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Listed Corporations and Disclosure: Australia and New Zealand – A Contrasting Yet Convegering Dynamic

Kalmen Datt and Adrian Sawyer

Abstract

The requirements for listed corporations to disclose material tax-related information has been in the spotlight over the last few years in Australasia, especially in regard to the large banks that have a major presence on both sides of the Tasman. In this paper we examine how listed companies have made disclosures in their financial statements in relation to material tax disputes with the respective revenue authorities.

forward. For the analysis we draw some common themes from the companies reviewed, including that companies will tend to make disclosures only after their tax positions have been challenged by the revenue authorities and they intend to dispute the revenue authority's approach.

1. INTRODUCTION

The legislature and other regulatory bodies impose various obligations on directors of companies to ensure that shareholders and stakeholders have the most recent relevant information available to them to determine whether to invest in or divest from, a company. In this paper we investigate these obligations in the field of taxation, and particularly the manner in which large corporate entities, listed on the Australian Securities Exchange (ASX) or the

New Zealand Stock Exchange (NZX), or both, complies with these obligations.[1] The emphasis of our enquiry is on companies and their directors' dealings with the Australian

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[1] This paper does not deal with Fin

Taxation Office or the New Zealand (NZ) Inland Revenue Department (ATO and IRD, respectively).[2]

Both countries have similar requirements relating to the disclosure obligations of quoted corporate entities. In section 2 of the paper we look at the disclosure requirements of companies in Australia. Section 3 briefly considers the equivalent regime in NZ with respect to the NZX Listing Rules and company reporting obligations. Section 4 then considers how various companies with trans-Tasman links comply with their obligations. This section is limited to an examination of the big four Australian banks[3] which have wholly owned subsidiaries in NZ. In section 5 we review how several Australian companies have complied with their disclosure obligations and the final section sets out our conclusions.

This review reflects a significant imposition of obligations relating to disclosure. From the data collected we conclude that companies generally comply with their disclosure obligations where there is a dispute with the ATO or IRD. It seems that where tax is concerned large corporations invariably rely on the opinions of their professional (or other) advisors to determine whether or not to make disclosure in situations where there is no dispute with the revenue authorities, and where there are no contrary opinions expressed by the Commissioner. With the law in its current form there would appear to be no obligation on directors to disclose any positions they take which are not challenged by the revenue authorities, but a disclosure requirement may exist where different opinions are held by the revenue authority on the tax outcome of a particular transaction to those held by a company. In our opinion this approach is followed irrespective of the degree of aggressiveness reflected in the tax position taken, either generally or in relation to any particular transaction.[4]

The paper now considers Australia and those aspects of the *Corporations Act* 2001 (Cth) (the Corporations Act) and the various regulations of the ASX that impact on the duty to make disclosure.

2. DISCLOSURE REQUIREMENTS IN AUSTRALIA

2.1 Continuous disclosure – The Corporations Act 2001 (Cth)

The obligation to make continuous disclosure under the Corporations Act has been imposed on what are described as 'disclosing entities'. The Corporations Act distinguishes between listed disclosing entities, where the listing rules of a listing market in relation to that entity require the entity to notify the market operator of information about specified events or matters as they arise for the purpose of the

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[2] This paper concentrates on the disclosure obligations of listed disclosing entities that are companies where the obligation to disclose arises out of dealings between the company and the relevant tax authority. As such, areas requiring disclosure such as directors' remuneration, are not considered.

[3] Often NZ companies are wholly owned subsidiaries of Australian companies. This is the case with the four largest banks in NZ which are subsidiaries of the Big Four Australian banks (ANZ Banking Group – ANZ National Bank; Commonwealth Bank of Australia – ASB Bank; National Australia Bank - Bank of New Zealand; Westpac Banking Corporation - WestpacNZ). As a result issues around tax must be reflected in the financial statements of the holding company rather than the NZ subsidiary.

