

# **REVIEW OF REGISTER OF RELEVANT INTERESTS**

## **CONSULTATION PAPER**

**DEPARTMENT OF THE TREASURY  
DECEMBER 2006**

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**Comments are sought on this consultation paper and the specific issues raised in it by no later than 28 February 2007.**

Submissions should be sent by mail, fax or email to:

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# CONTENTS

|    |   |   |
|----|---|---|
| 1. | INTRODUCTION.....                             | 1 |
| 2. | CONTEXT.....                                  | 1 |
| 3. | LEGISLATIVE PROVISIONS — TRACING NOTICES..... | 2 |
| 4. | CLERP 9 — INSERTION OF SECTION 672DA .....    | 3 |
| 5. | DISCUSSION.....                               | 4 |
| 7. | ISSUES ON WHICH COMMENTS ARE SOUGHT.....      | 6 |



# REGISTER OF RELEVANT INTERESTS

## 1. Introduction

The *Corporate Law Economic Reform Program (Audit Reform and Corporate Disclosure) Act 2004* included amendments to the *Corporations Act 2001* (the Corporations Act) requiring entities which receive information in response to their own or ASIC 'tracing notices' to put the information in a publicly available register. This requirement, in section 672DA of the Corporations Act, was designed to increase the information available to interested persons in relation to relevant interests in listed entities, information which does not appear on the face of the register of members.

The relevant provisions commenced on 1 January 2005.

Subsequently, the Parliamentary Secretary to the Treasurer, the Hon Chris Pearce MP, decided that the operation of the provision should be reviewed in the light of the experience to date.

The purpose of this paper is to initiate that review.

We would value comments from the issuers and recipients of tracing notices and the users of registers of relevant interests as well as the wider community about their experience with these provisions.

With the assistance of the comments and evidence received, the Treasury will report to the Minister on the operation of the current provisions. In particular, the report will discuss the effects of the requirements, including whether they have increased the information available and whether there is evidence that they have had the adverse consequences predicted at the time they were reintroduced in 2004.

## 2. Context

The context of these provisions is the takeovers regime in Chapter 6 of the Corporations Act. The purposes of Chapter 6, as described in section 602, include to ensure that:

- the acquisition of control over those entities subject to the provisions takes place in an efficient, competitive and informed market;
- the holders of shares and interests in an entity know the identity of the person who proposes to acquire a substantial interest, have reasonable time to consider the proposal and enough information to assess the merits; and
- as far as practicable, the holders of the relevant class of shares or interests have a reasonable and equal opportunity to participate in any benefits accruing.

Consistently with these policy objectives, the Corporations Act includes provisions that:

- require persons with a 'substantial holding' in the company or scheme to give notice to the company or responsible entity (and the market operator) (Part 6C.1)<sup>1</sup>; and

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<sup>1</sup> The term 'substantial holding' is defined in section 9 and encompasses the relevant interests of the person concerned and their associates. Notices need to be given when the person's interest first exceeds 5 per cent, ceases to exceed 5 per cent and at 1 per cent increments (section 671B). The concept of a 'relevant interest' is defined in sections 608 and 609.

- allow ASIC, a listed company or the responsible entity of a listed managed investment scheme to issue 'tracing notices' to find those with relevant interests who stand behind the names on the members register (Part 6C.2).

Transparency is vital in maintaining market integrity and ensuring market efficiency through open and equal access to relevant information. In its Objectives and Principles of Securities Regulation paper of May 2003, the International Organisation for Securities Commissions states that 'in an efficient market, the dissemination of relevant information is timely and widespread and is reflected in the price formation process.'

### 3. Legislative provisions – tracing notices

In brief, Part 6C.2 ('Tracing beneficial ownership of shares') included the following provision as at 2003 and these provisions continue in force (with the addition of section 672DA which is described below):

- it empowers the listed company or the responsible entity of a listed managed investment scheme to direct a member of the company or scheme to make specific disclosure about their own relevant interests and those of others (section 672A, 672B);
  - Such a notice may also be directed to persons named in previous disclosure under these provisions (section 672A(1)(b));
- it empowers ASIC, of its own accord or in response to a request from a member of the company or scheme, to issue such a direction (section 672A);
- a person given a direction under section 672A must disclose to the person giving the direction:
  - full details of their own relevant interest and the circumstances that give rise to that interest;
  - the name and address of each other person who has a relevant interest in any of the relevant shares or interests with details of the nature and extent of the interest and the circumstances that give rise to the interest;
  - the name and address of each person who has given the person instructions about such matters as the acquisition or disposal of the shares or interests or the exercise of any voting or other rights attached to the shares or interests, and full details of the instructions (subsection 672B(1)).
- the disclosure must be made, with certain exceptions, within 2 business days of receipt of the direction (section 672B(2));
- if ASIC gives the direction to disclose and receives information in response, then it has a discretion to pass it to the company or responsible entity concerned (section 672C(a));
  - where ASIC has initiated a notice in response to a request by a member of the company or scheme under subsection 672A(2), it is required to pass the information to that person unless it would be unreasonable in all the circumstances to do so (section 672C(b)).

