



# Cabinet Office Circular

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## Guidance for Dealing with Information Relating to Publicly Listed Companies

### Key Points

- **Ministers and officials should treat information received from commercial entities cautiously.**
- **If the Crown holds inside information, and if it is an insider under the insider trading legislation, it will be required to observe insider trading laws.**
- **Where the Crown is an insider and holds inside information, Ministers and officials should not:**
  - **disclose that information to third parties;**
  - **act on that information by buying or selling shares in the publicly listed company;**
  - **advise or encourage others to buy or sell shares in the company;**
  - **advise or encourage others to advise or encourage third parties to buy or sell shares in the company;**
  - **comment on the publicly listed company's value, the value of its shares or its prospects as a company.**

- **Even if confidential information is not actually possessed by the Crown, caution is required when acting on issues relating to a publicly listed company because there may be a perception that the Crown has access to confidential information.**
- **Government departments should report to Ministers on a case by case basis with respect to any issues that arises to which these guidelines apply.**

## **Introduction**

- 1 Cabinet has agreed that guidance be issued setting out general principles on dealing with information relating to publicly listed companies. The purpose of this circular is to set out guidance for Ministers and officials dealing with information relating to publicly listed companies including both those in which the Crown has an ownership interest and those in which it does not.
- 2 The guidance in this circular sets out a general approach for dealing with information relating to publicly listed companies. Ministers and chief executives should ensure that the relevant government department provides specific advice on individual situations as they arise.

## **General Principles**

- 3 The general nature of the relationship between Ministers and publicly listed companies in which the Crown has an ownership stake may be usefully informed by some of the principles underlying the role of Ministers generally. These principles include:
  - 3.1 Ministerial focus should be on government policy and monitoring rather than day-to-day operations.
  - 3.2 Ministers should not endorse any product or service. Ministers should restrict any comment to policy endorsement, not product endorsement.
  - 3.3 Ministers should take care to ensure that no conflict exists or appears to exist between their public duty and their private interests. Perception can often be as important as reality in establishing what is acceptable behaviour.
  - 3.4 As Ministers have the capacity to exercise considerable influence, they should take care to ensure their intentions are not misunderstood, and they do not inadvertently or inappropriately influence third parties, or involve themselves in matters which are not their responsibility.
- 4 Further information on these principles can be found at paragraphs 2.46-2.77, 2.160 and 2.170-2.185 of the *Cabinet Manual 2001*.

## **Dealing with Commercial Information - Exercise Caution**

- 5 Ministers should treat information received from commercial entities cautiously. There are more constraints on the use of such information than on information obtained from the core state sector. These constraints include insider trading legislation, consumer legislation (eg the Fair Trading Act 1986), the provisions of the Companies Act 1993, and the terms and conditions of any confidentiality agreement under which the government has received the information. This circular is primarily concerned with the constraints imposed by insider trading legislation.

- 6 It is almost impossible to predict the questions and issues that could be raised with Ministers by the media and other third parties on any particular issue at any particular time. Therefore, Ministers and officials should act cautiously when dealing with matters relating to a publicly listed company or a commercial agency in the wider state sector. There could be a perception that the Crown has access to confidential information. For example, this perception is likely to be strong with respect to Air NZ at this time given the Crown has access to company information under confidentiality agreements with Air NZ.
- 7 Market participants may act on statements by Ministers, even if those statements are made **without** the benefit of confidential information. Such market participant action may then impact on the market price for the publicly listed company's shares. With respect to any publicly listed company in which the Government may consider trading shares, the Crown may be open to allegations of manipulating the market for its own benefit. Allegations are easily made and, even if unfounded, damage will have been done.
- 8 There is also fiscal risk for the Crown insofar as any drop in the share price of listed companies in which it owns shares (eg Air NZ) will impact on the value of the Crown's shareholding. The Crown, if it breaches insider trading laws, could also face claims for compensation regardless of whether or not it owns shares in the particular company, and possibly court-imposed penalties.

### **Insider Trading Laws**

- 9 Part I of the Securities Amendment Act 1988 sets out the provisions relating to insider trading in the shares of publicly listed companies. In general, liability lies under this Act for the buying or selling of shares in publicly listed companies by insiders with inside information, and for tipping on inside information by insiders. The key sections of the Securities Amendment Act 1988, including the definitions of "insider" and "inside information", are annexed to this circular.

