

Slide Set 6

Continuous Disclosure Requirements of ASX-Listed Disclosing Entities



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Regulatory Framework

- > Key Legislation
 - Corporations Act 2001 (Cth); and
 - ASIC Act 2001 (Cth);

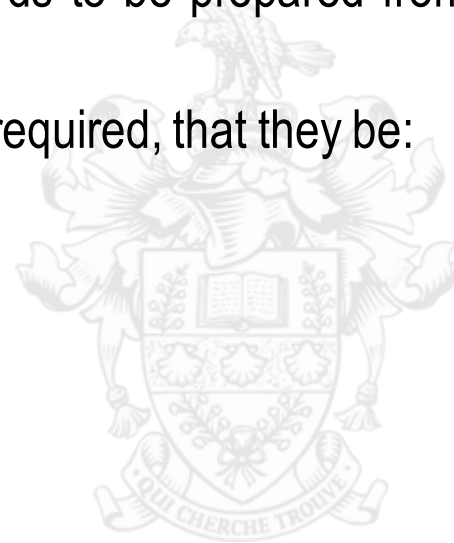
- > ASX Listing Rules (LRs)
 - LRs have contractual and statutory force between listed entities and the ASX.
 - enforceable by the court upon an application by the Australian Securities and Investments Commission ('ASIC'), the ASX or a person aggrieved.





Overall Structure of Regulation

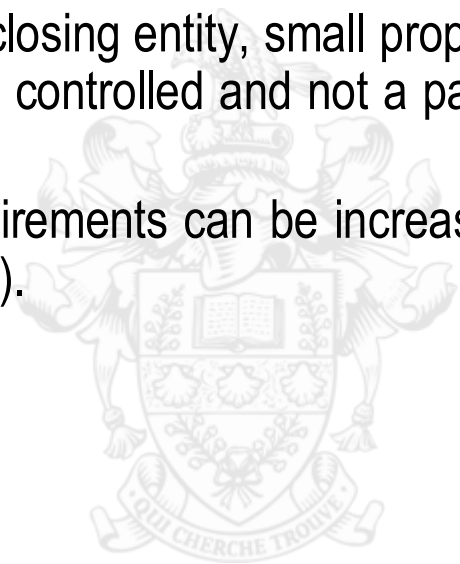
- > Overall structure of regulation (see sec 285)
 - Accounting and financial records to be kept
 - Financial reports complying with certain standards to be prepared from these records (but not all entities)
 - If the financial reports and other information are required, that they be:
 - Sent to shareholders
 - Presented at a general meeting
 - Lodged with the ASIC
 - The above actions to be audited





Overall structure (cont)

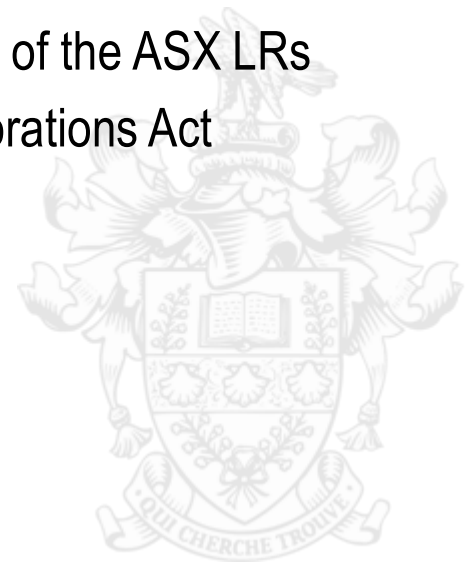
- > These requirements differ according to whether the company is a:
 - Public company
 - Large proprietary company whether or not a disclosing entity, small proprietary company which are disclosing entities or foreign controlled and not a part of a group.
 - Other small proprietary company (although requirements can be increased on request by 5% or more of voting shares (sec 293).
 - See sec 292.





