Law Council
OF AUSTRALIA

Business Law Section

13 December 2024

Beneficial Ownership and Transparency Unit
Market Conduct and Digital Division
Treasury
Langton Cres
Parkes ACT 2600

By email: beneficialownership@treasury.gov.au

Dear Treasury

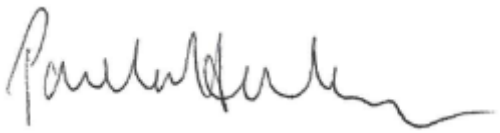
Submission on enhanced beneficial ownership disclosure for listed entities

This submission concerning the proposed changes to the beneficial ownership disclosure for listed entities is made by the Corporations Committee of the Business Law Section of the Law Council of Australia (the **Committee**).

The Committee would be pleased to discuss any aspect of this submission.

Please contact the chair of the Committee, Philippa Stone [redacted], if you would like to do so.

Yours faithfully



Professor Pamela Hanrahan
Chair
Business Law Section

Telephone +61 2 6246 3737 • ***Fax*** +61 2 6248 0639 • ***Email*** jessica.morrow@lawcouncil.au
PO Box 5350, Braddon ACT 2612, DX 5719 Canberra • Level 1, MODE3, 24 Lonsdale St Braddon ACT 2612
Law Council of Australia Limited ABN 85 005 260 622
www.lawcouncil.au

Law Council
OF AUSTRALIA

Business Law Section

Enhanced beneficial ownership disclosure for listed entities

Submission to the Beneficial Ownership and Transparency Unit
Market Conduct and Digital Division
Treasury

13 December 2024

Telephone +61 2 6246 3737 • *Fax* +61 2 6248 0639
Email Jessica.Morrow@lawcouncil.au
PO Box 5350, Braddon ACT 2612, DX 5719 Canberra
Level 1, MODE3, 24 Lonsdale St Braddon ACT 2612

Table of Contents

Introduction **1**
Section A: Executive summary **1**
Section B: General comments/observations **5**
Section C: Responses to consultation questions **19**
Annexure A: About the Business Law Section of the Law Council of Australia **25**

Introduction

1. This submission is made by the Corporations Committee of the Business Law Section of the Law Council of Australia (the **Committee**). A brief outline of the Business Law Section is set out in Annexure A.

2. This submission is in response to the consultation paper released by Treasury on 14 November 2024, which seeks comments on a proposed draft bill that proposes changes to the *Corporations Act 2001* (Cth), which include requirements for disclosure of derivatives in respect of shares in listed companies and increased ASIC enforcement powers in respect of compliance with the substantial shareholding notification provisions and tracing provisions in the Corporations Act, as well as changing the operation of the takeover provisions of the Corporations Act in relation to derivatives (the **Bill**).

3. The Committee welcomes the opportunity to provide feedback on the Bill. The Committee's responses to the particular consultation questions attached to the Treasury media release are set out in Section C of this submission. Before responding to those specific consultation questions, the Committee would like to make the following comments/observations on the Bill set out in Section B.

4. We also refer to an earlier submission made to Treasury on behalf of the Law Council of Australia titled "Multinational tax integrity: Public Beneficial Ownership Register" dated 23 December 2022.[1]

Section A: Executive summary

5. Without limiting the comments on the Bill in Section B of this submission, the points we would like to highlight are as follows:

   (a) **GN 20 is already operating effectively, and the changes concerning derivatives are unnecessary:** Takeovers Panel Guidance Note 20 (**GN 20**) already requires a person to disclose an aggregate relevant interest and long equity derivative position at 5% or more (and subsequent movements of 1% or more). Explanatory materials to the Bill (the **EM**) appear to proceed on the assumption that GN 20 is not working effectively to require disclosure of those long equity derivative positions. That assumption needs to be challenged, as the Committee's experience is that, because the Takeovers Panel already has the power to make a very broad range of remedial orders to compel compliance with GN 20 (including divestment orders), there is a very strong incentive on parties to comply, and parties do comply, with GN 20. The Committee therefore strongly questions the need to try to codify GN 20 into Part 6C.1 of the Corporations Act, with the resultant loss of flexibility to be able to deal with the broad range of complex derivative instruments in the market, which can be much more effectively dealt with in the Takeovers Panel guidance than in legislation[2].

[1] Law Council of Australia, '*Multinational tax integrity: Public Beneficial Ownership Register*' (23 December 2022), available at <https://lawcouncil.au/resources/submissions/multinational-tax-integrity-public-beneficial-ownership-register>.

[2] If there is a concern about the Takeovers Panel's powers to make declarations and orders in relation to equity derivative interests, see *Corporations Amendment (Takeovers) Act 2007* (Cth) and paragraphs 3.4 to 3.6 of its explanatory memorandum, available here. If there is any residual concern, that could be addressed by passing a regulation under section 602A(3) specifically stating that such interests are 'substantial interests'.

(b) **The changes will significantly increase the compliance burden, will have a negative impact on the derivatives market, and will involve serious privacy concerns, without serving any useful disclosure purpose:** We think that Treasury may have seriously underestimated the impact the changes proposed by the Bill will have on market makers (e.g. banks and investment banks), and on investors such as superannuation funds, corporates and individuals who engage in regular and legitimate hedging activity, both in terms of the significant time and cost in building new systems to be able to comply with the new requirements, and the significant ongoing compliance costs. For example, the vast majority (as high as 90%) of equity derivatives are cash settled derivatives (both listed and over the counter) entered into for legitimate hedging purposes, and are not in any way related to any control transaction. Under the proposed Bill, all of these would need to be disclosed in a substantial holder notice, with a full copy of the relevant agreement. They would also need to be disclosed in response to a tracing notice from a listed company. This serves no useful disclosure purpose, raises serious privacy and confidentiality concerns, and may have material adverse impacts on both the derivatives market and the broader equities market. This includes by (a) flooding the market with immaterial disclosure where there is no control purpose (substantial holding notices are likely to be thousands of pages long, and largely indecipherable to most market participants and media)[3], and (b) by reducing trade volumes and therefore the liquidity of securities, as well as the range of financial products on offer for corporate participants to manage their risk. These factors are important from a market efficiency and corporate governance perspective. The willingness of market makers to write derivatives will also be materially adversely affected by ASIC's proposed new "freezing power", which could result in ASIC ordering the disposal by a bank of its hedge position, or unwinding the swap in adverse market conditions, even though the bank has fully complied with its obligations and it is the client which is at fault.

(c) **The Bill should not make the proposed material changes to the tracing notice provisions and the takeover, compulsory acquisition and buy-out provisions without fully understanding the implications, and without further broad consultation:** If, despite the above, the Government does intend to proceed to codify disclosure of equity derivatives in Part 6C.1 of the Corporations Act, then the Bill should be limited to making that change. As presently drafted, the Bill goes far beyond its stated purpose of enhancing public disclosure of substantial interests in listed companies. For example, by deeming long positions under cash-settled equity derivatives and unhedged physically settled derivatives to be a "relevant interest" for the purposes of the Corporations Act, the Bill dramatically changes the existing scope and operation of (a) the tracing notice provisions in Part 6C.2 of the Corporations Act, (b) the takeovers provisions in Chapter 6 of the Corporations Act, and (c) the compulsory acquisition and buy-out provisions in Chapter 6A of the Corporations Act. It does not follow that, just because a person is required to disclose an aggregate relevant interest and long equity derivative position at or above 5% under Part 6C.1, that such equity derivatives should be required to be disclosed in response to a tracing notice (where the person has less than a 5% aggregate interest), or be automatically taken into account for the purposes of the 20% threshold in section 606, and, as set out below, there are good reasons why this should not be the case. Those changes materially alter

[3] A particularly burdensome requirement under the Bill is that banks that write, and investors that trade, these equity derivatives in a non-control transaction context will need to disclose a greater than 1% movement within each separate category contemplated by item 40 of the Bill, even if the aggregate movement is less than 1%.

the existing legislative framework for disclosure below 5%, takeovers, compulsory acquisitions and buy-outs, in a way which may have unpredictable and unintentional effects. In the Committee's view, these additional changes should not be made without further broad consultation on their impact.