### **Obligations on Publicly Listed Companies**

- 10 The New Zealand Stock Exchange ("NZSE") Listing Rules govern how and when any material information about a publicly listed company is disclosed to the market. In general, where a company is listed on the NZSE, it is required to disclose all material information that is not generally available to the NZSE, unless the information comes within one of the exceptions in the Listing Rules. The key sections of the Listing Rules in force until 1 December 2002 on the obligation to supply relevant information, and the Listing Rules to come into force on 1 December 2002 on continuous disclosure of material information, are annexed to this circular.
- 11 This means that the publicly listed company is obliged to assess whether to release information to the market. Release should be made through the NZSE. If Ministers provide material information to publicly listed companies (even if the information is general and not specifically related to that company) a company will then be obliged to disclose that information to the market unless the information comes within one of the exceptions in the Listing Rules. If a company is also listed on any other securities exchange in New Zealand or overseas (eg the Australian Stock Exchange) it will also be required to disclose information in accordance with the listing rules of that exchange.

## Obligations on the Crown from holding inside information of a Publicly Listed Company

- 12 A publicly listed company in which the Crown is a shareholder may make information available to the Crown, but only with appropriate confidentiality agreements in place between the two parties. This information must also fall within the exceptions to the NZSE Listing Rules or it will have to be disclosed to the market.
- 13 In situations where the Crown is a shareholder in a publicly listed company and holds material information relating to that company because it is a shareholder, any disclosure of this material information should be made by the Board of the company itself not by Ministers.
- 14 Where the Crown is an insider, the inappropriate use and/or premature disclosure of information that could affect the market for that company's securities could lead to claims of insider trading and bring with it the possibility of inquiry by the Securities Commission or litigation.
- 15 Legal risks arise for the Crown if it is an insider, and if it:
  - 15.1 discloses the confidential information it receives to others outside the Crown;
  - 15.2 makes any statements in relation to:
    - 15.2.1 the publicly listed company's value or prospects as a company;
    - 15.2.2 the value of the publicly listed company's shares; or
    - 15.2.3 whether to buy or sell the publicly listed company's shares;
  - 15.3 buys or sells shares in the publicly listed company; or
  - 15.4 encourages others directly or indirectly to buy or sell shares in a publicly listed company.
- 16 In order to minimise the legal risks, Ministers, advisers and officials should **not**:
  - 16.1 disclose confidential information of the publicly listed company to, or discuss it with, any person other than those within the Crown that have a legitimate need to know the information (ie Ministers, officials and advisers directly involved in issues relating to the publicly listed company);
  - 16.2 make any public or private statement or comment to anyone (other than Ministers, officials and advisers directly involved in issues relating to the publicly listed company) about:
    - 16.2.1 the value or prospects of the publicly listed company; and
    - 16.2.2 the value of the publicly listed company's shares;
    - 16.2.3 whether or not someone should buy or sell shares in the publicly listed company.

- 16.3 buy or sell shares in the publicly listed company on behalf of the Crown or in their private capacities or suggest that members of their family or anyone else does so if they are an insider and hold inside information;
  - 16.4 discuss progress on, or the outcome of, any initiatives that are being advanced involving the Crown's interests in the publicly listed company or its business (other than with Ministers, officials and advisers directly involved in issues relating to the publicly listed company);
  - 16.5 suggest to anyone else that they should advise or encourage other people to buy or sell shares in the publicly listed company.
- 17 The Official Information Act 1982 applies to all information held by the Crown. Any request under the Official Information Act for public company information held by the Crown should be handled in accordance with the requirements of the Act. The request should be considered in consultation with the relevant publicly listed company. Although each request will be considered as it arises under the terms of the Act, given the sensitive nature of inside information, it is likely such information would be withheld. If the information had already been released onto the market then it could not be withheld.

### **Legitimate Government Action**

- 18 There will be times when Ministers feel compelled to comment on or take action with respect to a publicly listed company in the national interest. It would only be appropriate to comment or take action on the publicly listed company's business issues after the company itself has provided the information to the market through the NZSE, and then only to the extent that the company has informed the market.
- 19 Where the Government is actively involved in a transaction involving a publicly listed company, Ministers may feel duty-bound to comment publicly. As a first measure, the publicly listed company should communicate the appropriate details of the proposal to the market through the NZSE. Ministers could then make statements about the proposal, the detail of which should go no further than that disclosed to the market by the publicly listed company.
- 20 Ministers may consider it in the public interest to address certain issues that the publicly listed company would not (eg national interest issues). Ministers would need to avoid saying anything that would materially affect the market price of the publicly listed company's shares.
- 21 Where the Government has a regulatory role in the industry in which the publicly listed company in which it has an interest operates, it is appropriate to undertake regulatory action such as making policy announcements that affect the whole industry. In such circumstances, there should be a clear internal separation of the Government's ownership role and its regulatory role.

### **Review of Insider Trading Laws**

- 22 The Government has signalled its intention to carry out a full review of insider trading laws. As legislation changes, so too will the obligations on publicly listed companies and insiders. This guidance will be updated in accordance with any legislative changes.