Continuous Disclosure

- > All listed companies are “disclosing entities”
- > Continuous disclosure requirements
 - Listed disclosing entities: Ch 6CA and Chapter 3 of the ASX LRs
 - Unlisted disclosing entities: Ch 6CA of the Corporations Act

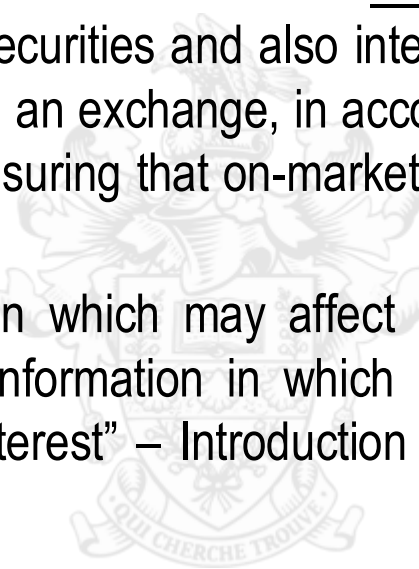




Continuous Disclosure (cont)

> Rationale

- The continuous disclosure regime (Ch 6A) provides for continuous disclosure of price sensitive information in respect both of securities and also interests in managed investment schemes that are quoted on an exchange, in accordance with the rules of the exchange, with the aim of ensuring that on-market trading occurs in an informed market.
- "[t]imely disclosure must be made of information which may affect security values or influence investment decisions, and information in which security holders, investors and ASX have a legitimate interest" – Introduction to ASX LRs.





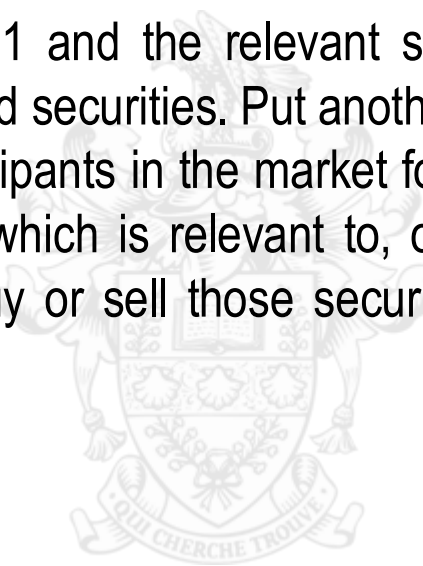
Listed Disclosing Entities

- > ASX-listed disclosing entity must comply with ASX LRs 3.1, 3.1A and 3.1B
 - LR 3.1 is fundamental to the statutory scheme of continuous disclosure.
 - In addition, CA s 323DA requires that an Australian incorporated listed company which discloses information to, or as required by, the US Securities Exchange Commission, the New York Stock Exchange or a prescribed securities exchange in a foreign country, also disclose the information in English to ASX on the next business day.
- > Statutory obligation to disclose in accordance with listing rules: 674 of Corporations Act 2001 (Cth)
 - Section 674 and related provisions impose criminal liability and civil penalty liability on a listed entity and its officers if they fail to comply with rule 3.1:



Purpose of ASX LR 3.1

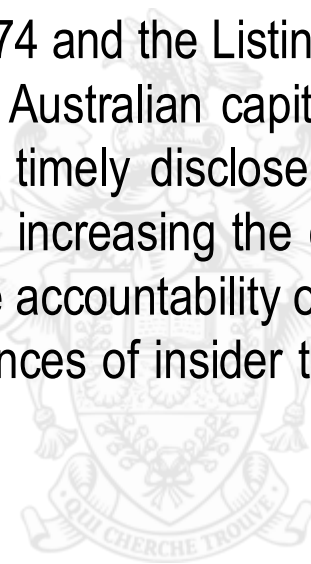
- > *Jubilee Mines NL v Riley* [2009] WASCA 62, Martin J (with whom Le Miere AJA agreed) observed that:
 - “the evident purpose of each of Listing Rule 3.1 and the relevant statutory provisions is to ensure an informed market in listed securities. Put another way, the legislative objective is to ensure that all participants in the market for listed securities have equal access to all information which is relevant to, or more accurately to, likely to, influence decisions to buy or sell those securities (at [87]).





Purpose of ASX LR 3.1 (cont)