(d) **Maintain the distinction between an interest under an equity derivative which does not confer a "relevant interest", and a "relevant interest"):** If the Government does decide to require disclosure of equity derivatives in substantial holding notices under Part 6C.1, we would strongly recommend against achieving that outcome by deeming such interests to be "relevant interests". The Bill needs to maintain the distinction between "relevant interests" and equity derivatives not giving rise to a relevant interest. The Government's objectives can be achieved in Part 6C.1 by different drafting techniques, such as requiring those interests to be disclosed as "disclosable economic interests" (or some similar new term). The reasons why the distinction is important include:

(i) The interest that a person acquires by entering into those types of equity derivative is fundamentally different to a "relevant interest", as understood by market participants based on more than 50 years of Court and Takeovers Panel decisions. The Takeovers Panel has consistently found that those types of equity derivatives do not give the necessary measure of control over voting or disposal to constitute a "relevant interest".

(ii) Allowing bidders to refer to those interests as "relevant interests" will enable bidders to over-inflate their apparent positions, by including equity derivatives which do not give the necessary measure of control over voting or disposal in their "relevant interests", with the intention of discouraging competition from third parties for control, and giving target shareholders, particularly retail shareholders, the appearance of a "done deal".

(iii) Including those interests as "relevant interests" will dramatically change the scope of the change of control provisions across many existing long-term contractual arrangements (e.g. shareholders agreements, joint venture agreements, lease agreements, customer/supply agreements and funding/financing agreements etc), in a manner which would not have been intended by the parties at the time the arrangements were entered into (because a traditional relevant interest has always been interpreted as excluding such interests). The unintended consequences of this are difficult to predict but could be extremely prejudicial in particular cases and would undermine the basis on which these contracts had been originally agreed.

(iv) As discussed above, those interests should not be "relevant interests" for the purposes of the tracing notice provisions, the takeover provisions the compulsory acquisition provisions or the buy-out provisions.

(e) **Equity derivatives include a very broad range of complex products, which are not easily "shoehorned" into an inflexible statutory reporting regime:** Section 608B includes a very broad definition of a "non-physically settled derivative-based interest" which may require disclosure. It is extremely difficult for market participants to respond to this provision without having seen the proposed form of the ASIC legislative instruments which will set the number of shares, or the method for determining the number of shares, in

which a person will be deemed to have a relevant interest by virtue of the derivative. Importantly though, those ASIC legislative instruments will need to deal with a range of products beyond a traditional cash settled equity swap, including collar transactions and back-to-back inter-bank and intra-bank hedging transactions. It is unclear how these will be dealt with.

(f) **Where an interest under an equity derivative is disclosed in a notice under Part 6C.1, the notice should have to include information of the type currently required by paragraphs 12–14 of Takeovers Panel GN 20, but should not need to attach standard form agreements):** If interests under equity derivatives not conferring a traditional relevant interest are required to be disclosed in a substantial holder notice, then the information required in relation to such interests should be limited to the GN 20 type summary of the interest, including any off-setting short positions, and any caps and collars etc. The notice should not need to attach any standard form documentation (e.g. an ISDA agreement). This disclosure will be far more beneficial to the market, and will reduce the risk of substantial holder notices being thousand, if not tens of thousands, pages long. If all relevant agreements need to be attached, the size of the notices, and the amount of information disclosed, will bury any material disclosure (and will be used by some to hide the relevant information).

(g) **(ASIC's new and unconstrained power to make "freezing orders" could unreasonably affect the rights of innocent third parties to relevant transactions):** We are concerned with ASIC's new power to make a range of freezing and divestiture orders over securities once it forms the view that "a person" has not complied with a tracing notice. These provisions which allow ASIC to make orders against a specified person, who may not be the non-compliant person, unreasonably prejudice the rights of innocent parties. This is a serious matter and may discourage writers from issuing these instruments which are a critical tool for hedging risk in Australian markets.

(h) **The obligation to file the substantial holding notices must be tied to actual knowledge of the situation giving rise to the need to file, not merely constructive knowledge):** Section 671BB(2) provides that, for the purposes of determining whether an obligation to file a substantial holding notice has been triggered, a person who ought reasonably to be aware of the situation giving rise to the need to file is taken to be aware of the situation. This is draconian in the context of provisions which give rise to criminal liability and material civil penalties. It should therefore be deleted. If the concern is that a person can avoid their disclosure obligations by remaining wilfully unaware of the situation triggering the need to give the notice, then the filing obligation should only be triggered where the person has wilfully avoided becoming aware, not some lesser test which can effectively be triggered by mere negligence.

(i) **The extension of the substantial holder and tracing notice regime to foreign listed bodies should take into account potential conflict of laws issues including what the "equivalent jurisdictions" exemptions will include):** Extending the substantial holder and tracing notice regime to foreign bodies listed on the ASX without considering what the "equivalent jurisdictions" exemptions will include, and whether ASIC's new freezing and divestiture orders will apply to foreign listed shares in that body.

(j) **The transitional arrangements must provide for a significant amount of time to adjust to the new regime):** In light of the very broad ranging nature of the changes to the Corporations Act, the market will require a significant amount of time to adjust to the new regime (including to build systems to capture and record the newly required information). Market participants cannot begin this process until the ASIC legislative instruments which will fix the method for calculation of a relevant interest under equity derivatives have been made public (presumably after adequate market consultation on those instruments). By way of precedent, when the Takeovers Panel implemented GN 20, it gave the market 16 months' notice of the commencement date.[4] The proposed commencement date of 6 months after Royal Assent (as mentioned in paragraph 1.175 of the EM) is too short.

Section B: General comments/observations

If the changes are to be made, we strongly recommend against doing this by deeming interests under equity derivatives that do not give a relevant interest, to be "relevant interests"

6. As discussed above, the Committee's view is that GN 20 is already operating effectively to require disclosure of aggregate relevant interests and long equity derivatives at or above 5%, and that the changes in the Bill are unnecessary. However, if the Government does decide to require disclosure of equity derivatives in substantial holding notices under Part 6C.1, we would strongly recommend against achieving that outcome by deeming such interests to be "relevant interests". Instead, this should be achieved by using new defined terms for those interests in Part 6C.1 (e.g. 'economic interest'), without deeming those interests to be "relevant interests"[5].

