disclosure is reduced to 5 business days,[34] and
- the ASX rule goes beyond the language of s 205G by requiring disclosure of details of the value of a transaction and disclosure of the position before and after a transaction.[35]

The obligation to disclose under the ASX Listing Rule falls on the company rather than the director, given the contractual nexus between the exchange and the company under the listing rules. However, ASX Listing Rule 3.19B requires a listed entity to make such arrangements as are necessary with a director of the entity to ensure that the entity can comply with its disclosure obligation under ASX listing rule 3.19A.[36] As stated in an ASX Guidance Note:

> An entity is not required to notify ASX of any information which it does not have, and thus would not be in breach of the Listing Rules in such a case.
>
> If information is not given to ASX because the director has not disclosed it to the entity, the entity does not breach rule 3.19A. However, if the entity does not take action to ensure that the director understands his or her obligations and makes the required disclosure, the entity will be in breach of rule 3.19B.[37]

Continuous disclosure. ASX Listing Rule 3.1 provides that, once a company becomes aware[38] of information concerning it that a reasonable person would expect to have a material

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30 s 205G(1)(b)(i).

31 s 205G(1)(b)(ii).

32 Blake Dawson *Company Law & Governance Update* 28 March 2008.

33 The ASX Listing Rules use the concept of 'notifiable interest', which is defined in terms that reflect s 205G: ASX Listing Rule 19.12.

34 See ASX Guidance Note 22 *Director Disclosure of Interests and Transactions in Securities – Obligations of Listed Entities*, para 7.

35 ASX Listing Rules Appendix 3Y, ASX Guidance Note 22 *Director Disclosure of Interests and Transactions in Securities – Obligations of Listed Entities*, paras 8, 21-22.

36 See also ASX Guidance Note 22 *Director Disclosure of Interests and Transactions in Securities – Obligations of Listed Entities*, para 9 and Attachment 1.

37 ASX Guidance Note 22 *Director Disclosure of Interests and Transactions in Securities – Obligations of Listed Entities*, paras 8, 10.

38 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 officer of the entity (ASX Listing Rule 19.12). A director or executive officer who becomes aware of information must immediately consider whether the information should be made available to ASX: an entity cannot delay giving information to ASX pending formal sign-off or adoption by the board (ASX Guidance Note 8 para 18).

effect on the value of the company's securities, the entity must immediately inform the ASX.[39]

The ASX/ASIC joint *Companies Update 02/08* (29 February 2008) sets out their view on how this continuous disclosure listing rule applies to margin lending to directors. It states that, where a director's relevant and material shareholding is subject to a margin loan (or similar funding arrangement), LR 3.1 may, in 'appropriate circumstances', require an entity:

> to disclose the key terms of the arrangements, including the number of securities involved, the trigger points, the right of the lender to sell unilaterally and any other material details. Whether a margin loan arrangement is material under listing rule 3.1 is a matter which the company must decide having regard to the nature of its operations and the particular circumstances of the company.

The information concerning margin loans that directors may be required to disclose to companies (as discussed in Section 1.5) has a direct effect on what companies have to disclose under the continuous disclosure requirements. A company would only be in a position to disclose details of the loan arrangements to the extent that the director has provided it with this information.

One commentary[40] has expressed the following view on the effect of LR 3.1 on margin loans:

- a decision on whether a director's margin loan arrangement will have a material effect on the price or value of an entity's securities could involve an assessment of the size of the director's shareholding as a portion of the total register – the larger the director's shareholding, the more material any margin loan arrangements may be
- it is arguable that there is no need to disclose those arrangements where the director's shareholding represents a very small portion of the entity's total issued share capital.

Another commentator[41] has said, for the purpose of the listing rule:

> In deciding the 'materiality' of a director's margined interest, factors such as liquidity, company size and levels of short selling may be taken into account.

A judgment of materiality may fluctuate frequently in volatile trading conditions.[42]

Preventing a false market. ASX Listing Rule 3.1B requires a listed entity, on request, to give ASX information needed to correct or prevent a false market in the entity's securities.

The ASX/ASIC joint *Companies Update 02/08 Companies Update 02/08* states:

> Listing rule 3.1B applies where ASX considers that there is or is likely to be a false market, and in such circumstances an entity must disclose information necessary to correct or prevent a false market. This requirement may arise even though the entity is

39 An entity must not disclose information that is for release to the market to anyone (including the media, even if the information is embargoed) until it has given the information to ASX and has received an acknowledgement from ASX that the information has been released to the market: ASX Listing Rule 15.7, ASX Guidance Note 8 para 22, Guidance Note 14 *Company Announcement Platform*. Making the Company Announcement Platform the central collection point for market sensitive information is designed to ensure the efficiency and integrity of the process of release of market information and significantly reduce the risk of insider trading and unequal access to information (ASX Guidance Note 8 para 23).

40 Blake Dawson *Company Law & Governance Update* 28 March 2008.

41 Cooper Grace Ward Lawyers 29 April 2008 'Risky business: limiting director exposure to margin borrowing'.

42 Australian Institute of Company Directors (*Position paper no. 9 – Directors' Margin Loans,* 21 July 2008).

not aware of any information that would be required to be disclosed under listing rule 3.1.

1.6.2 Possible additional disclosure to the market

Arguments for and against additional disclosure

Arguments for additional disclosure requirements for margin loans include:

- *clarity for disclosing parties:* the application of the current disclosure requirements to margin loans is not clear. Introducing a specific market disclosure requirement for margin loans would add to certainty and levels of compliance
- *information to the market:* arrangements that give third parties rights over the shareholdings of directors can have very material impacts on the market price of a company's shares. For instance, there may be a significant adverse impact on the market price of a company's shares where a director is required to divest large parcels of shares as a result of a margin call. Better disclosure to the market would improve the ability of market participants to assess the risk of divestiture of material shareholdings by directors.

Arguments against additional disclosure requirements directed specifically at margin loans include:

- directors may be discouraged from acquiring a significant parcel of the company's shares if the regulation of margin loan arrangements is considered too onerous
- the risk to the market from margin loans is questionable where a director's shareholding is insignificant relative to the company's overall issued capital
- conversely, where a director's shareholding is significant, disclosure to the market of details of the loan arrangements, particularly trigger prices for margin calls, may encourage some market participants to sell shares in the company for the purpose of triggering margin calls, which may lead to directors selling shares, thereby prompting a further decline in the market price of the shares.

Threshold for further disclosure requirements

An issue in introducing any further disclosure requirements is whether they should apply in all instances or only where the affected shares constitute a material proportion of the company's share capital.

One possibility is to limit the disclosure requirement to those directors who are also substantial shareholders,[43] given that a substantial shareholding may be sufficiently large that its sale in response to a margin call could materially affect the market price of the company's shares.

Possible content of further disclosure requirements

Initial information. The range of information that could be required to be disclosed under any additional disclosure requirement could include:

- a statement that a director has a margin loan
- disclosure of the number of shares subject to a margin loan

[43] Part 6C.1, definition of 'substantial holding' in s 9.

- details of the security arrangements, in particular the circumstances in which a margin call could be made (for instance, the market price of the shares that would trigger a margin call).

Updated information. One option might be to require disclosure to the market of material events that have occurred since entry into the margin loan and that may affect the company's shares. For instance, there could be an obligation to disclose to the market any material change to the margin lending arrangements.

A further possible disclosure obligation might arise when the market share price was within a specified range of the margin call strike price. However, this could generate concerns that disclosure of these details would encourage predatory selling by other market participants aimed at activating the margin call.

Who should disclose

The relevant information concerning a margin loan arrangement would be held by the director. Any further market disclosure requirement could be in the form of requiring the director to provide this information to the market (cf s 205G) or requiring the director to disclose the information to the company, which in turn would be required to disclose the information to the market.

1.7 A more generic approach to disclosure

Another option would be to develop a more generic principle-based provision under which:

- directors would be required to disclose to the company their interests or arrangements regarding their shareholdings or other equity-linked interests in the company, including financing arrangements
- a company would be required to disclose to the market all information concerning those interests or arrangements of directors that investors would reasonably require.[44] ASX or ASIC could employ Guidance Notes to assist in understanding the application of this test.

1.8 Issues for consideration

The Advisory Committee invites submissions on any aspect of matters raised in this chapter, including:

Regulation of margin loans to directors (Section 1.4)

(1) the implications for market integrity of margin loans to directors

(2) should there be specific regulation of the process of entering into margin loans by directors? If so:

- should it be left to individual companies to set the conditions under which directors can enter into margin loans
- should the legislation require prior company approval before directors can enter into margin loans
- should the legislation impose limitations on margin loans to directors
- should the legislation prohibit margin loans to directors

44 Cf s 710.

Disclosure by directors to the company (Section 1.5)

(3) should there be specific requirements for directors to disclose to the company that they have entered into margin loans? If so:

- should it be left to individual companies to set the disclosure requirements
- should the legislation require disclosure of entry into a margin loan
- should the legislation require disclosure of the details of a margin loan

Disclosure to the market (Section 1.6)

(4) should there be specific requirements for directors to disclose to the market that they have entered into margin loans? If so, what information should be disclosed (for instance, that the director has a margin loan, the number of shares subject to the loan or other details of the loan such as the circumstances in which a margin call could be made)

(5) should directors be required to disclose to the market (or to the company, which would then disclose to the market) particular events that have occurred since entry into the margin loan and, if so, what events (for instance, that a margin call has been made or that the market share price was within a certain percentage of the margin call strike price)

(6) should the market disclosure requirements apply to all directors or only to those directors who are also substantial shareholders

Generic approach to disclosure (Section 1.7)

(7) should directors be obliged to disclose to the company their interests or arrangements regarding their shareholdings or other equity-linked interests in the company, including financing arrangements

(8) should a company be required to disclose to the market all information concerning those interests or arrangements of directors that investors would reasonably require?

2 'Blackout' trading by company directors

2.1 The Minister's request

The Minister's letter expressed concern that active trading by directors between the close of a company's books and the release of results has the potential to affect confidence in the integrity of Australia's markets. The Minister's media release accompanying the reference stated that:

> Research has found a very significant lack of compliance with regard to rules around trading in the 'blackout' period. This is unacceptable and makes a mockery of the rules restricting such trading.

The Minister has asked CAMAC to:

- examine how overseas jurisdictions regulate 'blackout' trading, and compare and contrast overseas regulation with that of Australia
- given the already extensive insider trading prohibition, advise whether changes are required to Australia's regulatory framework to provide for greater confidence in the integrity of the market, specifically relating to directors' trading activity
- advise what form any such changes should take if they are required.

2.2 Background

Against the background of the prohibition on insider trading, some companies have adopted a policy by which directors or other officers are precluded from dealing in the company's shares during the sensitive period between the close of a financial reporting period and the release by the company of the results for that period. Companies are encouraged under the ASX Corporate Governance Council guidelines to adopt a policy of this kind, having regard to the sensitivity of any trading by directors or other officers within that period.

As observed by the ASX:

> A trading policy which includes a provision for a blackout on trading by directors and others in the period between the close of books and the announcement of full or half-year results acts as a mechanism for minimising the potential for any perception that directors or others are dealing in the entity's securities while in possession of inside information. Trading policies frequently permit trading in 'windows' following the full and half year results' announcements.[45]

There is no definition of a blackout period, nor is there a prohibition on such trading. Rather, it is a matter for each company to decide:

- whether to have a blackout trading policy in relation to all or some of its own securities
- to whom within the company that policy will apply
- during what period the blackout will operate, and
- whether any exemption from blackout trading can be granted, by whom and on what basis.