## Further Guidance

- 23 Further context-specific guidance should be provided by the relevant Government department in response to individual situations as they arise. Specific advice should cover whether information can or cannot be disclosed, and potential liabilities pertaining to the particular issues at hand. It may also be possible to anticipate and pre-empt the questions that might arise from the media.
- 24 For further information on the general guidance in this circular, please contact:
  - 24.1 Kirstie Drake in the Ministry of Economic Development; or
  - 24.2 Natalie Baird in the Cabinet Office.

Marie Shroff  
Secretary of the Cabinet

## ANNEX

**SECURITIES AMENDMENT ACT 1988 [Extract]\***

(\* The Securities Markets and Institutions Bill, currently before Parliament, may, when enacted change the name of this Act to the Securities Markets Act 1988.)

**2. Interpretation – ...**

“Inside information” in relation to a public issuer, means information which-

- (a) Is not publicly available; and
- (b) Would, or would be likely to, affect materially the price of the securities of the public issuer if it was publicly available:

**3. Meaning of “insider” – (1) For the purposes of Part I of this Act, “insider” in relation to a public issuer, means-**

- (a) The public issuer;
- (b) A person who, by reason of being a principal officer, or an employee, or company secretary of, or a substantial security holder in, the public issuer, has inside information about the public issuer or another public issuer;
- (c) A person who receives inside information in confidence from a person described in paragraph (a) or paragraph (b) of this subsection about the public issuer or another public issuer;
- (d) A person who, by reason of being a principal officer, or an employee, or company secretary of, or a substantial security holder in, a person described in paragraph (c) of this subsection, has that inside information;
- (e) A person who receives inside information in confidence from a person described in paragraph (c) or paragraph (d) of this subsection about the public issuer or another public issuer;
- (f) A person who, by reason of being a principal officer, or an employee, or company secretary of, or a substantial security holder in, a person described in paragraph (e) of this subsection, has that inside information.

**7. Liability of insider who deals in securities of a public issuer – (1) An insider of a public issuer who has inside information about the public issuer and who -**

- (a) Buys securities of the public issuer from any person; or
- (b) Sells securities of the public issuer to any person –

is liable to the persons referred to in subsection (2) of this section.

**(2) The persons to whom the insider is liable are –**

- (a) In a case where the insider buys securities of the public issuer, any person from whom the securities are bought for any loss incurred by that person in selling them to the insider;
- (b) In a case where the insider sells securities of the public issuer, any person to whom the securities are sold for any loss incurred by that person in buying them from the insider;
- (c) The public issuer for –
  - (i) The amount of any gain made or loss avoided by the insider in buying or selling the securities; and
  - (ii) Any amount which the Court considers to be an appropriate pecuniary penalty.

**9. Liability of insider for tipping about securities of a public issuer – (1) An insider of a public issuer who has inside information about the public issuer and who-**

- (a) Advises or encourages any person to-
  - (i) Buy or sell securities of the public issuer; or

- (ii) Advise or encourage any other person to buy or sell securities of the public issuer; or
  - (b) Communicates the information, or causes the information to be disclosed, to a person knowing or believing that person or another person will, or is likely to,-
    - (i) Buy or sell securities of the public issuer; or
    - (ii) Advise or encourage another person to buy or sell securities of the public issuer-
- is liable to the persons referred to in subsection (2) of this section.
- (2)The persons to whom the insider is liable are –
- (a) Any person who sells securities of the public issuer to a person who is advised or encouraged by the insider to buy securities of the public issuer for any loss incurred by that person:
  - (b) Any person who buys securities of the public issuer from a person who is advised or encouraged by the insider to sell securities of the public issuer for any loss incurred by that person:
  - (c) Any person who sells securities of the public issuer to a person referred to in subsection (1)(a)(ii) of this section who is advised or encouraged to buy the securities for any loss incurred by that person:
  - (d) Any person who buys securities of the public issuer from a person referred to in subsection (1)(a)(ii) of this section who is advised or encouraged to sell the securities for any loss incurred by that person:
  - (e) Any person who sells securities of the public issuer to a person referred to in subsection (1)(b)(i) or (ii) of this section for any loss incurred by that person:
  - (f) Any person who buys securities of the public issuer from a person referred to in subsection (1)(b)(i) or (ii) of this section for any loss incurred by that person:
  - (g) The public issuer for-
    - (i) Any consideration or benefit received by the insider; and
    - (ii) Any gains made, or losses avoided, by the persons referred to in subsection (2) of this section in buying the securities from or selling them to the persons to whom the insider is liable; and
    - (iii) Any amount which the Court considers to be an appropriate pecuniary penalty.

## **NZSE LISTING RULES – in force until 1 December 2002 [Extract]**

**Rule 1.1.2 Relevant Information** means at any time information received or generated and held by an Issuer about its undertaking, activities, business environment, prospects, financial position, or financial performance which is not reasonably available to an informed investor in the market in a form substantially as useable as the form in which it is available to the Issuer, and which upon disclosure to the market would, or would be likely to, affect materially the market price of any of the Issuer’s Quoted Securities.

