CHAPTER 4

DISCLOSURE OF INFORMATION FILED OVERSEAS

Introduction

4.1 The *Company Law Review Act 1998* among other things inserted s.323DA into the Corporations Law. The section provided as follows:

> **Listed companies to disclose information filed overseas**
>
> **323DA (1) [Timing of disclosure; relevant overseas exchanges]** A company that discloses information to, or as required by:
>
> (a) the Securities and Exchange Commission of the United States of America; or
>
> (b) the New York Stock Exchange; or
>
> (c) a prescribed securities exchange in a foreign country;
>
> must disclose that information in English to the Exchange on the next business day after doing so.
>
> **323DA (2) [Application of section]** This section applies only to a company that is:
>
> (a) incorporated in Australia; and
>
> (b) included in an official list of the Stock Exchange.
>
> **323DA (3) [Company's constitution]** This section applies despite anything in the company's constitution.

4.2 The Government indicated that it opposed the amendment and referred the matter to the PJSC for inquiry.

Submissions

4.3 The PJSC received 31 submissions which addressed this topic, of which 11 were in favour of the provision and 20 opposed to it.

4.4 Those against the provision included Allen Allen and Hemsley; Arnold Bloch Leibler; the Association of Mining and Exploration Companies; the Australian Institute of Company Directors; the Australian Law Reform Commission; the Australian Stock Exchange Ltd; Mr R.I. Barrett; Blakiston and Crabb; Ernst and Young; KPMG; the Law Institute of Victoria; Solomon Garland Partners and others.

4.5 Those in favour of retaining the provision included the Australian Society of Certified Practising Accountants; Mr John Wilkin (Corrs Chamber Westgarth); the Australian Shareholders Association; the Institute of Chartered Accountants; the Investment and Financial Services Association Ltd; the Securities Institute; Porter Western Limited and others.

Arguments against the provision

Duplication of provisions in the Listing Rules of the ASX

4.6 The most common point made by the submissions which opposed the provision was that the matter was largely addressed already by the ASX Listing Rules. Mr R.I. Barrett submitted that it was odd that a provision of the Corporations Law should regulate the information that an ASX listed company must furnish to the ASX. The assumption in s.1001A is that the content of disclosure requirements is the provence of the ASX Listing Rules, with the Corporations Law supporting this role with enforcement and sanctions. The continuous disclosure regime was established on the clear basis that ASX listing rules are the appropriate medium for substantive disclosure prescriptions. The ASX listing rules themselves include a note to Listing Rule 3.1 which advises that compliance with disclosure requirements involves lodgement with ASX of market sensitive information which a company lodges with an overseas stock exchange or other regulator which is available to the public.

4.7 Arnold Bloch Leibler submitted that listed companies are subject to the continuous disclosure requirements under the ASX listing rules. Any information which a reasonable person would expect to have a material price sensitive effect must be disclosed irrespective of whether it is disclosed to any other exchange.

4.8 KPMG submitted that the provision is superfluous because the listing rules require continuous disclosure. Others submitted that listed companies are for all practical purposes already obliged to disclose to the ASX information given or required by foreign exchanges. These submissions concluded that the provision was superfluous regarding material information.

Disclosure of confidential information

4.9 A number of submissions advised that the provision required disclosure of confidential information. Allen Allen and Hemsley submitted that the provision is not qualified, so it appears that even information given to a foreign exchange on a confidential basis must be published, even if an exclusion applies under ASX disclosure rules. The Law Institute of Victoria also submitted that there were concerns about the relevance of confidential information.

4.10 Solomons submitted that the provision could create unfair and unnecessary problems for Australian companies which are listed both on the ASX and on relevant foreign exchanges. This would put those Australian companies at a competitive disadvantage with overseas companies and with other Australian companies without

overseas listings. The difficulty is that the provision requires disclosure to the ASX of confidential information or information disclosed on the basis that it will not be released to the market. This information should be withheld from the Australian market if it is also withheld from the overseas market. The provision should be amended to ensure that only in respect of public disclosures to overseas exchanges is there also an obligation to disclose to the ASX in Australia.

Adverse effect on Australian companies

4.11 A number of submissions suggested that the provision may have an adverse effect on Australian companies and may be misleading and confusing. The Australian Law Reform Commission submitted that it was not convinced that an unqualified additional obligation of this kind could be justified. Rather, Australian disclosure requirements should be equal to world best standard, so that all significant matters disclosed to foreign exchanges should have already been covered more effectively and quickly in the first instance by the Australian disclosure regime.

4.12 Blakiston and Crabb submitted that the provision was too prescriptive and contrary to the simplification thrust. It requires duplication even though the information may have been released in a different form in Australia. It may require different accounting standards and be misleading and confusing. The AMEC also submitted that the effect could be misleading and confusing. Arnold Bloch Leibler submitted that in the United States, for instance, the form of reporting is different and the terminology and the language sometimes different. The methods of calculation are also different, with different accounting years and reporting periods. These may be difficult to compare in a meaningful way with the form of reports that the ASX require. In practical terms it may be difficult to reconcile the two lots of information. There could be quite a significant overlay of costs and time. If overseas exchanges require information which the ASX considers useful then the ASX should change its reporting requirements to require this in Australia. In the United States the form of reporting and the material is so completely different that it may not be meaningful in Australia. There is also the question of foreign exchange. Essentially the information may be the same but reconciliation between the two is difficult.

