Biotech Daily

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Editorial: ASX In Wonderland III; Corporate Regulation

Biotech Daily believes the regulation – or lack of regulation - of Australian listed companies needs a dramatic overhaul. The system has failed. The material below has been sent to Finance Minister Lindsay Tanner and the Minister for Corporate Law, Chris Bowen.

ASIC & ASX

The roles of the ASX and ASIC need to be reappraised. Neither organization is effective in policing the corporate sector. Despite a few high profile cases to salve the anger of its elected masters, ASIC is as anti-transparency as the companies it prosecutes. It is frustrating to report wrong-doing to ASIC only to be told the organization can't comment on cases - until the public relations cycle suits it. ASIC is behaving like a bad police force, pretending to solve crime when nothing is being done. If the organization is actually doing work then it should be able to say so.

The primary criticism from former investigators is the lack of funding. It is an old political confidence trick, that one inherits a powerful regulator and then merely fails to fund operational staff. The Australian Government says it has increased funding to ASIC, but there has been no increase in transparency or prosecutions. There needs to be a review of the qualifications and ability of investigating staff to ensure that sufficient people capable of tracking corporate crime are on the payroll.

As for the ASX, it is a developed world joke that the broking houses' collective, earning income on every single share trade, is the regulator of the broking houses and their trades. This is a conflict of interest. A new regulator is required.

The ASX attempts to monitor/police its member companies, but claims it is powerless to do so. It wastes resources tracking directors of innocent companies who are a day late with their Directors Interest Appendix 3X, 3Y and 3Z statements, but lets crooks operate without let or hindrance. Recently, the ASX asked a dead director and company secretary why he didn't file his final Appendix 3Z statement.

THE LISTING RULES

The Listing Rules are best described by Captain Barbossa (Geoffrey Rush) in Pirates of the Caribbean, referring to the Pirates Code, as "more guidelines, than your actual regulations".

The most basic concept of the listing rules, namely what is 'material' is not defined, nor – according to the ASX - has it ever been tested in court. Listing Rule 3.1 on transparency effectively says matters are material if they are of the nature of a dozen examples, but only if they are material; which is why we have headlines reading 'ASX in Wonderland'. The same is the case for 'fair and reasonable'.

If there is no definition of what is 'material' nor 'fair and reasonable' then how is anyone to know what is required? In any case the 'guideline' of material affecting profit expectations by more than 15 percent is a furphy. CSL does not need to say it has won a $10 million Government grant, because that amount is immaterial to a $20 billion company. But not to taxpayers and investors and not to companies whose market capitalization is $5 million!

ASX & ADMINISTRATORS

In the current case of the administration of Ventracor, it has been demonstrated that the ASX is powerless to enforce its own guidelines when faced with a single obstinate accountant. Ventracor was placed into voluntary administration with Ferrier Hodgson. Ventracor is (at the time of writing, still) a publicly listed company. The sale of all of its assets would by any measure be considered 'material'. But Ferrier Hodgson has told Ventracor shareholders nothing. It has posted several notices on its own website, but none have been posted to the ASX.

Again, the ASX says it is powerless to do any more than 'have a word' with Ferrier Hodgson, whose primary duty is to creditors, not shareholders. However, as the body legally responsible for Ventracor, the administrators should be held to be legally responsible to at least inform Ventracor shareholders of their actions. This can be fixed with a simple amendment to existing legislation requiring administrators to keep shareholders informed of any decision that could impact on their holdings or the remnants thereof. It would be better to revisit the entire Corporations Act and ASX Listing Rules.

ASX AND DATA PROVISION

The ASX also fails – through sloth – to inform shareholders of a most essential piece of company data – the correct market capitalization of a company.
Biotech Daily first raised this matter in 2004 and despite promises from the then head of the communications department, nothing has been done.
There are two distinct and easily-solved problems, but instead of dealing with the issues, the ASX simply does nothing.

SHARES IN ESCROW

Shares held in escrow are withheld from trading for a variety of reasons. However they have the full legal power to vote in general meetings and partake in rights issues and are worth the same as a tradeable share. This was demonstrated last month when Nanosonics released 97 million escrowed shares instantly doubling its ASX reported market capitalization. The correct figure should have been available all the time.

It is the bane of small companies that the ASX cannot be bothered publishing correct data. The ASX promised that at the next computer update, then expected at the end of 2005, the system would be updated to include shares in escrow to give the correct market capitalization. An investor using data from the ASX will find many smaller companies with an incorrect market capitalization due to this ASX failure. It discriminates against the younger, smaller companies, because most older companies don't have shares in escrow.

FOREIGN HOLDINGS

In one of the best pieces of dissembling I have ever heard, the present head of ASX communications told Biotech Daily that it was not the ASX's responsibility to count shares held and traded off-shore. Hence Resmed, according to the ASX, has a market capitalization of just $700 million, when the real figure is $3.5 billion. Peplin and Psivida are discounted by about 50% by the ASX, which claims to be incapable of doing what some companies themselves do and publish a real-time total market capitalization.

The ASX's job is to ensure an orderly market place, but it does not seem capable of publishing accurately the most important data. It is often out of date with lists of directors and other data. Resolving this data problem is not difficult. The companies with offshore trading can report their total holdings to the ASX in equivalence to Australian shares and the ASX can provide the market capitalization. The ASX needs a lesson in transparency and equity.

TRANSPARENCY

Finally, the present legal framework allows every unsavory and/or criminal operator to hide behind the concept of 'nominee' companies. If one reads the Top 20 shareholders of a company in its annual report – that is, who owns and runs the company – more often than not one learns nothing because the major shareholders are hidden under 'National Nominees', Commonwealth Custodians', 'Merrill Lynch Nominees' and other such mysterious entities. Apparently it is a system encouraged by the nominee companies to provide them with both large accounts (and account-keeping fees) and to provide power over the listed companies in whom they maintain the collective holding.

It is the precise opposite of transparency and I have heard no reasonable argument in support of this system. If Al Capone holds 22% of the Helpful Taxation Tips Co, with Edward Kelly (19%) and Ronald Biggs (15%) but they all hide under Honest Nominees (56%) then most investors might think the company benign, when it is not.

One company director said he needed to hide his holdings to prevent the Australian Taxation Office and his wife knowing how much he was worth. I think this is the main use of nominee companies. The paper trail from publicly-listed companies should be open and transparent and where there are related parties, the investors should be compelled to link them. A substantial shareholder notice for Cogstate (BD: May 29, 2009) from the Myer Family was exemplary in its openness. If the Myer Family can do it, anyone can.

The same needs to be the case with daily share transactions. Who needs to hide their identity unless there is something underhanded? Until recently brokers were able to tell which broking house was selling and buying and could even determine some buyers. In the interests of transparency the ASX shut down the one mechanism which could explain some unusual trading.

Ordinary shareholders have enough difficulty understanding the machinations of our 2000 listed companies, without the alleged gatekeeper, the ASX, further obfuscating important data and information.

The ASX should be entirely relieved of any role in regulation and a proper regulatory regime established along with an information system designed to benefit ordinary investors and not just "the big end of town". Anything less is a discriminatory disservice to all investors.

These proposed changes would be good for business and good for investors. Everyone benefits from transparency and equal treatment.

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