ASIC

Australian Securities & Investments Commission

ASIC's submission on CAMAC's issues paper *Aspects of Market Integrity*

Contents

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1 This is a public submission by the Australian Securities and Investments Commission (ASIC) on CAMAC's issues paper *Aspects of Market Integrity* dated February 2009.

2 The submission is structured in four sections:

- Section 1: Margin lending to directors
- Section 2: Blackout trading by directors and other officers
- Section 3: Spreading false or misleading information
- Section 4: Corporate briefings to analysts

3 Our submission answers the issues for consideration in paragraphs 1.8, 2.6, 3.6 and 4.7 of CAMAC's issues paper and where appropriate raises additional issues.

4 We refer to companies in this submission but in general our comments apply equally to managed investment schemes (with appropriate modifications).

5 This submission is dated 13 March 2009.

1 Margin lending to directors

Regulation of margin loans to directors

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

6 Margin lending has provided a valuable source of funds to support corporate growth, especially for smaller companies and those in 'rapid expansion' mode who are heavily reliant on funding from promoters. As noted in Senator Sherry's letter of reference to CAMAC, margin lending also facilitates investors' access to finance and, in particular, the acquisition by directors and senior executives of significant shareholdings in their company. These shareholdings may in turn serve to align the interests of directors and senior executives (i.e. 'officers' and 'senior managers', as defined in the *Corporations Act 2001*) and their companies.

7 However, directors' and, to a lesser extent, senior executives' margin loan arrangements may adversely impact market integrity by creating conflicts of interest, and this potentially reduces market confidence in their companies and the market generally.

8 Entry into margin loans can create conflicts of interest. The director or senior executive has a personal interest in maintaining the security price at a certain level to avoid a margin loan call and that may drive short term corporate decisions, or a reluctance to disclose some material information to the market (e.g. details of margin loan arrangements or information that may depress the price of the company's securities). These types of conflicts become more of an issue when share prices are going down and personal finances are under pressure.

9 In certain circumstances, confidence in a company and in market integrity can be severely affected if the company's directors or senior executives have entered into margin loan arrangements. The reasons for this include:

(a) The company's securities may be heavily sold in the market as a result of margin calls on directors and senior executives. In a falling market the momentum for sales becomes self-perpetuating. This was evident in the Australian market early in 2008. Shareholders perceive that the problem lies with directors' or senior executives' conduct rather than with corporate problems.

(b) A widespread perception that directors' and senior executives' real interests are not fully disclosed can have an adverse impact on market integrity. Shareholders should know when a price fall relates to a margin call and determine if the price fall is simply due to short-term trading

turbulence. Shareholders should also know about their directors' equity position and dealings, as that may itself reflect value and confidence in a company. Currently this information is sometimes not being fully disclosed to the market.

(c) There is also a question about market integrity where directors or senior executives can, or are required to, sell under a margin call even when they have confidential price sensitive information.

(2) Should there be specific regulation of the process of entering into margin loans by directors?

10 ASIC does not consider legislative bans or large scale restrictions on the ability of directors or senior executives to enter into margin loans are warranted at this time. Margin lending is a bona fide method of funding investments in companies and can be used to support corporate growth.

11 However, this is not to say that the practice should not be restricted in any way. As a matter of best practice some restrictions should be imposed on margin lending to deal with the conflicts of interest and other impacts on market integrity referred to above. As set out below (in paragraphs 20 to 27), ASIC also believes there should be mandatory disclosure of margin loan arrangements by directors to the board at the time of entry into those arrangements.

12 ASIC thinks that the appropriate restrictions on directors' and senior executives' margin loans depend on the circumstances of the individual company and the nature of the margin loan (e.g. what is appropriate for a larger company will likely not be appropriate for a smaller company; e.g. a loan over less than 1% of the company's shares will have less potential to damage a company than a loan over a 5% interest). The company's board is in the best position to assess the company's circumstances and the nature of the loan and set the appropriate conditions.

13 ASIC considers that it is very important for boards of listed companies to have clear policies on the circumstances where directors' and senior executives' margin loan arrangements are permitted—including restrictions on loan terms such as LVR exposure, and total equity that may be exposed per individual and amongst all senior executives collectively. Policies on when the company will make disclosure to the market of the existence of loans (and in certain cases loan terms or trigger events) should also be required.

