



7 September 2015

Mr Ben Tippett  
Senior Adviser, Listings Compliance  
ASX Compliance Pty Ltd  
Level 40, Central Park  
152-185 St Georges Terrace  
PERTH WA 6000

Dear Mr Tippett

**Brierty Limited (“Brierty” or the “Company”)**

We refer to your letter dated 3 September 2015 and respond as follows:

1. Yes, because the information regarding the existence of the contract variation and insurance claim ensures that users of Brierty’s Preliminary Final Report are not misled by the disclosure relating to Brierty’s FY2015 earnings disclosed in the Company’s preliminary unaudited results for FY2015.
2. Not applicable.
3. As set out in Brierty’s ASX announcement on 31 August 2015, the contract variation and insurance claim which followed the conclusion of works on a major road contract relate to the increased costs incurred by Brierty in reliance on data used in the tender process.

The contract variation relates to the increased level of rock experienced in completing the required earthworks over and above that indicated in the data provided as part of the tender process. Brierty first became aware of the increased rock levels when performing the contract in late 2014, with the particulars relating to the amount of the contract variation claim being finalised and provided to Main Roads WA in May 2015 following completion of the project. It is not unusual that such claims are finalised after the conclusion of a project. Brierty has been engaged in discussions with Main Roads WA since April 2015 regarding the matters giving rise to the contract variation claim. Brierty has also undertaken a substantial amount of work to justify the basis for its contract variation claim, and has provided Main Roads WA with additional information and clarification upon request to validate the basis of its claim.

Notwithstanding the continued engagement received from Main Roads WA in relation to the claim, due to the time it was taking to progress the contract variation claim leading up to the FY2015 year-end reporting requirements, Brierty management elected to formally put the matters the subject of the contract variation claim into formal dispute on 17 August 2015. The formal dispute process under the contract provides a finite time by which the parties need to seek to assess and agree the matters the subject of the variation claim. Putting such matters into the formal dispute process provided Brierty with increased certainty that its contract variation claim would be resolved before completion of the audit process for FY2015.

The insurance claim was notified to the insurers at the time of the events, being October 2014, November 2014, March 2015 and April 2015. Brierty has been in discussions with the insurer since as early as May 2015 to finalise the amount of the insurance payout. Importantly, whilst the costs associated with these matters is being assessed, the existence of the insurance claim is not disputed by Main Roads WA or the relevant insurers.

4. Brierty did not make any announcement about the existence of the contract variation and insurance claim, and its potential effect on Brierty's earnings for FY2015, prior to the release of the Company's FY2015 Preliminary Final Report.

As set out above, Brierty's contract variation and insurance claim is currently being assessed, and remains the subject of ongoing discussions between the relevant parties. Brierty is confident that the contract variation and insurance claim will ultimately be assessed and agreed in the Company's favour.

Given the status of discussions with Main Roads WA and the relevant insurers regarding the contract variation and insurance claim, Brierty believes that in the absence of Brierty's periodic reporting obligation to provide the information required in Appendix 4E on or before 31 August 2015, announcing the contract variance and insurance claim and its potential effect on Brierty's earnings for FY2015 would have been premature and potentially misleading to the market for Brierty securities.

In this regard, Brierty notes the guidance provided by ASX in *Guidance Note 8 Continuous Disclosure* in regards to the obligation to disclose an earnings surprise for the purposes of Listing Rule 3.1.

As Brierty has not published earnings guidance for FY2015, ASX has indicated in *Guidance Note 8 Continuous Disclosure* that it considers the best and most appropriate base guide to use for the purposes of determining what the market is expecting Brierty's earnings to be for FY2015 (in order to determine whether there is an obligation to disclose an earnings surprise for the purposes of Listing Rule 3.1) is Brierty's earnings for FY2014. In setting this base guide, ASX has recognised that market expectations can be set or modified by the disclosures the entity makes to the market over the reporting period, and can also be impacted by known external events affecting an entity (such as the general downturn in the resources industry).

Brierty's NPAT for FY2014 was \$9.9 million, although since that time, it is widely recognised that there has been a general slowdown in mine development and related contractor activity prompting greater competition for projects and resultant tighter margins, putting pressure on earnings. Accordingly, Brierty considers that a FY2015 NPAT of approximately \$9.2 million is likely to be consistent with market expectations.