**Rule 10.1.1 Obligation to Supply Relevant Information:** Without limiting any other Rule, every Issuer shall:

- (a) treat all Relevant Information as valuable property of the Issuer, to be used and applied strictly for the overall benefit of the Issuer;
- (b) safeguard all Relevant Information and take all reasonable steps:
  - (i) to ensure that it is not divulged to persons not entitled to receive it; and
  - (ii) to avoid knowingly letting any person acquire, or remain in, a position of privilege in relation to other holders or prospective holders of Quoted Securities of the Issuer by use of Relevant Information to deal in such Securities;
- (c) release all Relevant Information to the Exchange immediately it ceases to have greater value to the Issuer (in distinction to its Equity Security holders or any of

- them) for the information to remain confidential. It shall not be a sufficient reason to withhold Relevant Information, that release of it may adversely affect the market price of any of the Issuer's Quoted Securities, or its ability to attract and retain debt financing on favourable terms;
- (d) release all Relevant Information to the Exchange no later than it is received by:
    - (i) any person who is not bound by corresponding obligations of confidence with which that person is likely to comply; or
    - (ii) any person who is likely to use it in deciding whether or not to deal with Quoted Securities of the Issuer or to divulge it, directly or indirectly, to any such person; and
  - (e) release Relevant Information to the Exchange to the extent necessary to prevent development or subsistence of a market for its Quoted Securities which is materially influenced by false or misleading information emanating from:
    - (i) the Issuer or any Associated Person of the Issuer; or
    - (ii) other persons in circumstances in each case which would give such information substantial credibility.

## **NZSE LISTING RULES – in force from 1 December 2002 [Extract]**

**Rule 1.1.2 Material Information** in relation to an Issuer is information that:

- (a) a reasonable person would expect, if it were generally available to the market, to have a material effect on the price or value of Quoted Securities of the Issuer; and
- (b) relates to particular securities, a particular Issuer, or particular Issuers, rather than to securities generally or Issuers generally.

Without limiting what information a reasonable person would expect to have a material effect on the price or value of Quoted Securities of an Issuer, for the purposes of this definition, a reasonable person would be taken to expect information to have a material effect on the price or value of Quoted Securities of an Issuer if the information would, or would be likely to, influence persons who commonly invest in securities in deciding whether to buy or sell those Quoted Securities.

For the purposes of this definition information is **generally available to the market** if:

- (c) it is information that:
  - (i) has been made known in a manner that would, or would be likely to, bring it to the attention of persons who commonly invest in relevant securities; and
  - (ii) since it was made known, a reasonable period for it to be disseminated among those persons has expired; or
- (d) it is likely that persons who commonly invest in relevant securities can readily obtain the information (whether by observation, use of expertise, purchase from other persons, or any other means); or
- (e) it is information that consists of deductions, conclusions, or inferences made or drawn from either or both of the kinds of information referred to in paragraphs (c) and (d).

In this definition, **relevant securities** means securities of a kind the price or value of which might reasonably be expected to be affected by the information.

**Rule 10.1.1 Continuous Disclosure of Material Information:** Without limiting any other Rule, every Issuer shall:

- (a) once it becomes aware of any Material Information concerning it, immediately release that Material Information to the Exchange, provided that this Rule shall not apply when:

- (i) a reasonable person would not expect the information to be disclosed; and
- (ii) the information is confidential and its confidentiality is maintained; and
- (iii) one or more of the following applies:
  - (A) the release of information would be a breach of law;
  - (B) the information concerns an incomplete proposal or negotiation;
  - (C) the information comprises matters of supposition or is insufficiently definite to warrant disclosure;
  - (D) the information is generated for the internal management purposes of the Issuer; or
  - (E) the information is a trade secret.

In this Rule, an Issuer is aware of information if a Director or an executive officer of the Issuer has come into possession of the information in the course of the performance of his or her duties as a Director or executive officer.

- (b) not disclose any Material Information to the public, other Recognised Stock Exchanges (except as contemplated in the footnote to this Rule) or other parties except those parties to whom the proviso to Rule 10.1.1 (a) applies:
  - (i) prior to disclosing that Material Information to the Exchange; and
  - (ii) prior to an acknowledgement from the Exchange of receipt of that Material Information.
- (c) release Material Information to the Exchange to the extent necessary to prevent development or subsistence of a market for its Quoted Securities which is materially influenced by false or misleading information emanating from:
  - (i) the Issuer or any Associated Person of the Issuer; or
  - (ii) other persons in circumstances in each case which would give such information substantial credibility,even if the proviso to Rule 10.1.1(a) applies.