It is common for a company policy on blackout trading to provide that a designated person, such as the chair of the board of directors, may authorise transactions that would otherwise be contrary to that policy.

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[45] ASX, 'Review of directors' trading and trading during the "blackout" period-Q3 2008' (11 December 2008) at 4.

There are various statutory prohibitions and disclosure requirements, as well as ASX listing rules and corporate governance principles and recommendations, that impinge on blackout trading. The question is whether further regulatory or other initiatives are needed.

2.3 Current position

2.3.1 Regulatory requirements

While blackout trading is not in itself prohibited, share dealings by directors within a blackout period may contravene the law in certain circumstances. The prohibitions on insider trading, improper use of corporate position or information and market misconduct are relevant. These prohibitions are:

- the insider trading provisions, which prohibit persons with confidential material price-sensitive information from dealing in affected securities (Part 7.10 of the Corporations Act)[46]
- s 182, which prohibits directors from improperly using their position in the company to gain a personal advantage
- s 183, which prohibits directors from improperly using company information to gain a personal advantage
- the prohibitions on market manipulation and other forms of market misconduct in Part 7.10 of the Corporations Act.

There are also disclosure requirements in relation to directors' trading, including during blackout periods:

- s 205G,[47] which requires a director of a listed public company to notify the ASX of any changes in the relevant interests he or she holds in the securities of the company, or any related company. CAMAC has recommended various amendments to this provision, including that the period for disclosing information generally be reduced from 14 days to two business days[48]
- ASX Listing Rule 3.19A (complementing s 205G), which requires ASX-listed entities to notify the ASX of 'notifiable interests' of directors when the entity is admitted to the official list and when the director is appointed and also to notify the ASX of changes in notifiable interests, and Listing Rule 3.19B, which requires listed entities to make arrangements with their directors to ensure that the directors disclose to the entities all information necessary to comply with the disclosure obligation.

The ASX has observed that:

> The Listing Rules and Section 205G, together with the prohibitions on insider trading and market manipulation, help to maintain an informed and orderly market. ASX considers that investors in a listed entity and the market in general, have a legitimate interest in trading by directors. To be useful this information about holdings must be up-to-date and, where changes have occurred, must enable investors to understand the nature of the changes.
>
> ASX recognises that a director may choose to trade an entity's securities for a broad range of reasons which are unrelated to his or her knowledge of the entity and that directors' securities

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46 The insider trading provisions are analysed in detail in the Advisory Committee publications *Insider Trading Discussion Paper* (2001), *Insider Trading Proposals Paper* (2002) and *Insider Trading Report* (2003), available at **www.camac.gov.au**

47 See further ASIC Regulatory Guide 193, 'Notification of directors' interests in securities - listed companies' (June 2008).

48 Advisory Committee, *Insider Trading Report* (2003) rec 1.

trading is not necessarily an indicator of an entity's prospects. ASX considers that disclosure of directors' transactions is not generally a matter of continuous disclosure, but primarily one of good corporate governance.[49]

2.3.2 Corporate governance principles

The ASX Corporate Governance Council *Corporate Governance Principles and Recommendations* Recommendation 3.2, applicable to all listed entities,[50] states that:

> companies should establish a policy concerning trading in company securities by directors, senior executives and employees, and disclose the policy or a summary of that policy'.

The commentary on this recommendation states that:

> public confidence in the company can be eroded if there is insufficient understanding about the company's policies governing trading by 'potential insiders'.

The commentary states that:

> where companies establish a trading policy, they should also introduce appropriate compliance standards and procedures to ensure that the policy is properly implemented. There should also be an internal review mechanism to assess compliance and effectiveness. This review may involve an internal audit function.

Within that context, the commentary puts forward various matters that companies may find useful when formulating a trading policy, including to:

- identify clearly the directors, officers, employees or group of employees who are restricted from trading ('designated officers')
- identify whether trading windows or blackouts are used and, if so, details of their application
- specify whether there is any discretion to permit trading by designated officers in specific circumstances (for example, financial hardship), details of such circumstances, and the basis upon which discretion is applied
- make clear that it is inappropriate for the designated officer to procure others to trade when the designated officer is precluded from trading.

The commentary also makes suggestions about extending a blackout trading policy to various linked financial products.

The corporate governance principles and recommendations elsewhere state that the exercise of any entitlements under equity-based remuneration schemes should be timed to coincide with periods when trading is permitted under any trading policy established by the company.[51]

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49 ASX, 'Review of directors' trading and trading during the "blackout" period-Q1 2008' (27 June 2008) at 3.

50 The ASX Corporate Governance Council *Corporate Governance Principles and Recommendations* (2nd edition, 2007) are applicable to relevant trusts and externally managed entities, as well as listed companies. The commentary on Principle 3 and recommendations 3.1-3.3 states that references to 'directors' and 'employees' of a company should be applied as references to directors and employees of the responsible entity, and the relevant trading is in securities of the trust and to equivalent roles in respect of other externally managed entities. The trading policy should refer to the securities or units of the listed entity.

51 Item 3 (equity-based remuneration) of box 8.1 (Guidelines for executive remuneration packages) of recommendation 8.2.

A company is required to provide a statement in its annual report disclosing the extent to which it has followed the *Corporate Governance Principles and Recommendations*.[52] Recommendation 3.3 is that companies should provide in their annual reports the information set out in the 'Guide to reporting on Principle 3', including an explanation of any departure from Recommendation 3.2. Also, the following material should be made publicly available, ideally by posting it on the company's website in a clearly marked corporate governance section:

- any applicable code of conduct or a summary
- the trading policy or a summary.

2.4 Survey results

The ASX has issued two reports covering directors' trading in the shares of their companies during blackout periods.[53]

For the purposes of these reports, the ASX defines a blackout period as the period between the close of a company's books and release of half-year or full-year results.

The ASX reports for 2008 (being for the first quarter [Q1] and third quarter [Q3] of 2008[54]) indicated that:

- up to half of active trading[55] by directors in the shares of their companies took place during a blackout period, as defined by the ASX
- however, there was only a low level of contravention of the blackout trading policies of listed entities, by only a small proportion of the pool of directors.

The ASX has indicated that the reasons for this low contravention rate are that entities may confine the blackout period to a shorter time than that used by the ASX in its reports and that many companies permit trading during a blackout period if a waiver is granted, typically by the chairman of the board or the managing director.

In summary:

- of the 1,863 [Q1], 1,418 [Q3] active trades by directors in the shares of their own companies in the Q1 and Q3 periods, 795 or 42.7% [Q1], 718 or 50.6% [Q3] occurred during the ASX blackout period
- the active trades during the blackout period involved the securities of 381[Q1], 331[Q3] entities
- the active trades during the blackout period were made by 556 [Q1], 454 [Q3] directors
- of the active trades during the blackout period, 57 or 7.2% [Q1], 95 or 13.2% [Q3] potentially contravened the trading policies of the entities involved. The ASX sent

52 ASX Listing Rule 4.10.3.

53 The ASX announced in June 2008 that it will carry out reviews of trading by directors during the first quarter (Q1) and third quarter (Q3) of each year, beginning with Q1 of 2008.

54 ASX, 'Review of directors' trading and trading during the "blackout" period-Q1 2008' (27 June 2008); ASX, 'Review of directors' trading and trading during the "blackout" period-Q3 2008' (11 December 2008).

55 The ASX uses the term 'active' trading to exclude 'passive' changes of relevant interests, such as through employee incentive schemes, dividend reinvestment schemes, share purchase plans and rights issues.

letters to the entities concerned to ascertain whether a contravention may have occurred

- the majority of responses to the ASX letters indicated that the relevant transactions did not breach the entity's trading policy, as the chair of the board of directors had given the appropriate approval for the trade. However, 6 of the 57 [Q1], 15 of the 95 [Q3] trades were confirmed by the companies as contraventions of their trading policies. The confirmed contraventions involved 5 [Q1], 12 [Q3] individual directors in 5 [Q1], 9 [Q3] entities
- of the 6 [Q1], 15 [Q3] confirmed contraventions, 4 [Q1], 2 [Q3] related to entities in the All Ordinaries Index, of which 2 [Q1], 1 [Q3] were also in the S&P/ASX 200 Index. The remaining contraventions related to entities outside the All Ordinaries Index
- all active changes of interest in contravention of an entity's trading policy are being further analysed for possible instances of insider trading and breaches of the continuous disclosure requirements by listed entities. Possible instances will be referred to ASIC for further investigation.

A possible consequence of this ASX initiative is that knowledge by companies that they may be contacted to provide an explanation of apparent blackout trading, and that the ASX statistics will be published, may cause chairmen, or other designated persons, to refrain from providing waivers from blackout trading too readily.

2.5 Policy options

A question arises whether it is necessary or beneficial to move beyond the current legislative provisions and ASX guidelines relevant to blackout trading and, if so, in what manner. None of the approaches suggested below affects the application of the insider trading laws.

2.5.1 Incremental changes to the current approach

One view is that the ASX Corporate Governance Council voluntary approach, combined with the statutory and listing rule requirements that impinge on blackout trading, provide a sufficient, and balanced, regulatory approach. Any underlying impropriety in blackout trading is dealt with by the insider trading, and other market misconduct, provisions, while there is a range of disclosure provisions applicable to these trades to keep the market informed.

If further guidance were considered beneficial, companies could, for instance, be encouraged to:

- periodically re-evaluate the length of a blackout period and the scope of the persons covered, taking into account any changes in a company's business and personnel over time
- ensure that persons subject to a blackout period are aware of the restrictions on their trading, for instance requiring them to certify that they have read, and will comply with, the company's blackout trading policy.[56]

The ASX guidelines could also be more prescriptive about what constitutes a blackout period.

2.5.2 Possible further regulation of blackout trading

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56 Stinson Morrison Hecker LLP, 'Corporate Finance e-Alert: Recent Events Highlight the Need to Review and Update Insider Trading Policies' (20 November 2008): http://www.stinson.com.

A more interventionist approach would be to prohibit or restrict trading by directors and other designated officers of a company in the shares of that company during periods of particular price sensitivity. This would reduce the opportunity for illegal conduct, such as insider trading or market manipulation, which may otherwise be difficult to identify or prove. It would also remove any speculation and rumour following from the disclosure of trading by directors and other corporate officers in a blackout period.

Any move to strengthen the regulation of blackout trading raises a series of issues:

- should all, or some, public listed companies be obliged to have blackout trading policies
- should the content of blackout trading policies be standardised in relation to all or some of the following:
  - the blackout periods
  - who within a company are subject to the blackout trading policy
  - the affected securities or linked financial products
  - who can grant waivers
  - the criteria for granting waivers. For instance a suggestion in the ASX *Corporate Governance Principles and Recommendations* is to permit trading in the event of financial hardship. Another possible basis for waiver could be trading pursuant to non-discretionary trading plans of the type covered in the United States SEC Rule 10b5-1[57]
- what would be the most appropriate body, or mechanism, to implement any standardised approach
- what penalties or other responses should apply to any transgressions of a blackout trading policy? For instance, should breaches be dealt with only by internal company policy or should they be subject to an external response, by whom, and of what nature?