[4] There is no empirical evidence for this conclusion but is inferred from the paucity of information in financial reports both in Australia and NZ about what could be described as uncertain tax positions.

securities if the information would, or would be likely to, influence persons who commonly invest in securities in deciding whether to acquire or dispose of the securities. In *Australian Securities & Investment Commission v Fortescue Metals Group Ltd [No 5]*[12] ASIC launched proceedings against the defendants on the basis that certain disclosures made under the continuous disclosure provisions were false and misleading.[13]

Fortesque was successful before Justice Gilmour in the court of first instance. However, the Full Bench of the Federal Court unanimously found in favour of ASIC.[14]

contravened the Corporations Act. It is interesting to note the penultimate paragraph of Keane CJ's judgment states:[16]

> It is a curiosity of this case that there was no evidence that any member of the investing public was misled by, or suffered loss as a result of FMG's contraventions of the Act. Presumably, that is because those who invested in FMG have profited handsomely from that investment. This circumstance may be said to raise a question as to whether the prosecution of this case by ASIC was a game worth the candle. It is not, however, for this Court to call into question the exercise of ASIC's discretion to determine which cases it should pursue in the discharge of its regulatory functions.

In the final paragraph Keane CJ states:[17]

> In my respectful opinion, ASIC's allegations of misconduct on the part of FMG and Forrest were wrongly rejected by the trial judge. The trial judge erred in characterising FMG's public announcements as statements of opinion which could be justified, in terms of the requirements of s 1041H and s 674 of the Act, on the basis that the opinions were honestly and reasonably held. The terms of the framework agreements did not oblige the Chinese Contractors to build and transfer the infrastructure for the Project. And once FMG has made misleading statements about the terms of the framework agreements, FMG was required by s 674(2)(c) of the Act to correct the position.

In Jubilee Mines[18] Martin CJ was of the view that (at paragraph 57) the question of whether a reasonable person would be taken to expect information to have a material effect on the price or value of securities, is to be taken to be affirmatively answered if the information would, or would be likely to, influence persons who commonly invest in securities in deciding whether or not to subscribe for, or buy or sell those securities. His Honour continued:[19]

> On the face of it, the scope of information which would, or would be likely, to influence persons who commonly invest in securities in deciding whether or not to subscribe for, or buy or sell those securities is potentially wider than information which a reasonable person would expect to have a material effect on price or value, because there is no specific requirement of materiality in the former requirement.

In Flavel v Roget,[20] a case in which criminal charges were laid as a result of an alleged

then be made within the framework of the company and its affairs as they existed at the time of the execution of the memorandum. His Honour continued:[21]

> Sometimes this second test may not be necessary; sometimes the nature of the document might speak for itself. Its importance might be of such magnitude that, irrespective of the size of the company, irrespective of the general affairs of the company, irrespective of the state of the economy of the country, its importance achieves such prominence that immediate advice to the Home Exchange is the only course of action to adopt. But there can be many cases where the contents of the document are not susceptible to such an immediate and obvious evaluation. Much will depend upon the identity of the particular company; what one company should advise the Stock Exchange might not have to be advised by a second company; what should be advised by a company at one stage in its career might not have to be advised at another stage of its career because of changed circumstances.

In our opinion the views expressed in *Fortescue*, *Jubilee Mines* and *Flavel* should be seen as amplifying and explaining the views expressed in each successive case. As will be shown below boards of directors seem to take the view that, subject to advice being given, they need not disclose potential disputes with the ATO, even though the sums involved may be material, until a review is in progress or more usually after an amended assessment has been issued.