7. There are a number of important reasons for this:

   (a) Including interests under equity derivatives which do not confer a traditional "relevant interest" in a person's "relevant interests" and "holding percentage" for the purposes of Chapter 6C will simply exacerbate an existing issue in the market whereby shareholders (particularly retail shareholders) cannot tell the difference between the discloser's beneficial shareholding and their traditional "relevant interest", let alone an economic interest under an equity derivative which doesn't confer the necessary measure of control over disposal or voting to constitute a "relevant interest". Once a party discloses their "holding percentage", and refers to their "holding percentage" in their media announcements, the media will simply report this as if it were beneficial ownership. There have been many instances where bidders have then used this to their advantage, to over-inflate their apparent positions, and to discourage competition from third parties for control of listed companies by giving the appearance of a "done deal".

   (b) On the other hand, those market participants who do understand the difference between beneficial ownership and a relevant interest giving power to control disposal or voting under the current law will also be confused by deeming equity derivative interests which are not relevant interests in the traditional sense to be relevant interests for the purposes of Chapter 6C.

[4].See Takeovers Panel Media Release 20/035 and Media Release TP 21/018.

[5] For example, see paragraph 9(b) below.

(c) The term "relevant interest" has underpinned the operation of the takeover provisions for more than 50 years, and has been defined through many court and Takeovers Panel decisions. Further, the Takeovers Panel has consistently found that a cash settled equity derivative does not give the necessary measure of control over voting or disposal to constitute a "relevant interest" (although the Panel has required disclosure or an aggregate relevant interest and derivative interest at or above 5% under Takeovers Panel Guidance Note 20 (**GN 20**)). The term "relevant interest" should be confined to traditional "relevant interests" which confer the necessary measure of control.

(d) Most long-term legal agreements (e.g. shareholders agreements, joint venture agreements, lease agreements, customer/supply agreements and funding/financing agreements etc) include provisions around change of control etc. In our experience, many of these provisions define a change of control (which is typically an "event of default" which can give rise to a right of termination) by reference to a third party acquiring more than a 50% (or often less) "relevant interest" in a party, with "relevant interest" defined by reference to the Corporations Act definition. If the definition of "relevant interest" is now to be amended to include cash settled equity swaps and other derivative interests not amounting to a traditional relevant interest, this will change the scope of the change of control provisions across many existing contractual arrangements, in a manner which would not have been intended by the parties at the time the arrangements were entered into (because a traditional relevant interest has always been interpreted as excluding such interests). The unintended consequences of this are difficult to predict but could be extremely prejudicial in particular cases and would undermine the basis on which these contracts had been originally agreed.

(e) If equity derivatives which do not confer a relevant interest in the traditional sense are now deemed to be "relevant interests", this will change the operation of the deeming provision (through 20% links) in section 608(3)(a) of the Corporations Act, as a derivative interest would give a person "voting power" for the purposes of the Corporations Act. We assume that this is not intended. See also our related comments in paragraph 12(h) below.

(f) More generally, addressing the notice provisions in a targeted way, without amending the "relevant interest" definition, would avoid effectively amending all of the operation of Chapters 6 and 6A in ways which may have unpredictable effects, while still achieving the Government's objectives. We have expanded below on reasons not to extend the effect of the proposed changes to those Chapters, but simply note here the fact that the proposed "relevant interest" definition changes will involve significant uncertainty—there is no sensible reason for extending this uncertainty to the settled operation of other parts of the takeovers law, given the Government's objectives relate to disclosure. By way of example, the operation of the new provisions, as regards non-physically settled instruments, will depend on ASIC determinations to enable market participants to work out how to "count" these instruments, and it is not yet clear how such determinations will operate, given the complexity and variety of derivative instruments offered in the market to which they will need to apply.[6] Despite this, proposed new sections 608B(5) and (6) provide for a recalculation of the number of securities in which a

[6] Proposed new section 608B(3) says ASIC "may", by legislative instrument, make such determinations, but the counting method in section 608B(1) cannot operate unless determinations are made, as no fall-back mechanism is specified.

"relevant interest" is deemed to be held under such instruments if the ASIC determinations so provide, and for that to be deemed to occur through a transaction by the holder of the derivative position for section 606 purposes—that is, the operation of an ASIC determination in relation to an existing derivative instrument could lead to a deemed section 606 breach.

8. The defined terms chosen in the Bill, such as "relatable derivative-based holding percentage", "deemed physically settleable derivative-based holding percentage", and "deemed non-physically settleable derivative-based holding percentage", do not, in our view, help with a ready understanding of the operation of the legislation. For example, referring to "holding percentages" suggests some form of beneficial holding, which is not helpful, and most readers will not understand what a "relatable derivative-based holding percentage" relates to.

9. Instead, we would recommend that interests of the type referred to in the new sections 608A and 608B be referred to as "disclosable economic interests". Part 6C.1 would then require separate reporting, in the same notice of:

   (a) a person's "relevant interests" (in exactly the same way as it would be reported today);[7] and

   (b) a person's "disclosable economic interests", which would comprise:

      (i) their "physically settleable derivative based economic interest" (to the extent not already reported under category (a)); and

      (ii) their "non-physically settleable derivative based economic interest" (to the extent not already reported under category (a)).

10. We would stress that these changes would have no effect on the information proposed to be disclosed under the amended Part 6C.1, and is therefore consistent with the overall policy objectives of the proposed reforms.

Reporting of non-physically settled derivative-based interests under section 608B—ASIC's power, by legislative instrument, to determine the number, or the method for determining the number, of issued shares in which a person will be deemed to have a relevant interest by virtue of the derivative

11. Section 608B includes a very broad definition of a "non-physically settled derivative-based interest which may require disclosure. It is extremely difficult for market participants to respond to this provision without having seen the proposed form of the ASIC legislative instruments which will set the number of shares, or the method for determining the number of shares, in which a person will be deemed to have a relevant interest by virtue of the derivative. Importantly though, Section 608B will pick up a range of products beyond a traditional cash settled equity swap, including collar transactions and back-to-back inter-bank and intra-bank hedging transactions. It is unclear whether the proposed ASIC instruments will treat the multiple components of a transaction (e.g. the multiple puts and the multiple calls) as a single transaction, or as separate transactions, which could result in in a bank

[7] Substantial holder notices already require a person to disclose details of their relevant interest, including any relevant agreement giving rise to the relevant interest. Accordingly, market participants will continue to be able to ascertain the extent of a person's derivative-based relevant interest.

having to double count (or count a greater multiple of times) the number of shares which are the subject of a transaction[8].

Drafting issues with the definitions of "deemed physically settleable derivative based interests" and "deemed non- physically settleable derivative based interests"

12. There are a number of drafting issues with the proposed sections 608A and 608B. These include the following:

    (a) Section 608B refers in a number of places to the "value" of securities. Presumably this should be a reference to the market price of the securities, which may be different to "value" (see, by way of example, section 674(2)(d) and ASX Listing Rule 3.1 which distinguish between price and value of securities). Or, if this is not done, some guidance should be provided as to how value is to be determined.

    (b) The references in sections 608B(1)(d)(i) to "holding issued securities" and 608B(1)(d)(ii) to "value of issued securities" should instead be references to "holding the relevant issued securities" and "value of the relevant issued securities" (respectively), so that paragraph (d) refers back to the issued securities referred to in paragraph (c).