In determining when an entity becomes aware that its earnings for a reporting period will be different to the market's expectations, ASX has provided the following guidance (in section 7.3 of *Guidance Note 8 Continuous Disclosure*):

*"If an entity becomes aware that its earnings for the current reporting period will differ (upwards or downwards) from market expectations, it needs to carefully consider whether it has a legal obligation to notify the market of that fact."*

...

*"In ASX's opinion, for an entity to have to disclose under Listing Rule 7.1 market sensitive information about an expected difference in its earnings for the current reporting period compared to market expectations, there needs to be a reasonable degree of certainty that there will be such a difference."*

Given the status of discussions with Main Roads WA and the relevant insurers regarding the contract variation and insurance claim, Brierty believes that based on all information available to it



at this time, it does not have a reasonable degree of certainty that there will be a difference between its FY2015 actual earnings and the market's expectations of Brierty's FY2015 earnings.

Further, Brierty believes that making any public disclosure regarding the contract variation and insurance claim prior to the release of its Preliminary Final Report (including at the time of responding to the price query received from ASX on 17 August 2015) would have been premature and potentially misleading to the market for Brierty securities, such that a reasonable person would not consider the information materially price sensitive.

As ASX is aware, Appendix 4E requires Brierty to provide (amongst other things) details of its profit from ordinary activities after tax together with the percentage change (up or down) from the previous corresponding period, by no later than 31 August 2015. In accordance with the Listing Rules, Brierty had an obligation to release its FY2015 NPAT in its Preliminary Final Report by no later than 31 August 2015.

Brierty delayed finalising its Preliminary Final Report until 31 August 2015 to provide as much time as possible to seek to have the contract variance and insurance claim, as well as other outstanding contracting claims, assessed and agreed prior to releasing its Preliminary Final Report. Brierty notes that if outstanding contracting claims are not resolved prior to the completion of the audit process, in accordance with Accounting Standard 111 no value would be able to be attributed to the work performed under the relevant contract variation in Brierty's audited financial results for FY2015.

The Brierty Board closely monitored management's progress in seeking to have these outstanding claims resolved prior to the release of the Company's Preliminary Final Report on 31 August 2015.

It became clear on the morning of 31 August 2015 following receipt of an email from Main Roads WA that the contract variation claim relating to the Main Roads WA project was unlikely to be assessed and agreed prior to the need to release the Company's Preliminary Final Report by close of business on 31 August 2015.

Brierty management were successful in resolving all other outstanding matters, with the exception of this variation and the insurance claim, prior to this time.

As Brierty was required to disclose details of its profit from ordinary activities after tax for FY2015 in its Preliminary Final Report, and given the potential impact of Accounting Standard 111 on recognizing value associated with the relevant work performed if the contract variation and insurance claim was not finally resolved before completion of the audit process for FY2015, the Brierty Board chose to take a conservative view on the contribution from work performed in relation to that Main Roads WA contract variation and insurance claim for the purposes of the information disclosed in its Preliminary Final Report.

The Brierty Board formed the view that not disclosing the existence of the contract variation and insurance claim at the time of release of its Preliminary Final Report (and the potential impact that those claims may have on Brierty's FY2015 NPAT as disclosed in its Preliminary Final Report), had the potential to render the information in Brierty's Preliminary Final Report misleading.

Accordingly, Brierty made an announcement on 31 August 2015 to accompany the release of its Preliminary Final Report to explain that the final NPAT for FY2015 remained subject to the outcome of the Main Roads WA contract variation and insurance claim, and provided an NPAT range in the

event that the contract variation and insurance claim is not satisfactorily resolved by the completion of the audit for FY2015.

The Brierty Board was fully aware of the obligation to immediately announce the existence of the contract variation and insurance claim if it thought that its FY2015 NPAT was likely to depart from market expectations to an extent that it considers materially price sensitive and to not wait until the time of announcement of periodic results.

However, as set out above, Brierty does not believe that it has a reasonable degree of certainty that there would be a difference between its FY2015 actual earnings and the market's expectations of Brierty's FY2015 earnings. The disclosure regarding the existence of the contract variation and insurance claim was to ensure that the market was not misled by the information contained in Brierty's Preliminary Final Report for FY2015.

Appropriate processes have at all times been in place to monitor Brierty's financial performance on an ongoing basis and regularly assess Brierty's expectations against market expectations.

5. See answers to question 3 and 4 above.
6. Brierty is in compliance with the Listing Rules of the ASX, including Listing Rule 3.1.