14 ASIC considers that as a matter of best practice, directors and senior executives should disclose proposed margin loan arrangements to the board before they enter into them and agree not to enter into the loan unless the board approves their entry into the loan.

15 In deciding whether to approve a margin loan the board should consider issues such as:

(a) whether the nature of the proposed loan is such that it might lead to concentrated selling of the company's securities in the event of a market downturn (if a margin loan call is made) and whether the board is prepared to accept the risk that this may impact on the market's confidence in the company; and

(b) whether the loan may, in future situations, require disclosure to the market of material information about the loan under Listing Rule 3.1 and how this disclosure will affect the company.

16 As a matter of best practice, directors and senior executives should also be required to obtain board approval of any material changes to existing margin loan arrangements and to notify the board of any significant developments under their margin loan arrangements (e.g. if a margin call has been made and the director's or senior executive's proposed response to the margin call).

17 The board's policies in relation to margin loans (e.g. about when they will approve margin loans and when they will disclose them) should be transparent. They should be made readily available to investors by posting on the company's website with other corporate governance policies.

18 ASIC considers that the ASX Corporate Governance Council should develop principles and recommendations to guide listed entities on these policies. This approach would ensure listed entities adopt appropriate policies on directors and senior executives' margin loans or disclose why they have chosen not to do so. ASIC would be happy to assist the ASX Corporate Governance Council.

19 If the ASX Corporate Governance Council does not develop these principles and recommendations, consideration should be given to law reform that would at a minimum require pre-approval by the board of entry into a margin loan.

Disclosure by directors to the company

(3) Should there be requirements for directors to disclose to the board that they have entered into margin loans?

20 ASIC calls for law reform to require directors to disclose to the board that they have entered into a margin loan, and relevant details of the margin loan (e.g. 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). Directors should also be required to disclose changes to their margin loan arrangements. This will enable the board to be in a position to give disclosure to the market where material.

21 Early last year, it was said in the market that a number of companies were sold short in the belief that directors or substantial shareholders had significant margin loan exposures. On 29 February 2008, ASIC and ASX issued a media release (MR 08-37 'Disclosure guidance for listed entities') highlighting the need for disclosure of all material price sensitive information known to a company to the market and ASIC's expectation that all directors would have disclosed margin loan information to the board under s191 of the Corporations Act.

22 However, there is a view that disclosure of directors' margin loan arrangements is not required under s191 because the loan does not relate to the affairs of the company and/or because the loan is not material. ASIC does not agree with this interpretation of s191, but considers law reform is necessary to put the issue beyond doubt. It is in the interests of directors, companies and the market generally that the scope of s191 is clarified in this way.

23 It is important that the board have relevant information about directors' margin loans so that they are aware of conflicts of interests and can act appropriately in light of this knowledge. Disclosure of margin loans under s191 will enable the board to take this information about margin loans into account when deciding whether information has to be disclosed to the market and, therefore, contributes to a fully informed market.

24 In this context ASIC notes that it has also been argued that a company does not have information about a margin loan that it may be obliged to disclose under Listing Rule 3.1 because directors only know about their margin loans in their personal capacity rather than due to performance of their duties as an officer and that knowledge does not flow to the company except by specific advice. Amending s191 to make it clear that margin loans must be disclosed to the board would ensure that this argument is not available and will lead to a better informed market.

25 In light of the above, ASIC supports an amendment to s191 to clarify that directors must disclose to the board if they have entered into a margin loan and provide relevant details of the margin loan. It should also be clarified that directors and officers must disclose to the board if there are changes to their margin loan arrangements.

26 Adopting the same reasoning, s191 should also be amended to make clear that directors must disclose all their interests in securities of the company, including economic interests such as CFDs, options and other derivative instruments, of whatever amount.

27 Section 191 deals with directors' interests, not interests of other senior executives. As stated above in paragraphs 10–19, ASIC believes corporate best practice would be for companies to require all senior executives to make the same disclosures, under their contract terms.

