

*Consultation Paper 128: Handling confidential
information*

Submission to the Australian Securities and
Investments Commission

February 2010



Australia and New Zealand Banking Group Limited ('ANZ') is pleased to provide comments on ASIC's *Consultation Paper 128: Handling confidential information*.

In the market, ANZ undertakes transactions such as capital raising and mergers and acquisitions on its own behalf (and engages the services of advisers). It also acts as an adviser in relation to transactions by other companies. In both cases, ANZ may hold confidential price-sensitive information. The need to prevent this information from being mismanaged or leaked is fundamentally important to ANZ's business. We have in place a range of policies and procedures to ensure information is handled appropriately and employees are aware of their responsibilities to ANZ and its customers.

We support initiatives that provide guidance to assist market participants to exercise proper judgment regarding complying with existing legal and regulatory obligations and licensing requirements. We also support initiatives that assist to maintain high standards of conduct across the market by all participants. ASIC proposals seek to set a best-practice standard for the handling of confidential information. In many areas, ANZ already complies with the standard. Broadly, we support the proposals in the consultation paper. However, in some instances the proposals may add an unnecessary compliance burden because they will not enhance existing protections for confidential information.

General comments

ANZ would recommend revising the title of the Regulatory Guide to *Handling confidential price-sensitive information: Best practice guidelines*. This more accurately reflects the purpose of the Regulatory Guide. There is a range of confidential information, which would not be considered price-sensitive, and which would not be covered by the proposed guidance. For example, ANZ staff may have access to balances of accounts for listed companies. This information is confidential and ANZ employees who have access to this information would be required not to disclose it as part of their contract of employment. However, it would not be necessary for these employees to be subject to the conditions of the Regulatory Guide.

RG000.5 notes that 'reference to shares should be understood to include other financial products, including units and derivatives.' We would suggest that it would be clearer to replace references to 'shares' with 'financial products' to align with insider trading laws. Under s1042A of the Corporations Act 2001, 'financial products' includes:

- (a) securities;
- (b) derivatives;
- (c) interests in a managed investment scheme;
- (ca) debentures, stocks or bonds issued or proposed to be issued by a government;
- (d) superannuation products, other than those prescribed by regulations made for the purposes of this paragraph; or
- (e) any other financial products that are able to be traded on a financial market.

'Shares' is a commonly understood to mean an equity part-ownership in a listed company. The use of 'Financial Product' would help to highlight the applicability of insider trading laws and this Regulatory Guide to debt instruments such as derivatives.

We would also suggest that the Regulatory Guide align the terminology used for information security controls with that typically used within the information security industry. RG000.21(a) says 'storing confidential information on protected drives and tightly controlling access to these drives through password protection and blocking mechanisms'.

The terms 'protected drive' and 'blocking mechanisms' are not clear; 'password protection' is reasonably well known. This would be better written as: 'storing price sensitive information on systems implementing *logical access controls* only allowing access to authorised personnel.' The term logical access control is generically understood in the IT security and IT fields.

Insider lists for sensitive matters

We support Proposal C1 that companies should maintain a register for all people who are insiders on sensitive transactions. The company is the most appropriate body to hold an insider list for its own employees who are insiders. It should also maintain a list of third parties (eg those entities engaged to be advisers) who have been provided with certain confidential information relating to a transaction. However, the advisers would be the most appropriate body to hold insider lists for their own employees.

A company is not in a position to guarantee the accuracy of an adviser's insider list. This should be the responsibility of the adviser and it should be required to maintain a list of all its employees who are insiders on sensitive transactions. It is not necessary that this be provided to the company rather than these lists should be made available to the company upon request within a reasonable timeframe. It should be noted that these insider lists may be discoverable if litigation arises, i.e. companies may be able to compel access to insider lists maintained by advisers.

Paragraph 28 of the Consultation Paper suggests that 'requiring advisers and other service providers to inform the company of all staff who have inside information better positions the company to then question those parties further, should a leak occur.' It is not clear what legal authority a company would have to question the employees of a firm it has engaged as an adviser, except in limited circumstances e.g. a subpoena supports this course of action. In most cases this would be impractical and the company should be limited to requesting the adviser to undertake its own investigation.

Classification of documents

ASIC proposes that, in the case of major transactions, best practice may be for information that is created or given to a company to be classified according to the level of protection it requires. This document classification system could prescribe the specific requirements for creating, distributing and storing each class of information, reflecting the risks relating to loss of confidentiality of that information.