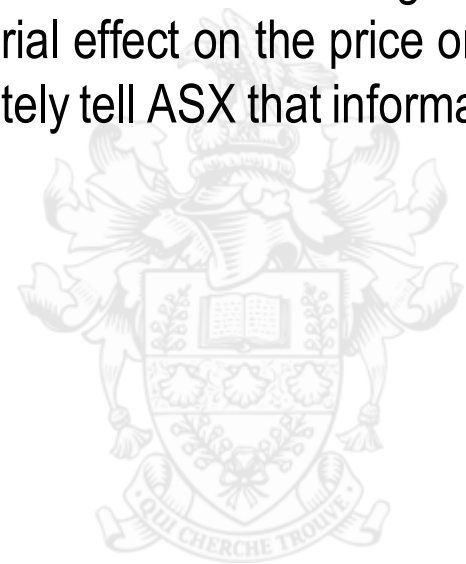
- > In *James Hardie Industries NV v ASIC* [2010] NSWCA 332; at [335], the Court of Appeal of the Supreme Court of New South Wales noted that:
 - “The continuous disclosure regime, contained in s 674 and the Listing Rules, is designed to enhance the integrity and efficiency of Australian capital markets by ensuring that the market is fully informed. The timely disclose of market sensitive information is essential to maintaining and increasing the confidence of investors in Australian markets, and improving the accountability of company management. It is also integral to minimising incidences of insider trading and other market distortions.”





ASX Listing Rule 3.1

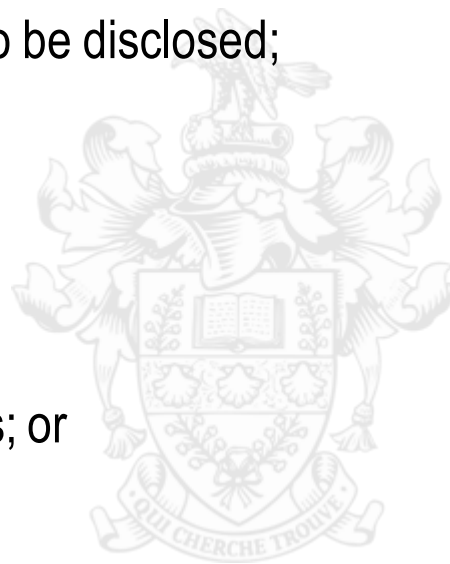
- > LR 3.1 states that:
 - “Once an entity is or becomes aware of any information concerning it that a reasonable person would expect to have a material effect on the price or value of the entity’s securities, the entity must immediately tell ASX that information”.





ASX Listing Rule 3.1A

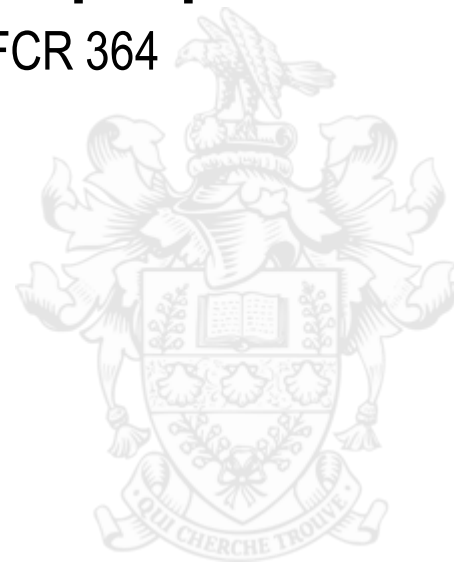
- > Information is not subject to the general continuous disclosure rule provided that the information:
 - would not be expected by a reasonable person to be disclosed;
 - is confidential;
 - would be unlawful to disclose;
 - concerns an incomplete proposal or negotiation;
 - constitutes a trade secret;
 - is generated for internal management processes; or
 - is insufficiently definite to warrant disclosure.





Australian Continuous Disclosure Regime

- > Recent Court Decisions
 - *Forrest v ASIC; Fortescue Metals Group Ltd v ASIC* [2012] HCA 39
 - *ASIC v Fortescue Metals Group Ltd* (2011) 190 FCR 364