2.2 Continuous disclosure – the ASX Listing Rules

The ASX Listing Rules (Listing Rules) provide that timely disclosure must be made of information which may affect the price or value of securities issued by a company.[22] The Listing Rules govern the admission of companies (and other entities) to the official ASX list, the quotation of their securities, and suspension of securities from quotation and removal of entities from the official list. The Listing Rules constitute a contract between the ASX and listed entities. Information need not be disclosed if this would breach a law or reveal trade secrets.[23]

The Listing Rules must be interpreted in accordance with their spirit, intention and purpose by looking at substance rather than form and in a manner that promotes the principles on which the listing rules are based.[24] Notwithstanding the forgoing, in certain circumstances disclosure may not be made if it would be inimical to the legitimate commercial interests of the disclosing entity if that confidential information would be disclosed and it would not adversely affect market integrity.[25] Listing Rule 3.1 also draws a distinction between continuous disclosure and the information to be contained in such documents such as financial statements and annual reports or prospectuses as provided by the Corporations Act.[26]

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[21] Id, at page 243.

[22] ASX Listing Rule 3.1.

[23] ASX Listing Rule 3.1A. Other exceptions are also mentioned in this rule.

[24] ASX Listing Rule 19.2.

[25]

In Guidance Note 8 on continuous disclosure, the ASX notes[27]

> Once a director or executive officer becomes aware of information, he or she must immediately consider whether that information should be given to ASX. An entity cannot delay giving information to ASX pending formal sign-off or adoption by the board, for example.

Companies listed on the ASX must also have regard to the ASX Corporate Governance Principles and Recommendations. These recommendations, as their name suggests, do not purport to lay down hard and fast rules which directors and managers of companies must follow but are simply recommendations to enable investors to assess the gove

In March 2009, in an attempt to refine current accounting standards and to bring greater equivalence to tax and financial accounting, the International Accounting Standards Board (IASB) issued an exposure draft, ED/2009/2, on how to reflect uncertain tax positions in financial statements of a company.[34] This exposure draft provided that:[35]

> Uncertainty about whether the tax authorities will accept the amounts reported to them by the entity affects the amount of current tax and deferred tax. An entity shall measure current and deferred tax assets and liabilities using the probability-weighted average amount of all the possible outcomes, assuming that the tax authorities will examine the amounts reported to them and have full knowledge of all relevant information. Changes in the probability-weighted average amount of all possible outcomes shall be based on new information, not a new interpretation by the entity of previously available information.

An accompanying document to the exposure draft describes the basis for the conclusions reached by the IASB. Paragraph BC 57 of this latter document states that an entity should only recognise tax benefits to the extent it is more likely than not that the tax authorities will accept them. Where tax outcomes are less certain the reason for adopting the weighted average test is that this uncertainty is included in the measurement of tax assets and liabilities by measuring current and deferred tax assets and liabilities using the probability-weighted average of all possible outcomes. This explanation is qualified as follows[36]:

> The Board does not intend entities to seek out additional information for the purposes of applying this aspect of the proposed IFRS. Rather, it proposes only that entities do not ignore any known information that would have a material effect on the amounts recognised.

Possibly even with this qualification the natural consequence of all the forgoing would seem to require financial statements to disclose, for the benefit of stakeholders including the revenue authorities, that an aggressive tax policy has been adopted or even that a tax minimisation scheme has been implemented. Certainly this would appear to be the case where there are divergent views about the tax consequences of structuring a transaction in a particular way. Another potential problem area is the transfer pricing rules where opinions can be markedly different. Presumably the more aggressive the scheme the less likely it would be that the tax authorities would accept the outcome and the greater the potential for a tax liability to arise. If this is the correct interpretation of the recommendation then effectively this would act as a 'red flag' to tax authorities to audit a particular taxpayer or at the very least to audit the transaction in question. If this interpretation was followed it has the potential to reduce, if not eliminate, significant avoidance and possibly even tax minimisation schemes, irrespective of whether they would ultimately be accepted by the courts or not.

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[34] Australia follows the recommendations of the IASB if the recommendations are implemented as policy.
[35] IASB, ED 2009/2, at paragraph 26 (our emphasis).
[36] Id, at paragraph BC 63.