    (c) In section 608B(1)(d)(i), the reference to giving "the financial benefits of holding securities" should only capture situations where the derivative gives all or substantially all, not just some, of the financial benefits of holding securities. For example, an instrument which gave a third party an amount equal to distributions on a parcel of shares, but was not referenced to any capital appreciation or loss on the parcel of shares, should not come within the definition.

    (d) The word "might" in section 608B(1)(d)(ii) should be changed to "will". The provision should only apply if, under the derivative, the other person will benefit if the price of the securities increases.

    (e) For the same policy reasons as the Bill amends the compulsory acquisition provisions in Division 1 of Part 6A.1, to exclude a deemed relevant interest under an equity derivative from counting towards the 90% relevant interest threshold for compulsory acquisition following a takeover bid, the Bill should also amend the compulsory buy-out provisions in Divisions 2 and 3 of Part 6A.1 so that a deemed relevant interest under an equity derivative does not count towards the 90% thresholds at which the compulsory buy-out obligations are triggered.[9] There is no logical reason to treat the compulsory buy-out regimes in Divisions 2 and 3 different to the compulsory acquisition regime in Division 1.

    (f) More generally, as noted above and below, we believe there is no reason to employ the extended concept of "relevant interest" in relation to the takeover provisions, given that the Government's objectives relate to disclosure. We strongly suggest that the risk of unintended consequences would be much reduced if the new concept (or, as we suggest, separate requirements for

[8] For example, should a collar be viewed as a single arrangement, or should the put and call options comprising the collar be viewed as two separate arrangements? If the latter, under the collar, the bank will be long a call option and short a put option, and both may create long exposures to the underlying company for the bank. This would result in material double counting of the banks relevant interest, unless the ASIC legislative instrument dealt with this in some other way.

[9] The absence of a provision corresponding to section 661A(2) in Divisions 2 and 3 of Part 6A.1 was no doubt simply a drafting oversight.

disclosure of derivative-based economic interests) were only applied in relation to disclosure, and not the takeover or compulsory acquisition provisions.

(g) Section 608B(3) provides that ASIC "may", by legislative instrument, determine the number, or the method for determining the number, of issued shares in which a person will be deemed to have a relevant interest by virtue of a non-physically settled derivative-based interest. However, the counting method in section 608B(1) cannot operate in relation to an interest unless a determination applying to the relevant type of interest has been made, as no fall-back mechanism is specified. This provision should either ***require*** ASIC to make such determinations or, if it does not, or if its determinations do not apply in a particular situation, specify a fall-back (e.g. "a number determined by the other person acting reasonably"). Further, as drafted s608B applies to derivatives over securities indices and baskets of securities, where any economic interest in individual underlying securities is tenuous and disclosure would be meaningless. The EM at 1.81 recognises this issue, but instead of relying on an ASIC determination to work out whether these derivatives give rise to a relevant interest, they should be excluded altogether.

(h) Sections 608A(1)(c) and 608B(1)(c) refer to derivatives in respect of issued securities in a body, registered scheme or listed notified foreign passport fund. Disclosable derivative interests should relate to securities of a particular class in a Chapter 6C body, not some other body, such as a private company. A person should only have a deemed "relevant interest" in a listed company's shares under the section where the equity derivative is in relation to shares in that company. In other words, the Corporations Act should only relate to the disclosure of security interests in Chapter 6C bodies.

(i) For the reasons given in paragraph 7 above, section 608B(6) should be deleted.[10]

(j) In the chaussure to the definition of "person's and associates' votes" in section 671BD(2), for clarity, the words "an interest" should instead be "a relevant interest".

Disclosure of short equity positions

13. In addition to requiring disclosure where a person's aggregate long position under equity derivatives and relevant interest is or exceeds 5%, GN 20 requires disclosure of any short equity derivative positions that offset the long positions (see paragraph 13(i) of GN 20). GN 20 also requires disclosure of short positions of more than 1% that have been acquired after a long position is disclosed (see paragraph 13(j) of GN 20).

14. It is not clear why the Bill does not address the disclosure of short positions that offset the long positions. This situation seems to be at odds with the statement in paragraph 1.12 of the EM that the Bill is "consistent with the approach outlined in the Takeovers Panel Guidance Note 20, [but] operates more broadly to cover market disclosures beyond the remit of the Takeovers Panel's guidance".

[10] If this section is retained, as the intention appears to be to align section 608B(6) with the existing section 606(1)(b), it would seem that the words "or on behalf of" (being the words that appear in section 606(1)(b)) should also be inserted after the words "entered into by" in section 608B(6). However, we believe it should be deleted in its entirety, as noted above.

15. Again, we query the need for the changes to be enacted at all, given the Panel guidance and its sensible operation (which, unlike the proposals, captures net economic positions).

Where an interest under an equity derivative is disclosed in a notice under Part 6C.1, the notice should have to include information of the type currently required by paragraphs 12–14 of Takeovers Panel GN 20, but should not need to attach standard form agreements

16. If interests under equity derivatives not conferring a traditional relevant interest have to be disclosed in a substantial holder notice, then the information required in relation to such interests should be limited to the GN 20 type summary of the interest, including any off-setting short positions, and any caps and collars etc. The notice should not need to attach any standard form documentation (e.g. an ISDA agreement). This disclosure will be far more beneficial to the market, and will reduce the risk of substantial holder notices being thousand, if not tens of thousands, pages long. If all relevant agreements need to be attached, the size of the notices, and the amount of information disclosed, will simply bury any material disclosure (and will be used by some to hide the relevant information).

Disclosure of equity derivative positions should not be required in response to a tracing notice given by a Chapter 6C body (as opposed to ASIC)

17. Even if ASIC is given power to require disclosure of equity derivative positions in response to a tracing notice given by ASIC under Chapter 6C.2 (other than in response to a request made under section 672A(2)), in order to assist ASIC with its enforcement of Chapter 6C, it does not follow that a Chapter 6C body should be able to force disclosure of equity derivative positions when a person's aggregate physical and derivative position is still below 5%. That would be a material change to the current position in relation to disclosure of equity derivatives.

18. The reason for enhanced disclosure at or above 5% is that 5% is widely recognised and accepted as the threshold for giving the holder of the aggregate interest sufficient influence so as to require disclosure in order to ensure an informed market. The same argument does not apply where a person holds an aggregate physical, relevant and economic interest below 5%.

19. An equity derivative position which does not give rise to a traditional relevant interest does not give rise to any actual or substantial measure of control over voting or disposal of voting shares, and should not have to be disclosed in response to a tracing notice from the Chapter 6C body. Expanding the provisions to require disclosure of such positions below the 5% threshold will add significantly to the compliance costs of the proposed legislation, which is not justified by the benefit the market would derive as a result.

20. Relevantly, the vast majority of equity derivatives are cash settled derivatives (both listed and over the counter) and are not related in any way to the control or takeover of the underlying listed entity. Instead, these will typically be either inter-bank arrangements, or exchange-traded fund or superannuation fund managers using these products to gain exposure to certain groups of securities/indexes. Importantly, under the Bill these participants would be required to disclose details of these derivatives in response to a tracing notice even if the interest, however categorised, was below 5%. As noted above, this is a material departure from the requirements in GN 20 and will create a significant compliance burden on this interbank market, without furthering the policy objectives of the Bill.

21. For example, if the Bill is passed, each time a bank/fund manager receives a tracing notice, in its response it must include detailed disclosure relating to its derivatives in respect of those securities, including details of the counterparties and the financial terms, both of which are commercially sensitive.