These provisions use the term 'relevant interest' which is defined in sections 608 and 609 of the Corporations Act. It relates particularly to power or control, whether direct or indirect, over voting securities. The term 'beneficial ownership' is not used in the operative provisions.

As at 2004, we were informed that almost all S&P ASX 100 listed entities analysed their registers on a periodic basis. Most of the top 50 listed entities analysed their registers on a monthly basis, the top 50–150 quarterly and those outside the top 150 listed entities analyse their registers on a quarterly or six monthly basis.

If its shares are trading at higher volumes than usual or the company is involved in a takeover, then a major company would analyse its register more frequently, possibly for an extended period.

## 4. CLERP 9 – insertion of section 672DA

### Recommendation of the Parliamentary Joint Committee on Corporations and Financial Services

Following consideration of the Corporate Law Economic Reform Program (Audit Reform and Corporate Disclosure) Bill 2003 (the CLERP 9 Bill), the Parliamentary Joint Committee on Corporations and Financial Services issued two substantial reports. In relation to this issue, it recommended that the Government reinstate in the Act the requirement for listed companies to keep a public register of information received in response to 'tracing notices' (Recommendation 27 of the PJC Report).

The PJC Report referred to:

- the omission of the requirement for such a register by the *First Corporate Law Simplification Act 1995* on the ground that it duplicated a requirement in the ASX Listing Rules and the belief that it would be simple for members of the public to access this information through the ASC's electronic searching facilities and through the ASX in the case of listed companies, rather than going to a company's offices and searching registers kept by it;
- the fact that this rationale no longer held and the information was not publicly available; and
- comments made to the Committee by various interested parties, including the Australasian Investor Relations Association, Mr Dean Paatsch of Governance Information Products, Mr Stephen Mayne and the Australian Conservation Foundation.
  - These comments included international comparisons, and views that it was market relevant information even if the interest was below the 5% substantial holding threshold, and that it was essential to ensuring compliance with the substantial holding and insider trading provisions.

The Committee concluded:

The Committee appreciates the arguments put forward to increase the transparency of company ownership by making available to shareholders the names of beneficial owners of their companies. The suggestion that companies if they have the information make it available to their shareholders appears reasonable, sensible and in the public interest.

#### Recommendation 27

The Committee recommends that the Government reinstate in the Act the requirement for listed companies to keep a public register of notices of beneficial ownership.

### Government response

The Government accepted this recommendation and Government amendments during the Bill's passage through the Parliament inserted Schedule 11A (section 672DA). The amendments reinstated, with several modifications, former section 724 of the Corporations Law.

The Supplementary Explanatory Memorandum for the CLERP 9 Bill makes it clear that section 672DA does not require companies or responsible entities to seek further information. The objective of the amendment was to make the information already collected available to the wider market.

### **What does section 672DA require?**

As indicated above, section 672DA requires that a listed company or the responsible entity for a listed managed investment scheme keep a register of specified information it receives under Part 6C.2, whether it or ASIC initiated the notice.

Section 672DA also addresses the location of the register, notifying ASIC about the location of the register, the form of the register, inspection and copying, and the time to enter information in the register. In brief, the information must be entered in the register before the end of 2 business days after the company or responsible entity receives it.

A copy of section 672DA is at **Attachment A**.

## **5. Discussion**

### **Opposition**

The re-introduction of these provisions was opposed by some parties on the following grounds:

- The register would allow free-riding on the research and strategies of fund managers.
  - This would damage the interests of fund managers and their beneficiaries, by affecting the price of securities the fund is trading.
  - It would encourage fund managers to undermine market efficiency by adopting less efficient investment strategies.
  - It would discourage further investment research.
- It would have an impact on investors.
  - Investors might black-list, as potential investment opportunities, companies who carried out s 672DA searches of their register.
  - The risk of beneficial shareholders becoming targets of unwarranted solicitation by stockbrokers or individuals was considered to be a risk that many investors would not be willing to take.
- It would have an impact on investment in Australia.
  - Making trading information publicly available would make the Australian market unattractive to domestic and foreign institutional investors.
- It would reduce transparency.
  - It would deter companies from analysing their share registers by issuing tracing notices and therefore reduce the transparency of share ownership.
- The requirements would not mirror international best practice.

- It would diminish the value of the information to the company or entity initiating the direction or notice because the information was available to the public at the same time.