Disclosure to the market

(4) Should there be specific requirements for directors to disclose to the market that they have entered into margin loans?

28 Listing Rule 3.1 is the principal mechanism for ensuring that the market is informed about price sensitive information. The continuous disclosure obligation under Listing Rule 3.1 extends to material information about margin loans which the company is aware of.

29 On the basis that the law reform requiring disclosure to the board under s191 is effected and best practice guidelines about entry into margin loans are developed, ASIC supports leaving market disclosure to a company as a result of the application of Listing Rule 3.1. That is, provided that companies are aware of the details of margin loan arrangements, ASIC thinks it is appropriate for the decision about what needs to be disclosed to be left to companies. This is because it is difficult to be prescriptive about the level of information that the market requires about margin loan arrangements – this will vary according to the circumstances of the company and the details of the particular margin loan. ASIC considers that, as for continuous disclosure generally, companies are best placed to determine what must be disclosed under Listing Rule 3.1 in relation to margin loans.

30 As stated above (see paragraphs 10–19) as a matter of best practice, the company's policy on when and what it will disclose should be clearly stated and available on the company's website.

31 Finally, ASIC notes that the extent to which s205G requires disclosure of margin loan arrangements by the director to the market is debateable. In part it will turn on the nature of the security interest held by the lender. ASIC does not press for specific amendment to s205G to require disclosure of margin loan arrangements to the market, as long as the above proposals, and those that follow below, are implemented. (We comment further on s205G in paragraph 35 below.)

(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?

32 As stated above (in paragraphs 20 to 27), ASIC thinks that the director should be required to disclose full details of the margin loan to the board, and major developments or amendments. The board should then decide what events should be disclosed to the market in order to comply with the continuous disclosure obligation in Listing Rule 3.1 (see paragraphs 28 and 29). What should be disclosed to the market will vary depending on the circumstances of the company and the relevant loan.

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

33 ASIC thinks the relevant principles apply to all directors. As stated above (in (see paragraphs 28 and 29)) what is disclosed to the market under Listing Rule 3.1 will vary depending on the individual circumstances of the company and the relevant loan. These circumstances could include the size of the directors' shareholding.

Generic approach to disclosure

(7) Should directors be generally obliged to disclose to the company their interests or arrangements regarding their shareholding, or other equity-linked interest in the company, including financing agreements?

34 The potential conflicts associated with margin loans over securities could also arise in connection other equity-linked interests in the company. ASIC is of the view that the proposals regarding entry and disclosure of directors' interests (i.e. the best practice guidelines and the proposed amendments to s191 discussed in paragraphs 10–27) should extend to

the acquisition by directors and senior executives of any interests or securities the return on which is linked to the performance of the company and includes securities that are hedged into the quoted securities market ('economic interests in securities').

35 In our view, s205G should also be extended to require disclosure by directors to the market of economic interests in securities that do not give rise to a relevant interest (e.g. cash settled equity derivatives). ASIC considers that this would support the principle that the market should be informed if a director of a company has entered into a transaction relating to the company's shares or the value of those shares.

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

36 Listing Rule 3.1 requires companies to disclose market sensitive information about the types of interests and arrangements of directors that are discussed in paragraph 34 above and of which the company is aware. Provided that disclosure of these interests and arrangements to the board is supported by the amendments to s191 and the best practice guidelines discussed above, ASIC thinks that Listing Rule 3.1 should be the primary mechanism for disclosing such information into the market.

37 ASIC also notes that the suggested amendment to the scope of s205G to cover all economic interests in securities would promote disclosure to the market of these type of interests.

Additional Issues—Section 1

38 ASIC also believes that law reform is needed to remove some inconsistencies in the application of the insider trading and substantial holding disclosure laws to margin loans.

Insider trading

39 Regulation 9.12.01(e) exempts the 'sale of financial products under a mortgage or charge of the financial products' from the insider trading provisions (s1043A(1)). This provides insider trading protection to borrowers and lenders.

40 This exemption from insider trading can result in inequity when a director's or senior executive's securities are sold in a falling market. The director or senior executive can realise a better price than other shareholder sellers by exiting at the (then) top of the market and so obtain a financial benefit. A person with inside information may not relay that information to a lender, but could acquiesce to a margin call without posting additional security with little risk of breaching the insider trading rules. ASIC would not ordinarily expect to rely on silence alone to constitute a claim for procuring a sale in breach of these rules.