A possible approach is found in the Model Code issued by the UK Financial Services Authority and applicable to all UK listed entities.[58] A listed company may impose more rigorous dealing obligations than those required by the Model Code.[59]

The Model Code contains regulatory guidelines (supplementing any applicable legal requirements) for transactions by directors of a listed company, and other persons discharging managerial responsibilities in that company, in the securities of that company. Its purpose is to ensure that these persons do not abuse, and do not place themselves under suspicion of abusing, inside information that they may be thought to have, especially in periods leading up to an announcement of the company's results. The Model Code also makes clear that nothing in it sanctions a breach of the insider trading provisions or other relevant legal or regulatory requirements.

Under the Model Code, a 'restricted person' must not 'deal' in any 'securities' of a listed company at any time, whether or nor during a blackout period, without obtaining in advance

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57 See further footnote 12.

58 The Model Code is set out in Annexure 1 to Listing Rule 9 of the FSA Handbook. Listing Rule 9.2.8 requires UK listed companies to ensure that every person discharging managerial responsibilities complies with the Model Code, and to take all proper and reasonable steps to secure their compliance.

59 Listing rule 9.2.9.

a 'clearance to deal'.[60] Various dealings, including under rights issues, pursuant to a takeover offer or where the dealing does not involve any change in the beneficial interest in the securities, are not subject to this requirement.[61]

A restricted person means anyone discharging managerial responsibilities concerning the company,[62] being directors and senior executives.[63] A dealing is widely defined to include, for instance, any acquisition or disposal of, or agreement to acquire or dispose of, the securities of the company or 'any other right or obligation, present or future, conditional or unconditional, to acquire or dispose of any securities of the company'.[64]

The Code sets out the procedures for a restricted person to obtain from the company clearance to deal, and the time period to transact after any clearance approval.[65] A director or company secretary must not deal in the company's securities without first notifying the chair (or a director designated by the board for this purpose) and receiving a clearance to deal from that person.[66] The company must maintain a record of the response to any dealing request made by a restricted person and of clearances given.[67]

In general, a restricted person cannot be given a clearance to deal during a 'prohibited period' or in regard to an investment of a short-term nature.[68] A prohibited period[69] includes a 'close period', being:

- 30 days before the announcements of quarterly results if the company reports on a quarterly basis
- the period from the end of a financial period up to and including the time of publication of the results if the company reports on a half yearly basis, and
- in general, 60 days immediately preceding the preliminary announcement of annual results or publication of an annual financial report.[70]

Transactions may be permitted during a prohibited period if the restricted person is in severe financial difficulty or other exceptional circumstances apply, though the FSA must be consulted at the early stage of any such application.[71] Other dealings are permitted during a prohibited period in various circumstances, namely under employee share schemes,[72] pursuant to dividend reinvestment or savings schemes,[73] where the transactions involve the exercise of options,[74] the uptake of qualification shares by directors,[75] or in some circumstances where the restricted person is a trustee.[76]

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60 s 3.
61 s 2.
62 s 1(f).
63 Note to s 4, referring to s 96B(1) of the *Financial Services and Markets Act 2000* (UK).
64 s 1(c). Securities are defined in s 1(g).
65 ss 4, 5 & 7.
66 s 4(a).
67 s 6.
68 s 8.
69 s 1(e).
70 s 1(a).
71 ss 9-11.
72 ss 12-13.
73 s 17.
74 ss 14-15.
75 s 16.
76 ss 18-19.

Another possible permitted transaction during a prohibited period, not found in the Model Code, could be a transaction under the types of non-discretionary trading plans that come within SEC Rule 10b5-1. This rule permits persons, such as directors and other corporate officers, who are likely to be aware from time to time of inside information concerning the company, to structure their own future trading plans concerning the company's securities, provided that when the plan is devised they are not aware of any price-sensitive information that would be relevant to any future time when the plan is implemented and they have no discretion over its implementation.

To prevent restricted persons from circumventing the procedures and restrictions, the Code imposes various obligations on them, including to prevent a 'connected person'[77] from entering into what otherwise would be a prohibited dealing during a close period.[78]

The Model Code is set out in Appendix B.

2.6 Issues for consideration

The Advisory Committee invites submissions on any matter raised in this chapter, including:

(1) the implications of blackout trading for market integrity

(2) would it be beneficial if the ASX Corporate Governance Council provided further guidance to companies about their approach to blackout trading and, if so, what guidelines might be appropriate (Section 2.5.1)

(3) should a more interventionist approach be adopted and, if so:

- how might that approach deal with the issues set out in Section 2.5.2
- should all or some of the requirements set out in the Model Code issued by the UK Financial Services Authority be adopted (Section 2.5.2)?

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77 A connected person is defined in s 1(b).

78 ss 20-22.

3 Spreading false or misleading information

3.1 The Minister's request

The Minister's letter states:

> During the recent market turbulence, concerns have been raised that some market participants may have been spreading false or misleading information in respect of certain securities in order to take advantage of artificial changes in their price. This practice is sometimes referred to as 'rumourtrage'.

The Minister's Press Release said:

> On the issue of false rumours or 'rumourtrage', concerns have been raised amid recent market turbulence that some market participants, here and overseas, may have spread false information to deliberately drive down a particular company's share price.
>
> In light of the concerns raised, it is appropriate to review the regulatory regime governing such rumours and market manipulation, with specific focus on the spreading of false information.

The Minister has asked CAMAC to:

- examine how overseas jurisdictions regulate the spread of false or misleading information, and compare and contrast overseas regulation with that of Australia; and
- advise whether changes are required to Australia's regulatory framework and, if so, what form they should take.

3.2 Context

The Minister's request refers to concerns about market participants taking advantage of the creation and spreading of rumours.

A rumour essentially involves unverified information purporting to be fact. It differs from the expression of an opinion, such as an analyst's view of the prospects of a company, derived from information provided by the company or others.

Rumours have the potential to distort markets and undermine market confidence. For instance, they can be used by short-sellers to drive down a company's share price.

In considering an appropriate response, it may be relevant also to look at:

- responding to rumours received about one's own entity
- responding to rumours received about another entity.

3.3 Initiating rumours

3.3.1 Current position

There are various legislative provisions relevant to persons who generate and spread false or misleading information about securities, to take advantage of consequent changes in their price.

The key provision is s 1041E, which prohibits the making of a materially false or misleading statement, or the dissemination of materially false or misleading information, that is likely to induce trading, or affect the price of trading, in any securities where the disseminator knows, or ought reasonably to have known, that the statement or information was materially false or misleading or does not care whether it is false or misleading.

Other applicable provisions include:

- the prohibition on market manipulation: s 1041A
- the prohibitions on false trading and market rigging: ss 1041B, 1041C
- the prohibition on inducing a person to deal in a financial product using false or misleading information: s 1041F
- the prohibition on a person who is carrying on a financial services business from engaging in dishonest conduct in relation to a financial product or financial service: s 1041G.

The prohibitions in s 1041E, as well as those in ss 1041F and 1041G, impose criminal liability, thereby requiring proof of breach beyond reasonable doubt. Failure to comply with any of these provisions may also lead to civil liability to affected individuals.[79] However, they are not civil penalty provisions. By contrast, the other provisions (ss 1041A, 1041B, 1041C), as well as imposing criminal liability, are also civil penalty provisions,[80] with the lower civil standard of proof of breach.

ASIC has initiated an investigation into allegations of market manipulation, including through the dissemination of false rumours (Project Mint).

While there is a range of relevant provisions, this is an area where there are practical problems in uncovering evidence and in proving each of the elements of an offence beyond reasonable doubt.

3.3.2 Other jurisdictions

Rumour-mongering is prohibited in other jurisdictions. The dissemination of false rumours is 'market manipulation' within the meaning of the EU *Market Abuse Directive,* which applies to the United Kingdom and other EU member States. Article 1.2(c) of that Directive describes 'market manipulation' as:

> The dissemination of information through the media, including the Internet, or by any other means, which gives, or is likely to give, false or misleading signals as to financial instruments, including the dissemination of rumours and false or misleading news, where the person who made the dissemination knew, or ought to have known, that the information was false or misleading.

The United States has rules prohibiting market manipulation by knowingly spreading false rumours.[81]

From March 2009, broking firms in the United Kingdom will be obliged to record, and retain for six months, telephone conversations and other electronic communications (including by fax and email) that involve receiving client orders and negotiating, agreeing and arranging transactions in the equity, bond, financial commodity and derivatives markets.[82]

The FSA requirements are aimed at market abuse generally. The FSA points out that market abuse is one of the most difficult offences to investigate and prosecute and that good quality recordings of voice conversations and electronic communications help in the detection and deterrence of inappropriate market behaviour. The FSA expects that a recording requirement

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79 s 1041I.

80 ss 1317DA, 1317E.

81 SEC Rule 10b-5, NASD Rule 5120(e) and NYSE Rule 435(5).

82 FSA Policy Statement 08/01 *Telephone Recording: recording of voice conversations and electronic communications* (March 2008). See also FSA 2008/6 *Conduct of business sourcebook (recording of telephone conversations and electronic communications) Instrument 2008*.

will reduce the profit incentive to commit market abuse and will have various economic benefits:

- recorded communications may increase the probability of successful enforcement
- this reduces the expected value to be gained from committing market abuses
- this, in principle, leads to increased market confidence and greater price efficiency.[83]

This requirement will have a limited effect on the detection of rumour-mongering. The FSA has indicated that it would not ordinarily expect that the conversations of research analysts, retail financial advisers or persons carrying on back-office functions would be captured.[84] Also, corporate finance business and corporate treasury functions are excluded.[85] Furthermore, the recording obligation only relates to conversations that are intended to lead to the conclusion of an agreement, not to general conversations about market conditions.[86] In addition, conversations on mobile phones are excluded, though this exemption will be subject to further review.[87]

By way of comparison with the UK approach, the requirements in the Corporations Act to record telephone conversations during a takeover bid were repealed on the basis that they did not increase the protection of security holders and imposed significant costs on the parties involved.[88]

3.4 Target response to rumours

Rumours can be initiated for various purposes. For instance, they may be created to misinform the market about the true financial position of a company, with the intention of artificially deflating or increasing the market price of its shares. Other rumours may be circulated in an attempt to force a company to acknowledge or disclose market-sensitive information otherwise exempt from disclosure requirements. An example would be a rumour concerning an incomplete proposal or negotiation that up to that point had not been publicly disclosed, in reliance on an exception to the continuous disclosure obligation under ASX Listing Rules.[89]

3.4.1 ASIC position

ASIC has issued guidance on how companies should deal with market rumours affecting their securities. In *Heard it on the grapevine* (1999), it said:

> Listed companies are sometimes asked to comment on market rumours with potential to affect their share price. Company disclosure policies should direct requests of this type to the corporate disclosure manager. The safest initial response to requests to comment on this type of rumour is always to say 'we do not respond to market rumours'.[90] The corporate disclosure manager will then need to assess whether a public announcement is warranted in the circumstances. Policies on responding to rumours should aim for consistency: saying 'we do

83 id at 2.1.
84 id at 2.15.
85 ibid.
86 id at 2.18.
87 id at 2.29.
88 Explanatory Memorandum to the Corporations Legislation Amendment (Simpler Regulatory System) Bill 2007 at 6.5.
89 ASX Listing Rule 3.1A.3 exempts incomplete proposals or negotiations from the continuous disclosure requirements in Listing Rule 3.1.
90 Unless the request comes from ASIC or the stock exchange, in which case a substantive response must be given.