Another and possibly more probable view is that companies (taxpayers) (leaving aside those areas such as transfer pricing where divergent opinions are readily found), in following the requirements of the IASB will take a different and more nuanced approach. This statement is made on the basis that the taxpayer has received unequivocal advice from their professional team that a scheme is valid and effective for tax purposes and the Commissioner has not made any statement in which he deals differently with this interpretation of the law. On this basis, and given the nature of the advice received, taxpayers that enter into tax minimisation and even avoidance schemes would not be obliged to highlight such schemes as even on a weighted probability basis there would be no prospect of a challenge, let alone a successful one.[37]

While writing this paper the AASB have noted that this exposure draft is to be revised and put out for further comment.[38] As far as we have been able to ascertain the revised exposure draft has not been issued as at the date of writing. For sake of completeness the next aspect we consider is auditor independence although in our view it is not directly connected to the obligation to make disclosure.

2.4 Auditor independence

The auditor independence provisions of Sarbanes-Oxley Act 2002 (USA) now require the auditor of companies doing business in the USA to be independent of those giving tax and other non audit advice.[39] While there are similar rules in Australia,[40] it is not regarded as being a breach of auditor independence rules if the auditor furnishes tax advice in addition to performing the audit function. Section 290.180 of the Australian Code of Ethics for Professional Accountants provides:[41]

> In many jurisdictions, the Firm may be asked to provide taxation services to an Audit Client. Taxation services comprise a broad range of services, including compliance, planning, provision of formal taxation opinions and assistance in the resolution of tax disputes. Such assignments are generally not seen to create threats to Independence.

Section 300 Corporations Act provides that the report of a financial company must include specific information in relation to its auditors. This includes details of the amounts paid or payable to the auditor for non-audit services provided, during the year, by the auditor (or by another person or firm on the auditor's behalf); a statement

whether the directors are satisfied that the provision of non-audit services, during the year, by the auditor (or by another person or firm on the auditor's behalf) is compatible with the general standard of independence for auditors imposed by the Act; and a statement of the directors' reasons for being satisfied that the provision of those non-audit services, during the year, by the auditor (or by another person or firm on the auditor's behalf) did not compromise the auditor independence requirements of this Act.

Section 307C requires auditors to furnish a written declaration that, to the best of their knowledge and belief, there have been no contraventions of the auditor independence requirements of the Act in relation to the audit or review; and no contraventions of any applicable code of professional conduct in relation to the audit or review other than as stated in the declaration.

We now turn to briefly considering a relatively new initiative, namely cooperative compliance agreements.

2.5 Cooperative compliance agreements

A cooperative approach between a revenue authority (in this context either the ATO[42] or IRD) with large enterprises involves the sharing of some responsibilities to ensure that effective compliance management systems are in place. A cooperative compliance approach has several benefits for both the revenue authority and the corporate taxpayers, namely:

- taxpayers have more real-time certainty about tax risks and compliance costs;
- the revenue authority can make real-time decisions about risk because taxpayers openly disclose their affairs; and
- more discussion allows the revenue authority and the corporate taxpayer to work through issues as they arise, whether it is a technical tax matter, new legislation or administration.

The ATO has had such an initiative in place since 2000, developing this into a Cooperative Compliance Model.[43]

The purpose of these forward compliance arrangements with the ATO is to lead to an environment less likely to produce surprises; a reduced likelihood of audit; concessional remission of administrative penalties and interest that apply in the event of tax shortfalls; and and more certainty, trust and ultimately less compliance cost . They require significant input both from the ATO and the taxpayer.[44]

The Cooperative Compliance Model outlines the relationship the ATO is seeking with large business and the wider community. This model is premised on a cooperative

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[42] The ATO refers to these as forward compliance agreements. To date, only a limited number of such agreements have been concluded with the ATO in relation to GST and excise duties only.

[43] For further details see ATO, Cooperative Compliance: working with large business in the new tax system (2000); available at: http://www.ato.gov.au/businesses/content.asp?doc=/content/22630.htm (accessed 16 February 2011).