22. This increased compliance burden will result in market participants having to establish new and complex systems to meet these new reporting requirements, incurring significant initial, and ongoing costs, without furthering the Government's policy objectives. We expect this will have an adverse effect on the market, including by reducing trade volumes and therefore the liquidity of securities, as well as the range of financial products on offer for corporate participants to manage their risk. These factors are important from a market efficiency and corporate governance perspective. Similar concerns are raised in paragraph 34 below.

Economic interests under equity derivatives which do not give rise to a traditional relevant interest should not be deemed to give rise to a relevant interest for the purposes of the takeover provisions in Chapter 6 of the Corporations Act

23. It does not follow, as Treasury has assumed, that simply because aggregate physical and equity derivative positions at or above 5% need to be disclosed, an equity derivative which does not give rise to a traditional "relevant interest" should be regarded as a deemed "relevant interest", with the result that it can cause or contribute to a breach of the 20% rule in section 606 of the Corporations Act. There are good reasons why this should not be the case.

24. The scope of the 20% rule in section 606 of the Corporations Act has for many decades been based on the definitions of "relevant interest" and "association". The Government should be extremely cautious about expanding the long-standing definition of "relevant interest", as that will necessarily mean materially expanding the scope of Australia's takeover laws, and affecting their operation in unpredictable ways.

25. The Takeovers Panel already has power to make a declaration of unacceptable circumstances and appropriate remedial orders if a person does acquire an aggregate long position and relevant interest over 20%. Importantly, the Takeovers Panel may, in its discretion, make such a declaration and orders having regard to the effect that the circumstances are having on the control, or potential control, of the company, and tailor the orders to suit the circumstances. The Takeovers Panel has made it clear that it will make such an assessment having regard to the particular circumstances at the time, rather than pre-judging the issue. The effect of the Bill would be to remove the Takeovers Panel's discretion on these nuanced matters. To the extent that one of the drivers for the proposed reforms was a concern as to the scope of the Takeovers Panel's jurisdiction in relation to such matters, this could easily be addressed through the enactment of a regulation under section 602A(3).

26. Further to our comments in paragraph 7(a), we expect there will be many instances where a bidder would be prevented from using these instruments to secure a strategic position in a listed entity for the purposes of effecting a change of control transaction. This would include instances that the Takeovers Panel would not currently find problematic, and would therefore remove market flexibility in how bidders can execute such transactions, without advancing any of the Government's policy objectives.

27. It is therefore not necessary, and it is unwarranted, to "hardwire" an acquisition of an equity derivative as a breach of, or contributing to a breach of, section 606, when in fact the equity derivative does not give a sufficient measure of control over voting or disposal to amount to a "relevant interest".

28. This is already recognised in paragraph 19 of GN 20, which states that "*the acquisition of a long position that would contravene s606 if it were comprised entirely of a* physical *holding may [underlining added] also give rise to unacceptable circumstances. Factors the Panel may take into account in determining whether such an acquisition is unacceptable include: (a) if the taker has attempted to exercise control or influence over the entity, (b) if and when the long position was disclosed; and (c) whether the acquirer of the long position could have relied on an exception in s611 if the acquirer had made the acquisition as a physical holding*". Note that the definition of "substantial interest" in section 602A was amended in 2007 to make it clear that the Takeovers Panel can made a declaration and orders in relation to equity derivative interests.[11]

29. The Bill also amends section 661(A)(2) in the compulsory acquisition provisions in Chapter 6A, so that a deemed "relevant interest" under an equity derivative does not count towards the 90% "relevant interest" threshold for compulsory acquisition following a takeover bid. This implicitly recognises that a deemed relevant interest under an equity derivative is something less than a 'true' relevant interest, because it does not confer a sufficient measure of control over voting or disposal. If a deemed "relevant interest" under an equity derivative does not count for compulsory acquisition purposes, it is illogical for it to count towards the 20% rule.

30. As noted above, addressing the notice provisions in a targeted way, without amending the "relevant interest" definition, and thus avoiding effectively amending all of the operation of Chapters 6 and 6A, in ways which may have unpredictable effects, would achieve the Government's objectives with much less risk of unintended consequences. The proposed "relevant interest" definition changes will involve significant uncertainty—there is no sensible reason for extending this uncertainty to the settled operation of other parts of the takeovers law.

31. By way of example, the operation of the new provisions, in respect of non-physically settled instruments, will depend on ASIC determinations to enable market participants to work out how to "count" these instruments, and it is not yet clear how such determinations will operate, given the complexity and variety of derivative instruments offered in the market to which they will need to apply. Despite this, proposed new sections 608B(5) and (6) provide for a recalculation of the number of securities in which a "relevant interest" is deemed to be held under such instruments if the ASIC determinations so provide, and for that to be deemed to occur through a transaction by the holder of the derivative position for section 606 purposes—that is, the operation of an ASIC determination in relation to an existing derivative instrument could lead to a deemed section 606 breach. This is an entirely inappropriate and dangerous possibility (and if the operation of the changes in relation to Chapter 6 is retained, section 608B(6) should be deleted), and there may be many other such unexpected outcomes.

[11] See *Corporations Amendment (Takeovers) Act 2007* (Cth) and paragraphs 3.4 to 3.6 of its explanatory memorandum, available here.

32. For these reasons, an "economic interest" under an equity derivative should not be deemed to give rise to a "relevant interest" for Chapter 6 or Chapter 6A purposes. This can be achieved by:

    (a) retaining, rather than repealing, section 609(6) (noting that this section has been amended by ASIC Corporations (Warrants: Relevant Interests and Associations) Instrument 2023/687, which was recently the subject of extensive public consultation by ASIC), and the reference to section 609(6) in section 671B(7)(a); and

    (b) limiting the operation of the new definitions so they are only relevant to Chapter 6C (and also, ideally, adopting the slightly varied approach suggested in paragraph 9 above, such that separate disclosure is required in relation to (1) true "relevant interests" (as currently understood) and (2) "disclosable economic interests").

The proposed power for ASIC to make "freezing orders" should be subject to Court or Takeovers Panel review

33. Under section 673A, ASIC can, if it forms the opinion that "a person" has failed to comply with the substantial holding notification provisions, or the tracing provisions, make a broad range of orders, including orders preventing disposal or acquisition of securities, or freezing voting and distribution rights in respect of securities, orders preventing registration of transfers or issuance of securities, and orders requiring the forced divestiture of specified derivatives. The provision is drafted so that the orders may be made against any "specified person" (who, as currently drafted, need not be the same person as the non-compliant person) in relation to any specified securities. There is not even any requirement that third parties not be unreasonably prejudiced.

34. The ability for orders to be made against third parties (without any consideration of the prejudice to them) is a very serious matter, and may have very significant consequences for derivative writers. The main purpose of derivatives is not to disguise holdings. Derivatives are instruments which enable management of economic risk, and also financing of investment in securities. They are used for these purposes in all major global financial markets, and if they become unacceptably risky for Australian market participants to write, this would involve a very significant loss of financial flexibility in Australia's markets. Provisions which allow a swap writer to be prevented from buying and selling hedge securities (which it will generally need complete flexibility to do, in the ordinary course, to manage its financial risk in relation to the swap), or from exercising normal rights is relation to such securities, could very materially affect the risks involved in providing such instruments, and therefore the willingness of market participants to do so. Similarly, any risk that a hedged position could be forcibly unwound or frozen may have the same effect on those who provide such instruments.