41 It has become market practice for company financiers to also provide significant margin loan facilities to directors and senior executives of the company. As company financiers, the lender will commonly have price sensitive information in moments of financial stress. ASIC's view is that no person with inside information about a security should be able to deal in that security. It is unfair that a financier who is in possession of inside information is able to take advantage of that information by selling securities to a person who is not aware of that information.

42 For this reason, ASIC recommends law reform to ensure that borrowers and lenders are subject to the insider trading provisions, by removing this regulation. Lenders should be able to manage facilities despite holding inside information by the use of appropriate information barriers. This amendment may prompt lenders to restrict their willingness to provide margin loans, but more importantly it will remove an unfair advantage that they may have over other creditors or persons dealing in the securities. This amendment will increase the level of confidence in market integrity.

Substantial holding disclosure

43 Most margin lenders under standard loan arrangements are not subject to the substantial holding disclosure requirements in s671B. There is presently an exemption from these requirements for lenders whose interest in securities arises solely because of a mortgage, charge or security taken by them in the ordinary course of their business (s609(1)). ASIC believes that consideration should be given to removing this exemption for any lenders who have an absolute power to sell securities on the occurrence of a market event, such as margin lenders. The substantial shareholding provisions are designed to establish the controllers of shares (including those who can control their disposal), and the interest of a margin lender is no different than any other person's interest in that respect, and is distinguishable from a standard loan facility.

2 Blackout trading by directors and officers

(1) The implications of blackout trading for market integrity

44 The issue of directors trading in securities in the blackout period has attracted the attention of commentators who have linked the practice to insider trading and called for the banning of trading by directors in the blackout period. Trading during the blackout period certainly creates a perception that directors are trading on the basis of inside information. It is this perception of unfairness that would appear to impact the overall confidence in integrity of the market.

45 However, the very fact that a director trades in securities during the blackout period does not mean that the director is engaging in insider trading. It is possible for the market to be fully informed during the blackout period, though audited figures have not been released. It is possible for a non-executive director not to have all the price sensitive information that the company has.

46 As noted in the CAMAC issues paper, the ASX has conducted a detailed analysis of trading by directors during blackout periods, based on disclosures by companies to ASX of directors' dealings. Of the significant number of trades reported in the blackout periods last year, only a relatively small number were conducted in breach of the company's blackout trading policy and to date none have been referred to ASIC for possible breach of the insider trading rules.

47 ASIC and ASX inquire into suspicious trading at or before the time of significant announcements to the market, whether or not they occur during a blackout period. ASX and ASIC will then investigate whether the trader is an insider. These reviews are more effective for identifying potential illegal trading activity by directors, than reviews of blackout trading.

(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

48 ASIC endorses the adoption of trading policies by companies, as recommended in the ASX Corporate Governance Principles and Recommendations. Clear and comprehensive disclosure of these policies would directly address market perceptions that directors are freely allowed to trade during this period whilst in possession of inside information.

49 One specific area where the ASX Corporate Governance Principles and Recommendations could be modified is to encourage greater disclosure to

shareholders about when waivers from any blanket prohibitions on trading during the blackout period would be granted. The less discretion attached to the ability to grant these waivers, the less likely that there will be a perception of waivers being granted purely to give a director a trading advantage.

(3) Should a more interventionist approach be adopted

50 The adoption of a more interventionist approach raises a number of significant issues, as set out in Section 2.5.2 of the CAMAC issues paper. The questions raised by adopting a more interventionist approach (such as banning blackout trading or adopting the rules in the Model Code) are:

(a) whether the perception issues raised by blackout trading can only, or most effectively, be addressed through the adoption of such an approach; and

(b) whether the benefits of adopting such an approach outweigh any costs or disadvantages associated with it.

51 ASIC believes that these decisions are essentially decisions of policy, that are more appropriately made by Government.