At ANZ documents are classified in accordance with ANZ's Information Classification Policy. Any ANZ employee who creates information is responsible for classifying it. Correct classification allows everyone who comes into contact with the information to know exactly how to handle it securely. We have three classifications to indicate that some information is more sensitive than others and requires more protection: Restricted, Internal or Public. Restricted is the highest level of classification and documents must be labeled accordingly. Internal and Public documents do not need to be labeled but must be handled in accordance with the policy.

The level of classification is based on the consequences for ANZ of unauthorised disclosure. ANZ holds much information which is Restricted but which is not price sensitive, for example, customer financial details. The unauthorized disclosure of this information would have significant reputational implications for ANZ but is unlikely to be price-sensitive. Nevertheless, all information which is price-sensitive would be Restricted.

Notwithstanding an effective classification system, the handling of a document should be determined by its content rather than its labeled classification. A company already has rights to reinforce the confidential nature of information and advisers would have a general law duty of confidentiality, in addition to any obligations under contract. It would be clear and simple for a company to, for example, state in a contract that all information provided in respect of a particular transaction should be treated as confidential, whether it is marked as such or not. The agreement could also stipulate requirements relating to creating, distributing and storing information.

Leak investigations

ASIC suggests it is best practice that, when there is a leak, or the suspicion of a leak, of confidential information relating to a specific transaction, a formal (but proportionate) leak investigation should be considered by each party that had access to the confidential information. We would agree that, where there is a leak, the company or adviser should consider whether an investigation is necessary.

In some circumstances, such an investigation would be a prudent measure by companies to ensure that future leaks do not occur. However, such an investigation would not be required in every situation. Whether to undertake an investigation should be at the company's discretion and should not be a mandatory requirement.

In particular, for advisers, a leak investigation should only be required where a company requests one, and where it is reasonable to believe a leak may have occurred. Unless this is included in the contract of service, an adviser would be under no legal duty to comply with a request from a company to undertake an investigation. However, given ASIC guidance is likely to become the standard, a refusal to undertake an investigation could reflect poorly on the advisory firm. The company should have reasonable grounds for requesting an investigation. None of this would prevent advisers from completing leak investigations where there has been no request, given advisers would also have an interest in ensuring that its employees are not leaking information.

A balanced approach is important as a leak investigation may be at significant cost and time to the company or the adviser. For example, it may entail a review of high volumes of

emails for each person on an insider list. It would also involve significant stress and strain on employees who are being investigated.

A key barrier to a successful investigation is that leaks can inherently be difficult to detect. Other than reviewing employees' work emails, it is difficult to obtain evidence of a leak. For advisers there is arguably little incentive to report adverse findings from leak investigations to external parties, given this may lead to litigation/claims against the advisers. Evidence of this nature is generally revealed where litigation arises and discoverable documentation reveals a leak. Advisers may also be discouraged from completing leak investigations as any allegation of wrongdoing against an employee may lead to the employee (in the absence of absolutely concrete evidence) bringing litigation against the adviser e.g. defamation, unfair dismissal, etc.

Umbrella agreements

ASIC proposes that companies that are active participants in mergers and acquisitions or capital raising and use the services of investment banks and other advisers on a regular basis should have umbrella agreements in place. These would set out general practices and principles the adviser must adhere to when undertaking work for the company, including how to handle confidential information.

Given a banker-client relationship already leads to general law duties of confidentiality, and general conduct is that transaction-specific confidentiality agreements might be signed, the use of umbrella agreements may not be necessary. Leaving the decision for the company to make based on the nature of their market activity is appropriate.

The proposal suggests that side agreements for specific transactions should still be signed regardless of an existing umbrella agreement. Any recommendation on umbrella agreements in the final Regulatory Guide should recognise that companies can proceed without side agreements, particularly where they form the view that an existing umbrella agreement or existing duties of confidentiality provide sufficient protection and clarity.

Confidentiality agreements

Under Proposal C5, all advisers would be required to sign transaction-specific confidentiality agreements. It is suggested that these should specifically restrict an adviser's use of the company's confidential information, including limiting the number of individuals given access to that information and could also cover conflicts of interest.