> not respond to market rumours' on some occasions and at other times indicating there is no substance in a rumour may send a signal to the market.[91]

Also, in *Better Disclosure for Investors - Guidance Rules* (2000), which followed consultation on *Heard it on the grapevine*, ASIC said, in Principle 7, that companies must 'develop procedures for responding to market rumours, leaks and inadvertent disclosures. Even if leaked or inadvertently disclosed information is not price-sensitive, give investors equal access by posting it on the company website.'

More recently, ASIC has noted that:

> companies do not want to be drawn into a situation where they are practically obliged to respond to every rumour, particularly as the substance nears the truth and a simple 'no' is not sufficient. It is, however, clear that just ignoring rumours will not work in this market. There will be some stories that have achieved such widespread fame, or infamy, that they must be confronted: the company must advise the ASX of the rumour and the true position to prevent there being a false market. Other stories will be close to the mark, and these will need to be affirmed to the market. The litmus test …is the false market.

Also:

> One thing is very clear: when dealing with rumours, the company and its advisers must not engage in selective disclosure of material information. It is not enough for you to call your major institutional desks, or the journalists, to set the story right, and rely on them to spread the word. That is just war by 'counter-rumour'. If the information is price-sensitive, then everyone must be told it, through the ASX platform.[92]

3.4.2 ASX

The ASX has indicated that, if there is market rumour or speculation, it may require the entity to respond, to ensure that the market is trading on fully informed basis.[93]

ASX Guidance Note 8 states, in relation to market speculation:

> ASX does not expect an entity to respond to all comments made in the media, or all market speculation. However when the market moves in a way that appears to be referrable to the comment or speculation, and the entity has not already made a statement in response, ASX would be likely to ask the entity for information or clarification to ensure that the market remains properly informed, or correct or prevent a false market in the entity's securities … Similar principles may apply in relation to speculation posted on forums such as internet bulletin boards or 'chat room' sites.
>
> Generally, in determining whether an announcement is required, ASX will examine the context in which the media comment or speculation occurs, the details and materiality of the information and the likely reaction of the market or the entity's share price to the information. ASX will also take into account previous relevant announcements by the entity and previous relevant media commentary. Where the media comment expresses the view or supposition of analysts or market commentators about a likely strategy or transaction and there is no apparent movement in the share price or volume, it is not likely that ASX will form the view that an announcement is required. Where the media comment appears to be reporting in specific detail a material change in strategy or that a material transaction is to occur, the source of the comment appears referable to those involved, and there is an apparent or likely movement in the share price or volume, ASX is likely to take the view that an announcement would be required.

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91 para 46.

92 Speech by ASIC Commissioner Belinda Gibson to the Australian Investor Relations Association 2008 Annual Conference 27 November 2008.

93 ASX Guidance Note 8 para 89.

> ASX does not generally require the disclosure of trade secrets, internal management documents or incomplete negotiations that an entity is entitled not to disclose. But it is ASX policy that, whatever the information, and however much it might otherwise have been reasonable not to disclose it, the information should be released to the whole market once it becomes known to any part of the market. In any event, the exception from listing rule 3.1 no longer applies, as the information is no longer confidential.
>
> Entities are encouraged to develop procedures for responding to rumours and speculation in the media and other forums, refer ASIC *Better disclosure to investors* guidance principles and ASX commentary.

Also, under Listing Rule 3.1B, ASX can require a listed entity to give it information needed to correct or prevent a false market.

3.4.3 AIRA

The Australasian Investor Relations Association (AIRA), *Best Practice Investor Relations: Guidelines for Australasian Listed Entities* (May 2006) states that:

> Listed companies should develop a written policy for dealing with rumours and market speculation. Generally, companies are encouraged not to comment on rumours and market speculation.
>
> Companies should set out their policy with regards to working with the ASX in instances in which market or media speculation on material information has occurred.[94]

3.4.4 United Kingdom

The FSA *Market Abuse Directive (Disclosure Rules) Instrument 2005* (FSA 2005/16) sets out various principles for targets in dealing with rumours about themselves, on the basis that the more accurate a rumour, the more likely it is that there has been a breach of confidentiality and that disclosure is required as soon as possible:

- where there is press speculation or market rumour regarding an issuer, the issuer should assess whether a disclosure obligation arises. To do this, an issuer will need to assess carefully whether the speculation or rumour has given rise to a situation where the issuer has inside information
- where press speculation or a market rumour is largely accurate and the information underlying the rumour is inside information, it is likely that the issuer can no longer delay disclosure, as it is no longer able to ensure the confidentiality of the inside information
- an issuer that finds itself in the circumstances described above should disclose the inside information as soon as possible
- the knowledge that press speculation or market rumour is false is not likely to amount to inside information. Even if it does amount to inside information, the FSA expects that in most of those cases an issuer would be able to delay disclosure (often indefinitely).[95]

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94 At 17.

95 Section 2.7: Dealing with rumours. See also FSA *Policy Statement regarding the implementation of the Market Abuse Directive provisions* (PS05/03) Section 3.15: Market Rumour.

3.5 Recipients of rumours

3.5.1 Current position

Rumours can influence a market to the extent that persons who hear them act on them or pass them on to other market participants.

A recipient of a rumour needs to take care in determining any response. A recipient would be precluded from trading in affected securities, or procuring others to do so, if the recipient knows or ought reasonably to know that the rumour contains confidential price-sensitive information and the other elements of the insider trading prohibition are satisfied.[96] As observed by the Advisory Committee in its *Insider Trading Proposals Paper* (2002):

> The current definition of inside information includes any 'matters of supposition' that may materially affect the price or market value of particular financial products, whether in fact true or not. Recipients of rumours or speculation may breach the current insider trading prohibition by trading in affected securities, unless the rumour or speculation is sufficiently widespread that it is 'generally available' or is sufficiently disbelieved that it is not price-sensitive.[97]

Also, a recipient of a rumour would be precluded from passing it on if it contains a statement or information that is materially false or misleading and is likely to influence market conduct and the recipient either knows or should know that the statement or information is materially false or misleading or does not care whether the statement or information is true or false.[98]

Beyond these legislative prohibitions, there is little regulatory guidance on how market participants should deal with received rumours. On the one hand, it is unrealistic to expect persons either to ignore rumours or not to discuss them with others, particularly where their presence can help explain certain market movements. On the other hand, trading on the basis of speculation that a rumour may have some truth, or in anticipation of further market movement as a rumour continues to circulate, or simply passing on a rumour, can accentuate its effect and thereby further distort the market, with consequential effects on market confidence.

3.5.2 Possible initiatives

One way to assist recipients in responding to rumours may be through the development of best practice guidelines on their treatment by market intermediaries, such as brokers, and by other significant market participants, including investment funds.

The UK Financial Services Authority has undertaken a review of industry practice in this area.[99] It identified various policies by firms on dealing with rumours. These policies could be incorporated into a possible best practice model along the following general lines:

- *compliance with regulatory requirements:* for instance, a requirement that any employee receiving a rumour obtain compliance advice about the legality of either trading in affected securities or passing on the rumour
- *trading based on rumours:* for instance, a requirement for the prior approval of senior management before trading based on rumours

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96 The key provision is s 1043A.

97 Section 1.33.

98 s 1041E.

99 See further UK Financial Services Authority *Market Watch* Issue No 30, November 2008, 'Thematic review: Rumours.'

- *conditions on which rumours can be passed on*: for instance, requirements for the prior approval of senior management before any rumour can be communicated and that any comment by the target of the rumour be included
- *the form in which rumours can be passed on:* for instance, a requirement that it be made clear that the communication is a rumour and involves unverified information purporting to be fact
- *training and monitoring:* how employees are made aware of best practice policies and how their conduct is monitored to check adoption of those policies.

There is a question whether ASIC, the ASX or some other industry body should have responsibility for any best practice guidelines and how compliance with those guidelines might be monitored or enforced.

3.6 Issues for consideration

The Advisory Committee invites submissions on any matter raised in this chapter, including:

Initiating rumours (Section 3.3)

(1) the implications for market integrity of rumour-mongering

(2) should all or some of ss 1041E, 1041F and 1041G be civil penalty provisions as well as attracting criminal liability

(3) should any of the elements of any of these three provisions be amended and, if so, in what manner

(4) should some form of compulsory recording of telephone conversations and other electronic forms of communication, such as SMS, be introduced

(5) any other steps to facilitate the detection and prosecution of rumour-mongering

Target response to rumours (Section 3.4)

(6) would there be benefit in ASIC or the ASX providing further guidance on how companies should deal with market rumours affecting their securities

(7) in that context, would it be beneficial to adopt any of the principles in the FSA Market Abuse Directive Instrument

Recipients of rumours (Section 3.5)

(8) would it be beneficial to develop best practice guidelines on how to deal with rumours received

(9) if so, what should be the content of those guidelines, who should develop them and how should they be monitored or enforced?

4 Corporate briefings to analysts

4.1 The Minister's request

The Minister's letter states:

> Analysts, and the research they perform, play an important role in Australia's financial markets, by keeping the market informed. Briefings are sometimes provided by companies to analysts on a confidential basis to assist in the pricing of securities in the market and to assist with research.
>
> Under the continuous disclosure obligations in the Corporations Act and the ASX Listing Rules, price-sensitive information must be provided to the market once the company becomes aware of it. Continuous disclosure both ensures that the market is fully informed and contributes to market fairness and efficiency. Alternative ways in which market-sensitive information may be distributed include press briefings and posting information on the company's website.
>
> There are concerns, however, that confidential briefings are being provided to analysts which create the perception that some analysts have access to critical information that is not available to other analysts, shareholders and the general public. These perceptions can lead to a lack of confidence in the integrity of Australia's financial markets and potentially create opportunities for insider trading.

The Minister has asked CAMAC to:

- examine the role that analysts' briefings play in Australia's financial market, including whether their role is a positive one that leads to greater market efficiency
- advise whether changes may be required to Australia's regulatory framework and, if so, what form they should take.

4.2 Role and types of analysts briefings

In this context, an analyst is anyone who reviews information concerning a company for the purpose of formulating commentaries or conclusions on the financial or other state of the company, which may be accompanied by recommendations regarding equity or debt investment in the company. Analysts may be employed by broking, investment advisory or other financial intermediary firms to provide in-house advice for client trading. Other analysts may be employed by institutional investors or other financial entities to guide their trading opportunities and strategies.

Corporate briefings to analysts, whether initiated by the company or at the request of analysts, can be one means by which analysts gain a greater understanding of a company's financial or other circumstances for the purpose of formulating commentaries and recommendations.

Companies may choose to brief analysts through any number of forums, whether public or private. Briefings may take place at any time. In practice, it is common for companies to initiate public or private analysts' briefings as background to the public release of periodic financial results, or the announcement of other material corporate developments.

4.2.1 Public briefings

Companies may conduct public briefings to analysts, in the sense that the content of the briefing, and any interchange with persons present, is simultaneously made 'generally available' to the market through some electronic or other means of broad distribution. Information is generally available if it has been made known in a manner that would, or would be likely to, bring it to the attention of investors generally and there has been a reasonable period for its dissemination.[100]

Public briefings to analysts can provide valuable information to the market, through the material presented by the company, questions asked by participants and the company's responses. It is to be expected that market participants will have differing abilities accurately to understand and analyse information provided during a public briefing. Persons are entitled to draw their own conclusions and act on them.