3 Spreading false or misleading information

Initiating rumours

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

52 In an efficient market, participants rely on the flow of reliable material information to establish prices for securities. A rumour, or unverified information about an entity or affecting an entity, will lead to inefficiencies in this pricing mechanism. In an environment of high market turbulence, the dissemination of unverified information has the potential to further destabilise markets and undermine market integrity.

53 The problems caused by rumours are most obvious in falling markets, and there has been repeated analysis of the laws restricting short selling and spreading of false information since 1929. However false rumours can also be used to falsely promote a security price.

54 Since January 2008 there has been concern that some individuals are deliberately spreading false or misleading information about listed securities in order to artificially provoke sales of securities, in some instance to reduce their market price and profit from short selling activities in the stocks. On 6 March 2008, ASIC posted media release MR 08-47, 'False or misleading rumours', expressing its concerns with this issue and initiated investigations into market manipulation. ASIC announced on 17 September 2008 that it was extending its enquiries on the question (MR 08-202, 'Enquiries into market manipulation'). ASIC has also conducted discrete investigations into conduct by individuals involving the initiation and spreading of rumours.

55 ASIC's Project Mint, investigating the integrity of the Australian markets and the impact of false rumours and collusion is still underway. Among other things, that work has contributed to a deeper understanding that conduct which may be classified as 'rumourtrage' or 'rumour-mongering' may take a wide variety of forms. Originating or initiating false or unverified information is caught by the current law, so long as the information is material. Simple on-communication or dissemination of that information may also be caught. In some cases it is difficult to distinguish between an opinion and a rumour, and in other cases a 'rumour of an opinion' may be originated and disseminated. In some cases a rumour has no basis in fact. In other cases it may be based, in varying degrees, on an element of truth or verified information. In that instance the information may also be inside information for the purpose of s1043A. Some or all of these elements may combine in unusual ways. As

noted in more detail below, the current legislative framework could be better adapted to this wide variety of conduct.

(2) and (3) Should all or some of s1041E, 1041F and 1041G be civil penalty provisions as well as attracting criminal liability and should any of the elements of any of these three provisions be amended, and if so, in what manner?

56 Each of sections 1041E to G are important parts of ASIC's armoury in ensuring the origination and dissemination of unverified information does not affect market integrity. They are currently criminal offences. We also consider 1041H, imposing civil liability only, plays a role in this respect.

57 However, the regulatory options provided by 1041E to G are limited in ways that other provisions focussed on market integrity (sections 1043A and 674 in particular) are not, because they are not civil penalty provisions. We think it important that those limitations are removed to ensure ASIC has access to the full range of regulatory options (administrative, civil, civil penalty and criminal), in responding to conduct affecting market integrity. This will assist ASIC to ensure that the range of conduct that can constitute 'rumourtrage' is met by a scaleable response on ASIC's part.

58 For example, some conduct may be appropriately dealt with by administrative action (that is, banning or licensing action) by ASIC based on s1041H (inter alia). Other conduct may have had such a detrimental effect on market integrity, and be capable of proof to the criminal standard, that a criminal prosecution is the appropriate regulatory response. However, at least some of the conduct will fall between those two extremes. Where the criminal standard of proof is not able to be met, but market integrity is fundamentally affected, we consider administrative action alone to be an inadequate regulatory response. On that basis, ASIC supports law reform so that ss1041E-G of the Corporations Act constitute civil penalty provisions, as well as criminal offences.

59 We note that the Revised Explanatory Memorandum to the Financial Services Reform Bill 2001, in relation to the application of the civil penalty regime to the insider trading and some market misconduct provisions (1041A, 1041B, 1041C and 1041D) stated:

> '2.79 Another major problem that exists in relation to the market misconduct and insider trading provisions, is the difficulty ASIC has in successfully prosecuting a breach of the provisions. As the existing provisions are offence provisions, the criminal burden of proof (beyond reasonable doubt) applies. ASIC has found it difficult to prove elements of the offences beyond reasonable doubt, as many elements refer to the defendant's state of mind. This difficulty may result in cases not being pursued even where there has been a breach

> of the provisions. This is undesirable as it casts the law into disrepute, and also threatens the integrity of financial markets.
>
> 2.80 It is therefore proposed to make the market misconduct and insider trading provisions civil penalty provisions. The application of the civil burden of proof (balance of probabilities) will facilitate the bringing of actions for breaches of the provisions. The application of civil penalties is likely to act as a deterrent to market misconduct. Another option is to redraft the offence provisions to make them easier to prosecute. However, significant objections to such a proposal may be anticipated given that criminal sanctions would apply to contraventions.
>
> …
>
> 2.87 Breaches of the market misconduct and insider trading provisions must be punished to ensure the integrity of Australian financial markets. ASIC's ability to enforce these provisions will be enhanced by making them part of the civil penalty regime.'

