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## Listed companies should now update their share trading policy

Tony Stumm, Partner

### Introduction

On 30 January 2015, ASX Limited released a revised Guidance Note (**GN27**) on Trading Policies in response to some published criticism of anomalies with the content of existing policies under ASX Listing Rule 12.

### Discussion

Having an ASX compliant share trading policy is one of the essential planks in an anti insider trading policy. It also makes the rights of company directors to trade in shares very transparent. Trading policies specify when it is permissible to trade in shares (trading windows) and when trading is not allowed (blackout periods).

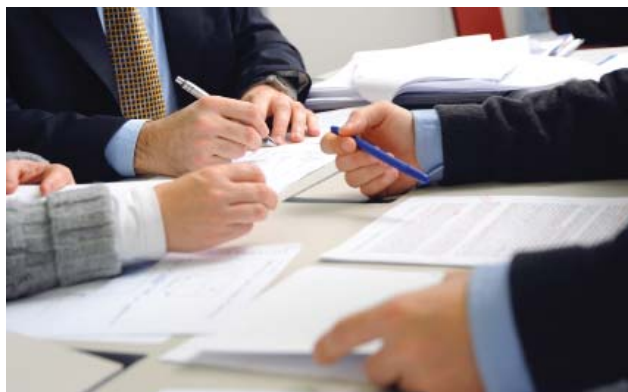
By the release of GN27, the ASX requires all ASX listed companies to review their existing trading policies and to '*tighten them up*'.

New content prescribed in GN27 explains how existing policies should be expanded (and what needs to be covered in new trading policies).

### Expanding your company's existing share trading policy

These are the expansion areas required by the ASX:

1. What periods are defined as '*blackouts*' or closed for trading.
2. What periods are generally acceptable trading windows.
3. Explain the policy on trading in derivatives issued over the entity's securities.
4. Explain if margin lending or other security financing arrangements are allowed.



5. Explain the policy on trading in securities in other entities.
6. Explain what matters are to be taken into account when a '*clearance to trade*' is granted.
7. Cover monitoring and enforcing the policy.

## Conclusion

The ASX has not specified a transition time for companies to comply with GN27. ASX listed companies are contractually bound

by their listing application to comply with the ASX Listing Rules, in particular, ASX Listing Rule 12.9 (share trading policy). Because ASX Listing Rules 12.9 to 12.12 have not been amended to cover the detail required by GN27, GN27 would seem to have status as '*good practice guidance*' rather than being prescriptive content backed by the ASX Listing Rules. It is debateable therefore as to whether GN27 can be regarded as mandatory to follow even though an ASX Guidance Note represents the ASX's interpretation of a particular listing rule and represents compliance guidance from the ASX.

However, given that GN27 may only be influential over a decision for a company to amend its share trading policy, good corporate governance suggests that by adopting the GN27 changes, a listed entity is demonstrating to its shareholders and other stakeholders that it treats share trading seriously.

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# The problem with verbal joint ventures

Tony Stumm, Partner

## Introduction

Almost every kind of shared investment can cause problems between the investors. A joint venture is no different. This article looks at the problems which arose with a property development joint venture in the recent NSW case of *Russo & Ors v Russo & Ors* [2015] NSW SC17.

## The background

Joseph Russo and John Russo were brothers and operated as property developers in Sydney. Their cousin Angelo Russo, invested funds from Angelo personally, his wife and a superannuation fund, into three real estate developments of the Russo brothers.

Angelo's company and the companies operated by the Russo brothers had an undocumented joint venture over three developments. When things soured, Angelo's interests sought an account for the money Angelo's interests had invested. This claim was defended by the Russo brothers.

The Court had to determine:

1. If the joint venture was restricted to Angelo and his wife and the Russo brothers interests; or
2. Was the joint venture narrower and restricted to Angelo's company (trustee of the superannuation fund) and the companies associated with the Russo brothers; and

3. Was the claim for an accounting of the money invested by Angelo's interests brought by the right parties.

To complicate things further, Angelo's claim arose after six years i.e. outside the statutory limitation period.

