Insight: From the capital

Don't ask and we won't tell

Regulators standing by as some companies punch holes in their disclosure rules

John Robertson
Melbourne, Victoria

Investors must rely on the goodwill of ASX-listed mining company executives to give them the details of commercial agreements. The ASX listing rules assume this is done accurately and completely. In reality, investors need to ask the right questions or risk being poorly informed.

In May 2012, NuCoal Resources Ltd announced it had executed an agreement to purchase the Plashett coal exploration licence in the Hunter Valley, New South Wales. The company said completion of the agreement was subject to certain conditions. The conditions cited by the company were "NuCoal obtaining shareholder approval, ministerial approval under the Mining Act 1992 (NSW), and land access and compensation agreements being obtained over the area covered by the proposed drilling programme".

In April 2013, the company announced the ASX had granted waivers it was seeking and it would "now progress to finalise the remaining conditions precedent". The company referred to the same conditions as it had done a year earlier.

In October 2013, the company sought to update investors about the status of the agreement and once more referred to the same set of outstanding matters.

In January 2014, the company said that it was discussing the acquisition of Plashett with the vendor and would provide an update "in due course". On March 5, NuCoal announced that the Plashett vendor had given notice that it would terminate the agreement.

In advising the market of this dramatic turn of events the company repeated earlier references to the agreement having been "subject to certain conditions being achieved".

The company cited the same conditions as it had over the prior two years but, on this occasion, added a new one. Apparently, finalisation had also required "no material adverse change to the material assets owned by NuCoal since the date of signing the agreement".

The problem for NuCoal was that it had been caught up in a long-running official corruption enquiry into the way in which its primary development asset had been acquired some years earlier. The New South Wales government decided in January to confiscate this asset. The loss was the apparent catalyst

for the Plashett vendor pulling the plug on its deal.

Despite ample warning during a prolonged public examination of evidence during 2013 that its holding was in danger or that other financial penalties could apply, NuCoal had not alerted investors to the risks posed to the Plashett acquisition from an adverse finding.

Investors could have easily concluded, even after the government decision, that NuCoal could pursue development of Plashett. This, it turns out, was unfounded.

NuCoal investors could be disadvantaged in this way because ASX does not require companies to lodge copies of commercial agreements. Nor does the ASX or ASIC police the content of announcements to verify that summarised versions are accurate representations of full agreements.

No doubt NuCoal directors would argue that their consciences were clear because they had always used the word "including" to preface the partial list of conditions to which completion of the agreement was subject.

No matter how legally adept, this ploy throws the onus back on investors to ask what other matters, not disclosed in public statements, were included in the agreement. On this model, a failure to disclose becomes the fault of investors, not the company. Allowed to flourish, continuous disclosure is flung out the window.

An unambiguous example of an inaccurately summarised agreement involves Black Mountain Resources Ltd and Alcyone Resources. On December 24, Black Mountain announced it "has secured A$3 million strategic long-term debt financing with Alcyone Resources Ltd". In its summary of the agreement, Black Mountain said: "Pursuant to the facility, Alcyone will have equal first ranking security and will also have the right to appoint a director."

Alcyone also made a statement purporting to summarise the same agreement. It said: "Pursuant to the facility, Alcyone will have second ranking security after existing secured creditors and will also have the right to appoint a director."

The two statements do not sit together easily. Black Mountain Resources has declined to release a copy of the agreement because Alcyone has objected to it being made public.

Worse was to come. More than four hours after markets closed on Friday, March 14, Black Mountain announced that Alcyone was not in a position to meet its commitments under the funding agreement. Apparently, Alcyone's capacity to meet its obligation to Black Mountain had depended on funds being available under a financing agreement with a third party.

Alcyone had announced this latter agreement as a done deal on December 11, but on March 5 said negotiations were "incomplete and in the board's view unable to be completed".

There had been no mention of its funding being conditional when Black Mountain said it "has secured" its financing.

In contrast to these examples, Teranga Gold Corp announced a funding agreement covering its Senegal gold properties on December 13. Subsequently, it released a gold purchase and sale agreement and a share purchase agreement as well as a formal summary document. Armed with these, investors could, if necessary, independently verify the terms and make up their own minds about the impact of any change in anticipated conditions.

Of course, this leaves out the most important difference between the Teranga example and the others cited here. Teranga is listed in Canada and its Australian lodgements simply reflected what it had to do in its home jurisdiction.

ASX-listed companies are generally hostile to the idea of making agreements public despite the legal requirement, and the official assumption, that all material contents are disclosed.

Investors are being left to fend for themselves. Their options are limited. One protection is to seek confirmation from directors that there are no matters of commercial significance omitted from their agreement summaries, document the exchange and simply sue their socks off if they have been untruthful. This might sound extreme, but there are few alternatives if ASX and ASIC do not foster higher corporate standards. ▼

John Robertson is a director of EIM Capital Managers, an Australian-based funds management group. He has worked as a policy economist, business strategist and investment market professional for nearly 30 years after starting his career as a federal treasury economist in Canberra, Australia