While ANZ is not opposed to this proposal, it is not clear that these confidentiality agreements would add to existing contractual agreements (whether umbrella or transaction-specific) and general duties of confidentiality. However, in some instances they may be warranted. The company is best placed to evaluate its contractual protections with respect to its confidential information, and the need for a transaction-specific confidentiality agreement to supplement other protections for confidential information. We believe the Regulatory Guide should recommend companies consider the need for confidentiality agreements for transactions on a case-by-case basis.

Individual confidentiality agreements

ASIC proposes that individuals involved in highly sensitive transactions (both in the company and at advisory firms or other service providers) should be required to sign individual confidentiality agreements. The key rationale for this appears to increase employees' personal responsibility and focus their minds on the importance of maintaining confidentiality.

The obligation of employees to prevent the unauthorised release of confidential information arises as a condition of their employment as well as the existing law. In relation to ANZ's own transactions, employees are required to sign an acknowledgement of these obligations. A formal confidentiality agreement is not signed. We believe this is sufficient to remind employees of their obligations. Where ANZ is acting as an adviser, these requirements would largely be driven by the customer. Generally, this involves ANZ signing a transaction-specific agreement that covers confidentiality. Employees receive regular training on the requirements of ANZ policies in relation to price-sensitive information and make regular attestations regarding their compliance with them. We do not believe it is necessary for individual confidentiality agreements to be signed for every transaction.

Nevertheless, we support the proposal that companies should regularly focus employees' minds on their obligations in relation to highly sensitive transactions. The format of this should be left to the company or advisory firm to determine.

Personal account dealing policies and controls

In general, ANZ supports Proposal D2 and D3 which require listed companies and firms in the financial industry who advise on market-sensitive transactions to have personal account dealing policies in place for their employees. However, in a retail bank such as ANZ, the requirement for employees to seek pre-trade approval would not need to apply to all staff. For example, many employees who work in the retail arm of the bank, e.g. branch staff, would not need to be subject to this requirement. ANZ's existing policy states that no employee can trade with inside information, however, additional controls in the form of pre-trade approval need only apply to staff who are more likely to have access to price-sensitive information about ANZ or its clients. The Regulatory Guide should provide sufficient clarity that this requirement applies only to employees with access to price-sensitive information.

Furthermore, in relation to this proposal, the definition of confidential information is relevant. This should be clarified to apply only to confidential price-sensitive information. For example, many employees in a bank would be in possession of confidential information about the company (eg account balances), however only a limited number of staff will likely come across confidential information that is price-sensitive.

Proposal D3 suggests firms should have in place policies that, among other things, require agreement to be entered into to provide the advisory firm with contract notes or records of trade for all completed trades. ANZ currently requires employees to retain this information but does not require them to provide it. ANZ employees who potentially would be covered

by the personal account dealing policy would engage in a large number of trades, which would be mostly benign. In most cases collecting this information would be irrelevant and burdensome. However, employees should be able to produce it as required in the event it is required, for example, if a contravention is suspected.

Sounding the market

Our interpretation of Proposal E1 is that ASIC's expectation is for all sounding to be completed before the next trading day, as opposed to taking place during the course of several days whilst the market is closed. The reference to "trading halt" seems to imply the former interpretation; however this is not 100% clear. It may be beneficial to clarify that a listed company is not expected to place itself on trading halt before sounding the market, unless there are other considerations which require the company to do so.

If the requirement is for all sounding activities to be completed before the next trading day (where there is no trading halt), this may significantly hinder an adviser's ability to provide an informed and comprehensive advice to the company, given this in effect gives a very narrow window of opportunity to sounding the market to 4pm AEST to next trading day 10am AEST (if listed on the ASX).

There are various references to sounding 'institutional shareholders' (eg RG000.69). These should instead reference the sounding of investors, given parties that are not existing institutional shareholders may also be approached i.e. a prospective shareholder. It is not clear whether these requirements are also intended to apply to non-institutional investors e.g. prospective retail investors.

Paragraph 45 of the Consultation Paper states '[t]here must be no opportunity for 'over the wall' investors to trade in the company's securities prior to a formal release of the details of the transaction to the ASX. In practice, there is no way for ANZ to ensure there is 'no opportunity' for investors to trade securities. Individuals could still trade in related securities and trading can still occur on OTC markets or in CFDs while the ASX is closed.

ANZ would be pleased to provide any further information about this submission as required, and can be contacted as follows:

Ms Jane Nash
Head of Government & Regulatory Affairs
ANZ
Level 9, 833 Collins Street
Melbourne VIC 3000
(03) 8654 3622
jane.nash@anz.com