## What was entailed in examining Angelo's claim

The process examined the investment trail provided by Angelo's funds in each of the projects. This entailed Angelo proving the sources of the invested funds and their application to one or more of the projects. Some money appeared to have been lent on the projects rather than as a direct investment, and a home unit was separately bought by Angelo's wife. Additionally Angelo and his wife, from time to time, applied their money to various expenses incurred in one or more projects.

## Court's findings

There was not a written joint venture agreement so the Court had to assess what was said in evidence to determine if a joint venture existed. The evidence entailed recognition from the Russo brothers about the sharing of profits with Angelo. Angelo additionally kept ledgers showing funds provided by Angelo's interests in what the Court accepted as part of the overall evidence demonstrating a joint venture.

The claim for an account was therefore consistent with the rights of joint venturers to call for an accounting of their interests. Angelo and his wife placed trust and confidence in the Russo brothers without a formal agreement based on an agreed return for the value of funds provided. Though companies were involved, the Court considered that the joint venturers were Angelo and his wife and the Russo brothers, and ordered an account to take place supplemented by ancillary orders agreed to by the parties.

On the issue that the claim was statute barred because it was made six years after the completion of the last project, the court considered that there was no finite period for the joint venture so that the completion date of one project was irrelevant. In any event, the distribution of money to the joint venturers was within the six year limitation period as was Angelo's discovery of misapplication of joint venture funds, leading to the claim.

The court ordered that the account:

1. Define the contribution of each joint venturer to the projects.
2. Determine the distribution to each joint venturer from the projects.
3. Determine properly incurred expenses for each project.
4. Determine the income received from each project.

## Conclusion

The trial went for seven days and would have proved to be an expensive exercise. In hindsight, Angelo and his wife should have insisted on a written joint venture agreement with inherent safeguards addressing control, financial management, committee oversight and full progressive accounting. Dealing with relatives should not cloud your judgment. Do not dispense with a documented joint venture agreement because of family ties, friendship or long standing relationships.

The articles in this publication are not comprehensive terms of the law involved. You should consult a lawyer if you have issues which these articles touch on. The Corporate Team at Carter Newell can advise you on these types of matters. Please contact Tony Stumm for assistance.

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# Upcoming presentations



## CPD Program March 2015

### 11 March - Ethics in practice: Ho far can you go for your client?

Special Counsel Nola Pearce presenting ethics in practice including ethics in negotiating transactions and settlements and at mediation, deciding whether the client's instructions pose an ethical dilemma, and when you need to take action, and what you should do.

### 18 March - Warranties, indemnities and disclosure in private M&A transactions

Special Counsel Matt Couper presenting warranties, indemnities and disclosure in private M&A transactions including the role of warranties and indemnities in a sale agreement, the relationship between due diligence and warranties and common forms of qualifications and limitations to warranty and indemnity protection.

### 25 March - Update on ancillary orders

Special Counsel Stephen Hughes presenting an update on ancillary orders including the Fair Work Commission's powers to make costs and ancillary orders against parties and their representatives and recent decisions involving the exercise of the Commission's discretion.

### 27 March - Existing and emerging defences available to directors for breaches of *The Corporations Act*

Partner Tony Stumm presenting existing and emerging defences available to directors for breaches of *The Corporations Act* including business judgment rule, the ss 1317S and 1318 'exculpatory' defences and the AICD's report on the '*honest and reasonable director*' defence.

### 30 March - Warranties and indemnities in contracts

Special Counsel Brett Heath presenting warranties and indemnities in contracts including ensuring all relevant parties are included in the contract, personal liability issues for directors, legal implications of a contracting party being a corporate trustee or a director of a company and deeds of access and indemnity.

If you would like to register for any of these seminars, or to find out more information, please visit [www.carternewell.com](http://www.carternewell.com).

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