

Senate Economics Legislation Committee
ANSWERS TO QUESTIONS ON NOTICE
Treasury Portfolio
Budget Estimates
2014 - 2015

Department/Agency: ASIC

Question: BET 163

Topic: continuous disclosure requirements

Reference: written - 12 June 2015

Senator: Xenophon, Nick

Question:

163 Further to my questions asked during the hearings, I have attached the letter sent to me by the Chairman of Qantas, Leigh Clifford.

* - With this further information, can ASIC please expand on the answers it provided during the hearings, with particular reference to obligations under the continuous disclosure requirements.

Answer:

Q: "This goes to the issue of private investor briefings and the fundamental issue of why mum and dad investors should be denied the same sorts of information that are given to private investor briefings. Should there be equal access to information?"

The selective provision of information identified as market-sensitive under the Listing Rules is prohibited under the continuous disclosure regime. The continuous disclosure regime that applies to listed entities is fundamentally important to the integrity of our markets. The aim of the continuous disclosure provisions is to ensure that material market-sensitive information is equally available to all in the market at the same time. Briefings can be a key risk area for selective disclosure of confidential, market-sensitive information.

ASIC recognises that effective engagement of entities with institutional investors can potentially enhance the long-term performance of entities, for the benefit of all shareholders. However, continuous disclosure obligations must take precedence over any other stakeholder engagement goals. In particular, our experience is that engagement that is primarily focussed on a select group of shareholders (such as institutional investors) and/or their intermediaries can be a significant risk area for selective disclosure of market-sensitive information.

Engagement with institutional investors should not be viewed as a way in which those investors can gain additional market-sensitive information to that which is already disclosed to the market as a whole. This type of engagement should instead focus on institutional investors and their intermediaries providing the listed entity with feedback regarding previously disclosed information or information that is clearly not market-sensitive.

Qantas' response

In relation to Qantas, we understand from the Qantas letter sent to Senator Xenophon that, in relation to its confidentiality obligations, Qantas was referring to the information or feedback provided by investors to Qantas rather than information provided by Qantas to investors. The

Senate Economics Legislation Committee
ANSWERS TO QUESTIONS ON NOTICE

Treasury Portfolio

Budget Estimates

2014 - 2015

continuous disclosure regime would not generally require Qantas to release information about an investor's investment approach. In contrast, the continuous disclosure regime prevents Qantas from discussing with investors any market-sensitive information which has not already been disclosed to the market. If an accidental release of market-sensitive information occurs, this information must be immediately disclosed to the market.

We note that even if the information discussed in such briefings has already been disclosed to the market, or is not market-sensitive and therefore not required to be disclosed, selective engagement with particular shareholders can lead to perceptions of unfairness, particularly amongst retail investors. This highlights the need for strong controls and practices within listed entities around this sort of engagement. ASIC has made recommendations to listed entities about this issue in order to promote market integrity (see below).

Q: "In terms of continuous disclosure and equal access of information to investors, what work has ASIC done?"

a) ASIC review of practices and recommendations

ASIC recently conducted a review of practices in this area and has made recommendations for listed entities and their advisers. In May 2014 ASIC issued Report 393 on *Handling of confidential information: Briefings and unannounced corporate transactions*. The report details ASIC's review on the handling of confidential, market-sensitive information in the context of briefings and during the lead up to the announcement of corporate transactions.

In addition, there is already a significant amount of best practice guidance on briefings and the handling of confidential, market-sensitive information, contained in:

- ASIC Report 393 and ASIC Regulatory Guide 62 *Better disclosure for investors*;
- ASX Guidance Note 8 on continuous disclosure;
- Industry guidance in publications such as Governance Institute of Australia and Australasian Investor Relations Association's jointly published *Handling confidential, market-sensitive information: Principles of good practice*, and the Australian Financial Markets Association's *Handling confidential and price-sensitive information and soundings: Best practice guidelines*.

The guidance includes, amongst other things, recommendations that listed entities should consider making copies of investor briefing presentations publicly available to the market as a whole. This accords with the recommendations of the Corporations and Markets Advisory Committee (CAMAC) in its 2009 report *Aspects of market integrity* and the Parliamentary Joint Committee on Corporations and Financial Services in its report *Better shareholders—Better company: Shareholder engagement and participation in Australia*, released in June 2008

Senate Economics Legislation Committee

ANSWERS TO QUESTIONS ON NOTICE

Treasury Portfolio

Budget Estimates

2014 - 2015

ASIC Report 393 provides entities with further guidance on how to conduct briefings with greater transparency. These recommendations were consistent with those of CAMAC and PJC, and include:

- access to briefings by listed entities be as broad as possible and be made available as quickly as possible, including through making webcasts, podcasts and transcripts publicly available;
- listed entities refrain from trying to manage or correct market expectations through selective briefings;
- listed entities have procedures in place which ensure that they do not disclose market-sensitive information in their communications. Importantly, entities also need to monitor whether these policies are actually being followed on a consistent basis;
- analysts and institutional investors should not attempt to elicit confidential, market-sensitive information from listed entities, and should know what to do if they suspect they have been given such information;
- listed entities need to think about perception as well as what the law and listing rules might strictly require. Perception is a key consideration for listed entities. If the market thinks that an entity is favouring a select audience, serious commercial consequences can follow. Good boards will think about the "front page" test as well as legal obligations; and
- listed entities and their advisers read and apply best practice guidance.

We consider that the existing guidance provided by ASIC, ASX, and industry bodies on the handling of confidential, market-sensitive information when conducting briefings is sound. The challenge for listed entities and their advisers is to implement the guidance in a consistent manner and approach issues with a view to following the spirit underlying the guidance.

Our key focus for our future work in this area is therefore not on more guidance but on assessing whether entities, advisers and analysts are implementing the guidance in a consistent manner and, if we identify a breach of the law, taking appropriate enforcement action.

b) ASIC enforcement and surveillance work

While selective briefings can occur without any contravention of the law, ASIC has acted where market-sensitive information is disclosed contrary to the law. ASIC recently took successful action against Newcrest Mining Limited in relation to market-sensitive

Senate Economics Legislation Committee

ANSWERS TO QUESTIONS ON NOTICE

Treasury Portfolio

Budget Estimates

2014 - 2015

information that was improperly disclosed at briefings conducted by the company. This action resulted in significant penalties being imposed by the Court.

We began conducting a targeted review of analysts' research reports in late 2014, and this work is continuing throughout 2015. We are considering the type of information that is available to analysts at the time they make a material change in their forecasts or recommendations. We are looking to ensure that changes in research recommendations are not based on non-public, material information which may have been provided to analysts during briefings.