## **Other factors**

On the other hand, there are a number of other factors, outlined below, which need to be taken into account. They include:

- the information available immediately before section 672DA was reinserted;
- the nature of the information on the Register of Relevant Interests and its current usage;
- the delay between the trade and the information provided in response to the tracing notices being made public and whether this reduces the opportunity for free riding on research and some of the other concerns outlined above; and
- the apparent lack of a standard practice overseas.

These are discussed briefly below.

## **What information was available immediately before the CLERP 9 Act?**

The following information about the holders of interests in listed companies and the responsible entities of listed managed investment schemes was available before section 672DA:

- it is a basic principle of corporate law that registers of members are open to the public;
- substantial holding notices, which must be provided to the market operator, are published by the ASX; and
- the information received in response to 'tracing notices' was available to the relevant company or responsible entity and generally to the person who requested ASIC to issue the notice, but would not be available to other interested persons.

## **What information does the register hold? Who uses it?**

It is the raw information received in response to tracing notices which is required to be included in the Register of Relevant Interests. It is not the analysis which the company or entity which initiated the direction would usually commission and use.

Several investor relations firms have reported informally that they have received no more than 20 requests to search registers since the provision was enacted. These requests were made by professionals: lawyers; investment banks; and corporate clients. No requests were made by members of the wider public. It is understood that the requests were made in relation to shares in companies that were the subject of a takeover bid.

It has been pointed out that the raw material available on the Register of Relevant Interests will only be useful to sophisticated investors or those employed by them. While sophisticated investors will have more ability to understand the information on the register, this is the normal position in the market. Much information which must be made available to all is in fact accessed and understood only by some.

## **How long after the trade is the information likely to be included in the register?**

Since the introduction of section 672DA, it has been suggested that the time for including the information in the register should be extended from the current 2 business days after receipt of the information.

Transactions will not appear on the registers until at the earliest some seven business days after they occur. It takes time for the transaction to be settled and for tracing notices to be issued and replied to, as well as the two business days to enter the interest in the register under section 672DA.

### **When does such information have to be made public under overseas regimes?**

It does not appear that there is one consistent international standard that Australia could apply. There are a variety of mechanisms for companies to serve notices on shareholders or former shareholders to obtain information about beneficial ownership and then make that information publicly available.

- Section 92 of the Companies Act in Singapore, for example, provides that when companies obtain details of beneficial ownership by issuing notices, they must enter those details into a register open for public inspection. Section 92 gives no explicit time limit for entering the details in the register, but instead provides that section 88 shall apply in relation to that part of the register as it applies to the remainder of the register. Section 88 requires that entries shall be made in the register 'forthwith'.
- The United Kingdom (under section 213 of the Companies Act 1985) and New Zealand (under section 25 of the Securities Markets Act 1988) have similar systems, but with no explicit time for entering the details in the UK register or the New Zealand file of notices, both of which are open to public inspection.
- The United States has a very different system, involving quarterly disclosures. It is not easy to make a sensible comparison with its law, since it involves a fundamentally different system of checks and balances.

### **Transparency to assist in combating money-laundering**

On 14 October 2005, the Financial Action Task Force released its mutual evaluation report on anti-money laundering and combating the financing of terrorism in Australia. The report recommended that Australia improve its requirements on the disclosure of beneficial ownership of corporations to ensure that information on ultimate ownership/control is made available in a timely manner to competent authorities (including law enforcement agencies).

It is possible that any reduction in the issue of tracing notices by companies may result in reduced information being available to competent authorities immediately and would instead require that ASIC issue a tracing notice.

## **7. Issues on which comments are sought**

We are interested to learn about the experience with the Registers of Relevant Interests, more than 18 months after their reintroduction.

It needs to be kept in mind that any possible detriments from the provision have to be weighed against the benefits of increasing market transparency through the prompt release of information under section 672DA.

Issue 1

What has been your experience of using the Register of Relevant Interests?

## Issue 2

What effects has the register had since its introduction on 1 January 2005? For example:

- (a) is there evidence of 'free-riding' on the research and strategies of fund managers through use of the register?
- (b) have the number of tracing notices being issued reduced?
- (c) is there any indication that investors (institutional or retail) have avoided investing in companies which issue tracing notices for that reason?

## Issue 3

What modifications to these provisions would you make to improve their usefulness?