Yours faithfully



Ian Sydney  
CFO/Company Secretary  
**BRIERTY LIMITED**



3 September 2015

Ian Sydney  
CFO/Company Secretary  
Brierty Limited  
72 Melville Parade  
South Perth WA 6151

**By email**

Dear Mr Sydney,

**Brierty Limited (“the Entity”) – ASX aware query**

ASX Limited (“ASX”) refers to the following:

1. The price query letter sent to the Entity on 17 August 2015 in which it was noted that the price of Entity’s securities had decreased from a close of \$0.36 on 12 August 2015 to an intra-day low of \$0.27 on 17 August 2015 (“Price Query Letter”).
2. The Entity’s response to Price Query Letter dated 17 August 2015 (“Price Query Response”), in which the Entity stated as follows:
  - a) In response to the first question “Is the Entity aware of any information concerning it that has not been announced to the market which, if known by some in the market, could explain the recent trading in its securities?”, the Entity answered “No.”
  - b) In response to the third question “If the answer to question 1 is “no”, is there any other explanation that the Entity may have for the recent trading in its securities?”, the Entity answered:

*“The Entity is not aware of any other explanation for the recent trading in its securities.”*
3. The Price Query Letter and the Price Query Response were released to the market on 17 August 2015.
4. The Entity’s preliminary final report for the year ended 30 June 2015 (“Preliminary Final Report”) lodged with the ASX Market Announcements Platform and released at 1:36 pm (AEST) on Monday 31 August 2015, in which the Entity stated as follows:

*“Brierty notes that an audit on its FY2015 accounts has not yet been completed, given Brierty is currently well advanced in resolving a contract variance and insurance claim on a major road project which has the potential to materially impact on the Group’s FY2015 earnings. The variance includes weather-related insurance claims and direct negotiations with its client, Main Roads WA, on increased costs incurred by Brierty in reliance on data used in the tender process. Negotiations regarding the variations are now in their final stages. The total variation is valued at approximately \$9.1 million (pre-tax).*

*Although Brierty has confidence in the validity of its contract variance claims, it has chosen to use the time*



available to it to seek to finalise these claims prior to completion of the audit process (being up to 30 September 2015), given the claims are close to resolution. Brierty's auditor has agreed with this course of action.

As a result, Brierty has reported NPAT of \$2.9 million for FY2015 in its unaudited accounts, which excludes all of the contract variance claims. Brierty notes that it has taken a conservative view on the contribution from work performed under the contract variation and therefore does not expect a deterioration in the profit between those reported in the preliminary final results and those that will be reported in the audited final results. The Group has worked closely with its auditor, EY, in preparing the preliminary unaudited results.

Further detail on the FY 2015 results is included in the separate release to the market on 31 August 2015 and the operating and financial review included as part of this annual report."

5. The decrease in the Entity's share price from a closing price on 31 August 2015 of \$0.255 to a close on 1 September 2015 of \$0.23.
6. Listing Rule 3.1, which sets out the requirement of continuous disclosure under the ASX listing rules:

"3.1 Once an entity is or becomes aware of any information concerning it that a reasonable person would expect to have a material effect on the price or value of the entity's securities, the entity must immediately tell ASX that information."
7. Listing Rule 3.1A, which sets out exceptions from the requirement to make immediate disclosure, provided that each of the following are satisfied.

"3.1A Listing rule 3.1 does not apply to particular information while each of the following requirements is satisfied in relation to the information:

  - 3.1A.1 One or more of the following applies:
    - It would be a breach of a law to disclose the information;
    - The information concerns an incomplete proposal or negotiation;
    - The information comprises matters of supposition or is insufficiently definite to warrant disclosure;
    - The information is generated for the internal management purposes of the entity; or
    - The information is a trade secret; and
  - 3.1A.2 The information is confidential and ASX has not formed the view that the information has ceased to be confidential; and
  - 3.1A.3 A reasonable person would not expect the information to be disclosed."
8. The definition of "aware" in Chapter 19 of the Listing Rules. This definition states that:



*“an entity becomes aware of information if, and as soon as, an officer of the entity (or, in the case of a trust, an officer of the responsible entity) has, or ought reasonably to have, come into possession of the information in the course of the performance of their duties as an officer of that entity.”*

Additionally, you should refer to section 4.4 in Guidance Note 8 *Continuous Disclosure: Listing Rules 3.1 – 3.1B “When does an entity become aware of information”*.