The ASX Corporate Governance Council recommends that listed entities consider webcasting or teleconferencing analyst or other briefings or posting a transcript or summary of the transcript on the website.[101] Likewise, the Australasian Investor Relations Association (AIRA) has indicated that equity of access to information, including the content of analysts' briefings, is best achieved by dissemination of information to the widest range of audiences, using all available technologies.[102] However, some evidence suggests that relatively few analysts' briefings are public.[103]

Companies that are disclosing entities must comply with the continuous disclosure obligations.[104] It would be a matter for each disclosing entity to determine whether any information provided at a public briefing to analysts also needs to be disclosed under the continuous disclosure provisions. For instance, confidential price-sensitive information otherwise exempt from these disclosure obligations,[105] but which is intentionally or inadvertently disclosed in a public briefing to analysts, would lose the element of confidentiality and would be subject to the disclosure obligations.

There are other constraints on companies in conducting public briefings. For instance, any information provided by a company to the market, including through these briefings, is subject to the prohibitions on disseminating false or misleading information and publishing false information to induce persons to deal in particular securities.[106]

4.2.2 Private briefings

Corporate briefings to analysts or others may be private, in the sense that their content is not simultaneously made 'generally available' to the market.

Private briefings may range from structured corporate presentations to a select group of analysts or other interested parties through to informal and unstructured private face-to-face

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100 s 1042C.

101 *Corporate Governance Principles and Recommendations* (2nd edition, 2007) Box 6.1.

102 *Best Practice Investor Relations: Guidelines for Australasian Listed Entities* (May 2006) at 4. Those guidelines also recommend (at 8-10) that:

- an analysts' briefing that coincides with a results announcement to the ASX be webcast through the organization's website
- webcasts of listed entity events be widely publicised beforehand (for instance, through the entity's website or an announcement to the stock exchange) so that all interested parties may participate
- recordings of webcasts be made available on the entity's website to enable a replay of the event to occur
- as a matter of good practice, listed entities should lodge a copy of all investor presentations with the exchange(s) on which the issuer is listed.

103 G North, 'Closed and private company briefings: Justifiable or unfair?' (2008) 26 C&SLJ 501 at 515 states that, based on an empirical study by the author of listed Australian company reporting for the 2004-2005 financial year, 'only a small minority of Australian listed companies currently provide open access to their result-related briefings and conference calls, with advance notice of the briefing access details'.

104 Corporations Act ss 674-678, ASX Listing Rule 3.1.

105 ASX Listing Rule 3.1 contains various exceptions to the disclosure requirements.

106 The elements of these offences are set out in ss 1041E, 1041F.

or electronic communications between an analyst and a corporate officer, often in response to particular queries or requests from the analyst.

Private briefings raise potential regulatory and other issues that do not arise with public briefings, given the limited immediate distribution of the information provided at them. The issues include:

- whether the benefits of private corporate briefings in terms of greater market efficiency are outweighed by the risks of advertent or inadvertent non-compliance with relevant laws
- whether other issues of fairness arise from private briefings which can affect the level of confidence in the fairness of the market
- whether further legislative or other initiatives are needed to ensure better compliance with relevant laws.

4.3 Information on private briefings

It seems that companies often employ private briefings as a method of communication with analysts. A poll of ASX top 200 companies in 2005 found that:

- 98% of the 68 respondent companies held one-on-one meetings and 76% held analyst conference calls
- 97% of the respondent company chief executive officers and 89% of the chief financial officers attended the one-on-one meetings
- of the companies holding private briefings, 63% did not place any conditions on the meetings and 40% of companies still hosted them during blackout periods
- one company suggested that one-on-one meetings were the most frequently used communication tool and were very effective. Another company thought that one-on-one meetings were one of the best ways to ensure that analysts understand the company properly. Others suggested that these meetings would assist in building rapport with fund managers and brokers. One company indicated that content was generally focused on broad strategy, growth opportunities and gaining a greater understanding of the nature of the industry and operations of the business.[107]

4.4 Legal position of private briefings

Companies are subject to various legislative prohibitions and obligations in any private briefings to analysts.

4.4.1 Insider trading

The insider trading prohibition places constraints on the information that a company can lawfully include in a private briefing to analysts.

Companies may refer to, or provide analysts with, any information that is already 'generally available'. Also, analysts are free to make deductions or draw conclusions or inferences from any generally available information and either themselves trade or recommend others to trade.[108]

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107 Australian Investor Relations Association (AIRA), *Snap Poll, One-on-One Meetings with Analysts and Fund Managers* (15 June 2005), cited by G North, 'Closed and private company briefings: Justifiable or unfair?' (2008) 26 C&SLJ 501 at 510.

108 s 1042C(1)(c).

However, a company, through its corporate officers, may not directly or indirectly disclose any inside information, being information that is materially price-sensitive and is not generally available,[109] if the persons disclosing the information know, or ought reasonably to know, that the recipient of that information would, or would be likely to, trade in affected securities or procure some other person to do so.[110] Inside information is broadly defined to include matters of speculation, matters that are insufficiently definite to warrant being made known to the public, and matters relating to the intentions, or likely intentions, of any person, including the company.[111] Also, subject to certain conditions, the recipients of inside information are prohibited from trading or procuring others to trade.[112]

A company that, say, inadvertently disclosed inside information during a private briefing to analysts could reduce or overcome its potentially harmful effect by immediately placing that information in the public arena. Information becomes ‘generally available’, and persons aware of it can lawfully trade in affected securities, once it is made known in a manner that would be likely to bring it to the attention of the investing public and a reasonable period for its dissemination has elapsed.[113] For disclosing entities, this could be achieved through a continuous disclosure notice to the exchange.

4.4.2 Continuous disclosure

Any confidential price-sensitive information otherwise exempt from the continuous disclosure obligations,[114] but which is included or referred to in a private briefing to analysts by a disclosing entity, may lose the element of confidentiality and have to be disclosed to the market through a continuous disclosure notice.

4.4.3 Market misconduct

As with public briefings, any information provided by a company in a private briefing is subject to the prohibitions on the dissemination of materially false or misleading information and improperly seeking to induce persons to deal in particular securities.[115]

4.5 Benefits of private briefings

Private briefings to analysts have been described as a means of improving the pricing efficiency of financial markets in that:[116]

- they allow an exchange of information on management quality, research and development and innovation
- companies report the financial results publicly, but the private briefings focus on interpretation and explaining how and why the results were achieved
- as financial reports become more obscure, complex and technical, private meetings with analysts and institutions ensure that financial reports are properly understood and construed[117]

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109 s 1042A, definition of ‘inside information’.

110 s 1043A(2).

111 s 1042A, definition of ‘information’.

112 s 1043A(1).

113 s 1042C.

114 ASX Listing Rule 3.1A.3 exempts incomplete proposals or negotiations from the continuous disclosure requirements in Listing Rule 3.1.

115 The elements of these offences are set out in ss 1041E, 1041F.

116 Some of these claimed benefits are referred to in G North, ‘Closed and private company briefings: Justifiable or unfair?’ (2008) 26 C&SLJ 501 at 508.

- analysts undertake ongoing intellectual analysis in the wake of private briefings, which in turn feeds into the efficient market pricing mechanism of companies
- the release of information to major market influencers through private briefings keeps the market informed through advisory or trading actions.

Private briefings have also been described as an important part of a company's investor relations program, allowing the company to articulate its:

- long-term strategy
- organization history, vision and goals
- management philosophy and the strength and depth of management
- competitive advantages and risks in the context of industry trends and issues
- key sources of profit.[118]

It is also argued that the flow of information to financial markets is enhanced when listed entities have a clear dialogue with investment professionals involved in the production of research:

> Open and professional communications facilitate a fair, orderly and transparent market, for the benefit of all participants. For analysts, this means they have reasonable access to the company information that they need to perform their job. For listed entities, this assists them in attracting or allocating capital more effectively. For investors, this helps to make informed investment decisions.[119]

Furthermore:

> Although much of the information about listed entities comes to investors from the issuers themselves, research reports prepared and distributed by financial analysts are equally crucial. In order to conduct high quality research and make recommendations that have reasonable and adequate bases, analysts must communicate directly with company representatives, especially investor relations officers and senior management. Only through such dialogue can analysts fully comprehend the information in a company's public disclosure documents (e.g. company annual reports).
>
> Because listed entities receive requests for information and access to company management from many people – individual shareholders, institutional investors, financial analysts, retail investors and the media – they cannot be expected to fulfill every request for direct access to specific individuals.
>
> However, listed entities should recognise the vital role that qualified financial analysts play in the financial market. Analysts must, from time to time, inevitably form opinions on the quality of management and this may involve an in-person analyst meeting. Such meetings are an opportunity to ask questions and obtain further details about results and plans already publicly released by the company. Importantly, this opportunity allows the analyst to assess and evaluate management's answers.[120]

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117 G North, 'Closed and private company briefings: Justifiable or unfair?' (2008) 26 C&SLJ 501 at 508 cites a survey conducted in 1995 and 1996 of executives of 33 large listed UK companies by J Holland, 'Private voluntary disclosure, financial intermediation and market efficiency' (1998) 25 *Journal of Business Finance and Accounting* 29.

118 Australian Investor Relations Association, *Best Practice Investor Relations: Guidelines for Australasian Listed Entities* (May 2006) at 8.

119 AIRA and Finsia, *Principles for building better relations between listed entities and analysts*.

120 ibid.

4.6 Concerns about private briefings

Concerns have been raised from time to time about regulatory compliance and enforcement issues that may arise with private briefings, as well as some broader and more general questions of market fairness.

4.6.1 Insider trading and continuous disclosure

One concern is that private briefings may increase the practical likelihood of analysts receiving, and acting upon, inside information, notwithstanding the legislative prohibition on insider trading. Questions may also arise concerning compliance with the continuous disclosure requirements.

Australian approach

The industry guidance responds to these concerns, pointing out that analysts' briefings should be limited to an opportunity to provide background to previously disclosed information, not to discuss undisclosed price-sensitive information.[121] In the same vein, the ASX Corporate Governance Council Principles state that companies should promote timely and balanced disclosure of all material matters concerning the company.[122]

ASIC and ASX recommend the following practical steps that companies can take to ensure that the release of information to analysts complies with the continuous disclosure requirements and does not breach the insider trading laws:

Overseeing, coordinating and monitoring disclosure

- companies should nominate a senior officer responsible for overseeing and coordinating disclosure of information to the stock exchange, analysts, brokers, shareholders, the media and the public.[123] Similarly, AIRA envisages the appointment of an investor relations officer responsible for managing a listed entity's disclosure process in accordance with continuous disclosure principles and co-ordinating production and dissemination of material information to the market.[124] AIRA also sees one of the investor relations objectives as being to build working relationships with analysts (as well as with portfolio managers, investor relations industry associations, regulators, senior managers within the organization, communities and financial media)
- this officer should be aware of information disclosures in advance, including information to be presented at private briefings[125]

121 Australian Investor Relations Association, *Best Practice Investor Relations: Guidelines for Australasian Listed Entities* (May 2006) at 8. AIRA states that any material information inadvertently disclosed during these briefings should be immediately released to the exchanges(s) on which the issuer is listed and the information made readily available to all investors.