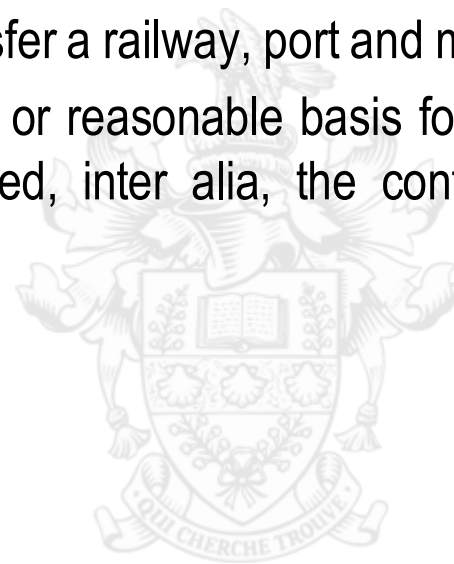




ASIC v Fortescue Metals Group Ltd (2011) 190 FCR 364

> Facts

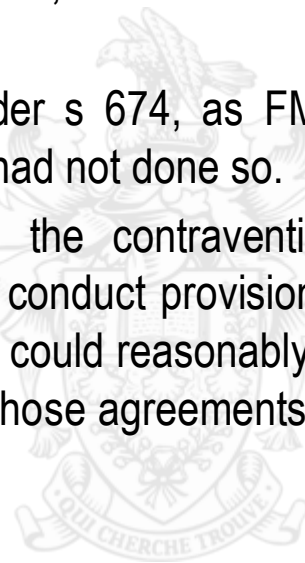
- Fortescue Metals Group (“FMG”) had made three notifications to ASX which referred to binding agreements to build and transfer a railway, port and mine.
- ASIC alleged that FMG did not have a genuine or reasonable basis for those disclosures and alleged that it had contravened, inter alia, the continuous disclosure provision under s 674.





ASIC v Fortescue Metals Group Ltd (2011) 190 FCR 364

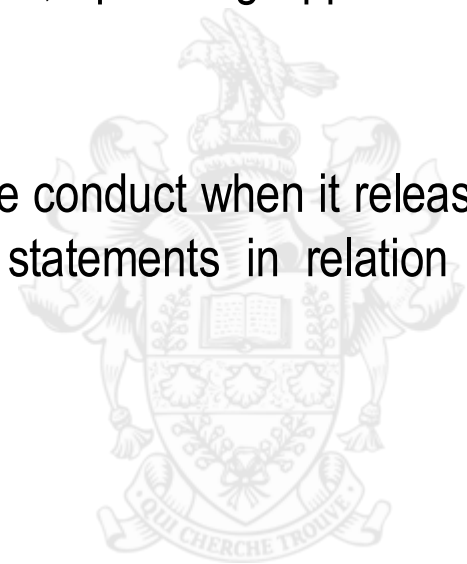
- > Keane CJ (with whom Jacobson and Finkelstein JJ agreed) held:
 - The announcements contravened the misleading and deceptive conduct provisions;
 - The agreements were not binding agreements to build, finance and transfer the infrastructure for the project to FMG.
 - Breach of the continuous disclosure provisions under s 674, as FMG need to correct the misleading statements it had made and it had not done so.
 - FMG's Chief Executive, Forrest, was involved in the contraventions of the continuous disclosure and misleading and deceptive conduct provisions, because he knew the terms of the framework agreements and could reasonably be inferred to have known of the disparity between the terms of those agreements and FMG's representations about them.





Fortescue Metals Group Ltd v ASIC; Forrest v ASIC [2012] HCA 39

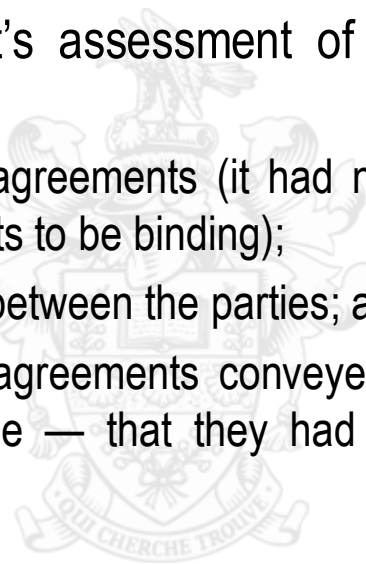
- > FMG and Forrest were granted special leave to appeal to the High Court
- > On appeal, High Court came to a different conclusion, upholding appeals by both FMG and Forrest.
- > The High Court unanimously held that:
 - FMG did not engage in misleading and deceptive conduct when it released the ASX announcements and made other public statements in relation to the agreements.