35. The EM draws an analogy between the freezing order provision, and ASIC's powers under sections 72 and 73 of the *Australian Securities and Investments Commission Act 2001* (Cth) (**ASIC Act**). However, ASIC's powers under sections 72 and 73 of the ASIC Act only apply where ASIC has commenced an investigation, and for the purposes of that investigation, and where the persons have failed to comply with a requirement to provide information to ASIC. That is not a requirement under section 673A.

36. In the Committee's view, these very broad additional powers conferred on ASIC are not appropriate. If, despite this, they are introduced, they should be subject to some guardrails. At the moment, the EM simply says that they are intended to be unfettered. Here we would suggest the following:

    (a) ASIC should only be permitted to make a freezing order where it is satisfied that the non-compliance with Part 6C.1 or 6C.2 had or is having an impact on the efficient, competitive and informed market for securities in the relevant Chapter 6C body. This way, an immaterial non-compliance with the provisions will not expose a person to a freezing order being made on their securities.

    (b) ASIC should not be empowered to make an order if it would involve unreasonably prejudice to third parties.

    (c) The provisions should allow the person against whom a freezing order is made to apply to the Takeovers Panel for that order to be revoked or lifted (although we note, for completeness, that this would be a completely inadequate remedy, given that a swap writer often needs to be able to act immediately to close out or further hedge its position, with even a few minutes or hours delay having the potential to be economically disastrous, and the fact that Panel proceedings inevitably take weeks or months to resolve).

Information to be included in a substantial holding notice be limited to information which is known the discloser

37. Section 671BB has been amended so that the time for giving the notice is calculated by reference to when a person becomes "aware of the situation", rather than "aware of the information" under the existing law. We understand that this is to overcome the drafting issue identified in the EM, but, if this change is made, section 671BA still needs a provision like section 672BA(2) in relation to tracing notices, so that the obligation to include information in the substantial holding notice only applies to information known to that person.

The obligation to file the substantial holding notices must be tied to actual knowledge of the situation giving rise to the need to file, not merely constructive knowledge

38. Section 671BB(2) provides that, for the purposes of determining whether an obligation to file a substantial holding notice has been triggered, a person who ought reasonably to be aware of the situation giving rise to the need to file is taken to be aware of the situation.

39. This is draconian in the context of provisions which give rise to criminal liability and material civil penalties. It should therefore be deleted. If the concern is that a person can avoid their disclosure obligations by remaining wilfully unaware of the situation triggering the need to give the notice, then the filing obligation should only be triggered where the person has wilfully avoided becoming aware, not some lesser test which can effectively be triggered by mere negligence.

The defence to civil liability for breach of the substantial holding notice provisions should <u>not</u> be amended to reduce its availability

40. Section 671C currently provides a defence where the person proves that they contravened the section because of inadvertence or mistake, or because they were not aware of a relevant fact or circumstance. The Bill seeks to limit this to where the inadvertence or mistake was "reasonable in all of the circumstances", and where it

was not the case that the person "ought reasonably to be aware" of the fact or circumstances.

41. No justification is given in the EM for this narrowing of the defence. Absent some clear additional policy justification, the defence should be retained in its current form.

42. Again, if the concern is that a person can avoid their disclosure obligations (or avail themselves of the defence) by remaining wilfully unaware of the situation triggering the need to give the notice, then this should be made clear.

Extension of the disclosure regime to foreign listed bodies

43. The provisions include a foreign body listed on ASX in the definition of Chapter 6C body, so that holders of "relevant interests" in the securities of those foreign entities will potentially be required to comply with the substantial shareholding notification requirements which apply to an Australian listed company under Part 6C.1, and the tracing notice provisions which apply to Australian listed companies under Part 6C.2. It is not clear whether there has been any direct consultation with the 150 foreign companies listed on ASX who will be impacted by this change, and who will no doubt be surprised that they are now subject to Australian disclosure laws which were not a condition of their listing on ASX. ASX may also have views in relation to this proposal, as it already has its own methods of requiring a level of disclosure in relation to holdings in such companies (calibrated to the companies' access to relevant information under the relevant foreign laws). In any event, as set out below, there are a number of issues with this proposal.

44. Section 671A(3) states that a foreign listed company does not have to comply with Part 6C.1 if the foreign listed company is subject to disclosure requirements under foreign law or foreign financial market rules and ASIC is satisfied such requirements are equivalent to the requirements of Part 6C.1 and has made a declaration to this effect in a legislative instrument. It is difficult to respond to the consultation on this point without knowing what foreign laws/rules ASIC will declare as being equivalent. We also strongly doubt that many foreign laws (even in mainstream jurisdictions) will be able to be characterised as "equivalent" to the proposed new requirements, given their proposed extended ambit. It would be preferable if the Bill made it clear that a foreign company listed on ASX does not have to make disclosures under Part 6C.1 if its shares are also listed on an approved foreign exchange (e.g. United States, United Kingdom, Ireland, Canada, New Zealand, Singapore, Hong Kong etc.).

45. In any event, even if the home jurisdiction of the relevant foreign listed entity is declared by ASIC, section 671A(4) only exempts the foreign listed entity from Part 6C.1 if the entity, *"immediately"* after the information is given to "a person" (presumably a regulator in its home jurisdiction or perhaps the foreign listed entity itself) gives that information to ASX. Apart from the fact that there may be logistical issues in this where, because of time differences, the foreign entity cannot "immediately" give the information to ASX, this obligation should only apply where the foreign entity has disclosed that information to its home regulator for public release in its home market.

46. The application of the tracing notice regime to these foreign companies means that the foreign companies, and ASIC, could seek to trace interests in shareholdings in the foreign companies which are not listed on ASX (for example, shares listed on the entity's home exchange, which are not held through CDIs listed on ASX). We assume that this is not the intention.

47. It is possible that the proposed application of the tracing notice regime to these foreign companies may act to disincentivise major foreign companies from maintaining a listing on ASX, or, if they are already listed on the ASX, it may encourage them to delist from the ASX to the detriment of local shareholders.

Transitional arrangements

48. In light of the very broad ranging nature of the changes to the Corporations Act, the market will require a significant amount of time to adjust to the new regime (including to build systems to capture and record the newly required information). Market participants cannot begin this process until the ASIC legislative instruments which will fix the method for calculation of a relevant interest under equity derivatives have been made public (presumably after adequate market consultation on those instruments). By way of precedent, when the Takeovers Panel implemented GN 20 it gave the market 16 months' notice of the commencement date.[12] The proposed commencement date of 6 months after Royal Assent (as mentioned in paragraph 1.175 of the EM) is too short.