9. ASX’s policy position on the concept of “confidentiality” which is detailed in section 5.8 of ASX Guidance Note 8 *Continuous Disclosure: Listing Rules 3.1 – 3.1B “Listing Rule 3.1A.2 – the requirement for information to be confidential”*. In particular, the Guidance Note states that:

*“Whether information has the quality of being confidential is a question of fact, not one of the intention or desire of the listed entity. Accordingly, even though an entity may consider information to be confidential and its disclosure to be a breach of confidence, if it is in fact disclosed by those who know it, then it ceases to be confidential information for the purposes of this rule.”*

Having regard to the above, we ask that you answer the following questions in a format suitable for release to the market in accordance with Listing Rule 18.7A:

1. Does the Entity consider the information in the Preliminary Final Report, namely the contract variance and insurance claim on a major road project which has the potential to materially impact on the Entity’s earnings, to be information that a reasonable person would expect to have a material effect on the price or value of its securities?
2. If the answer to question 1 is “no”, please advise the basis for that view.
3. If the answer to question 1 is “yes”, when did the Entity first become aware of the information?
4. If the answer to question 1 is “yes” and the Entity first became aware of the information before the date of the Preliminary Final Report, did the Entity make any announcement prior to that date which disclosed the information? If so, please provide details. If not, please explain why this information was not released to the market at an earlier time, commenting specifically on when you believe the Entity was obliged to release the information under Listing Rules 3.1 and 3.1A and what steps the Entity took to ensure that the information was released promptly and without delay.
5. If the answer to question 1 is “yes” and the Entity first became aware of the information before the date of the Price Query Response, please advise of the basis for the Entity’s statement in the Price Query Response that the Entity was not aware of any explanation for the recent trading in its securities.
6. Please confirm that the Entity is in compliance with the Listing Rules and, in particular, Listing Rule 3.1.

#### **When and where to send your response**

This request is made under, and in accordance with, Listing Rule 18.7. Your response is required as soon as reasonably possible and, in any event, by not later than half an hour before the start of trading (ie before 9.30 a.m. AEST) on Monday 7 September 2015. If we do not have your response by then, ASX will have no choice but to consider suspending trading in the Entity’s securities under Listing Rule 17.3.

You should note that if the information requested by this letter is information required to be given to ASX under Listing Rule 3.1 and it does not fall within the exceptions mentioned in Listing Rule 3.1A, the Entity’s obligation is



to disclose the information “immediately”. This may require the information to be disclosed before the deadline set out in the previous paragraph.

ASX reserves the right to release a copy of this letter and your response on the ASX Market Announcements Platform under Listing Rule 18.7A. Accordingly, your response should be in a form suitable for release to the market.

Your response should be sent to me by e-mail at [ben.tippett@asx.com.au](mailto:ben.tippett@asx.com.au). It should not be sent directly to the ASX Market Announcements Office. This is to allow me to review your response to confirm that it is in a form appropriate for release to the market, before it is published on the ASX Market Announcements Platform.

### **Listing Rule 3.1**

Listing Rule 3.1 requires a listed entity to give ASX immediately any information concerning it that a reasonable person would expect to have a material effect on the price or value of the entity’s securities. Exceptions to this requirement are set out in Listing Rule 3.1A.

The obligation of the Entity to disclose information under Listing Rules 3.1 and 3.1A is not confined to, nor is it necessarily satisfied by, answering the questions set out in this letter.

In responding to this letter, you should have regard to the Entity’s obligations under Listing Rules 3.1 and 3.1A and also to Guidance Note 8 *Continuous Disclosure: Listing Rules 3.1 – 3.1B*.

### **Trading halt**

If you are unable to respond to this letter by the time specified above, you should discuss with us whether it is appropriate to request a trading halt in the Entity’s securities under Listing Rule 17.1.

If you wish a trading halt, you must tell us:

- the reasons for the trading halt;
- how long you want the trading halt to last;
- the event you expect to happen that will end the trading halt;
- that you are not aware of any reason why the trading halt should not be granted; and
- any other information necessary to inform the market about the trading halt, or that we ask for.

We may require the request for a trading halt to be in writing. The trading halt cannot extend past the commencement of normal trading on the second day after the day on which it is granted.

You can find further information about trading halts in Guidance Note 16 *Trading Halts & Voluntary Suspensions*.

If you have any queries or concerns about any of the above, please contact me immediately.

Yours sincerely

*[Sent electronically without signature]*

Ben Tippett  
**Adviser, Listings (Perth)**