We consider this reasoning also applies to ss1041E-G.

60 If s1041E–G become civil penalty provisions, we suggest that the approach adopted by the legislature in respect of 1041A through C be followed and the 'fault' element from the existing provisions removed. For example, when sections 1041A and 1041B became civil penalty provisions, the element of 'intent' was removed from these provisions.

61 The maximum prison penalty for the major market integrity offences (s1041A-G, s1043A and s674) is 5 years imprisonment. CAMAC may wish to consider if there is merit in lifting the maximum to 10 years, in line with the proposed penalty for illegal cartel activity.

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

62 In ASIC's opinion compulsory recording of telephone conversations and other electronic forms of communication would help to deter rumour mongering and other market abuses – partly by making it logistically more difficult for traders. To maximise effectiveness, any compulsory recording of communications would need to be accompanied by reform banning the use on trading floors of mobile phones and any other devices that cannot be recorded or taped.

63 As noted by the FSA in Policy Statement 08/01, investigating and prosecuting market abuse matters is very difficult and good quality recordings would help in detection of this conduct. We acknowledge that participants who wish to

engage in illegal conduct could evade detection by using secure alternative communication channels.

64 The cost of implementing these measures would be very significant. We have not attempted to quantify these costs as they are best estimated by industry. It is a matter for Government whether the benefits outweigh these costs.

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

65 ASIC has no additional regulatory proposals at this stage. ASIC has established a number of initiatives to seek early information about the flow of rumours in sufficient detail for them to be traced to the originator.

Target response to rumours

(6) and (7) Would there be benefit in ASIC or the ASX providing further guidance on how companies should deal with market rumours affecting their securities and in that context, would it be beneficial to adopt any of the principles of the FSA Market Abuse Directive Instrument

66 ASIC has published guidance for companies on dealing with rumours (Regulatory Guide 62 *Better Disclosure*). The principles enunciated there remain valid. We accept 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 clear however that simply ignoring rumours is not appropriate in this market.

67 We will consider whether the principles need to be refreshed in conjunction with the guidance work we are undertaking mentioned immediately below.

Recipient of rumours

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

68 ASIC is currently developing and will shortly proceed with consulting with the industry on 'good practice' guidelines to assist market participants (brokers and fund managers) who are the recipients of rumours. We plan to complete this work in the next 3 months. Our work in this area will take into account the detailed guidance the FSA published in November 2008 on rumours and will involve a discussion on origination, rules for balanced dissemination of established rumours, and house rules for handling

information, and acting on it. We will also look at practices in the US market. As noted above 'rumourtrage' and 'rumour-mongering' conduct may occur in a wide variety of forms.

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

69 In addition to support for a civil penalty regime targeted at this conduct, we suggest some amendments to other provisions of the Act that will enhance ASIC's administrative powers in this area. Those enhancements will assist ASIC to ensure that all varieties of the conduct that affect market integrity are able to be the subject of regulatory action.

Additional Issues—Section 3

AFS Licensee general obligations

70 We recommend that s912A(1) is amended to specifically require AFS licensees who are market participants or who deal in or advise in securities to have guidelines to ensure responsible discussion of information about listed entities. Including a specific obligation of this type ensures that it dealt with by all licensees (similar to the specific obligation regarding conflicts in s912A(1)(aa)). We consider that the implementation of arrangements to prevent the initiation and spreading of rumours is complementary to the requirement to ensure that the financial services provided by the licensee or its representatives are provided efficiently, honestly and fairly (refer s912A(1)(a)), and accordingly, the primary responsibility for implementing these arrangements should rest with the licensee.