Fortescue Metals Group Ltd v ASIC; Forrest v ASIC [2012] HCA 39

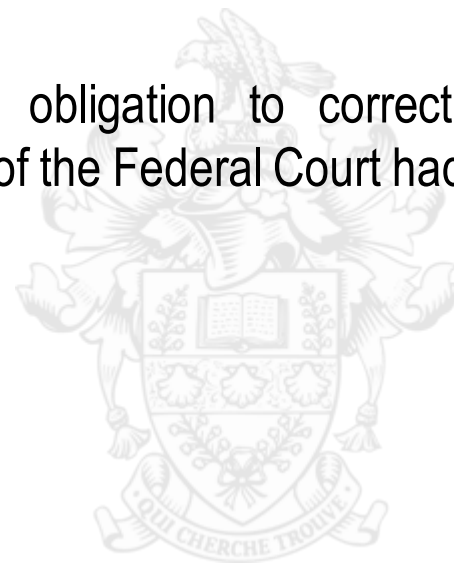
- > FMG was considered to have a reasonable basis for describing the framework agreements as “binding”
- > The following facts were important in the High Court’s assessment of ASIC’s allegations:
 - the parties genuinely intended to make legally binding agreements (it had not been established at trial that FMG did not believe the agreements to be binding);
 - the agreements accurately recorded the bargain reached between the parties; and
 - the public statements made by FMG in relation to the agreements conveyed to the intended audience what the parties said they had done — that they had entered agreements— and no more.





Fortescue Metals Group Ltd v ASIC; Forrest v ASIC [2012] HCA 39

- > A finding that FMG's statements were not misleading or deceptive was sufficient to determine that there had been no contravention by FMG of the continuous disclosure provisions in s 674.
- > FMG was not under any continuous disclosure obligation to correct those statements (as ASIC had argued, and the Full Court of the Federal Court had held).





Fortescue Metals Group Ltd v ASIC; Forrest v ASIC [2012] HCA 39

- > A finding that FMG had not contravened the Corporations Act was sufficient to determine that Forrest had not been involved in any such contraventions and also had not breached his duties as a director.





Review of ASX Listing Rules Guidance Note 8

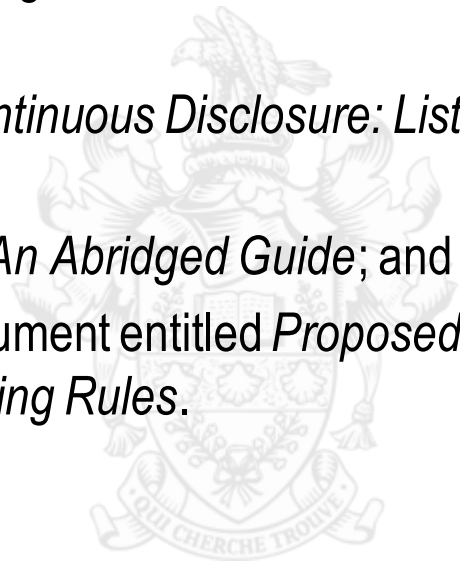
- > ASIC and ASX: Shared Regulatory Responsibility
 - ASX Guidance Note 8: *Continuous Disclosure: Listing Rules 3.1- 3.1B* (GN8)





Review of ASX Listing Rules Guidance Note 8

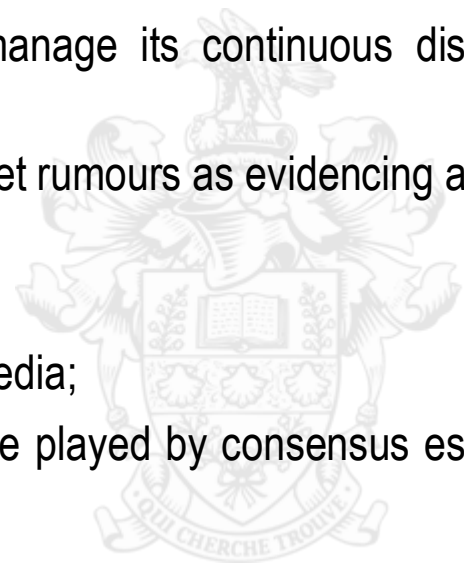
- > On 17 October 2012 ASX released for public comment:
 - a consultation paper entitled *Review of ASX Listing Rules Guidance Note 8 – Continuous Disclosure: Listing Rules 3.1 – 3.1B*;
 - a proposed new version of *Guidance Note 8: Continuous Disclosure: Listing Rules 3.1 – 3.1B*;
 - a shorter guide entitled *Continuous Disclosure: An Abridged Guide*; and
 - proposed Listing Rule changes outlined in a document entitled *Proposed Disclosure-Related Amendments to the ASX Listing Rules*.