122 *Corporate Governance Principles and Recommendations* (2nd edition, 2007), Principle 5.

123 *Better Disclosure for Investors* Principle 3. See also ASX Corporate Governance Council *Corporate Governance Principles and Recommendations* (2nd edition, 2007), Box 5.1.

124 *Best Practice Investor Relations: Guidelines for Australasian Listed Entities* (May 2006) at 6.

125 *Better Disclosure for Investors,* Principle 5. The ASX Commentary on this principle in Guidance Note 8 states (at para 87) that the 'relevant officer should either be involved with the day to day management of the entity and have a high degree of familiarity across the breadth of its operations, or have ready access to senior management who have responsibility for day to day management of the entity. This will assist to ensure that the officer is kept informed of any planned disclosures, including activities such as analysts' briefings and press conferences'.

Releasing company information

- price-sensitive information must be publicly released through the stock exchange before disclosing it to analysts or others outside the company. Further dissemination to investors (for instance, on the company's website immediately after the stock exchange confirms an announcement has been made[126]) is desirable following release through the stock exchange[127]

Briefing analysts

- *reviewing discussions:* companies should have a procedure for reviewing briefings and discussions with analysts afterwards to check whether any price-sensitive information has been inadvertently disclosed. If it has, the company should announce the information immediately through the stock exchange, then post it on the company website (as the company no longer has control of that information). Slides and presentations used in briefings should be given to the stock exchange for immediate release to the market and posted on the company website[128]
- *handling unanticipated questions:* when dealing with analysts' questions that raise issues outside the intended scope of discussion:
  - only information that has been publicly released through the stock exchange should be discussed.[129] A company may be able to answer an analyst's question in general terms (for instance, by confirming the fact of a bid in a tendering process which is publicly known) while not giving detailed disclosure (for instance, the details of the bid or the tender process)[130]
  - if a question can only be answered by disclosing price-sensitive information, the company representative should decline to answer or take the question on notice and announce the information through the stock exchange before responding[131]
- *responding on financial projections and reports:* companies should:
  - confine comments on market analysts' financial projections to errors in factual information and underlying assumptions (it is inappropriate to correct a draft report if doing so involves providing material information that is not public: any clarification should be confined to drawing the analyst's attention to information that has already been made available to the market[132])
  - seek to avoid any response that may suggest that the company's, or the market's, current projections are incorrect

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126 *Better Disclosure for Investors - Guidance Rules* (2000) Principle 2 is that companies should use current technology to give investors better access to corporate information. In particular, price-sensitive information should be posted on a company's website as soon as it is disclosed to the market. The ASX says that, as minimum best practice, companies should place analysts' briefings on the company's website or retain a third party to do so: Guidance Note 8 para 82, Commentary on Principle 2 in *Better Disclosure for Investors - Guidance Rules*.

127 *Better Disclosure for Investors* Principle 6, commented on in ASX Guidance Note 8 para 88. See also *Heard it on the grapevine* paras 29-32, ASX Guidance Note 8 paras 59-62. Companies may find it useful to consider analysts' briefings when formulating their continuous disclosure policies: *Corporate Governance Principles and Recommendations* (2nd edition, 2007) Box 5.1.

128 *Better Disclosure for Investors* Principle 8. See also ASX Guidance Note 8 para 90.

129 *Better Disclosure for Investors* Principle 9, *Heard it on the grapevine* paras 49-50, ASX Guidance Note 8 para 59.

130 ASX Guidance Note 8 para 92.

131 *Better Disclosure for Investors* Principle 9, *Heard it on the grapevine* paras 49-50.

132 ASX Guidance Note 8 paras 59-60.

- use the continuous disclosure regime to establish a range within which earnings are likely to fall
- publicly announce any change in expectations before commenting to anyone outside the company.[133]

AIRA provides further guidance on how to avoid analysts' briefings breaching the insider trading law or a company's continuous disclosure obligations:

> Any new material information delivered during these briefings should be lodged with the exchange(s) on which the issuer is listed prior to it being provided to investors/analysts.
>
> Some listed entities impose 'blackout periods' during which they do not make appointments with institutions/analysts. The blackout usually commences at, or soon after, the end of the financial period and concludes when a listed entity's results are announced.
>
> Whether or not a company imposes blackout periods, it is important for listed entities to avoid giving any indication of what their results may be before this information has been lodged with the exchange(s) on which the issuer is listed, and adhere to continuous disclosure obligations.[134]

AIRA also recommends that companies develop policies on:

- avoiding discussion of unreleased price-sensitive information in analysts' briefings
- how to handle questions in relation to price-sensitive information
- how to respond in the event of an inadvertent release of price-sensitive information during market briefings.[135]

US approach

The US Securities and Exchange Commission, in response to concerns about selective disclosures of material non-public information in analysts' briefings, introduced a rule, over and above the insider trading provisions, designed to regulate communications between companies and analysts. Rule 100 *Selective disclosure and insider trading* (Regulation FD) states that whenever an issuer, or person acting on its behalf, discloses material non-public information to certain enumerated persons (in general, securities market professionals or holders of the issuer's securities who may well trade on the basis of the information), the issuer must make public disclosure of that same information:

- simultaneously (for intentional disclosures), or
- promptly (for non-intentional disclosures).

The SEC commentary points out that Rule 100:

> requires that when an issuer makes an intentional disclosure of material nonpublic information to a person covered by the regulation, it must do so in a manner that provides general public disclosure, rather than through a selective disclosure. For a selective disclosure that is non-intentional, the issuer must publicly disclose the information promptly after it knows (or is reckless in not knowing) that the information selectively disclosed was both material and nonpublic.

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133 Principle 10. See also ASX Guidance Note 8 paras 93-95.

134 Australian Investor Relations Association, *Best Practice Investor Relations: Guidelines for Australasian Listed Entities* (May 2006) at 9.

135 Australian Investor Relations Association, *Best Practice Investor Relations: Guidelines for Australasian Listed Entities* (May 2006) at 17.

In introducing this rule, the SEC stated that:

> We believe that the practice of selective disclosure leads to a loss of investor confidence in the integrity of our capital markets. Investors who see a security's price change dramatically and only later are given access to the information responsible for that move rightly question whether they are on a level playing field with market insiders.[136]

Some studies[137] have suggested that this rule has led to most US companies using public briefings to present information to analysts.

4.6.2 Record-keeping

There is no obligation on companies to record communications at private briefings. In the event of an enforcement action for, say, insider trading, the onus remains on the regulator to prove that material price-sensitive and confidential information was provided to analysts.

AIRA recommends that listed entities:

- keep a record of all meetings and briefings with investors/analysts[138]
- consider making recordings or transcripts from conference calls available on request and/or add these to the organization's website.[139]

A question arises whether there should be some move to introduce mandatory recording, and retention, requirements for all or some types of private briefings. A record could serve as key evidence for the purpose of regulatory enforcement of the insider trading or continuous disclosure provisions.

4.6.3 Fairness

Private briefings to corporate analysts, even when carefully conducted to ensure that there is no breach of the insider trading or continuous disclosure provisions, may nevertheless still raise questions of fairness and equal access to corporate information and whether this may undermine confidence in the fairness of the market.

For instance, a perception may arise that significant information not available to investors generally (for instance, a better appreciation of company strategies, opportunities and future prospects) is being disclosed at private briefings, or that analysts present can, through questions, gain a fuller or earlier understanding of publicly released information than the market generally.[140] Private briefings of this nature could also be seen as giving analysts who have better contacts in listed companies an unfair advantage over their uninvited counterparts.[141]

Some attempt has been made to determine whether private briefings confer on those attending them significant benefits not available to other analysts or investors generally. For instance, one study has suggested that:

- companies manage private meetings around the public result announcements to be able to claim that they are saying the same thing in private and public, though in

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136 SEC Final Rule *Selective disclosure and insider trading* (2000).

137 As summarised by G North, 'Closed and private company briefings: Justifiable or unfair?' (2008) 26 C&SLJ 501 at 510, 513-514.

138 At 8.

139 Australian Investor Relations Association, *Best Practice Investor Relations: Guidelines for Australasian Listed Entities* (May 2006) at 9.

140 *Heard it on the grapevine* para 2.

141 *Heard it on the grapevine* para 21.

practice the information content of the published material is much less than the private exchange

- the quality of private disclosure is much higher than public disclosure because the private discussion is much richer conceptually: public voluntary disclosure is designed merely to satisfy minimum market pressures and regulations
- private meetings draw the attention of financial institutions or analysts to the key parts of complex published documents.[142]

A survey conducted in 1999 indicated that, at least at that time, analysts rated private contact with companies, including private analysts' meetings, as a more important primary source of information than reliance on public documents.[143]

There is a particular question whether prior public notice should be given of the timing of the release of a company's financial results. Currently, there may be a concern that some analysts or other market participants, but not the market generally, receive advance notice of the timing of this publication and accompanying presentations.

4.7 Issues for consideration

The Advisory Committee invites submissions on any matter raised in this chapter in relation to public or private briefings to analysts, including:

(1) the role that analysts' briefings play in Australia's financial market and the implications for market efficiency and integrity of these briefings

Public briefings

(2) whether there should be greater guidance on what is required to ensure that the information provided in a public briefing is effectively and expeditiously disclosed generally? For instance, should all public briefings be webcast and/or podcast and in either case should a transcript of the proceedings also be provided

(3) whether there are any approaches to public briefings of analysts in overseas jurisdictions that could usefully be adopted in Australia.

Private briefings

(4) whether private briefings to analysts increase market efficiency beyond what may be achieved through public briefings

(5) whether particular issues arise in relation to compliance with, and the enforcement of, the insider trading and continuous disclosure provisions, and whether, or in what manner, those issues could be dealt with through further legislative or other initiatives. In this context:

- should the equivalent of SEC Rule 100 *Selective disclosure and insider trading* be adopted
- should there be mandatory record-keeping requirements for some or all private briefings and, if so, of what nature

142 J Holland, 'Private voluntary disclosure, financial intermediation and market efficiency' (1998) 25 *Journal of Business Finance and Accounting* 29, cited by G North, 'Closed and private company briefings: Justifiable or unfair?' (2008) 26 C&SLJ 501 at 509.

143 M Epstein & K Palepu, 'What financial analysts want' (1999) 80 Strategic Finance 48, cited by G North, 'Closed and private company briefings: Justifiable or unfair?' (2008) 26 C&SLJ 501 at 509.

(6) whether there should be any restrictions on when companies can conduct private briefings, for instance by the introduction of mandatory blackout periods for non-public briefings prior to the publication of periodic financial results

(7) whether there are fairness or other equal access concerns with current practices regarding private briefings and, if so, how they might be dealt with. For instance:

- in what, if any, circumstances, would it be appropriate and feasible to require that all or part of the content of communications in private briefings to analysts be made available to investors generally, and
- if that content is to be made available, in what manner
- should the market be informed in advance of the timing of the publication of a listed company's financial results

(8) whether any issues of intellectual property rights would arise in any move to require that the content of communications in private briefings to analysts be made available to investors generally and, if so, how they might best be dealt with

(9) whether there are any approaches to private briefings of analysts in overseas jurisdictions that could usefully be adopted in Australia.