Other minor amendments to the substantial holder provisions

49. Sections 671B(1)(d), 671BB(1)(b)(i), 1710B(3)(a) and 1710B(4)(a) refer to a takeover bid being "made". There is currently some uncertainty in the market as to whether this means (i) a takeover bid being announced, (ii) a bidder's statement being served on the target, (iii) a bidder's statement being lodged with ASIC or (iv) a bidder's statement being despatched to shareholders.[13]

50. ASIC has expressed its view on the question as follows:

> *"Accordingly, having regard to the procedural nature of a takeover bid, ASIC considers that a bidder makes a bid for the purposes of s671B(1)(c) and paragraph (b) of the definition of 'substantial holding' in s9:*
>
> *(a) in the case of an off-market bid—when the bidder's statement is sent to the target (this is the day on which the first step of the bid procedure referred to in s632 is to be completed and the 'bid period' commences: see s9 and items 3–5 of the table in s633(1)); and*
>
> *(b) in the case of a market bid—when the bidder has the bid announced to the relevant financial market (see item 2 of s635)."*

51. The current position of uncertainty should be rectified by incorporating ASIC's (sensible) views into Chapter 6C.

Other minor amendments to the tracing notice provisions

52. Section 672BB(c) (which mirrors the existing section 672B(2)(c)) provides that the disclosure is to be made within 2 business days after any fee prescribed by the regulations is paid. Currently the prescribed fee is a nominal $5.[14] Given the difficulties in making payments to persons in respect of whom a tracing notice is served (particularly those overseas) noting that the company will be unlikely to have bank account details for such persons, and given the potential for the payment of

[12].See Takeovers Panel Media Release 20/035 and Media Release TP 21/018.

[13] For mention of this uncertainty, see ASIC Regulatory Guide 5, dated March 2024, at [5.288]; see also Renard & Santamaria, *Takeovers & Reconstructions in Australia*, at [906].

[14] Item 5 in Schedule 4 of the *Corporations Regulations 2001* (Cth).

the fee to be used as a delaying tactic by the recipient of a tracing notice, it is submitted that the Bill should be amended to provide that the person giving the tracing notice should only have to offer to pay the prescribed fee and that, if the recipient of the tracing notice does not request payment (and provide bank account details) within 1 business day, the recipient is deemed to have waived their right in respect of the fee.

53. Section 672DA(8) specifies that a person who wishes to inspect the register must pay the prescribed fee (if the Chapter 2C body requests the payment) and then the register must be provided by no later than 21 days after the fee is paid. The following amendments should be made to this regime, as outlined below.

    (a) The demand for the payment of the fee can be used as a delaying tactic by the Chapter 6C body, noting that the register only has to be provided 21 days *after* the fee has been paid. The Bill should be amended to specify that, if the Chapter 6C body does not, within 2 business days, inform the person requesting the register that it requires the fee to be paid then the Chapter 6C body is deemed to have waived its right to the fee.

    (b) The prescribed fee is currently specified as "a reasonable amount that does not exceed the marginal cost to the company of providing a copy".[15] This is a vague and uncertain concept. It would be better if a fixed dollar amount were specified (e.g. $500). This would ensure that the Chapter 6C body cannot (i) seek to require payment of a very high fee and (ii) use the quantum of the fee as a delaying tactic.

54. Section 672AA(1) specifies a broad range of methods by which ASIC can give a tracing notice direction. It is unclear why there is no equivalent provision for the benefit of key persons of Chapter 6C bodies. The absence of an equivalent provision raises uncertainty as to the methods of service that a key person can use (particularly the use of email).

ASIC legislative instruments

55. ASIC has enacted a number of legislative instruments relating to the relevant interest provisions and the substantial holder notification provisions. Each of these has been the subject of a public consultation process. None of these instruments are controversial. The instruments are:

    (a) ASIC Corporations (IDPS—Relevant Interests) Instrument 2015/1067;

    (b) ASIC Corporations (Securities Lending Arrangements) Instrument 2021/821;

    (c) ASIC Corporations (Relevant interests, ASIC and ASIC Chairperson) Instrument 2023/194;

    (d) ASIC Corporations (Takeover Bids) Instrument 2023/683;

    (e) ASIC Corporations (Bidder Giving Substantial Holding Notice) Instrument 2023/685;

    (f) ASIC Corporations (Warrants: Relevant Interests and Associations) Instrument 2023/687;

[15] Item 3(b) of Schedule 4 to the *Corporations Regulations 2001* (Cth).

(g) ASIC Corporations (Compulsory Acquisitions and Buyouts) Instrument 2023/684; and

(h) ASIC Corporations (Relief to Facilitate Admission of Exchange Traded Funds) Instrument 2024/147.

56. It is unfortunate, and very inefficient, that anyone looking for Australia's relevant interest and substantial holder provisions cannot simply open up the Corporations Act to find them. This adds to the cost of doing business and the cost of ASIC's activities.[16] There is significant frustration with the current state of play.[17] Treasury and the Government have been slowly chipping away at this problem (e.g. through the enactment of the Treasury Laws Amendment (2023 Law Improvement Package No 1) Act 2023 (Cth)). It would be a shame to miss this current opportunity to remove such inefficiencies and incorporate the effect of the above-mentioned ASIC instruments into the Corporations Act.[18] To do so would also be consistent with the recommendations of, and comments by, the Australian Law Reform Commission in its Final Report, Confronting Complexity: Reforming Corporations and Financial Services Legislation dated 30 November 2023 to simplify the Corporations Act and reduce the complexity created by the use of delegated legislation.

[16] See also Australian Law Reform Commission, Final Report, *Confronting Complexity: Reforming Corporations and Financial Services Legislation*, ALRC Report 141, November 2023, [2.10] – [2.50], [2.51] – [2.74].

[17] See, for example, Rodd Levy, "Searching for Australia's takeovers laws" dated 24 October 2023.

[18] The organisation "Conisante Consulting" has consolidated these instruments into a "mark-up" of the relevant provisions to Chapters 6 to 6C of the Corporations Act, which is available here.

Section C: Responses to consultation questions

Consultation questions	Comments
Disclosure of information about ownership of listed entities—Derivative based interests	
1. The draft Bill proposes the repeal of s609(6) and redefines 'derivatives' in s608A. What impact would the expanded definition of relevant interests in s608A and 608B have on ownership transparency and regulatory burden? 1.1. What impact will the removal of this exclusion have?	For the reasons given in Section B of this submission, interests under equity derivatives of the types referred to in sections 608A and 608B should not be deemed to be "relevant interests", but should be defined separately in Part 6C.1 as "disclosable economic interests". This achieves the Government's disclosure objective, and avoids (i) considerable market confusion and unintended impacts under long term commercial arrangements, and (ii) those interests being picked up in the tracing notice regime; the takeovers provisions and the compulsory acquisition provisions. For the reasons given in Section B, it does not follow that simply because an aggregate relevant interest and long equity derivative interest of 5% or more requires disclosure, that equity derivatives should be caught by the tracing notice regime; the takeovers provisions and the compulsory acquisition provisions. Section 609(6) should not be repealed, as interests under equity derivatives should not automatically be counted for the purposes of section 606 or the compulsory acquisition provisions. Control issues in relation to equity derivatives can be dealt with by the Takeovers Panel, which can make a declaration of unacceptable circumstances and remedial orders. Not only should section 609(6) not be repealed, it should be re-enacted in the form inserted into the Corporations Act by ASIC by ASIC Corporations (Warrants: Relevant Interests and

Consultation questions	Comments
	Associations) Instrument 2023/687 (which was recently the subject of extensive public consultation by ASIC). See the Committee's detailed observations in Section B in relation to the impact on ownership transparency and regulatory burden. In particular, requiring interests of the type referred to in sections 608A and 608B in response to a company tracing notice will significantly increase the compliance costs for market makers and 'run-of-the-mill' hedging transactions, without any market transparency or disclosure benefit.
2. Subsection 608(8) is key in defining one of the categories of derivate-based interests that must be disclosed under the proposed amendments to Chapter 6C. The draft Bill assumes subsection 608(8) operates as outlined in ASIC Regulatory Guide 5 (RG 5) Relevant interests and substantial holding notices, at (RG 5.163–5.166) where ASIC observes in effect that the provision: • is not intended to be limited to arrangements regarding designated parcels of underlying securities; and • should be applied on the basis that the person who has a relevant interest in underlying securities will satisfy their relevant obligations by applying the securities they have a relevant interest in (even for example if they have less than the number held at the time).	The operation of the provision outlined in RG 5 is sufficiently clear and is, in our experience, generally followed in practice. We do not think any changes to section 608(8) are necessary.

