HERBERT SMITH FREEHILLS

WHAT'S IN A NAME? ASX THINKS QUITE A LOT ACTUALLY

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Legal Briefings – By **Tony Damian and Nicole Pedler**

On 30 May 2019 ASX advised it continues to identify instances where listed entities have announced a material transaction without disclosing the identity of the other party and that in its view, if the transaction is material enough to require disclosure, so too is the identity of the other party.

IN BRIEF

- ASX considers that if a transaction is sufficiently material to warrant disclosure under ASX Listing Rule 3.1, the identity of the other party or parties will generally itself be material information that must also be disclosed.
- ASX has also provided that where there is little or no publicly available information regarding the other party or parties, the announcement by the listed entity should also include a summary of the due diligence undertaken by it on the other party or parties' financial and other capacity to perform their obligations in relation to the transaction.
- Where listed entities are considering whether and how to disclose early stage approaches by potential acquirers in relation to potential transactions, we think target boards should take a practical approach to assessing the information about a potential acquirer to include in an announcement.

ASX'S 30 MAY 2019 COMPLIANCE UPDATE

ASX notes in its compliance update released on 30 May 2019 (**Compliance Update**) that it continues to identify instances where listed entities have announced a material transaction without disclosing the identity of the other party or parties to the transaction. This observation is in the context of a range of different types of transactions that include binding and non-binding term sheets or memoranda of understanding for acquisitions or disposals of assets, off-take agreements, distribution agreements, strategic investments and financing arrangements.

ASX considers that if a transaction is sufficiently material to warrant disclosure under Listing Rule 3.1, the identity of the other party or parties will generally itself be material information that must also be disclosed under that rule on the basis that such information is required by investors and their professional advisers to understand the ramifications of the transaction and to assess its impact on the price or value of the entity's securities.

ASX advises in the Compliance Update that if ASX finds instances where a listed entity has not disclosed an appropriate level of information about the other party or parties to a material transaction, ASX will not hesitate to suspend trading in the entity's securities until the information has been released to the market. For completeness, ASX also outlines the fact that compliance with continuous disclosure obligations is required even where a non-disclosure agreement or confidentiality agreement might otherwise require information to be kept confidential.

This is particularly relevant in the context of control transactions, whether a friendly, bear-hug or hostile situation, as the identity of the potential acquirer is key to forming a view on the likelihood of a proposal eventuating or succeeding. For example, from the identity of the potential acquirer it may be possible to determine or at least infer its ability to fund and complete the acquisition, its capacity to compete against other potential bidders, whether foreign investment, competition or other regulatory approvals are required and its objectives (such as if it is a financial or strategic buyer).

While the other party's name might not be a controversial inclusion, what might cause a bit more consternation is ASX's recommendation that where there is little or no information regarding the other party or parties in the public domain (for example, because they are private companies), the announcement should also include a summary of the due diligence undertaken by the listed entity on their financial and other capacity to perform their obligations in relation to the transaction. The disclosure obligation is the listed entity's but the information to be included about another party is typically provided and verified by the other party, so in some situations there may be a tension between the information the other party wishes to supply as compared with the information the listed entity thinks should be supplied.

OUR TAKE ON DISCLOSURE OF POTENTIAL TRANSACTIONS AND THE OTHER PARTY'S DETAILS

There will be a spectrum of situations where a potential takeover is announced, from a non-binding indicative offer that is submitted before the counterparty has commenced due diligence to announcement of entry into a binding implementation deed.

We think that for potential transactions it is reasonable to assume that ASX's guidance is to be applied in the context of the situation the listed entity finds itself in.

In a practical sense, this means that while it is reasonable to include such additional information about the bidder where a binding implementation deed is announced and presumably the target has investigated the funding and execution capability of the bidder, it may not be possible or required in other situations.

In response to early stage confidential approaches listed entities have tactical decisions to make about whether to disclose the approach. If the decision is made to disclose the approach, the listed target board will usually either advise that it has not reached a view on the merits of a proposal and for investors to take no action, or to provide the target board's initial view subject to any necessary caveats. Those caveats can include matters such as ascertaining the funding capability of the potential acquirer.

In these early stage announcements we consider that ASX's guidance be applied through a practical lens so that where the listed entity is announcing a potential transaction that it has not committed to, and does not have further material information about the potential acquirer's identity and funding capacity, it should not be criticised for not disclosing the additional information ASX outlines in its Compliance Update. We think this approach is consistent with ASX's Guidance Note 8 on continuous disclosure obligations, which notes that the guidance on the content of announcements on market sensitive contracts or acquisitions or disposals does not apply to "interim" or "holding" announcements about an uncertain situation. Other situations may of course require fuller disclosure in relation to the potential bidder.

KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.

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