ASX Guidance Note 8

- > (Proposed) Date of Effect: 1 May 2013
- > Key areas of amendment
 - what ASX means by the word "delay" when it defines "immediately" as "promptly and without delay";
 - when an entity should ask for a trading halt to manage its continuous disclosure obligations;
 - when ASX treats media and analyst reports and market rumours as evidencing a loss of confidentiality;
 - the operation of the "reasonable person" test;
 - ASX's expectations around the monitoring of social media;
 - the disclosure of earnings surprises, including the role played by consensus estimates in setting market expectations for earnings; and
 - worked examples.

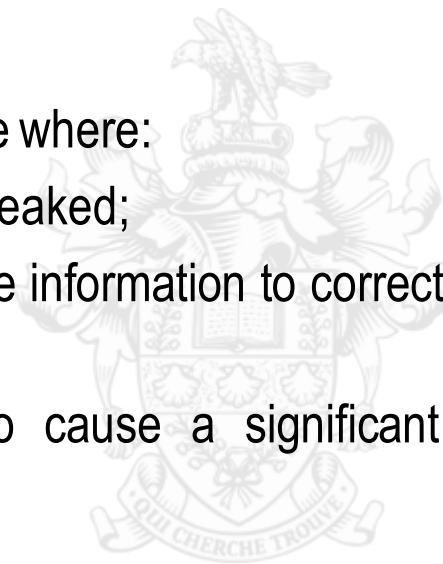




ASX Guidance Note 8 (cont)

- > Disclosure must be made promptly and without delay:-
 - GN 8 clarifies meaning of “immediate” disclosure

- > Use of trading halts to manage disclosure compliance where:
 - There is an indication that information has been leaked;
 - The company has been asked by ASX to provide information to correct a false market;
 - The information is damaging and is likely to cause a significant fall in company’s securities.





ASX Guidance Note 8 (cont)

- > Monitoring of major sources of news and information, including **investor blogs and social media**
 - ASX expectations
- > **Reasonable Person Test**
 - Listing Rule 3.1A.3

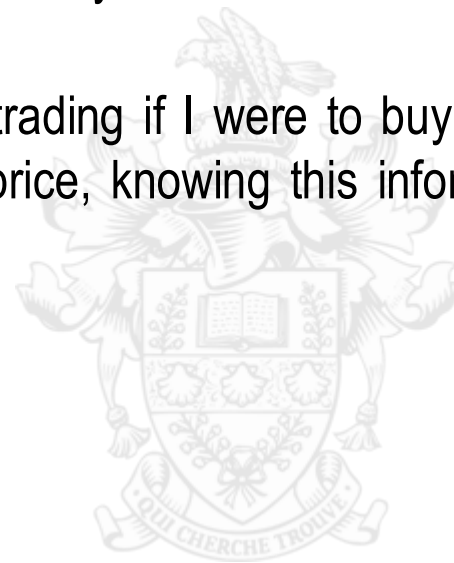




ASX Guidance Note 8 (cont)

> What is **material information**?

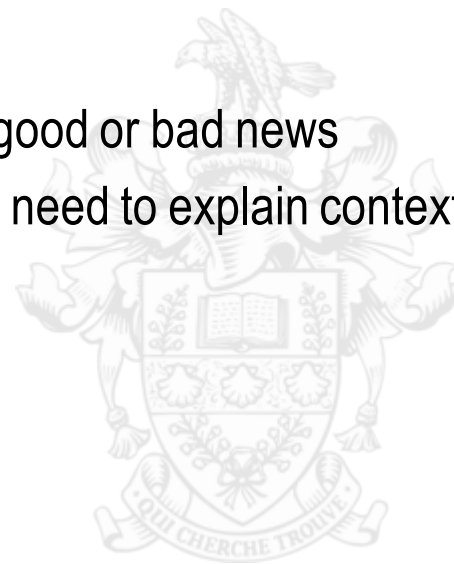
- “Would this information influence my decision to buy or sell securities in the entity at their current market price?”
- “Would I feel exposed to an action for insider trading if I were to buy or sell securities in the entity at their current market price, knowing this information has not been disclosed to the market?”





ASX Guidance Note 8 (cont)

- > Managing **content of disclosure**
 - Headings for announcements
 - Key information
 - Consistent application of Listing Rules: whether good or bad news
 - If announcement made to prevent a false market need to explain context of disclosure.





ASX Guidance Note 8 (cont)

> Earning Guidance

- disclosure of earnings surprises, including the role played by consensus estimates in setting market expectations for earnings;