Consultation questions	Comments
2.1. Is the operation of the provision outlined in the regulatory guidance sufficiently clear and followed in practice? 2.2 Would the legislation benefit from expressly clarifying the operation of subsection 608(8) in any way—for example, specifying the relevant assumption to be made regarding how a counterparty will satisfy their obligations for the purposes of applying the provision? 2.3. If it were to do so, should the assumption depend on the reason the relevant interest arises?	
3. In relation to the disclosure of non-physically settled derivatives, the draft Bill proposes ASIC be empowered to make a legislative instrument to determine either: • the number of issued securities in which the other person is taken to have a relevant interest; or • the method of working out the number of issued securities the other person is taken to have a relevant interest in. The ability for ASIC to determine a specific number is intended to cover the situation whereby ASIC may need to remove certain derivatives from consideration and thereby determine the value to be zero. 3.1 Is this approach preferable to enabling ASIC to exclude particular kinds of derivatives from the beneficial ownership	This is approach is not preferable. The Bill should either: • ***require*** ASIC to make this legislative instrument; or • if it does not, or if its instruments do not apply to some scenarios, specify a fall-back. As above, we think ASIC should be required to make an instrument to determine the value of these interests. However, we ASIC's instrument itself should include several alternatives to allow the relevant party to select the most appropriate option for their derivative arrangement. It goes without saying that ASIC must undertake a consultation process on its proposed instrument. See the Committee's detailed observations in paragraph 12.

Consultation questions	Comments
disclosure requirements? If not, what alternative approach would be better? 3.2 Should ASIC have additional flexibility in the way it prescribes, or allows parties to a derivative to determine, the number of underlying securities a person is deemed to have an interest in?	
4. The draft Bill includes provisions intended to ensure that arrangements and interests that simultaneously meet the definition of more than one category of derivative-based relevant interest are not double counted. Are all instances of potential double counting effectively avoided under current drafting?	We cannot think of any instances of double counting of interests arising under the new terms contemplated in item 40 of the Bill. This is not to say that no such instances will arise in practice. Further, given the complexity these new categories pose to market participants, we expect that many people, however well meaning, will incorrectly categorise their interests under this new regime. The preferred approach to categorising these interests is set out in paragraphs 8 to 10.
5. The draft Bill intends to attribute the new deemed relevant interests to the party to the transaction that is in the bought position. Is that intention achieved, or is further clarity required?	This is clear on our reading of the Bill. However, if this is the intention, then it should be made explicit in the final version of the EM.

Consultation questions	Comments
Substantial holding information (including disclosure of derivative-based holdings)	
6. The draft Bill proposes providing ASIC with the power to approve the form in which substantial holder notices are lodged, removing a legislative obstacle to moving towards machine readable lodgements. 6.1. What processes would be involved in meeting a requirement that substantial holder notices be lodged in machine readable format? 6.2. What impact would carrying-out these processes have on businesses? 6.3. What impact would requiring substantial holder notices to be lodged in machine readable format have on transparency of market operations?	It is hard to comment on this item without seeing the proposed form of the new substantial holder notice. As a general comment, we note that there is a large variation in the market as to the level of detail, form and content that each market participant includes in their current substantial holder notices. This is not to suggest that there is a level of non-compliance, but given the complexity of many arrangements that give rise to substantial holdings, and the complicated networks of associations of some participants, this variation is to be expected. In order to reduce this variation so a machine could read and use the information being lodged, the areas with the propensity for the widest variation in responses would need to be simplified, and sufficient guidance would have to be released to assist participants in completing these forms consistently. We expect this simplicity would be welcomed by businesses. However, there is a risk that oversimplifying these forms will result in important information or a certain level of nuance being missed in these disclosures.
Freezing orders	

Consultation questions	Comments
7. The Explanatory Memorandum outlines relevant considerations regarding how ASIC should balance the rights of third parties with the desire to ensure compliance with the disclosure obligations in exercising its expanded freezing powers. 7.1. Does this guidance strike the right balance? 7.2. Is the guidance in the Explanatory Memorandum sufficient or should ASIC be required to give preference to a particular approach by the legislation?	See the Committee's detailed observations in paragraphs 33 to 36.

Annexure A: About the Business Law Section of the Law Council of Australia

The Law Council of Australia represents the legal profession at the national level; speaks on behalf of its Constituent Bodies on federal, national, and international issues; and promotes the administration of justice, access to justice, and general improvement of the law.

The Business Law Section of the Law Council furthers the objects of the Law Council on matters pertaining to business law.

The Section provides a forum through which lawyers and others interested in law affecting business can discuss current issues, debate and contribute to the process of law reform in Australia, and enhance their professional skills.

The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Law Society of the Australian Capital Territory
- New South Wales Bar Association
- Law Society of New South Wales
- Northern Territory Bar Association
- Law Society Northern Territory
- Bar Association of Queensland
- Queensland Law Society
- South Australian Bar Association
- Law Society of South Australia
- Tasmanian Bar
- Law Society of Tasmania
- The Victorian Bar Incorporated
- Law Institute of Victoria
- Western Australian Bar Association
- Law Society of Western Australia
- Law Firms Australia

The Business Law Section has approximately 1000 members. It currently has 14 specialist committees and working groups:

- Competition & Consumer Law Committee
- Construction & Infrastructure Law Committee
- Corporations Committee
- Customs & International Transactions Committee
- Digital Commerce Committee
- Financial Services Committee
- Foreign Corrupt Practices Working Group
- Foreign Investment Committee
- Insolvency & Reconstruction Law Committee
- Intellectual Property Committee
- Media & Communications Committee
- Privacy Law Committee
- SME Business Law Committee

- Taxation Law Committee

The Section has an Executive Committee of 12 members drawn from different states and territories and fields of practice. The Executive Committees meet quarterly to set objectives, policy and priorities for the Section.

The members of the Section Executive are:

- Dr Pamela Hanrahan, Chair
- Mr Adrian Varrasso, Deputy Chair
- Dr Elizabeth Boros, Treasurer
- Mr Philip Argy
- Mr Greg Rodgers
- Mr John Keeves
- Ms Rachel Webber
- Ms Shannon Finch
- Mr Clint Harding
- Mr Peter Leech
- Mr Chris Pearce
- Ms Lisa Huett

The Section's administration team serves the Section nationally and is part of the Law Council's Secretariat in Canberra.

The Law Council's website is www.lawcouncil.au.

The Section's website is www.lawcouncil.au/business-law.