## CORPORATIONS ACT 2001 – SECT 672DA

### Register of information about relevant interests in listed company or listed managed investment scheme

- (1) A listed company, or the responsible entity for a listed managed investment scheme, must keep a register of the following information that it receives under this Part on or after 1 January 2005 (whether the information is received pursuant to a direction the company, or responsible entity, itself gives under section 672A or is received from ASIC under section 672C):
  - (a) details of the nature and extent of a person's relevant interest in shares in the company or interests in the scheme;
  - (b) details of the circumstances that give rise to a person's relevant interest in shares in the company or interests in the scheme;
  - (c) the name and address of a person who has a relevant interest in shares in the company or interests in the scheme;
  - (d) details of instructions that a person has given about:
    - (i) the acquisition or disposal of shares in the company or interests in the scheme; or
    - (ii) the exercise of any voting or other rights attached to shares in the company or interests in the scheme; or
    - (iii) any other matter relating to shares in the company or interests in the scheme;
  - (e) the name and address of a person who has given instructions of the kind referred to in paragraph (d).

The register must be kept in accordance with this section.

- (2) A register kept under this section by a listed company must be kept at:
  - (a) the company's registered office; or
  - (b) the company's principal place of business in this jurisdiction; or
  - (c) a place in this jurisdiction (whether or not an office of the company) where the work involved in maintaining the register is done; or
  - (d) another place in this jurisdiction approved by ASIC.
- (3) A register kept under this section by the responsible entity of a listed managed investment scheme must be kept at:
  - (a) the responsible entity's registered office; or
  - (b) the responsible entity's principal place of business in this jurisdiction; or

- (c) a place in this jurisdiction (whether or not an office of the responsible entity) where the work involved in maintaining the register is done; or
  - (d) another place in this jurisdiction approved by ASIC.
- (4) The company, or the responsible entity, must lodge with ASIC a notice of the address at which the register is kept within 7 days after the register is:
- (a) established at a place that:
    - (i) is not the registered office of the company or responsible entity; and
    - (ii) is not at the principal place of business of the company or responsible entity in this jurisdiction; or
  - (b) moved from one place to another.

Notice is not required for moving the register between the registered office and the principal place of business in this jurisdiction.

Note: The obligation to notify ASIC under this subsection is a continuing obligation and the company or responsible entity is guilty of an offence for each day, after the 7 day period, until ASIC is notified (see section 4K of the *Crimes Act 1914*).

- (5) An offence based on subsection (2), (3) or (4) is an offence of strict liability.

Note: For strict liability, see section 6.1 of the *Criminal Code*.

- (6) The register must either contain:
- (a) the name of each holder of shares in the company, or interests in the scheme, to whom the information relates; and
  - (b) against the name of each such holder:
    - (i) the name and address of each other person (if any) who, according to information the company, or the responsible entity, has received under this Part on or after 1 January 2005, has a relevant interest in any of the shares or interests (together with details of the relevant interest and of the circumstances because of which the other person has the relevant interest); and
    - (ii) the name and address of each person who, according to information received by the company, or the responsible entity, under this Part on or after 1 January 2005, has given relevant instructions in relation to any of the shares or interests (together with details of those relevant instructions); and
  - (c) in relation to each item of information entered in the register, the date on which the item was entered in the register;
- or be in such other form as ASIC approves in writing.
- (7) The register must be open for inspection:
- (a) by any member of the company or scheme – without charge; and

- (b) by any other person:
  - (i) if the company, or the responsible entity, requires the payment of a fee for the inspection – on payment of the fee; or
  - (ii) if the company, or the responsible entity, does not require the payment of a fee for the inspection – without charge.

The amount of the fee required by the company, or the responsible entity, under subparagraph (b)(i) must not exceed the amount prescribed by the regulations for the purposes of this subsection.

- (8) A person may request the company, or the responsible entity, to give to the person a copy of the register (or any part of the register) and, if such a request is made, the company, or the responsible entity, must give the person the copy:
  - (a) if the company, or the responsible entity, requires payment of a fee for the copy:
    - (i) before the end of 21 days after the day on which the payment of the fee is received by the company or the responsible entity; or
    - (ii) within such longer period as ASIC approves in writing; or
  - (b) if the company, or the responsible entity, does not require payment of a fee for the copy:
    - (i) before the end of 21 days after the day on which the request is made; or
    - (ii) within such longer period as ASIC approves in writing.

The amount of the fee required by the company, or the responsible entity, under paragraph (a) must not exceed the amount prescribed by the regulations for the purposes of this subsection.

Note: The obligation to give the copy under this subsection is a continuing obligation and the company or responsible entity is guilty of an offence for each day, after the period referred to in paragraph (a) or (b), until the copy is given (see section 4K of the *Crimes Act 1914*).

- (9) The information that subsection (6) requires to be entered in the register must be entered in the register by the company, or the responsible entity, before the end of 2 business days after the day on which the company, or the responsible entity, receives the information.

Note: The obligation to enter the details in the register under this subsection is a continuing obligation and the company or responsible entity is guilty of an offence for each day, after the 2 business day period, until the details are entered in the register (see section 4K of the *Crimes Act 1914*).