Banning powers

71 We recommend s920A(1) is amended so that ASIC can make a banning order against a person if they contravene the licensee's guidelines on rumourtrage discussed above.

72 We consider that the rules of conduct imposed by licensees on their employees and representatives to ensure that they comply with the financial services laws are an important means by which the objects of Chapter 7 of the Act are achieved. It should be made clear that ASIC can use its banning power where conduct by an employee or representative breaches a licensee's internal guidelines. The amendment we suggest in conjunction with the amendment we suggest to 912A(1) above, would provide ASIC with an additional administrative remedy which would ensure ASIC could appropriately deal with rumourtrage conduct by the range of persons associated with financial services licensees.

Extension of s1309

73 We note that s1309(1) of the Act provides, among other things, that an officer or employee of a corporation who makes available, or gives information, or authorises or permits the making available or giving of information to an operator of a financial market, is guilty of an offence. The relevant market operator at the present time is ASX. We consider that this offence should be extended to false information made available to the clearing or settlement operators, presently Australian Clearing House Pty Ltd ('ACH') and the ASX Settlement and Transfer Corporation Pty Ltd ('ASTC'). Treasury and the Reserve Bank of Australia (with ASX) are currently preparing rules and regulations requiring disclosure of short selling transactions to ASX and to ASTC of equities securities lending transactions. Rumourtage is said to benefit short sellers, and it is therefore important that ASIC and ASX/ASTC/ACH have reliable information on short selling activity. Expanding s1309 in the manner proposed would encourage accurate reporting.

4 Corporate briefings to analysts

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

74 Analysts' briefings play an important and positive role in increasing the dissemination of accurate information on companies to the market. They enable management to explain the company's financial results, business strategies and outlook and they provide analysts with the opportunity to question and evaluate management. Public and private briefings are an important resource for analysts to gain greater insight on the company and its management and so formulate more knowledgeable recommendations. Informed and critical analysis of company results and management performance promotes a more efficient market and enhances market integrity.

75 Of course any disclosures at briefings must comply with the laws relating to continuous disclosure and insider trading (particularly the tipping offence which must be engaged when price sensitive information is provided to analysts).

76 There may be fairness issues (both real and perceived) in relation to the current practice of private briefings with well-connected analysts potentially having access to more detailed and higher quality discussions with management. However, ASIC believes the benefits that the market derives from more informed and critical analysis of companies and management mitigate the fairness issues, provided the law is complied with. In determining whether any briefing is appropriate, management must act for proper purposes and in the best interests of the company.

Public briefings

(2) Whether there should there be greater guidance on what is required to ensure that the information provided in a public briefing is effectively and expeditiously disclosed generally

77 A briefing is public when 'the content of the briefing, [and any interchange with persons present,] is simultaneously made 'generally available' to the market.' (CAMAC issues paper, page 31)

78 ASIC believes there should be some common understanding about what should be considered public, and therefore materials presented made available to the market. There is some circularity in the above definition.

79 In principle, if a company generates materials or provides information or reports that are provided to a number of analysts then those materials should be made available to the market, even if a particular item of information may not be so material and price sensitive that the continuous disclosure requirements are engaged. It may be that the Corporations Act should be amended to require this, supplementing the continuous disclosure provisions.

80 Many companies ensure that information provided in a public briefing is expeditiously disclosed to the general public by:

(a) Placing slides and other material presented at analysts' briefings on the company website at the time of the briefing;

(b) Giving investors access to live broadcasts of analysts' briefings, and making telephone conferencing facilities available to allow investors to listen to briefings; and

(c) Recording analysts' briefings and placing a transcript or summary of the briefing and questions and answers on the company website as soon as possible after the briefing.

81 ASIC considers that the law should not be specific on the means by which companies make the information presented at public briefings available generally, though clearly a written record must be provided to the market. Companies are best placed to determine what is the most effective and efficient disclosure mechanism in their particular circumstances. A more flexible approach will also allow companies to take advantage of technological developments.

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

82 ASIC does not believe the adoption of a rule equivalent to the SEC Rule 100 Selective disclosure and insider trading is necessary on the basis that the continuous disclosure and insider trading provisions in the Corporations Act already adequately deal with this issue.