[44] See ATO, Forward Compliance Arrangements (2008) available at http://www.ato.gov.au/content/00100436.htm (accessed 1 May 2011.)

relationship that is based on mutual respect and responsibility. Thus in the Australian context there are a few large corporate taxpayers that have forward compliance agreements in place which, while beyond this study, may be able to be evaluated for their impact on tax-related activities and associated disclosures.

The IRD embarked on a similar initiative after investigating developments in this area internationally in 2009. In the IRD's view[45] the relationship will be one that is guided by a written agreement, reviewed annually, between a company's board of directors and the Commissioner of Inland Revenue (Commissioner). This agreement will set out the responsibilities of both parties and provide a framework for the progression and resolution of issues. The expectation of such an agreement is that it brings with it a whole-of-organization commitment and is thus at the Commissioner/Board of Directors level. The IRD suggests that there are four ke45c). Th.251a07 Tc .1154

The paper now considers the disclosure obligations of directors in NZ as required for stock exchange listing and financial reporting by issuers.

3.0 New Zealand Disclosure Requirements

In comparison to Australia, New Zealand takes a lighter regulatory hand to disclosure requirements in that it is less prescriptive in what companies need to disclose in their financial statements and to the NZX. For New Zealand listed companies (that is, those on NZX or the smaller sub-exchanges) companies and other entities which issue securities have obligations under the NZX Listing Rules[47] to keep the market constantly informed on matters that may affect the price of their securities; that is, listed issuers are required to disclose material information immediately. Continuous disclosure is the requirement for listed companies to provide timely advice to the market of information required to keep the market informed of events and developments as they occur.

The NZX provides guidance for listed companies,[48] including examples of situations when disclosure should be made. One of the aims behind this NZX guidance it to provide a process that is moving towards closer alignment with ASX disclosure requirements. Interestingly none of the examples directly refer to taxation issues, although material legal proceedings would include tax disputes. One issue is when would a dispute between a listed company and Inland Revenue be material – apart from issues of the financial amount, would the requirement to disclose arise at the audit phase, once discrepancies have been noted, at the time of a notice of proposed adjustment (NOPA), when the full dispute resolution process is underway, or when the dispute enters the court process? Clearly the last step would comprise legal proceedings, although arguably even at the time of a NOPA being issued it is almost inevitable suggesting that disclosure may be necessary.

A further requirement for directors of listed companies is set out in Appendix 16 to the ZX Listing Rules, which contain provisions regarding what the NZX sees as a Code for Best Practice Corporate Governance. This includes the company having a Code of Ethics that its directors should follow, along with recommended practice for the composition of the Board and subcommittee of the Board.

Companies that meet the requiremani of lai.153 TD 5.5(made.)-cess that iE5683 0 TD .

High Court decision, representing the amount of primary tax in dispute, interest, legal and other costs.

any assessments received would be disputed.[60] The amount in dispute was not specified.

The 2010 annual financial report noted the following:[61]

> Tax on NZ structured finance transactions
>
> A $171 million tax expense on New Zealand structured finance transactions was recognised in the year ended 30 June 2010 representing a significant one-off impact of an adverse tax ruling between ASB Bank and the New Zealand Commissioner of Inland Revenue settled in December 2009. The settlement represented 80% of the amount of

denying the utilization of losses arising from the funding activities of Futuris' inter-company financier. The assessments were attributable to the 2003 year. In total, the primary tax assessed was $14.7m, penalties of $3m and interest of $7m. A provision had been raised against this potential exposure. The Group was confident of the position it had adopted and intends to defend vigorously the deductions claimed. There were similar notifications in the 2009 annual financial report.