Appendix A

Letter from the Minister

19 November 2008

Mr Richard St John
Convenor
Corporations and Markets Advisory Committee
GPO Box 3967
SYDNEY NSW 2001

Dear Mr St John

As a result of the global financial crisis and the related turbulence in Australian financial markets, the effect on the market of a number of practices has given rise to a significant degree of concern in the business, and broader, community.

I am concerned that the lack of transparency and accountability surrounding some of these practices could mean that there is potential for damage to the integrity of the market and investor confidence. In my view, the Corporations and Markets Advisory Committee, as a statutory source of independent advice to the Australian Government on issues relating to corporations and financial markets law and practice, is the correct forum to provide advice on the effect of these practices.

Directors' interests in listed securities and margin lending

Margin lending refers to the practice of providing loans that are secured over an asset held by the borrower, with a condition that if the ratio of the asset's market value to the amount of the loan falls below an agreed level, the borrower may become subject to a 'margin call'. If this occurs the borrower must reduce the level of indebtedness or increase the value of the security pledged, commonly by selling part of the security to pay down the loan. Margin loans are commonly utilised to enable investors to acquire financial products which are then used as the collateral.

Margin lending plays an important role in the market. It facilitates investors' access to finance and their ability to pledge assets as security. Any restriction on margin lending has the potential to distort investment decisions and interfere with the efficient allocation of capital.

Margin lending can provide a means of facilitating the acquisition of meaningful shareholdings by directors, which may contribute to the alignment of directors' and companies' interests and act as an inducement to good performance. The leveraging of shareholdings may magnify a director's gain or loss from those shareholdings.

However, following financial market events in early 2008, some analysts have suggested that there may be a significant adverse impact on the market price of a company's shares where a director is required to divest large parcels of shares as a result of a margin call. In particular, concerns have been directed at the level of disclosure to the market of margin lending arrangements.

Regulation of margin lending

ASX listing rule 3.1 provides that, once a company becomes aware of information concerning it that a reasonable person would expect to have a material effect on the value of the company's securities, the entity must immediately inform the ASX.

On 29 February 2008, the ASX and ASIC jointly issued *Companies Update 02/08* which clarified that, where a director's relevant and material shareholding is subject to a margin loan (or similar funding arrangement), listing rule 3.1 may, in 'appropriate circumstances', require an entity to disclose the key terms of the arrangements (including the number of securities involved, the trigger points, the rights of the lender to sell unilaterally, and any other material details). This disclosure obligation operates in conjunction with section 191 of the *Corporations Act 2001* which arguably obliges a director to disclose their substantial shareholdings that are subject to loan arrangements. This provision obliges a director with a material personal interest in a matter relating to the affairs of the company to give the other directors notice of that interest.

Notwithstanding the companies update required under ASX listing rule 3.1 and section 191, some uncertainty may remain as to the nature of directors' obligations to disclose margin loan arrangements to their boards, and the obligations of companies to disclose margin loan arrangements to the market.

There is also a question as to whether the current disclosure obligations in respect of margin lending arrangements best address the various competing policy considerations involved.

Better disclosure to the market will improve the ability of market participants to assess the risk of divestiture of material shareholdings by directors. However, some commentators have suggested that the provision of specific details of loan arrangements, such as trigger prices, may encourage market manipulation by short sellers of the company's stock.

The frequency, nature and extent of any mandatory disclosures may also impact on the regulatory burden imposed on companies. Generally, greater disclosure increases the costs and complexity of compliance. Improving the clarity and certainty of the test to be applied in determining whether disclosure is required may reduce complexity, the costs of compliance, and costs resulting from erroneous non-compliance.

The current regime should also be assessed in terms of the effect on directors as well as on the company itself. Rules that impose costs upon directors may act as a disincentive to directors acquiring a material shareholding in companies which employ them. The extent to which any rules require the disclosure of the personal affairs of directors or their associates may have a similar effect.

In regards to this issue, I refer you to the work previously undertaken by Chartered Secretaries Australia (*Disclosure of shareholdings subject to security interest or other third-party rights — submission to ASX*, 13 June 2008) and the Australian Institute of Company Directors (*Position paper no. 9 – Directors' Margin Loans*, 21 July 2008).

Having regard to all the above matters, I request that CAMAC:

(i) examine how overseas jurisdictions regulate the disclosure of directors' shareholdings subject to margin loans or similar funding arrangements, and compare and contrast overseas regulation with that of Australia; and

(ii) advise whether changes are required to Australia's regulatory framework and if so what form they should take.

‘Blackout’ trading by company directors

A ‘blackout’ period refers to the time when a company’s officers are prohibited by the policies set by the company from trading in the company’s securities. These periods generally occur prior to the release of annual or half-yearly results. ‘Blackout’ trading is when officers trade during a ‘blackout’ period.

The obligation to have a ‘blackout’ policy is regulated by Recommendation 3.2 of the ASX *Corporate Governance Principles and Recommendations*. This states that ’companies should establish a policy concerning trading in company securities by directors, senior executives and employees, and disclose the policy or a summary of that policy’. Under ASX Listing Rule 4.10.3, a company is required to provide a statement in its annual report disclosing the extent to which it has followed the *Corporate Governance Principles and Recommendations*. If the company has not followed a recommendation, it must provide reasons for its non-compliance.

‘Blackout’ trading is not against the law, however, individuals who trade with information which is not generally available are subject to the insider trading prohibitions in Part 7.10 of the Corporations Act. Additionally, section 183 of the Corporations Act imposes a prohibition on directors improperly using company information to gain a personal advantage, and section 205G of the Corporations Act and ASX listing rule 3.19A impose disclosure obligations in respect of the holding, or alteration, by directors of certain interests they have in the company.

Both the ASX and Regnan have recently reviewed trading by directors and found a significant lack of compliance with regard to not trading in the ‘blackout’ period. ASX Markets Supervision Pty Limited (ASXMS) also conducted a review which examined rule 3.19A notifications via the Companies Announcements Platform between 1 January 2008 and 31 March 2008. That review found that of the 1,863 active trade notifications lodged, 43 per cent occurred in the period between the close of books and the release to the market of the relevant entity’s half-year and full-year results. Both reviews also identified significant levels of late compliance or non-compliance by directors with their obligations under section 205G and rule 3.19A.

I note that ASIC published Regulatory Guide 193 - *Notifications of directors' interests in securities - listed companies* on 25 June 2008. This document provides some clarification of the notification obligations of directors and sets out the criteria taken into account by ASIC when assessing whether regulatory action should be taken.

I am concerned that active trading by directors between the close of books and the release of results has the potential to affect confidence in the integrity of Australia’s markets. From a policy perspective, such confidence is central to maintaining Australia’s attractiveness as an investment destination.

I request that CAMAC:

(i) examine how overseas jurisdictions regulate ‘blackout’ trading, and compare and contrast overseas regulation with that of Australia;

(ii) while noting the already extensive insider trading prohibition, advise whether changes are required to Australia’s regulatory framework to provide for greater confidence in the integrity of the market, specifically relating to directors’ trading activity; and

(iii) advise what form any such changes should take if they are required.

Spreading false or misleading information

During the recent market turbulence, concerns have been raised that some market participants may have been spreading false or misleading information in respect of certain securities in order to take advantage of artificial changes in their price. This practice is sometimes referred to as ‘rumourtrage’.

Section 1041E of the Corporations Act prohibits the dissemination of false information that is likely to have a negative effect on the price of any securities in circumstances where the disseminator knew, or ought reasonably to have known, the information was false.

In parallel to this provision, there are prohibitions on market manipulation (section 1041A), false trading and market rigging (section 1041B and 1041C), and inducing a person to deal in a financial product using false or misleading information (section 1041F). Additionally, section 1041G of the Corporations Act prohibits a person carrying on a financial services business from engaging in dishonest conduct in relation to a financial product or financial service.

On 7 March 2008, the Australian Securities and Investments Commission initiated an investigation into the allegations of market manipulation by false rumours and collusive behaviour (Project Mint).In light of the concerns that have been raised regarding rumourtrage, it is appropriate to review the regulatory regime governing market manipulation, with specific focus on the spreading of false information.

I request that CAMAC:

(i) examine how overseas jurisdictions regulate the spread of false or misleading information, and compare and contrast overseas regulation with that of Australia; and

(ii) advise whether changes are required to Australia’s regulatory framework, and if so what form they should take.

Disclosure of market-sensitive information

Analysts, and the research they perform, play an important role in Australia’s financial markets, by keeping the market informed. Briefings are sometimes provided by companies to analysts on a confidential basis to assist in the pricing of securities in the market and to assist with research.

Under the continuous disclosure obligations in the Corporations Act and the ASX Listing Rules, price-sensitive information must be provided to the market once the company becomes aware of it. Continuous disclosure both ensures that the market is fully informed and contributes to market fairness and efficiency. Alternative ways in which market-sensitive information may be distributed include press briefings and posting information on the company’s website.

There are concerns, however, that confidential briefings are being provided to analysts which create the perception that some analysts have access to critical information that is not available to other analysts, shareholders and the general public. These perceptions can lead to a lack of confidence in the integrity of Australia’s financial markets and potentially create opportunities for insider trading.

I request that CAMAC:

(i) examine the role that analysts' briefings play in Australia's financial market, including whether their role is a positive one that leads to greater market efficiency; and

(ii) advise whether changes may be required to Australia's regulatory framework; and if so, what form they should take.

Referral and resourcing

It is important to ensure that Australia's system of corporate law and regulation is sufficiently robust to provide investors with confidence that they are able to make fully informed decisions. I therefore seek CAMAC's advice on the corporate law aspects of the matters set out in this letter.

In order to assist in this task, I have approved the payment of $100,000 to CAMAC. I would appreciate CAMAC's advice by 30 June 2009. Due to the nature of the issues contained in this referral, I believe it is important that this timeframe is adhered to, although I also note the complexity of these matters and as such I request that CAMAC keep Treasury informed of any factors that might impact on the delivery of your advice within this timeframe.

The Government values the expertise and insights that CAMAC brings to corporate law policy development and looks forward to receiving its report.

Yours sincerely

NICK SHERRY

Appendix B
The FSA Model Code

Introduction

The FSA Model Code imposes restrictions on dealing in the securities of a listed company beyond those imposed by law. Its purpose is to ensure that persons discharging managerial responsibilities do not abuse, and do not place themselves under suspicion of abusing, inside information that they may be thought to have, especially in periods leading up to an announcement of the company's results.

Nothing in the Model Code sanctions a breach of the market abuse or insider dealing provisions or any other relevant legal or regulatory requirements.