Disclosure of information not material or relevant to the Australian market

4.13 A number of submissions suggested that the provision required disclosure of information which may not be material in Australia. Allen Allen and Hemsley submitted that disclosure obligations should be based on non-discriminatory rules relevant to the Australian market. The present position is discriminatory because disclosure must be made even if information is not material or relevant to the Australian market and there is not otherwise any Australian requirement to disclose. There is no purpose in requiring certain companies but not others to disclose information which is not otherwise required to be disclosed to the ASX, simply because they are listed on a foreign exchange. Disclosure should be left to the ASX listing rules to be applied in a consistent and non-discretionary manner.

4.14 Arnold Bloch Leibler submitted that the provision appeared to require the disclosure of information which was not material, which would increase costs without leading to a more informed market. KPMG submitted that the provision could result in the filing of unnecessary information because, unlike ASX Listing Rules, it requires lodgement of all information disclosed to a foreign exchange, rather than only information which is likely to have an effect on prices or values.

Arguments in favour of retaining the provision

Globalisation and harmonisation

4.15 A number of submissions suggested that the provision would have positive benefits for globalisation and harmonisation of international standards. The AAANZ submitted that the provision was consistent with harmonisation of accounting standards, which is widely supported by the commercial community. The CPA/ICA/CICS (W.A.) submitted that the provision recognises not only harmonisation of accounting standards for disclosure in financial statements, but also reporting for other non-financial information disclosures in other documents and listing rules across jurisdictions. The listing rules are not sufficient here because compliance resides with the company. It is not relevant that the information may be required in less detail or voluntarily reported in Australia.

4.16 The Securities Institute submitted that the provision was an essential element of continuous disclosure and global best practice. It recognises the global trend to standard documentation in all markets and the internationalisation of this business. Corrs submitted that uniformity of disclosure was a good thing and that the law should move towards this. IOSCO, the international association of stock exchanges, had been working for 10 years for the same rules for prospectuses in different countries. The ASA submitted that the provision encouraged global harmonisation of disclosure standards.

Benefits for investors

4.17 A number of submissions suggested that the provision would benefit shareholders and investors. The IFSA submitted that for reasons of equity Australian investors should not be in a worse position than overseas investors. There have been instances where Australian companies have declined to supply to the Australian market information which is disclosed to overseas markets. Mr Sandy Easterbrook submitted that Australian shareholders would like the more extensive disclosure that the United States regime insists that US shareholders in the same company get. Some shareholders should not have better disclosure than others. The CPA/ICA/CICS (W.A.) submitted that it was appropriate for Australian shareholders to receive the same information in respect of a company as those overseas. Mr Nick Renton submitted that the provision is a formal mechanism for information by the front door rather than the back door. It is not an answer to say that all the information is on the Internet. The Securities Institute submitted that the provision will ensure that Australian shareholders are as well informed as their counterparts overseas.

Minimal effect on Australian companies

4.18 A number of submissions suggest that the provision would have minimal effect on Australian companies. Professor Hancock (AAANZ) submitted that the provision was not misleading and contrary to simplification, because markets are fairly efficient and fairly well informed. However, unnecessary paper work was certainly a concern. Other submissions suggested that costs of the provision would not be onerous. Mr Sandy Easterbrook submitted that there would be no real extra cost, because it was only necessary to send an extra fax or email copy. The ASA and Mr Nick Renton submitted separately that additional cost would be minimal, because the information is already with foreign exchanges. The IFSA submitted that costs of the provision would have already been incurred and will decrease with electronic distribution of information.

4.19 Several submissions suggested that Australian companies could adapt to the different disclosure requirements of Australia and, for instance, the United States. The IFSA submitted that the mere fact that the information was not in a familiar form was not a reason to deny access. Mr Sandy Easterbrook submitted that the better companies would produce a reconciliation for the different types of disclosure. The ASA and the AAANZ submitted separately that a number of companies already include reconciliations in their annual reports.

Conclusions

4.20 The PJSC concluded that the provision was superfluous and included a number of potentially undesirable consequences. The Listing Rules of the ASX already require the disclosure of any information which would have a material effect on the price or value of company securities. Any additional information disclosed to foreign exchanges would not be price sensitive and would not be material to the Australian market. Therefore there seems little reason for the provision.

4.21 The PJSC considered that conceptually it is preferable for the ASX Listing Rules to provide for disclosure requirements of listed companies, with the Corporations Law providing for enforcement of these, as intended by s.1001A. It is not appropriate for the Corporations Law to provide this kind of detailed prescription for listed companies.

4.22 The PJSC accepted that there were possible difficulties with the release of confidential information and that the large amount of non-material information disclosed to, for instance, United States exchanges, would need to be reconciled with Australian accounting principles to be meaningful, at some cost to the individual company.

4.23 The PJSC concluded that the strongest argument in favour of retaining the provision was that it would encourage globalisation and harmonisation of disclosure standards. The PJSC strongly supports these objectives and in no way wishes to reduce their importance. However, the PJSC considers that in this case the best way to advance these desirable features for listed companies is not through the Corporations

Law. Rather, the ASX and the various accountancy bodies should move to adopt world best practice for disclosure standards.

4.24 The PJSC does not accept that shareholders will be disadvantaged by removal of the provision, because, as noted above, the only additional information which the provision requires to be disclosed is non-material.

Recommendation

4.25 The PJSC recommends that s.323DA of the Corporations Law be deleted.