Futuris lost the appeal in the High Court under the Judiciary Act but was able to prosecute its appeal under Part IVC TAA. In 2010 the matter relating to the sale of the building products division was heard by the Federal Court on the merits and Futuris was successful.[65] The Commissioner has appealed

The 2008 annual financial report of BHP noted the following.[70] The ATO had issued assessments against subsidiary companies, primarily BHP Billiton Finance Ltd, in respect of the financial years 1999 to 2002. The assessments related to the deductibility of bad debts in respect of funding subsidiaries that undertook certain projects. BHP Billiton Finance Ltd lodged appeals on 17 July 2006. The amount in dispute at 30 June 2008 for the bad debt disallowance was approximately US$1,162 million (A$1,224 million) (net of tax), being primary tax US$656 million (A$691 million), penalties of US$164 million (A$173 million) and interest (net of tax) of US$342 million (A$360 million). An amount of US$606 million (A$638 million) in respect of the disputed amounts was paid pursuant to ATO disputed assessments guidelines, which require that taxpayers generally must pay half of the tax in dispute to defer recovery proceedings. Upon any successful challenge of the assessments, any sums paid will be refundable with interest.

The 2008 report continued that in November 2007 and March 2008, the ATO issued further assessments disallowing capital allowances claimed on the plant and equipment funded by the loan from BHP Billiton Finance Ltd relating to the above project. The amount in dispute at 30 June 2008 is approximately US$629 million (A$662 million), being primary tax US$368 million (A$387 million), penalties US$92 million (A$97 million) and interest (net of tax) of US$169 million (A$178 million). BHP had lodged objections against the amended assessments which have been disallowed by the ATO. Subsequently BHP lodged appeals against some of these objection decisions, and indicated that it would lodge the remainder by October 2008.

The 2008 annual financial report also made mention of another dispute with the ATO in respect an assessment for Petroleum Resource Rent Tax purposes in relation to sales of gas and LPG produced from the Gippsland Joint Venture. Petroleum Resource Rent Tax had been paid and expensed based on the ATO's assessment, and any success in the dispute would result in book and cash benefit. Given the

> BHP Billiton was again successful on all counts. The ATO sought special leave to appeal to the High Court only in relation to the Beenup bad debt disallowance and the denial of the capital allowance claims on the Boodarie Iron project. The High Court has granted special leave only in relation to the denial of the capital allowance claims on the Boodarie Iron project. A date for the appeal has not yet been set. As a result of the ATO not seeking to challenge the Boodarie Iron bad debt disallowance, the ATO refunded US$552 million to BHP Billiton including interest. BHP Billiton also expects that as a result of the High Court not granting special leave for the Beenup bad debt disallowance, the ATO will refund the amount paid in relation to this dispute of US$62 million plus interest. BHP Billiton settled the Hartley matter with the ATO in September 2009.
>
> The amount remaining in dispute following the decision of the High Court for the denial of capital allowance claims on the Boodarie Iron project is approximately US$435 million, being primary tax of US$328 million and US$107 million of interest (after tax).

The matter was heard by the High Court in late 2010 but at the time of writing a

> companies follow different tax strategies. Some are more aggressive than others and some knowingly embark on what could turn out to be tax avoidance schemes.

The fact that each of the companies considered appeared to disclose all disputes with the relevant revenue authority does not mean that this is indeed the case where the continuous disclosure rules are being considered. For example, for a company such as BHP, with a dispute of say $1 million, this would have an insignificant impact on its share price, whereas a dispute of this size could be quite significant for other companies, and consequently require disclosure.

However, when one looks at the rules (such as the ASX Listing Rules and NZX Listing Rules and associated statutory reporting obligations) relating to financial statements and the notes to such accounts, it may well be necessary to disclose all material disputes[74] with the revenue authorities as the financial statements must be prepared in compliance with international financial reporting standards, and must reflect a true and fair view of the company's affairs.[75] These requirements, read in conjunction with each other, suggest that all material disputes must be disclosed. The questions is when is a dispute 'material' such that it has reached the point that disclosure is required – is this when an amended assessment is issued and it is disputed by the company, or at some earlier stage? We would suggest that once there is a clear difference in view between the revenue authority and the taxpayer, and this difference can be quantified, and sum is material, then disclosure should be made. The fact and the basis for a dispute, albeit the amount is small in numerical terms, could well have a disproportionate impact on the views of investors and other