83 ASIC has no other comments on approaches to public briefings in overseas jurisdictions.

Private briefings

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

84 Private briefings, whether in the form of presentations in stockbrokers' offices or private conversations between analysts and corporate officers, enable

analysts to directly engage with company management on an informal or one-on-one basis. They are an effective way for analysts to test their views, resolve any misunderstandings and gain a better insight into the company's business and strategies. They also give analysts greater opportunity to challenge management's views and assumptions and hold them to account. However, ASIC believes it is critical that in conducting private briefings, companies strictly comply with the law and that further steps can be taken to ensure and to enable ASIC to monitor this compliance.

(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

85 As noted above, all analyst briefings must be conducted in compliance with the laws requiring continuous disclosure and prohibiting insider trading.

86 ASIC believes it is not practicable or appropriate to require all private briefings to be recorded and made available to the public for a number of reasons. Firstly, private briefings vary significantly in their degree of formality, from structured group presentations to individual telephone conversations and meetings. Also, many companies conduct a significant number of private briefings. Investor relations personnel in large companies may be involved in hundreds of private briefings each reporting period. Requiring taping and publishing of every briefing would be onerous and for many companies, impractical.

87 Existing guidelines on best practice investor relations provide companies with processes they can implement to reduce the risk of potential non-compliance with disclosure laws. For example, companies should keep the number of persons authorised to speak on their behalf to a minimum. These persons should be made aware of the information that can and cannot be disclosed before any analyst briefing. Depending on the size of the company, it may be appropriate to have one senior manager overseeing all briefings and other information disclosures. Companies need to develop a disclosure regime that reflects the circumstances of the company and minimises the risk of selective disclosure.

88 Although mandating the taping of private briefings is not considered appropriate, ASIC recommends that at the least, the ASX Corporate Governance Council develop best practice guidance requiring companies to keep detailed records of all private briefings. The scope of the record-keeping requirement would be a matter for discussion but, as a minimum, it should include:

(a) all persons present;

(b) date and timing (length) of the meeting; and

(c) an outline of the topics discussed.

89 Record keeping requirements would enable companies to undertake a review procedure following every private briefing, to confirm that no price-sensitive information has been inadvertently disclosed. If price-sensitive information has been inadvertently disclosed, the information should be immediately released to the ASX and posted on the company's website.

90 The discipline of record-keeping would ensure that companies turn their mind explicitly to the disclosure issue after every private briefing. The keeping of records would also allow ASIC or others to determine retrospectively whether market sensitive information was discussed at a private briefing. It would also be best practice for companies to keep a central record of when analysts' briefings occur that could be easily accessed by the company and regulators.

91 Law reform to stipulate maintenance of these records may be an appropriate measure.

(6) Whether there should be any restrictions on when companies can conduct private briefings

92 ASIC does not propose that there should be mandatory restrictions on when companies can conduct private briefings. While it would not generally be appropriate for companies to give non-public briefings in the blackout period prior to the publication of financial results, this may not always be the case for all companies. Given the significant variance in disclosure issues that companies in different industries and circumstances face, companies themselves are in the best position to determine when it is not appropriate to give private briefings. Instead, ASIC supports the development of best practice guidance by the ASC Corporate Governance Council that recommends no private briefings during a company's blackout period.

(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

93 As noted above, there may be fairness issues (both real and perceived) in relation to the current practice of private briefings. While ASIC recognises the benefits of direct, one-on-one access to company management, it is critical for market integrity that the market can be assured of compliance with the law.

94 Where a company generates a document or other record to provide additional material information to more than one analyst in a private briefing, ASIC believes it is appropriate that the company immediately make the document or record widely available either on the company's website or by other means.

95 ASIC also considers that the market should be informed in advance of the timing of the publication of a listed company's financial results and any public

analysts' briefings. Advance notice should assist in ensuring that investors have equal access to price sensitive information that the company discloses at this time to the market.

(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

96 ASIC believes that industry participants are better placed to comment on whether any issues of intellectual property rights arise in any move to require the content of private briefings to be made available to investors generally.

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

97 At this stage, ASIC has no comment on approaches to private briefings in overseas jurisdictions.