The Code provides as follows:

Definitions

1 In this code the following definitions, in addition to those contained in the listing rules, apply unless the context requires otherwise:

(a) close period means:

(i) the period of 60 days immediately preceding a preliminary announcement of the listed company's annual results or, if shorter, the period from the end of the relevant financial year up to and including the time of announcement; or xx

(ii) the period of 60 days immediately preceding the publication of its annual financial report or if shorter the period from the end of the relevant financial year up to and including the time of such publication; and

(iii) if the listed company reports on a half yearly basis the period from the end of the relevant financial period up to and including the time of such publication; and

(iv) if the listed company reports on a quarterly basis the period of 30 days immediately preceding the announcement of the quarterly results or, if shorter, the period from the end of the relevant financial period up to and including the time of the announcement;

(b) connected person has the meaning given in section 96B (2) of the Act (Persons discharging managerial responsibilities and connected persons);

(c) dealing includes:

(i) any acquisition or disposal of, or agreement to acquire or dispose of any of the securities of the company;

(ii) entering into a contract (including a contract for difference) the purpose of which is to secure a profit or avoid a loss by reference to fluctuations in the price of any of the securities of the company;

(iii) the grant, acceptance, acquisition, disposal, exercise or discharge of any option (whether for the call, or put or both) to acquire or dispose of any of the securities of the company;

(iv) entering into, or terminating, assigning or novating any stock lending agreement in respect of the securities of the company;

(v) using as security, or otherwise granting a charge, lien or other encumbrance over the securities of the company;

(vi) any transaction, including a transfer for nil consideration, or the exercise of any power or discretion effecting a change of ownership of a beneficial interest in the securities of the company; or

(vii) any other right or obligation, present or future, conditional or unconditional, to acquire or dispose of any securities of the company;

(d) [deleted]

(e) prohibited period means:

(i) any close period; or

(ii) any period when there exists any matter which constitutes inside information in relation to the company;

(f) restricted person means a person discharging managerial responsibilities; and

(g) securities of the company means any publicly traded or quoted securities of the company or any member of its group or any securities that are convertible into such securities.

Dealings not subject to the provisions of this code

2 The following dealings are not subject to the provisions of this code:

(a) undertakings or elections to take up entitlements under a rights issue or other offer (including an offer of securities of the company in lieu of a cash dividend);

(b) the take up of entitlements under a rights issue or other offer (including an offer of securities of the company in lieu of a cash dividend);

(c) allowing entitlements to lapse under a rights issue or other offer (including an offer of securities of the company in lieu of a cash dividend);

(d) the sale of sufficient entitlements nil-paid to take up the balance of the entitlements under a rights issue;

(e) undertakings to accept, or the acceptance of, a takeover offer;

(f) dealing where the beneficial interest in the relevant security of the company does not change;

(g) transactions conducted between a person discharging managerial responsibilities and their spouse, civil partner, 4child or step-child (1within the meaning of section 96B(2) of the Act1);

(h) transfers of shares arising out of the operation of an employees' share scheme into a savings scheme investing in securities of the company following:

(i) exercise of an option under 1 an approved SAYE1 option scheme; or

(ii) release of shares from a 1 HM Revenue and Customs approved share incentive plan1;

(i) with the exception of a disposal of securities of the company received by a restricted person as a participant, dealings in connection with 1 the following employees' share schemes;

(i) an HM Revenue and Customs approved SAYE option scheme or share incentive plan, under which participation is extended on similar terms to all or most employees of the participating companies in that scheme; or

(ii) a scheme on similar terms to a HM Revenue and Customs approved SAYE option scheme or share incentive plan, under which participation is extended on similar terms to all or most employees of the participating companies in that scheme; or

(j) the cancellation or surrender of an option under an employees' share scheme;

(k) transfers of the securities of the company by an independent trustee of an employees' share scheme to a beneficiary who is not a restricted person;

(l) transfers of securities of the company already held by means of a matched sale and purchase into a saving scheme or into a pension scheme in which the restricted person is a participant or beneficiary;

(m) an investment by a restricted person in a scheme or arrangement where the assets of the scheme (other than a scheme investing only in the securities of the company) or arrangement are invested at the discretion of a third party;

(n) a dealing by a restricted person in the units of an authorised unit trust or in shares in an open-ended investment company; and

(o) bona fide gifts to a restricted person by a third party.

Dealing by restricted persons

3 A restricted person must not deal in any securities of the company without obtaining clearance to deal in advance in accordance with paragraph 4 of this code.

Clearance to deal

4 (a) A director (other than the chairman or chief executive) or company secretary must not deal in any securities of the company without first notifying the chairman (or a director designated by the board for this purpose) and receiving clearance to deal from him.

(b) The chairman must not deal in any securities of the company without first notifying the chief executive and receiving clearance to deal from him or, if the chief executive is not present, without first notifying the senior independent director, or a committee of the board or other officer of the company nominated for that purpose by the chief executive, and receiving clearance to deal from that director, committee or officer.

(c) The chief executive must not deal in any securities of the company without first notifying the chairman and receiving clearance to deal from him or, if the chairman is not present, without first notifying the senior independent director, or a committee of the board or other officer of the company nominated for that purpose by the chairman, and receiving clearance to deal from that director, committee or officer.

(d) If the role of chairman and chief executive are combined, that person must not deal in any securities of the company without first notifying the board and receiving clearance to deal from the board.

(e) Persons discharging managerial responsibilities (who are not directors) must not deal in any securities of the company without first notifying the company secretary or a designated director and receiving clearance to deal from him.

Persons discharging managerial responsibilities are:

(in accordance with section 96B(1) of the Act):

(a) a director of an issuer:

(i) registered in the United Kingdom that has requested or approved admission of its shares to trading on a regulated market; or

(ii) not registered in the United Kingdom or any other EEA State but has requested or approved admission of its shares to trading on a regulated market and who is required to file annual information in relation to shares in the United Kingdom in accordance with Article 10 of the Prospectus Directive; or

(b) a senior executive of such an issuer who:

(i) has regular access to inside information relating, directly or indirectly, to the issuer; and

(ii) has power to make managerial decisions affecting the future development and business prospects of the issuer.

5 A response to a request for clearance to deal must be given to the relevant restricted person within five business days of the request being made.

6 The company must maintain a record of the response to any dealing request made by a restricted person and of any clearance given. A copy of the response and clearance (if any) must be given to the restricted person concerned.

7 A restricted person who is given clearance to deal in accordance with paragraph 4 must deal as soon as possible and in any event within two business days of clearance being received.

Circumstances for refusal

8 A restricted person must not be given clearance to deal in any securities of the company:

(a) during a prohibited period; or

(b) on considerations of a short term nature. An investment with a maturity of one year or less will always be considered to be of a short term nature.

Dealings permitted during a prohibited period

Dealing in exceptional circumstances

9 A restricted person, who is not in possession of inside information in relation to the company, may be given clearance to deal if he is in severe financial difficulty or there are other exceptional circumstances. Clearance may be given for such a person to sell (but not purchase) securities of the company when he would otherwise be prohibited by this code from doing so. The determination of whether the person in question is in severe financial difficulty or whether there are other exceptional circumstances can only be made by the director designated for this purpose.

10 A person may be in severe financial difficulty if he has a pressing financial commitment that cannot be satisfied otherwise than by selling the relevant securities of the company. A liability of such a person to pay tax would not normally constitute severe financial difficulty unless the person has no other means of satisfying the liability. A circumstance will be considered exceptional if the person in question is required by a court order to transfer or sell the securities of the company or there is some other overriding legal requirement for him to do so.

11 The FSA should be consulted at an early stage regarding any application by a restricted person to deal in exceptional circumstances.

Awards of securities and options

12 The grant of options by the board of directors under an employees' share scheme to individuals who are not restricted persons may be permitted during a prohibited period if such grant could not reasonably be made at another time and failure to make the grant would be likely to indicate that the company was in a prohibited period.

13 The award by the company of securities, the grant of options and the grant of rights (or other interests) to acquire securities of the company to restricted persons is permitted in a prohibited period if:

(a) the award or grant is made under the terms of an employees' share scheme and the scheme was not introduced or amended during the relevant prohibited period; and

(b) either:

(i) the terms of such employees' share scheme set out the timing of the award or grant and such terms have either previously been approved by shareholders or summarised or described in a document sent to shareholders, or

(ii) the timing of the award or grant is in accordance with the timing of previous awards or grants under the scheme; and

(c) the terms of the employees' share scheme set out the amount or value of the award or grant or the basis on which the amount or value of the award or grant is calculated and do not allow the exercise of discretion; and

(d) the failure to make the award or grant would be likely to indicate that the company is in a prohibited period.

Exercise of options

14 Where a company has been in an exceptionally long prohibited period or the company has had a number of consecutive prohibited periods, clearance may be given to allow the exercise of an option or right under an employees' share scheme, or the conversion of a convertible security, where the final date for the exercise of such option or right, or conversion of such security, falls during a prohibited period and the restricted person could not reasonably have been expected to exercise it at a time when he was free to deal.

15 Where the exercise or conversion is permitted pursuant to paragraph 14, clearance may not be given for the sale of the securities of the company acquired pursuant to such exercise or conversion including the sale of sufficient securities of the company to fund the costs of the exercise or conversion and/or any tax liability arising from the exercise or conversion unless a binding undertaking to do so was entered into when the company was not in a prohibited period.

Qualification shares

16 Clearance may be given to allow a director to acquire qualification shares where, under the company's constitution, the final date for acquiring such shares falls during a prohibited period and the director could not reasonably have been expected to acquire those shares at another time.

Saving schemes

17 A restricted person may enter into a scheme under which only the securities of the company are purchased pursuant to a regular standing order or direct debit or by regular deduction from the person's salary, or where such securities are acquired by way of a standing election to re-invest dividends or other distributions received, or are acquired as part

payment of the person’s remuneration without regard to the provisions of this code, if the following provisions are complied with:

(a) the restricted person does not enter into the scheme during a prohibited period, unless the scheme involves the part payment of remuneration in the form of securities of the company and is entered into upon the commencement of the person’s employment or in the case of a non-executive director his appointment to the board;

(b) the restricted person does not carry out the purchase of the securities of the company under the scheme during a prohibited period, unless the restricted person entered into the scheme at a time when the company was not in a prohibited period and that person is irrevocably bound under the terms of the scheme to carry out a purchase of securities of the company (which may include the first purchase under the scheme) at a fixed point in time which falls in a prohibited period;

(c) the restricted person does not cancel or vary the terms of his participation, or carry out sales of securities of the company within the scheme during a prohibited period; and

(d) before entering into the scheme, cancelling the scheme or varying the terms of his participation or carrying out sales of the securities of the company within the scheme, the restricted person obtains clearance in accordance with paragraph 4.

Acting as a trustee

18 Where a restricted person is acting as a trustee, dealing in the securities of the company by that trust is permitted during a prohibited period where:

(a) the restricted person is not a beneficiary of the trust; and

(b) the decision to deal is taken by the other trustees or by investment managers on behalf of the trustees independently of the restricted person.

19 The other trustees or investment managers acting on behalf of the trustees can be assumed to have acted independently where the decision to deal:

(a) was taken without consultation with, or other involvement of, the restricted person; or

(b) was delegated to a committee of which the restricted person is not a member.

Dealing by connected persons and investment managers

20 A person discharging managerial responsibilities must take reasonable steps to prevent any dealings by or on behalf of any connected person of his in any securities of the company on considerations of a short term nature.

21 A person discharging managerial responsibilities must seek to prohibit any dealings in the securities of the company during a close period:

(a) by or on behalf of any connected person of his; or

(b) by an investment manager on his behalf or on behalf of any person connected with him where either he or any person connected has funds under management with that investment fund manager, whether or not discretionary (save as provided by paragraphs 17 and 18).

22 A person discharging managerial responsibilities must advise all of his connected persons and investment managers acting on his behalf:

(a) of the name of the listed company within which he is a person discharging managerial responsibilities;

(b) of the close periods during which they cannot deal in the securities of the company; and

(c) that they must advise the listed company immediately after they have dealt in securities of the company.